

PLEASE NOTE: THIS IS NOT AN OFFICIAL RECORD OF THE EVENT—IT IS A SUMMARY OF THE ISSUES DISCUSSED.

John Bellinger III served as Senior Associate Counsel and Legal Adviser to the National Security Council (NSC) during the first Bush term, and acted as Legal Advisor to the Secretary of State, Condoleezza Rice, under President Bush's second term. He is a partner in the international and national security practice of Arnold & Porter LLP in Washington, DC, and Adjunct Senior Fellow in International and National Security Law at the Council on Foreign Relations. He led the US delegation for negotiation of the Third Additional Protocol to the Geneva Conventions and initiated a formal US-EU dialogue on human rights and international humanitarian law.

Mr Bellinger began by conceding that the US did not engage with international law during the first Bush term, but that in the second term they accomplished more. For example, in the last two years of the second Bush administration, the Senate, at Mr Bellinger's urging, approved more international treaties in that time period than in any other period in US history. It approved 90 treaties, including many international humanitarian law treaties, such as the Hague Cultural Property Convention and the CCW Protocols on Incendiary Devices. One of his greatest regrets was that he did not get the UN Convention on the Law of the Sea passed. On the other hand, he advised the Secretary of State regarding the importance of following international law and not to isolate the US from its allies. He advised Dr Rice to attend the American Society of International Law (ASIL) meeting—the first time in 30 years that the Secretary of State had been present.

Mr Bellinger said that he was aware of the legacy the Iraq conflict and Guantanamo had on the Bush Administration and regretted that the Iraq war and 'Gordian knot' of Guantanamo overshadowed the second term and obscured the achievements and efforts made to comply with international law during this time.

He made two main points and predictions regarding President Obama's stance on international law:

- That we would see more continuity than change with the previous administration.
- That it is going to be difficult to satisfy the expectations of the international community.

Mr Bellinger selected three international legal issues to discuss, which he believes will prove a crucial testing ground for the Obama administration's opportunities and challenges in international law. These were the rulings of the ICJ in the *Avena* case, the relationship of the US with the international criminal court, and the closing of Guantanamo.

The International Court of Justice and the *Avena* cases

To introduce the background of these cases, Mr Bellinger explained that under the Vienna Convention on Consular Relations, foreign nationals must be informed, without delay, of their right to communicate with their consulate when they are detained by law enforcement officials. The US, he says, is one of many countries that have been in violation of this Convention.

In the *Avena* case, around 50 Mexican nationals were arrested in the US for crimes including rape and murder. They had been sentenced to death and had exhausted all appeals under state law. Mexico initiated proceedings against the US before the International Court of Justice (ICJ), asserting that the US had failed to comply with the Vienna Convention on 54 separate occasions. On March 31, 2004, the ICJ issued its ruling in the case, holding that the US had violated the Vienna Convention in most of those cases and calling for the US to review and reconsider the convictions and sentences.

Mr Bellinger explained that this was the first challenge the State department inherited in the second term. The dilemma here was that the defendants could have no more appeals under US state law. The Secretary of State appreciated that it was important to adhere to the UN Charter and to demonstrate compliance with international law, and also to comply with the Vienna Convention as a policy to protect their own nationals from the same fate in foreign countries.

Then US Attorney General, Alberto Gonzalez, said it would be very difficult, under Constitutional law, to comply with the judgment. President Bush acted on the recommendations of the Secretary of State, not the Attorney General, and in February 2005 ordered that the cases be reviewed. However, Texas challenged this order before the US Supreme Court (*Bush v Texas*). The Supreme Court found that the US had violated international law but that, in the absence of legislation, the President did not have the competence under the Constitution to order compliance with the ICJ's decision. Mexico promptly brought the matter back to the ICJ, which confirmed that the US remained in violation of the ICJ order.

President Obama now finds himself in the same situation. Under the Constitution, the President lacks the power to compel states to comply with the ICJ judgment. One of his options is that he introduce legislation that would give him the necessary legislative basis, but this in itself would be a challenge, even with a Democratic Congress.

The International Criminal Court

The US is not a state party to the Rome Statute relating to the establishment of the International Criminal Court (ICC). The Bush administration has a reputation for being hostile to the Court's efforts in international criminal law. Mr Bellinger said it should be noted, however, that President Clinton signed the Rome Statute on the last possible day of office. He then issued a statement saying that the treaty was highly flawed and that he would not send it to the Senate, advising that his successor, whoever he may be, not to do so either. When he took office President Bush famously 'unsigned' the treaty, an act which Mr Bellinger says was 'regrettable' and has endured as a symbol defining President Bush's stance on the issue ever since.

There are a number of domestic obstacles to the US signing the Rome Statute. Both Democrat and Republican Congressmen are not receptive to the ICC, and it is not popular with US armed forces or public opinion. One of the main concerns is that US armed forces would be accused of war crimes for political ends.

Here again, Mr Bellinger, says, President Obama faces an opportunity and a challenge. He has the chance to move forward, but which may not happen immediately. An option in the meantime could be to offer greater assistance to the Prosecutor, Jose Moreno Ocampo. He has not done so yet, and Mr Bellinger points to domestic policy constraints. President Obama faces concern from the Senate and the military, and it is hard to implement a change in the attitude towards the Court when the US is still involved in combat in so many regions.

What Mr Bellinger termed the '64,000 dollar question' is what President Obama will do in relation to the ten-year review of the ICC. He believes that President Obama should try to forge a new leadership role for the US and contribute to negotiations on the Statute, thus demonstrating to the military and the Senate that he is addressing the flaws in the Rome Statute. This may encourage Congress to become more receptive to the ICC.

Guantanamo

From the outset, Mr Bellinger stated that Guantanamo was one of the Bush administration's most serious mistakes, labelling it a hole they got into in first term which they could not dig themselves out of by the end of the second. He also stressed the need to remember that it was born out of decisions made at the time which were not unreasonable in light of certain facts, such as the need to be able to detain people but the fact that this could not be done on American soil. In President Bush's second term, the magnitude of the errors that hinged on this issue became more obvious. Mr Bellinger applauds President Obama's decision to close Guantanamo (which he announced on his second day in office) but is not sure that it will satisfy the international community. Mr Bellinger discussed the timeline for closing Guantanamo (22 January 2010), noting that this may be difficult in practice in light of the fact that Congress has already passed a law prohibiting any of the prisoners from coming to the US.

President Obama has inherited the thorny legal issues surrounding the fight against Al-Qaeda. For example, what is the 'rule of law' in these areas—which laws apply in these situations? He noted it was that in a recent speech, President Obama used the phrase 'we are at war with Al-Qaeda' which was strikingly similar rhetoric to the controversial term, 'global War on Terror', used during the Bush administration. He believes this is perhaps because after examining the legal options in this issue, President Obama, himself a lawyer, has concluded that 'war' is the most appropriate 'framing legal principle'.

Controversially, President Obama has continued the practices of rendition and prolonged detention without trial, perhaps because the legal challenges in this area are so great. The question is, with President Obama continuing these controversial policies, how will the international community react? Mr Bellinger hopes that it will engage in discussion with the United States, to try and reach compromise and cooperate in combating these issues, and not accuse the US of violating international law.

To conclude, Mr Bellinger stated that President Obama has a tremendous opportunity but it is important to remember that domestic politics plays a large role in the changes the President can effect. In response to questions, Mr Bellinger agreed that it was troubling that the US was seen as so 'out-of-step' with its allies on many issues in international law, especially in light of the positive role the US played in post-War Europe in spreading its values. He agreed it was disappointing that President Obama was not moving ahead with the powers he has, but recognized that he was in a difficult position. The international legal framework in which the President operates is changing, and this is one of the biggest challenges.