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RESPONSE

COUNTERINSURGENCY, THE WAR ON TERROR, AND THE LAWS OF WAR: A RESPONSE

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AS a graduate student attending George Washington University in the late sixties, I attended a debate between John Norton Moore and Richard Falk concerning both the wisdom and validity of the ongoing war in Vietnam. As John Moore rose to respond to Professor Falk's critique of the Vietnam conflict, he uttered this very memorable line: "Dick, I disagree with but two of your points—your premise and your conclusion." After all of these years, I can offer this same assessment regarding Ganesh Sitaraman's article[1] stating his perceived need for revision of the existing Law of War (LOW) in order for the United States to successfully implement a modern counterinsurgency strategy.

The premise: An ongoing "global insurgency" now represents the single most significant national security threat to the United States. Counterinsurgency has become the warfare of this age, and the current LOW cannot effectively accommodate this military reality.

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[1] Ganesh Sitaraman, Counterinsurgency, the War on Terror, and the Laws of War, 95 Va. L. Rev. 1745 (2009).

The conclusion: It is essential that the international community devise two Laws of War—a conventional Law of War and a law for "counter-insurgency war."

INTERNAL ARMED CONFLICTS

Insurgencies are not a new phenomenon. These are "armed conflict[s], not of an international character, occurring in the territory of one of the High Contracting Parties"[2] to the 1949 Geneva Conventions, to which the provisions of Common Article 3 of those Conventions, and—for those states party to it—Protocol Additional II[3] apply. In other words, an insurgency is not a "war." It is an armed attempt by dissident elements internal to a state to overthrow and displace the constituted government of that state.

How, then, does one conjure up the concept of a "global insurgency?"[4] Will periodic insurgencies occur throughout the world? Of course. Are these insurgencies now so pervasive in nature, and of such common purpose, that—taken collectively—they represent a "global insurgency?" I think not. This term is no more valid, factually and legally, than the Bush Administration's use of the phrase "Global War on Terrorism" (GWOT). So why are we to believe that the United States must now be prepared to base a significant portion of its military strategy on the premise that it will be a constant player in an ongoing "global insurgency," continually intervening in internal conflicts that occur around the globe?

Perhaps this contention is driven by the fact that, for a seemingly endless period of time, the United States has been engaged in assisting the governments of Iraq and Afghanistan in dealing with insurgent elements? If so, apparently forgotten is the reality that initial United States involvement in both these countries occurred in the form of international armed conflicts—that is, conventional conflicts waged for the specific purpose of eliminating both real and perceived national security threats.

[2] See Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[3] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Protocol, June 8, 1977, 1125 U.N.T.S. 609.

[4] For a detailed discussion of the "global insurgency" concept, see David Kilcullen, Countering Global Insurgency (Nov. 30, 2004), available at http://smallwarsjournal.com/documents/kilcullen.pdf.

A U.S. decision to intervene in an ongoing insurgency was never at play in either of these situations. And it is difficult to discern how a military strategy rooted in a conscious decision to engage actively in a constant repetition of the U.S. experience in Iraq and Afghanistan could best serve U.S. national security interests.

It is telling that Mr. Sitaraman, in asserting the need for an "insurgency Law of War" to deal effectively with a "global insurgency," often appears to base this need on the inability of the existing LOW to sufficiently address the legal issues associated with the previous administration's "GWOT." This linkage between insurgency and international terrorism is inaccurate, as is his related contention that the LOW is inadequate to deal with this "war." Insurgency and international terrorism are distinct in nature. Completely different legal regimes apply.[5] And, importantly, the "GWOT" was a sound bite—not a reality. The prior administration's attempts to bend LOW principles to what were, in truth, its counterterrorism needs, resulted in failure. The fault, however, did not lie with a LOW regime that was never meant to resolve legal matters associated with terrorism. A "war on terror legal framework" has simply never existed. This misconstrued linkage of terrorism and insurgency—and the legal principles related to each—undermines the premise that only a new "insurgency LOW" can meet the challenges of insurgency.

Also missing from Mr. Sitaraman's contention that the existing LOW inhibits the ability of the United States to develop an effective counterinsurgency strategy is any assessment of the predominant role played by the host governments of states confronted with insurgent elements. If the United States chooses to lend its support to such a government, it will do so at the invitation of that government. This clearly distinguishes the traditional insurgency situation from the recent U.S. experience in Iraq and Afghanistan, atypical insurgency scenarios that have apparently driven much of Mr. Sitaraman's thinking on this subject. The United States possesses no independent legal right to intervene in a state challenged by an insurgency—and may not conduct unilateral military operations within such a state. Thus, while it may be prudent that the United States develop a sophisticated counterinsurgency policy, its im-

[5] A dozen or so international conventions, ranging from the 1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft to the 2005 Convention for the Suppression of Acts of Nuclear Terrorism, comprise the international legal regime currently applicable to terrorism.

plementation cannot be based on an assumed right of unilateral intervention for the purpose of defeating an imagined "global insurgency."

It is the host government of any state afforded assistance by the United States that will continue to exercise sovereignty over its territory. The importance of this—in the context of Mr. Sitaraman's call for a distinct and comprehensive "LOW regime for insurgencies"—is that states dealing with such situations have inevitably determined to demonstrate their sovereign viability by insisting upon continued application of their domestic law. Indeed, one of the enduring aspects of any internal conflict is the significant reluctance of a government under siege to recognize the applicability of even the limited provisions of Common Article 3 and Protocol Additional II, because such recognition grants a degree of status to those who seek its defeat. This historic truism does not auger well for international support for a separate and comprehensive "LOW for insurgencies"; such a term is both a legal and political misnomer.

THE LAW OF WAR AND "WINNING" THE POPULATION

The bottom line is that neither the customary nor codified principles of the LOW—principles based, as Mr. Sitaraman notes, on a kill-capture strategy—were ever meant to apply to internal armed conflicts. Such conflicts are, by definition, not "wars." And, because there exists no "global," or, if you will, "international" insurgency, internal conflicts will continue to be dealt with by various governments on a very individual and localized basis. That said, it is worthwhile to consider a number of Mr. Sitaraman's asserted disconnects between the current LOW and the essential counterinsurgency goal of "winning" the population.

"Distinction"

"Distinction" is a LOW principle, applicable to conventional international armed conflicts, that requires a military force to distinguish between combatants and noncombatants, and between military objectives and protected property or protected places. When applied in conjunction with the principle of "proportionality," the issue becomes whether the noncombatant (civilian) damage that occurs from a use of military force is disproportionate to a legitimate military advantage to be gained. Mr. Sitaraman contends that, when applied to insurgencies (internal conflicts), this principle—weighted, in his view, in favor of the use of force—results in unnecessary civilian damage and casualties. And, in

turn, this runs counter to the goal of winning the support of the civilian population.

Suffice it to say, once again, that none of the customary principles of the LOW readily lend themselves to the conduct and regulation of internal armed conflicts. This is not their purpose. As already noted, such conflicts and conventional conflicts are distinct in nature, with the international community being reluctant to impose comprehensive and restrictive legal requirements on a de jure government dealing with dissident elements within its territorial boundaries. This is not to imply, however, that an informed government will fail to appreciate the necessity of minimizing the loss of life and property among its civilian population. Indeed, as Mr. Sitaraman notes in attempting to make the argument that the conventional application of the principle of "distinction" is ill-suited to the achievement of success in waging the "global insurgency," governments continuously exercise "discretion" in determining how and where to use force when dealing with insurgency scenarios. While such governments may take the basic customary LOW principles of conventional warfare into consideration when making use of force decisions, a rigid application of the concept of "distinction"—or any other conventional LOW principle—is not required and would often be self-defeating. These long established principles do not adversely affect the formulation of a successful counterinsurgency strategy.

"Civilian Compensation"

Mr. Sitaraman's discussion of the need for enhanced civilian compensation in the context of insurgencies focuses almost exclusively on the U.S. experience in Iraq and Afghanistan. To reiterate, it is noteworthy that the "insurgencies" that currently exist in these two countries are atypical in nature—both morphing from conventional international conflicts. In neither situation did the United States receive a request by a host government to assist it in countering insurgent elements. Indeed, these insurgencies are largely the product of U.S. military displacements of the prior governments of these states.

Also of note is the fact that there are no existing customary or codified LOW compensatory practices. The Foreign Claims Act is purely a product of U.S. domestic law, and—while condolence and solatia payments may be customary in certain areas of the world—these practices are not mandatory. Most importantly, the manner in which civilians are compensated for damages incurred as a result of a government's use of

force during the course of an internal conflict is almost exclusively a matter of host state concern and control. Any U.S. compensatory program would have to comport with—and complement—that of a host government's. This means that a United States-formulated "insurgency LOW" compensatory scheme could not be independently implemented. And, most decidedly, there will be no international support for the development of an "insurgency LOW" that mandates when and how governments under siege must compensate their own citizens for damages incurred in an insurgency context.

Occupation Law

Mr. Sitaraman's assessment of the disconnect between "occupation law" as an element of the LOW and the crafting of an effective counterinsurgency strategy is, again, apparently based exclusively on U.S. experience in Iraq and Afghanistan. In brief, states responding to requests from other states confronting insurgencies do not "occupy" the latter. The United States "occupied" both Iraq and Afghanistan as a result of international, rather than internal, armed conflicts. Those experiences thus do not justify formulating a "new" occupation law applicable only to counterinsurgency scenarios.

Non-Lethal Weapons (NLW)

Mr. Sitaraman contends that, despite the obvious advantages accruing from the use of NLW in an insurgency environment, "the laws of war prohibit the use of many non-lethal weapons."[6] This is a puzzling statement, one that I've not heard even in the context of the use of NLW in conventional conflicts. While it is true that several international conventions dealing with weapon systems might be interpreted as prohibiting the use of a very small number of NLW, there are many other NLW systems readily available. Moreover, in the context of internal conflicts, it is most questionable whether the provisions of the international conventions referenced by Mr. Sitaraman would even apply. The use of NLW in insurgency situations would appear to be more an issue of domestic than international law. The LOW, as it relates to the use of NLW, requires no revision in order for such systems to be effectively employed in counterinsurgency operations.

[6] Sitaraman, supra note 1, at 1807.

Detention Policy

Once again, Mr. Sitaraman mistakenly conflates the legal issues evolving from the past administration's formulation of a detention policy applicable to its "GWOT" and those issues associated with a host government's incarceration of insurgent elements within its own borders. Legal concerns arising from international terrorism and localized insurgencies are completely different in nature. The detention of insurgent personnel will largely be dictated by a state's domestic law—and will bear absolutely no resemblance to the U.S. detention of "unlawful enemy combatants" seized during its "war on terrorism." And, as repeatedly noted, the U.S. experience in Iraq and Afghanistan—conventional conflict scenarios in which the United States constructed detention operations that had nothing to do with "winning the local populations,"—cannot offer legitimate examples of how the LOW adversely affects the ability of a host state to effect a detention system that contributes to a successful counterinsurgency campaign.

Rethinking Compliance: From Reciprocity to Exemplarism

Finally, Mr. Sitaraman contends that, in crafting an effective counterinsurgency strategy, a new "counterinsurgency LOW" must move away from LOW compliance based almost exclusively on the principle of reciprocity to compliance grounded in "exemplarism." This means that the counterinsurgent must act in accordance with the law, regardless of the insurgent's actions. But while reciprocity does serve as an important policy basis for LOW compliance in a conventional warfare environment, it is not the legal basis for such compliance. States are not freed from their LOW obligations simply because one of the parties to a conflict fails to meet its LOW obligations. Even more relevant is the fact that, with respect to insurgency scenarios, host governments must act in accordance with both their domestic law and international human rights conventions to which they are party. The force of these obligations does not rest on whether the insurgent elements are meeting these same standards.

In considering U.S. involvement in insurgency situations, it is essential to note that the actions of U.S. personnel are not dictated by those of the insurgents. It is firmly established U.S. policy that "Members of Department of Defense components will comply with the Law of War during all armed conflicts, however such conflicts are characterized, and in

all other military operations."[7] That is, the actions of U.S. military personnel involved in insurgency operations are never dependent upon whether insurgent elements engage in a reciprocal compliance with the LOW. In brief, the U.S. armed forces currently engage in "exemplarism." There exists no requirement to formulate a new "counterinsurgency LOW" based on this concept.

CONCLUSION

In conclusion, for the above noted reasons, I disagree with Mr. Sitaraman's premise that a "global insurgency" now represents the warfare of this age—a "war" that cannot be dealt with by the existing customary and codified LOW. His use of Iraq and Afghanistan as his principal examples of insurgency situations is United States-centric and therefore misplaced. Both are atypical in nature—insurgencies evolving not from within, but from conventional international conflicts initiated by the U.S. The current LOW is, in fact, capable of dealing with traditional insurgencies and represents the extent to which the global body politic is willing to impose legal obligations on states faced with insurgency scenarios. There is no need to formulate a distinct "insurgency LOW." The currently applicable law is sufficient to meet the needs of the international community.

[7] Department of Defense Directive 2311.01E, DOD Law of War Program (May 9, 2006), available at http://www.dtic.mil/whs/directives/corres/html/231001.htm.