

Watch Your Step

President Barack Obama will surely make mistakes. But with advice from these Washington observers, maybe he can avoid some of the traps out there.

Don't Demonize China

BY ANTONIO F. PEREZ

It's actually fairly easy to say what the Obama administration should not do in international law. Doing nothing in foreign policy is usually better than doing something. So many more things can go wrong in foreign policy than in domestic policy, unless of course, as professor Daniel Drezner recently writes, all politics is now global.

So, with the caveat that domestic problems can't be solved anymore without an international law strategy, here's a Top 10 list of "Don't Dos" in international law:

10. Don't lose much sleep over the Law of the Sea Treaty (sometimes called LOST by its enemies).

Sure, the 1994 Clinton amendment to this "new international economic order" re-tread treaty from the '70s solved our previous objections, namely, to international management of deep seabed resources. But the Arctic is melting, international piracy is out of control, and the maritime interdiction of weapons of mass destruction and their precursors (the so-called proliferation security initiative) raise new issues. There are better ways to burnish your internationalist credentials.

9. Don't appoint judicial nominees who advocate using foreign and international law to interpret the Constitution, unless you want to pick a needless fight.

8. Don't appoint as secretary of state somebody

you can't control, such as she-who-must-not-be-named. (Oops, I may be too late. If so, at least there are plus sides: You may have eliminated a primary challenge in 2012, and you can play good cop to her bad cop at every summit meeting.)

7. Don't ignore the Treaty on Conventional Forces in Europe, which requires advance notification of troop movements in Eastern and Central Europe. The Russians conveniently suspended it just before moving forces to the Georgia theater of operations last summer. Treaties as tripwires make sense.

6. Don't be afraid to show your knowledge of the various religions of the world and their values as a basis for dialogue on the moral underpinnings of a truly international law, even if your secular constituents begin to think you really "get" religion as well as the Islamic world's disgust with American materialism (and even if Pat Buchanan's peasants with pitchforks initially think you've sold out to the mullahs).

5. Don't let the moral pressure from your supporters or moralist advisers lock you into a too-forward-leaning approach to humanitarian intervention. By any reasonable interpretation of what happened in Rwanda, the situations in Darfur and the eastern Congo today require massive international force. Just don't go there. Leave it to the French.

4. Don't let Joe Biden stay in Washington too long. Somebody must have died somewhere.

3. Don't let your White House counsel Gregory Craig, who also counseled Elián González's father almost

10 years ago, run Cuba policy. You may have to win Florida again. So if you lift sanctions, couple it with a grand strategy to promote democracy in Cuba.

But be careful. The worst time for a bad regime, as Alexis de Tocqueville taught, is when it's trying to reform itself. Just ask Mikhail Gorbachev. And if the Cuban people vote with their flippers, you (unlike Bill Clinton when he faced boatloads of Haitians) may not have a habeas-free refugee camp at Guantánamo Bay. If you're looking for the perfect foreign and domestic law and policy storm, this would be it.

2. Don't rule out trying to amend the Geneva Conventions on the law of war. The temptation to repudiate the unlawful combatant theory, and perhaps even accept the 1977 Additional Protocol's attempt to validate POW status, may be irresistible. But you will have earned enough brownie points by closing Gitmo, which has lost its *raison d'être* anyway now that the Supreme Court has extended constitutional habeas jurisdiction to at least some foreign territory.

The intel obtained from some of the high-value prisoners will scare you to death, and you won't want to contract out U.S. national security to the bureaucrats of the International Committee of the Red Cross. You get elected; they don't.

Your hero, Abraham Lincoln, slowly and carefully built consensus for what many then saw as a violation of the laws of war, the Emancipation Proclamation—slapping down John Frémont's premature emancipation of rebels' slaves in occupied Missouri and posing as a doubter of his constitutional authority to rely on the doctrine of military necessity and thereby inducing moderates to make the case for him.

Burrus Carnahan's wonderful *Act of Justice* (2007), about Lincoln's use of military commissions to prosecute bushwhackers and of the military necessity to free slaves, is

far better than a briefing book in explaining how the Bush administration really went wrong in building international support for legal revision.

But you will have to find a better word than "quaint" to describe the old Geneva rules, even if your inclination toward legal pragmatism eventually increases your sympathy for then-White House counsel Alberto Gonzalez. After all, with "malice toward none; with charity for all."

1. Finally, don't demonize China for labor and other human rights violations only to have to back off eventually and lose credibility.

You know, as a lawyer, that linking trade to human rights as a matter of law is risky, because you may be accused of hypocrisy if you can't distinguish Colombia from China. Sure, the PRC is a trade competitor, but it's the global economy, stupid; and China now is the indispensable economy to Madeleine Albright's indispensable nation.

Try more persuasion (as the Chinese would call it, *li*) and fewer World Trade Organization sanctions claims (what the Chinese, who think litigation signifies a failed relationship, would call *fa*).

After all, you, like the Chinese, believe in a harmonious international order, even if you disagree on the terms for surrender. Oops, I meant "harmony."

Hope this helps, but don't blame me if it doesn't. That's what it means to be president.

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