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A Reply to Wittes on the United States and Extraterritoriality

By Peter Margulies Monday, March 10, 2014, 4:34 PM

I'm usually a big fan of Ben's cogent observations on Washington's folkways. Unfortunately, I can't be as enthusiastic about Ben's reply to my earlier post on Harold Koh's memos regarding extraterritoriality of human rights treaties. Ben overstates the duration of the United States' position against extraterritoriality. He also includes some pokes at Koh's service as "L" that cry out for additional context.

First, the US position lacks the pedigree that Ben claims. The US ratified the ICCPR in 1992, and former "L" Conrad Harper asserted the current US position in 1995. In 2011, the US in its "Fourth Periodic Report" to the UN Human Rights Committee (HRC) acknowledged it was "mindful" of the HRC's contrary view of the UN Human Rights Committee, and did not offer an argument on the merits in support of the US position. That makes less than sixteen years of full-throated US endorsement of the non-extraterritorial view: hardly the "longstanding" allegiance that Ben suggests. In contrast, the HRC stated its opposing view in 1981 (the HRC's view is too broad, as my forthcoming Fordham article suggests, but that's another issue; see Beth Van Schaack's recent article for a definitive treatment). The Supreme Court, in 1992's *United States v. Alvarez-Machain*, noted that a party to a bilateral treaty objecting to another party's reading of the agreement should seek to change the treaty's terms as soon as possible if it wishes its own reading to prevail. In other contexts, the US has not been reticent on this score: in 1992, the Senate included a number of reservations, understandings, and declarations (RUDs) to the ICCPR. Following Jack and Curt, I generally view RUDs as within the prerogatives of states parties. However, the Senate, despite ample notice of the HRC's ruling, did not include an RUD that pushed back against the ICCPR's extraterritorial effect. Indeed, as Dean Koh's memo on the ICCPR observes, the 1992 Senate Committee on Foreign Relations Report on the Covenant endorsed a broad reading of the territorial scope of the agreement. The current US position thus departs from the course of dealing that the US has followed in limiting treaties.

Ben also questions the timing of Dean Koh's memos. However, the ICCPR memo, which has attracted the most attention, dates from 2010. That memo was not a last-minute parting shot. In 2010, Dean Koh also robustly defended the legality of US policy in the conflict against Al Qaeda. Ben did not regard Koh's stance on that point as out of step. In taking that position, Koh was appropriately mindful of the United States' strategic interests and the need to leverage perceived legitimacy to bolster those interests. Particularly since so many of our longtime allies disagree with our reading of the ICCPR, Koh is surely entitled to a presumption that the same salutary concerns fueled his analysis of the ICCPR's coverage.

Topics: Relationship between LOAC and IHRL, Non-International Armed Conflict, NIAC: Conflict with IHRL, International Law

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