

# Reclaiming the Legal High Ground: Suggestions for the Incoming Administration

Anthony Clark Arend, Ph.D.

November 2008

## In Brief

- Immediately upon taking office, President Obama should make a high-profile declaration of his commitment to follow and promote international law.
- The president should quickly issue executive orders to prevent the mistreatment of prisoners and launch a review of existing legal memos that may continue to guide U.S. policy.
- The president should announce the creation of a non-partisan task force on international law comprised of the most respected American legal scholars and statespersons and should be chaired by a person of impeccable integrity.

Even before the election, many legal scholars were offering advice to the next president about steps to restore America's position as a leader in the development and promotion of international law. Since the election, many others have come out with thoughtful proposals to President-elect Obama. While there is so much that needs to be done to correct the disastrous mistakes of the last 8 years, there are several initiatives to prioritize:

## General Policy Statements

First, in his Inaugural Address, President-elect Obama should explicitly state that the United States is committed to following and promoting international law. He should indicate that the United States has been the great champion of international law -- especially international human rights law -- and that his Administration is committed to restoring America's leadership position.

While there may be some debate about the extent to which he should discuss the actions of the Bush Administration, there would be no harm in Obama stating in his Address

*Anthony Clark Arend is Professor of Government and Foreign Service at Georgetown University. On July 1, 2008, he became the Director of the Master of Science in Foreign Service in the Walsh School of Foreign Service.*

that “the United States is moving away from the approach of the past 8 years,” or words to that effect. But to emphasize one point -- some statement about a new approach to international law must come in the Inaugural Address.

Second, either in the Inaugural Address or in subsequent addresses, Obama should explain why the international rule of law is vital to United States national security. President Obama should tell the American people that international legal rules are established to promote order and stability at the global level. Without such order, it becomes impossible for the United States to promote its own national security and to realize its other foreign policy goals. We depend upon a system of rules for the basic conduct of diplomacy, the promotion of international trade and commerce, and the regulation of all other interstate transactions. And, the president should note, international law seeks to establish fundamental norms of justice and decency—norms that have been a part of this country since its founding, norms that exist not just to protect others, but to protect Americans as well.

## Specific Steps

First, the Obama Administration should begin the process to close Guantanamo. Guantanamo has become the international symbol of the Bush Administration’s disrespect for international law. Obama would fulfill his campaign promise and send a clear message to the world that America is truly moving in a different direction. While there has been much discussion about what to do with the detainees, solutions can be found that are calculated to prevent truly dangerous persons from committing acts of violence -- but this is the subject worthy of a longer treatment.

Second, Obama should issue an Executive Order requiring the intelligence community to follow the same techniques for interrogation allowed in the Army Field Manual. This order will make it clear that no one operating on behalf of the United States will be permitted to engage in behavior that violates international law or comes close to violating the law. And in case it has been forgotten, the Field Manual specific prohibits:

- Forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner.
- Placing hoods or sacks over the head of a detainee; using duct tape over the eyes.
- Applying beatings, electric shock, burns, or other forms of physical pain.
- Waterboarding.
- Using military working dogs.
- Inducing hypothermia or heat injury.
- Conducting mock executions.

- Depriving the detainee of necessary food, water, or medical care.

Truly these are techniques that we can live without.

Third, Obama should direct the new attorney general to formally withdraw the existing Office of Legal Counsel memos on the status and treatment of detainees. Even though the infamous Bybee Memorandum has been withdrawn, current memos -- such as the Levin Memo and probably the still-classified Bradbury Memo(s) -- continue to allow for methods such as waterboarding. In connection with these actions, it is critical that Obama appoint a well-respected person to be head of the Office of Legal Counsel at the Justice Department.

Fourth, the new president should seek the repeal of the Military Commissions Act. While at least one portion of this Act has already been ruled to be unconstitutional by the Supreme Court in the *Boumediene* decision, the Act contains many other defects-- such as allowing evidence obtained through coercive techniques to be admissible and denying the defendant access to potentially exculpatory evidence. Moreover, like Guantanamo, the Act is a sad symbol of the Bush Administration's approach to detainees that is best put behind us.

Fifth, the president should announce the creation of a non-partisan task force on international law. This task force should be comprised of the most respected American legal scholars and statespersons and should be chaired by a person of impeccable integrity—such as former Justice Sandra Day O'Connor or former Senator George Mitchell.

This task force should address a series of questions about the role of America in the international legal system, including:

- 1) How should the United States interpret the meaning of concepts like “torture,” “cruel, inhuman and degrading treatment,” and “prisoner of war”? With the old Justice Department memos formally withdrawn, interpretations truly consistent with the law should be adopted.
- 2) How should domestic laws be revised in light of our international legal obligations? While I believe that the Military Commissions Act should be repealed as soon as possible, there are many other domestic laws that need to be examined in light of international law.
- 3) What existing treaties should the United States ratify to signal our commitment to the rule of law? At present, the United States is not a party to several human rights agreements, including the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Statute of the International Criminal Court. The task force should consider whether now is the time for America to ratify these—and other—agreements.
- 4) What new international agreements should be created? America's recent military activities have shown that there are many areas where international law is inadequate. For example, it seems clear that the framers of the Geneva Conventions did not fully appreciate the question of how to categorize

captured terrorists. Are they prisoners of war? Criminals? Or something else? And what about the status of private military contractors? How do they fit into the existing legal framework? The task force should explore whether there needs to be a new Geneva Convention to address these problems. My sense is that there does need to be a new Geneva Convention and that with the fresh start that the Obama Administration represents, now may be the best time to move forward with the negotiations.

## Conclusions

Needless to say, these are just some initial thoughts -- many of which could be elaborated on in great detail. But, they provide some general guidance that could be useful as President-elect Obama puts together his plan for his new Administration. Obama has quite a mess to clean up. America's image has become so tarnished that we can no longer speak with authority about international law. He must acknowledge the failures of the past and then take concrete steps to correct them. Only if this is done, can the United States begin to regain international legitimacy and reclaim the legal high ground.

This essay was adapted from a post on Dr. Arend's blog, "Exploring International Law," which is accessible at <http://blogs.georgetown.edu/?BlogID=2>.

## Building a New American Arsenal

The American Security Project (ASP) is a bipartisan initiative to educate American public about the changing nature of national security in the 21 century.

Gone are the days when a nation's strength could be measured by bombs and battleships. Security in this new era requires a New American Arsenal harnessing all of America's strengths: the force of our diplomacy; the might of our military; the vigor of our economy; and the power of our ideals.

We believe that America must lead other nations in the pursuit of our common goals and shared security. We must confront international challenges with all the tools at our disposal. We must address emerging problems before they become security crises. And to do this, we must forge a new bipartisan consensus at home.

ASP brings together prominent American leaders, current and former members of Congress, retired military officers, and former government officials. Staff direct research on a broad range of issues and engages and empowers the American public by taking its findings directly to them.

We live in a time when the threats to our security are as complex and diverse as terrorism, the spread of weapons of mass destruction, climate change, failed and failing states, disease, and pandemics. The same-old solutions and partisan bickering won't do. America needs an honest dialogue about security that is as robust as it is realistic.

ASP exists to promote that dialogue, to forge consensus, and to spur constructive action so that America meets the challenges to its security while seizing the opportunities the new century offers.



American Security Project

[www.americansecurityproject.org](http://www.americansecurityproject.org)