

Trying to make (some) black swans into white (or at least grey) swans

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Definition of a “black swan”

- Taleb, “The Black Swan” 2007.
- The event is a surprise to the observer (FH: but at least some of them e.g. banking crash 2008 could have been predicted & were predicted by some) &
- The consequences of the surprise event are severe &
- After the event, it is rationalised as though it could have been anticipated and mitigated (FH: although, in some cases, that is true)
- What may not currently be being foreseen by military lawyers, owing to the narrow view of their role adopted by them &/or other government lawyers, but which is, in fact, foreseeable.

What armed forces & governments need legal advice about?

- Criminal & disciplinary charges. } not
- Lawful conduct of military operations (Ops. Law). } further
- Legal rules on the protection of the victims of war. } addressed
- Strategic legal advice.
- Future developments in the law of armed conflict (LOAC).
- Developments in international law with a possible impact on the conduct of military operations & the protection of victims of war.
- Issues where there are no or inadequate international law rules and which might give rise, if not otherwise addressed, to military operations.

Strategic legal advice

- Ops. Law tends to address tactical issues.
- E.g. proportionality of an individual attack and not proportionality of the operation as a whole.
- Could be seen as a *ius ad bellum* issue and just for the Foreign Ministry but significant implications for the armed forces.
- See Cohen & Lubell, “Strategic Proportionality: Limitations on the Use of Force in Modern Armed Conflicts”, <https://digital-commons.usnwc.edu/ils/vol96/iss1/6/>
- Use of particular weapons in particular contexts could raise strategic legal issues.
- Includes how the other side & civil society understand the legal rules.
- Has the need for strategic legal advice been recognised & acted upon?

Future developments in the *law* of armed conflict

- Not just a matter of negotiating treaty texts; also need to see the implications of the “direction of travel” of ICRC proposals (e.g. urban warfare; responsibility for second order consequences of attacks).
- Military lawyers may be involved in e.g. CCWC negotiations but do they report back to and receive input from the operators? What role do they play in the team of negotiators?
- Are military lawyers aware of “direction of travel” issues or only draft legal rules?
- How do military lawyers feed in their concerns to the overall national response to “direction of travel” issues?

Developments in international *law* with a potential impact on the conduct of military operations & the protection of victims

- International law includes *both* rules about the operation of the international legal system (e.g. jurisdiction; state responsibility) *and* substantive rules regulating behaviour (e.g. international law of the sea; international environmental law; international human rights law).
- Cannot depend on issues being raised by other government lawyers; they may not recognise there is an issue of concern to the armed forces &/or think they can deal with it themselves.
- Military lawyers dealing with such issues need some understanding of international law as a whole; not all Ops. Lawyers have that.
- It is often possible to modify the scope of an emerging norm by making representations.
- It is often not a matter of black and white; military legal input would show what is non-negotiable and where there is some flexibility.
- E.g. scope of State complicity (Art.16 of the ILC Draft Articles on State Responsibility), according to case-law & not just the commentary.

Issues where there are no or inadequate international legal rules & the situation could result in military operations

- Sun Tzu: “The supreme art of war is to subdue the enemy without fighting.”
v. Maslow: “... if the only tool you have is a hammer, [it is tempting] to treat everything as if it were a nail.”
- E.g. hostile activities by State A in the territory of State B, which do not amount to an armed attack or a use or threat of force.
- Not just a question of establishing attribution.
- Concept of intervention needs to be clarified & needs to be clearer what the victim can do in response; that should take account not only of the actual intervention but to what it could foreseeably lead.
- Where a neglected issue could result in (unnecessary) military operations, military lawyers should be raising the concern with foreign ministry & defence ministry lawyers.
- Is that happening at all?

Implications

- The view of the role of the military lawyer needs to be broadened.
- That does not mean that they should all be able to do everything.
- Those who would give advice about possible implications of developments in international law for the conduct of military operations probably do need to have experience of actually advising on Ops. Law during operations.
- Implications for training.
- Limited view of the role is probably shared by other government lawyers (e.g. Foreign Affairs & Defence). It is not suggested that military legal advice is *instead* of their advice but *in addition* to it. It will improve the quality of overall legal advice & government decision-making.