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The New Diplomacy Threatens American Sovereignty and Values

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It is difficult to turn on the television today without seeing an odd assortment of folks sitting around a casino table playing poker. Formerly a game people played rather than watched, poker has become a major television hit, with sports networks airing poker marathons to compete with popular events on other stations.

Perhaps this explains why I have come to think of international diplomacy during and after the Cold War as two very different poker tables. At the Cold War table, in operation from 1945 to 1989, sat two high-stakes players: the United States and the Soviet Union. Since this game required immense military and economic power to play, these two dominated the action. The United Nations had a lesser seat at the table, and from time to time other nations would bid up a particular hand, but the United States and the Soviet Union always held the decisive cards.

A novel aspect of televised poker is the ability of the camera to show hidden cards as players bluff and disguise their hands. It turns out that the Soviet Union, far weaker economically and militarily than the world knew, was consistently bluffing and over-

playing its hand. When the United States, especially during the Reagan administration in the 1980s, increased its military strength and economic power, the weakness of the Soviet hand became evident and the Soviet Union essentially folded.

The post–Cold War table is quite different. With no nation capable of sitting across from the United States in a military and economic power contest, the nature of both the game itself and the kind and number of players began to change. For starters, many new players sought a seat at the table. Other nations wanted in the game, of course, but so did nongovernmental organizations (NGOs) of many types. International organizations, including the United Nations and newer ones such as the World Trade Organization (WTO), took what they viewed as their rightful place at the table, as did new groupings of nations such as the European Union and the "like-minded states."

Short on military and economic capital, these new players have sought to change the table to a "soft power" game. Small- and medium-sized "like-minded states" and NGOs have combined to carry out a "new diplomacy," with notable victories in enacting international treaties to ban land mines and to establish the International Criminal Court (ICC). At the same time, other expansions of international law, including the developing doctrine of universal jurisdiction, seek to move global issues away from traditional diplomatic or political arenas and into courtrooms.

In one sense, who could object to the world's changing from hard power to soft? And who would oppose the wider application of legal standards around the world? The answer to both questions is: the United States. Despite the high-sounding rhetoric about international law and soft power, the new diplomacy seeks to alter the world's political power structure and to do so in a way that presents real threats to American sovereignty and values. In the next few hands, the nature of the post–Cold War diplomatic table is likely to be decided.

International Law and Its Discontents

The United States is a nation of laws with the most highly developed legal system in the world. Some believe the United States should therefore be a natural ally in the major expansion of international law that is now under way. Such a view ignores two fundamental realities: (1) international law is entirely different from U.S. law and, by its very nature, the one impinges on the other; and (2) international law is presently being used as a tool by advocates of the new diplomacy to pursue an agenda that is antithetical to important American interests.

One way to understand the nature of international law is to contrast its philosophy with U.S. law. The American legal system essentially begins with the individual rights of each citizen expressed in the Declaration of Independence and the Bill of Rights. A major purpose of U.S. law is to protect those rights against intrusion by the government or other citizens. When necessary, some of those individual rights may be ceded to government. Even then Americans cede rights sparingly and to a level of government closest to the people: first, local, second, state, and finally, federal. Although the federal government has steadily expanded its reach in recent decades, the historical roots of the U.S. legal and political system run from the ground up, emanating from individual rights up the branches of government as necessary.

By contrast, international law, especially as it is being developed today, is essentially top-down in nature. A relatively small group of world leaders, augmented by hundreds of NGOs, decides that the world needs to ban land mines, create an aggressive international criminal court, or impose new standards about global warming. They attempt to leverage support from the United States and other nations through what new diplomacy advocates call "the mobilization of shame." The treaties go into force without the support of most nations of the world, and certainly without the agree-

ment of nations representing most of the population of the world. In some cases, the treaties purport to apply new international law even to citizens of nations that do not sign them. This formulation and, where possible, implementation of new international law by elites, is very different from the consent-driven rule of law developed in the United States.

Of course America's traditional European allies are much more comfortable with this top-down development of law. Even America's closest friend, Great Britain, had a royal tradition to its lawmaking that is quite foreign to the American system. When critics of the U.S. approach wonder how we can be so out of step with Britain and other democratic allies about these new diplomacy treaties, it is clear that they have forgotten their American history. "Taxation without representation" was the bitter fruit of an unrepresentative English system, and the Revolutionary War was largely fought over such differences. Further, the current development of the European Union, in which individual nations cede important powers to the group, underscores that Europe is still committed to a very different approach from the American tradition of individual rights and bottom-up democracy.

Another way in which international law differs from the U.S. rule of law is that international law has no constitution or overarching set of principles; instead it attempts to codify and enforce international politics as they are, or as the proponents of a change wish them to be. As the French writer Maurice Bourquin noted, "International law is the crystallization of international politics." Indeed, some have argued that it is a misnomer to refer to international "law" since the term implies something far more concrete and enforceable than what travels under that banner.[1] With no con-

1. John R. Bolton, "Is There Really 'Law' in International Affairs?" *Transnational Law and Contemporary Problems* 10 (Spring 2000): 1. See also Robert H. Bork, "The Limits of International Law," *The National Interest* (Winter 1989–1990): 3.

stitution to set forth international legal principles, no community to particularize them into laws, and no executive to enforce them, international law is not at all like the U.S. concept of the rule of law.

What international law is, and what we are seeing in this recent expansion, is essentially one tool in the kit of diplomatic power. In a sense, international law is only what the powerful nations of the time agree it is and are willing to enforce. For example, the U.S. and allied bombing of targets in Kosovo in 1999 did not have U.N. Security Council approval and therefore, under the U.N. Charter, presumably violated international law. Nevertheless, the major world powers agreed that was a good thing to do and any violation of international law never became a major issue. International law is also a tool to which weaker nations may resort, in the absence of other forms of power, while more powerful nations may prefer other tools.[2]

More specifically, the present expansion of international law is about small- and medium-sized states—mostly Canada and the European Union nations—joining with human rights NGOs to pursue a particular political agenda. It is to these players, the new diplomacy processes they are using, their agenda, and the effect on U.S. sovereignty and values that we now turn.

New Players Change the Table

The biggest change in post–Cold War diplomacy is the addition of nonstate actors, especially NGOs, to the bargaining table.[3] Various figures about their growth have been cited and they are all impressive. Before World War I, for example, there were 176 international NGOs. By 1956, there were nearly 1,000, and by 1970 nearly

2. Paul W. Kahn, "Speaking Law to Power," *Chicago Journal of International Law* 1 (1) (2000): 1.

3. See Jessica T. Mathews, "Power Shift," *Foreign Affairs* 76 (1) (1997): 50.

2,000. One source estimates that during the 1990s international NGOs grew from 5,000 to 27,000, while another suggests that these organizations quadrupled in the last decade so that there are now more than 50,000 of them.[4]

It is not just the quantity of these NGOs that is significant but also the role they now play in international diplomacy. In their early days NGOs were limited to providing advocacy and support in diplomatic hallways. In the past decade, however, they have moved from the hallway to the diplomatic table and have not only advocated but provided the main leadership and drafting of several treaties. About 1000 NGOs were front and center in the Ottawa Process leading to the treaty to ban land mines, and NGO leader Jody Williams won a share of the Nobel Prize for those efforts. Similarly NGO leader William Pace is acknowledged as the principal coordinator in the development of the ICC.

Nongovernmental organizations have not just joined the diplomatic table, but in treaties such as those banning land mines and establishing the ICC, they have supplanted the leadership of traditional world powers and, to some degree, even nation-states. As Professors Diana Tussie and Maria Pia Riggirozzi have noted: "NGOs have kicked at the doors and wriggled into the closed rooms of international negotiations. Chipping in at the sides of state power, in many instances they have altered daily operational procedures and priorities."[5] For example, the U.S. delegation was left out of the final negotiations on the ICC at the Rome conference in 1998 and, like other countries, was presented a "take it or leave it" package by NGOs and their colleagues from the like-minded

4. See Joseph S. Nye Jr., *The Paradox of American Power* (Oxford: Oxford University Press, 2002): 60. See also Edith Brown Weiss, "The Rise or the Fall of International Law?" *Fordham Law Review* 69 (November 2000): 350; and Daniel W. Drezner, "On the Balance Between International Law and Democratic Sovereignty," *Chicago Journal of International Law* 2 (2) (2001): 322.

5. Volker Rittberger, ed., *Global Governance and the United Nations System* (Tokyo: United Nations Press, 2001): 175.

states.[6] The ICC has moved ahead without ratification by the United States, Russia, Japan, India, China, and other major powers.

The NGO leadership at the diplomatic table—a role previously reserved for nation-states—is problematic in several respects. For one thing, NGOs tend to be narrowly focused on a single issue, less concerned with the balancing of interests required of policy leaders. Unlike states, NGOs are not charged with juggling jobs, a national debt, and a variety of spending priorities. NGOs are largely formed to pursue a single mission, such as banning land mines, or a package of purposes, such as human rights. Their style is generally more one of debate and confrontation than compromise. This makes them excellent advocates but not balanced leaders of an international legal process. NGOs would sacrifice a wide range of procedural measures or legal niceties in order to enact treaties that further their agenda. Americans who would be suspicious of such single-issue groups in the United States should be doubly concerned about their influence in the undemocratic international arena.

A related problem is that nearly all NGOs participating in the development of these new international treaties are on one side of the issue. At meetings about the ICC, basically, all the NGOs in attendance favor an aggressive international criminal court, just as NGOs in Ottawa overwhelmingly supported the enactment of a rapid and total ban of land mines. There is also considerable anti-American sentiment among these NGOs, which is somewhat ironic since the largest number of NGOs is based in the United States and receives heavy funding from U.S. donors. Consequently, granting these new actors power at the diplomatic table has had a lopsided political effect in favor of aggressive new treaties and against U.S. foreign policy.

6. David Scheffer, "Developments in International Law: The United States and the International Criminal Court," *American Journal of International Law* 93 (1) (1999): 20.

Finally, NGOs do not have the sort of accountability that would be expected of leaders developing international law.[7] NGOs work from their own local base directly into the international arena, skipping over the national level with its give and take or checks and balances system of democratic accountability. Indeed, it is ironic that U.S.-based NGOs are attempting, with some success, to put policies into effect internationally that they could not enact in their own country. They are accountable, finally, only to those donors who provide their funding. One participant in the Rome conference on the ICC asked a relevant question: "Who elected these NGOs anyway?" The answer, of course, is that, unlike the leaders of nation-states, they elected themselves.

Joining NGOs in leading the recent expansion of international law have been the "like-minded states." These are essentially medium-sized and smaller states such as Canada, Australia, and the members of the European Union that have been eager to play a larger role on the diplomatic scene. When he served as Canada's foreign minister, Lloyd Axworthy gave great impetus to the new diplomacy by hosting the Ottawa Conference, which stepped out of the normal international arms control processes and sought a fast-track treaty to ban land mines. When that collaboration of NGOs and like-minded states succeeded, these groups continued their efforts in Rome to create an aggressive new model for an international criminal court. The like-minded states have teamed with the NGOs to create a powerful new presence at the diplomatic table.

7. P. J. Simmons, "Learning to Live with NGOs," *Foreign Policy* 112 (Fall 1998): 82. See also "NGO, Heal Thyself!" *Foreign Policy* 135 (March/April 2003): 16.

The New, New Diplomacy Game

There's a new game in town.[8] With the closing down of the Cold War table, and its predictable two-player military and economic power game, NGOs and small and medium-sized states have attempted to reshape the diplomatic table and introduce a new game. Though styled in idealistic terms—soft power, the rule of international law—the new diplomacy game is merely global politics by other means. The practitioners of the new diplomacy have been quite successful in the early rounds.

The new diplomacy is essentially pursuing an aggressive human rights agenda through attempted expansion of international law. The game, as it has been played out in the adoption of the land mines treaty and the development of the ICC, has several distinctive characteristics.

First the new diplomacy takes an objective being pursued by normal diplomatic processes and moves things in a different direction and on a faster track. Arms control negotiations, under the aegis of the U.N., were already under way on the problem of landmines. The U.N. Convention on Certain Conventional Weapons (CCW) and the U.N. Conference on Disarmament in Geneva had been formulated for just such a purpose. However, these conventional approaches were moving too slowly, and their objective—limitations on land mines rather than an outright ban—was too narrow for human rights advocates. Instead Canadian Foreign Minister Lloyd Axworthy and two major NGOs—the International Campaign to Ban Landmines and the International Committee of the Red Cross—called their own convention in Ottawa where they

8. See David Davenport, "The New Diplomacy," *Policy Review* 116 (December 2002/January 2003). See also Andrew F. Cooper et al., eds., *Enhancing Global Governance: Towards a New Diplomacy* (Tokyo: United Nations University Press, 2002).

could control a different agenda: a treaty implementing a ban of land mines to be adopted in the record time of fifteen months.[9]

Similarly, an international criminal court had been in the works for decades, having been accelerated following the ad hoc tribunals for Rwanda and the former Yugoslavia.[10] The United Nations had logically commissioned the International Law Commission (ILC) to draft a proposal for such a court, and the United States and other world powers were deeply involved and supportive. Once again, however, human rights activists were not satisfied with the direction of the ILC's proposals and wanted a much broader authority for the court on a faster timetable.[11] In Rome, a newly formed NGO, the Coalition for the International Criminal Court, and the like-minded states shoved the ILC proposal aside and advocated a court of much broader jurisdiction.[12] No one expected a treaty to be approved in the short time of the Rome conference, but again the new diplomacy worked on a fast track and succeeded in producing a treaty.

A second tactic of the new diplomacy game is to supplant the normal consensus-based processes of international law with a no-reservations, take-it-or-leave-it treaty that seeks support from a coalition of the willing. In the case of the ICC, for example, the U.N. had commissioned the International Law Commission to develop a proposal that would achieve the widest possible consensus.[13] Instead NGOs and the like-minded nations preferred a stronger

9. See Maxwell A. Cameron et al., eds., *To Walk Without Fear* (Oxford: Oxford University Press, 1998).

10. See Herman von Hebel, "An International Criminal Court: A Historical Perspective," in *Reflections on the International Criminal Court* (The Hague: Klewer Law International, 1999): 13.

11. See Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law* (Transnational Publishers, 2002): 40–42, 79.

12. John Rosenthal, "A Lawless Global Court," *Policy Review* 123 (February/March 2004): 32–35.

13. Ibid.

court with less support. Rather than seek consensus, both the land mines and ICC conventions simply took a vote. Both treaties precluded the possibility of a nation's signing with reservations, a standard part of international law confirmed in the Vienna Convention on the Law of Treaties.[14] Both treaties went into force without the support of the majority of the nations of the world, representing well under half the world's population.

Other aspects of the new diplomacy game attempt to play away from the traditional power-based approach to international relations. Lobbying and marketing have been introduced to treaty negotiations through the new diplomacy process. The various efforts of the new diplomacy are characterized by the terms "participation," "empowerment," "people-centered," and "consensus." Indeed, new diplomacy drafts are circulated as "consensus documents." In Ottawa, NGOs flooded delegates with faxes, e-mail messages, and calls to their cell phones. Daily displays showed the horror of land mines. Canadian Foreign Minister Axworthy openly referred to the campaign as "the mobilization of shame," a refrain that has been repeated in other human rights efforts.

The United States has been slow to respond to the new diplomacy approach. By the time the United States articulated the changes it would need to support the land mines treaty, advocates were already locked into their positions. The U.S. delegation accomplished some changes to the Rome Treaty for the ICC but still ended up on the losing end of a lopsided vote for the treaty. President Clinton was ambivalent about the treaties, but President Bush has been strongly opposed. Ironically, the United States is characterized as isolationist and out of step for not supporting these new diplomacy victories when, in fact, proponents of the treaties knew they were advocating aggressive agreements that the United States would not approve. In the end, the new diplomacy advocates

14. Vienna Convention on the Law of Treaties, May 22, 1969, art. 19.

wanted the treaty their way, with or without international support, including that of the United States.

A Three-Way Expansion of International Law

Those keeping score on the new diplomacy game should watch for expansions of international law in three areas: (1) treaty-based law; (2) universal jurisdiction, as part of customary international law; and (3) international organizations and global governance. New diplomacy players are working for breakthroughs in all these aspects of international law. Taken together, these reforms could well revolutionize international law at the expense of state sovereignty.

If international law is largely soft and symbolic in comparison with U.S. law, treaty-based law is the firmest of the lot. Although states may give up some part of their sovereignty when they sign and ratify a treaty, they have nevertheless made their own sovereign decision to do so. Advocates of the new diplomacy expansion of international law have found a number of ways, some old and some new, to advance their agenda through treaties.

The treaty agenda over the last decade has become a very active one. New diplomacy advocates have figured out that, rather than raise an issue before the U.N. General Assembly, it makes more sense to call a conference on the matter, where they control the guest list and the program. The model for this approach was the 1992 Conference on Environment and Development in Rio de Janeiro, which brought a crowd of NGOs and produced an aggressive environmental regulatory agenda. Of course this has been followed by a host of conferences such as the one in Kyoto on global warming, the Ottawa Convention on land mines, and so on. These conferences produce a lot of heat and passion and often a draft of a treaty as well, focused generally on human rights, the environ-

ment, sustainable development, or other new diplomacy agenda items.

Even though treaties are generally only applicable to signatory states, they nevertheless have an impact on the diplomatic and policy environment. For one thing, they set the agenda that the world will discuss. In the case of land mines, for example, the normal arms control processes were focused on limitations, but the Ottawa Convention changed the conversation to a total ban. Kyoto set standards for global warming which then became the topics to which others must react. By being the first and most passionate statements in their field, these treaties develop a set of global expectations. Treaties also provide a standard for the new diplomacy's "blame, shame and name" approach in which countries that do not sign or follow the treaty become objects of attack. Russia experienced this recently when it signaled that it may not ratify the Kyoto accord on global warming. Its reasoning was much like that of the United States, which has not signed on. It is not that they oppose treaties—an accusation routinely made against the United States—but that the Kyoto accord poses dangers to Russian economic growth and may do little for the environment. Finally, Russia succumbed to the shame campaign and ratified the treaty. The globalists rarely accept that a nation may have strategic reasons or other priorities for refusing to ratify or follow a treaty.

These recent treaties pack another surprising punch. Both the land mines treaty and the Rome Treaty for the International Criminal Court do not allow nations to state reservations when they sign and ratify. The ability of a nation to express reservations and exceptions to parts of a treaty has been a standard part of international law, confirmed in the Vienna Convention on the Law of Treaties. This feature has allowed nations, such as the United States, to sign treaties they otherwise would not sign, by accepting the treaty in part but stating reservations to other sections. This novel assertion,

which flies in the face of international law, is a bold one and it remains to be seen whether it will be accepted.

Bolder and more expansive still, the treaty creating the ICC purports to give the court jurisdiction over citizens of nonsignatory states, again in apparent violation of international law and the Vienna Convention.[15] If a citizen of a nonsignatory state, such as the United States, commits a crime within the court's jurisdiction on the territory of a signatory state, the treaty provides that charges can be brought.[16] This has triggered quite a debate, which will probably not be resolved until a test case comes forward. Nevertheless, provisions such as these demonstrate the broad objectives and determined approach of the new diplomacy treaties.

At the same time, the new diplomacy seeks to expand a second basis of international law: the doctrine of universal jurisdiction. Universal jurisdiction is an old legal doctrine that is being stretched almost beyond recognition. The original justification for allowing courts of any nation to have jurisdiction over certain crimes was that, otherwise, pirates would escape without prosecution, the high seas not being a part of any national jurisdiction. Today, proponents of expansive international law have changed the doctrine from one of locus—the high seas—to one based on the gravity of the offense. The new doctrine of universal jurisdiction is that certain crimes—war crimes, crimes against humanity, genocide—are so serious that any court may take them under its jurisdiction.

The most visible case of modern universal jurisdiction involved the prosecution of General Augusto Pinochet of Chile for violations of human rights law. The courts of both Great Britain and Spain took it upon themselves to pursue this matter, even though his crimes were committed in Chile where, as "senator for life," he enjoyed virtual immunity from prosecution. If the United States is

15. Ibid., art. 34.
16. Rome Statute of International Court, July 17, 1998, art. 12(2).

sometimes considered the world's police force, Belgium apparently aspires to be its courtroom. Belgium's law of universal jurisdiction has been the most aggressive, and cases have been filed there against a wide range of international leaders, from Ariel Sharon to George H. W. Bush, and the leaders of the Rwandan genocide. Recently, Belgium agreed to limit its law to cases involving Belgian nationals, after Donald Rumsfeld suggested that NATO should consider moving its headquarters out of Brussels, rather than risk sending Americans there to face potential arrest based upon Belgian court cases. Nevertheless, this is likely only a temporary setback for universal jurisdiction.

The third prong of the international legal expansion is taking place at the level of international institutions and the campaign for global governance. A 1995 report from the Commission on Global Governance framed much of the agenda.[17] "Our Global Neighborhood" offers comprehensive proposals to "organize life on the planet." From U.N. reform to expansion of the rule of law and the creation of new international organizations and agencies, the suggestions all propose more extensive and assertive global governance. The creation of the ICC was a huge step toward global governance. Even the evolution of the European Union on a regional level creates more of a global governance climate.

Much of the global governance movement is distinctively anti-American in tone and seeks to balance U.S. power. For example, there is considerable interest in the U.N. and elsewhere in sustainable development. The agenda, however, is not just stimulating more activity in underdeveloped countries but encouraging less use of resources by developed countries. A movement against the death penalty is gaining momentum and a U.N. Human Rights Commission rapporteur included the United States on his inspection tour,

17. The Commission on Global Governance, *Our Global Neighborhood* (Oxford University Press, 1995).

which was supposed to focus on "extrajudicial, summary or arbitrary executions." The recent WTO decision finding the U.S. steel tariffs in violation of that organization's policies highlights yet another layer of global governance.

Taken together, there is clearly a significant movement toward the expansion of international law. The new diplomacy has an agenda to expand international controls over human rights, human security, the environment, sustainable development, and the rights of women and children, to name but a few. With new players at the table pursuing strategies through new treaties, through the expansion of universal jurisdiction, and through global governance by international institutions, the game is clearly under way. The effect of all this on the United States must be assessed by policymakers.

International Law Challenges American Values and Interests

The United States should recognize that it has legitimate interests and values it must protect on the international scene. The rapid development of international law—through new treaties, increased use of universal jurisdiction, and expansion of international organizations and global governance—necessarily impinges on the sovereignty and interests of individual nations. Since many of these efforts are motivated by a desire to balance U.S. power, and some are blatantly anti-American in intent, the United States especially must count the cost of expanded international law and weigh that against the public and international relations cost of not participating.

At a very practical level, some expansions of international law expose U.S. citizens to legal and economic risks. The broad jurisdiction of the ICC, for example, poses a real risk of prosecution of U.S. political leaders and military personnel. Although President

Clinton signed the treaty at the last moment, having previously voted against it in Rome, even the Clinton administration acknowledged that the treaty did not contain sufficient protections for American military personnel. With more soldiers abroad than any other nation, the United States faces the greatest risk. Without doubt, the combination of an independent prosecutor, as opposed to charges emanating from the Security Council as was originally intended, and the assertion of the right to charge citizens of nonsignatory states creates the opportunity to prosecute American personnel. So, too, has the expansion of universal jurisdiction exposed U.S. political officials to legal processes abroad based on questions of the legitimate exercise of American foreign policy. These are matters to be handled diplomatically, not in a court of law.

Similarly, expansions of treaties in the environmental arena will carry a major economic cost. The proposed limits on global warming in the Kyoto protocols are a first step that carries a huge economic price tag. They will doubtless be followed by even more rigorous restrictions on the use of resources and on manufacturing as the sustainable development agenda moves forward. All nations' leaders owe it to their people to count the cost of such international movements. This is certainly not something the environmental NGOs, with their narrow focus, will do.

A second practical problem with this expansion of international law is that it also intrudes upon domestic policy and values. Jeremy Rabkin provides a wonderful example when he tells of the Nixon administration's and the U.S. Senate's approving the World Heritage Convention in 1972, "a seemingly innocuous treaty under which countries proposed historic or scenic sites for the international equivalent of a landmarks registry."[18] But the big surprise came more than twenty years later when the U.N.'s World Heritage

18. Jeremy Rabkin, *Why Sovereignty Matters* (Washington, D.C.: The AEI Press, 1998): 46–47.

Committee opined that a proposed mining operation near Yellowstone National Park, one of the registered sites, would not be appropriate. It took another bill in the House of Representatives, requiring specific congressional approval for international inspection of U.S. sites, to put that cow back in the barn.

A more current example of international law challenging domestic values concerns the death penalty. It is difficult to see how a criminal sentence, arrived at through a judicial system, could be anything other than a matter of domestic law. Indeed, the death penalty was not prohibited by the Universal Declaration of Human Rights in 1948, having just been imposed by the Nuremberg and Tokyo tribunals. The European Convention on Human Rights, adopted two years later, recognized a person's right to life, "save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."[19] About one-half of nations retain capital punishment in some form.

Nevertheless, many human rights activists would like to eliminate the death penalty altogether and would use international law, if possible, to do so. When a rapporteur from the U.N. Commission on Human Rights came to the United States to examine capital punishment, he mentioned that the United Nations was increasingly moving to a position against the death penalty. One wonders how that became a part of the United Nations agenda and how, short of a vote, it could have become an operative concern. Once again, however, international law may become a platform for influencing U.S. domestic policy.

Indeed, an agenda is developing that could attempt in a whole host of areas to replace American values by those decided internationally. A current emphasis on human security, rather than on national security, could lead to international intervention in previ-

19. Robert F. Drinan, *The Mobilization of Shame* (New Haven, Conn: Yale University Press, 2002): 131.

ously domestic matters. As one commentator noted: "Once security is defined as human security, security policy embraces the totality of state responsibilities for the welfare of citizens from the cradle to the grave."[20] International conferences, to be followed by treaties, continue to develop the rights of women and children in ways that conflict with U.S. law and religious practice. Building on the success of the land mines treaty—which moved that issue from arms control conferences of nations to humanitarian meetings led by NGOs—human rights activists have discussed limits on small arms and even attempts to control the size and scope of the military forces of individual nations.

Moving from the practical to the strategic, the current expansion of international law seeks to move power away from the U.N. Security Council, where the United States can protect its values and interests with its veto power, to other forums and organizations where it is one nation (no matter how small), one vote. Advocates of the ICC freely admit that a primary reason they sought an independent prosecutor, rather than relying on the U.N. Security Council as had been done in the ad hoc tribunals, was to avoid the politics of the permanent members and their veto power. Likewise, the land mines campaign clearly moved its agenda outside of U.N. processes. New diplomacy advocates urge reform of the Security Council, especially expansion of its membership and elimination of the veto, but in the meantime they are eager to move ahead in other forums where U.S. influence can be neutralized and outvoted.

In more conceptual terms, the United States is right to be concerned that the expansion of international law shifts power away from the people and toward more remote, and less democratic, bureaucracies and elites. With its values of grassroots and bottom-up approaches to governance, the United States would not even

20. Ramesh Thakur, "Security in the New Millennium," in Andrew F. Cooper, et al., eds., *Enhancing Global Governance* (Tokyo: United Nations University Press, 2002): 275.

grant its own courts some of the powers accorded the ICC. International organizations rarely incorporate the kinds of political checks and balances or accountability that are at the core of American federalism. Also, the recent appointments of nations known as violators of human rights to important U.N. positions of human rights leadership should remind the United States of the dangers of accountability to international institutions that do not share its democratic values.

In the final analysis the expansion of international law threatens what the United States perhaps values most: its own sovereignty. The basic stance of the globalists is that state sovereignty is an antiquated seventeenth-century concept that will eventually give way to the regional and international institutions that make up the growing web of global governance. They argue that with global communication and markets come global problems that transcend sovereign states and require global solutions. A transition away from state sovereignty and toward global governance is, in the view of the new diplomacy advocates, an evolution to a higher order of things. Those, like the United States, that prize sovereignty are thought to be defending a dinosaur.

Of course sovereign states have been the foundation of the world order at least since the Treaty of Westphalia in 1648. A few new treaties will not change that. But at a deeper level, is state sovereignty an antiquated idea that is simply playing out its string? The case for the continued relevance and usefulness of state sovereignty needs to be reexamined. State sovereignty breaks government down into useful, functional entities that can effectively oversee territories and people. Compared with remote international institutions, state sovereignty brings government closer to the people, a fundamental policy principle that is as relevant today as ever. State sovereignty protects national self-determination and cultural diversity, allowing people to keep historical languages and customs.

Indeed one could argue that some of the most important global agenda items today are better addressed by sovereign states than by international institutions. The problems of terrorism and global security, for example, have only been dealt with when sovereign states took up the challenge. Is anyone really prepared to say that international law and institutions are reaching the point where they are effective in the face of such military and political challenges? Stability requires order, education, and a host of public goods best provided by a sovereign government. Indeed, weakened states generally encourage conflict, as many nations in Africa have learned.

In short, state sovereignty is far from the anachronism some liberal internationalists would have us believe. It has strengths that international institutions would be hard-pressed to develop. If the world is moving down the road toward greater global governance, it is moving slowly, and the movement will need to find a way to respect and incorporate state sovereignty. The rumors of its demise are both premature and overstated. The United States is on the right side of the state sovereignty as opposed to global governance dilemma and should not be blamed or shamed into giving up its position.

Conclusion

Having won the Cold War superpower game, the United States now finds itself at a new diplomatic table with new players and tactics. A new diplomacy, led by NGOs and several small- and medium-sized states, seeks to advance its agenda through the expansion of international law. Although cast in lovely marketing terms such as "soft power," "the rule of law," and "our global neighborhood," the new diplomacy agenda essentially seeks to shift the diplomatic game away from U.S. military and economic strength toward international law and institutions where NGOs, especially, have come to play a leadership role.

At the same time this treaty-based agenda presses forward, globalists seek to expand the legal doctrine of universal jurisdiction and to strengthen the hand of international institutions. Moving away from state sovereignty and toward global governance is clearly the agenda.

Even though the United States has chosen not to sign most of the new diplomacy treaties, American values and interests are nevertheless threatened by this attempt to expand international law. It will not be enough for the United States simply to say "no" to the new diplomacy. The United States will need to energetically engage the new players and tactics, making the case that strong and sovereign states will better meet the needs of the twenty-first century than will wholesale expansions of international law.