

6-1-2008

The Development of NATO EBAO Doctrine: Clausewitz's Theories and the Role of Law in an Evolving Approach to Operations

Colonel Jody M. Prescott

Follow this and additional works at: <http://elibrary.law.psu.edu/psilr>



Part of the [International Law Commons](#), [International Trade Law Commons](#), and the [Transnational Law Commons](#)

Recommended Citation

Prescott, Colonel Jody M. (2008) "The Development of NATO EBAO Doctrine: Clausewitz's Theories and the Role of Law in an Evolving Approach to Operations," *Penn State International Law Review*: Vol. 27: No. 1, Article 5.
Available at: <http://elibrary.law.psu.edu/psilr/vol27/iss1/5>

This Article is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Penn State International Law Review by an authorized administrator of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

The Development of NATO EBAO Doctrine: Clausewitz's Theories and the Role of Law in an Evolving Approach to Operations

Colonel Jody M. Prescott*

I. Introduction

The role of law in military operations today is pervasive, and it contributes significantly to the complexity of the international security environment.¹ The practice of “operational law,” as it is often called, requires legal advisors on military operations to be competent in areas of the law as diverse as environmental law, contracts, claims and human rights in addition to the more typical bodies of law that one would expect in a military operation, such as the law of armed conflict.² Legal complexity is just one of a number of operational aspects that have forced international organizations to reassess their traditional methods of conducting military operations.³ In particular, conflicts since the end of

* Chief Legal Advisor, International Security Assistance Force (ISAF). The views expressed in this article are mine, and do not reflect the official views of ISAF, the Joint Warfare Centre, or the U.S. Army Judge Advocate General's Corps. I wish to thank Lieutenant Colonel (Ret.) Kelly Jordan, Lieutenant Colonel Charles Newbegin, Wing Commander Alexander Mason, Lieutenant Colonel (Ret.) Michael Davidson, Squadron Leader Andrew Gannon, and Ms. Mette Hartov for their insightful comments and critique on this article. Any mistakes are, of course, my own doing.

1. “Modern wars are complex affairs conducted ‘among the people’ and, as Sir Richard Dannatt, head of the British army, put it recently, ‘in the spotlight of the media and in the shadow of international lawyers.’” *After Smart Weapons, Smart Soldiers*, ECONOMIST, Oct. 27, 2007, at 33; Michael Kelly, *Legal Factors in Military Planning for Coalition Warfare and Military Interoperability: Some Implications for the Australian Defence Force*, 2 AUSTL. ARMY J., Autumn 2005, at 161-71, available at http://www.apcml.org/documents/aaj_autumn05_kelly_17.pdf.

2. See U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS, 3-2 through 3-16 (Mar. 1, 2000).

3. See, e.g., Cedric de Coning, *The Implications of the Integrated Missions Concept for Training in United Nations and African Union Peace Operations*, PEACEKEEPING THIS MONTH, July 17, 2007, available at <http://www.apsta-africa.org/news/article/17072007.php>.

the Cold War have shown that the mere coincident use of military force alongside civilian reconstruction and development programs in an operational environment is not sufficient to set the conditions conducive to a stable and lasting peace.⁴ Accustomed in the past to working largely independently of one another, military and civilian efforts often lacked the horizontal coordination between them necessary for practical cooperation at the strategic, operational and tactical levels of operations.⁵ Further, the use of their respective conventional planning, execution and assessment techniques did not always generate the necessary vertical coherence in strategy implementation between the different levels of their operations that would ensure their plans were effectively carried out.⁶ Finally, military and civilian organizations have realized that certain conditions necessary to build a stable and lasting peace, such as establishing the rule of law, can be challenging to achieve using traditional approaches.⁷

Within NATO, for example, recognition of these problems has led to two closely related initiatives: the Comprehensive Approach and the Effects Based Approach to Operations (EBAO).⁸ The Comprehensive Approach began as a Danish effort that primarily sought to achieve better political coordination between NATO and other strategic level organizations such as the UN and EU.⁹ This initiative was based in part

4. Ambassador Friis Arne Petersen, Embassy of Den., Washington, D.C., Presentation at NATO Comprehensive Approach Workshop (May 25, 2007), <http://www.ambwashington.um.dk/en/menu/TheEmbassy/AmbassadorsGreeting/AmbassadorsSpeechesandPublications/AmbassadorFriisArnePetersensPresentationAtNATOComprehensiveApproachWorkshop.htm>.

5. De Coning, *supra* note 3. See also U.S. Military Authorities and Nongovernmental Humanitarian Organizations Establish Guidelines on Relations in Hostile Environments, 101 AM. J. INT'L L. 877, 877-78 (2007) (collaborating between government officials and a group of U.S. nongovernmental organizations to develop "rules of the road" to guide relations between U.S. military forces and humanitarian organizations in conflict zones.).

6. Petersen, *supra* note 4.

7. See, e.g., de Coning, *supra* note 3; THE IRAQ STUDY GROUP REPORT 6, 54 (2006), available at http://www.usip.org/isg/iraq_study_group_report/report/1206/index.html; TIMO NOETZEL & SIBYLLE SCHEIPERS, COALITION WARFARE IN AFGHANISTAN: BURDEN-SHARING OR DISUNITY? 3-4 (Chatham House Briefing Paper, Oct. 2007), available at http://ccw.politics.ox.ac.uk/publications/scheipers_10567_bp1007afghanistan.pdf.

8. Tim Williams, *The Road to Riga & the Path Ahead: NATO's Transformation Agenda before and after the Riga Summit*, ROYAL UNITED SERV. INST. FOR DEF. AND SEC. STUDIES, http://www.rusi.org/downloads/assets/The_Road_to_Riga_and_the_Path_Ahead.pdf (last visited May 24, 2008); Michael Romba & Ralph Thiele, *Networked Security in the German Forces*, J. JAPCC 29, 2007 Edition 5, 29, 29-30.

9. Petersen, *supra* note 4. Importantly, the respective comprehensive approaches of NATO and the EU reflect their different missions and different resources. NATO's emphasis is on the military strengths of the alliance, while the EU focuses on "the mixture of available instruments [i.e., economic] and the positive perception of softpower by other actors [as] EU advantages." EUMS-IMS Roundtable Meeting on

upon the successful Danish experience at the national level with statutorily required civil-military cooperation in operations in the Balkans.¹⁰ The NATO leadership endorsed this concept at the Riga Summit in 2006, and directed the North Atlantic Council to propose pragmatic measures to “improve coherent application of NATO’s own crisis management instruments,” and to enhance the interface of civilian and military efforts with organizations such as the UN, non-governmental organizations, and local actors.¹¹

If the comprehensive approach represents NATO’s overarching political concept for devising an improved way of conducting NATO operations in general, then EBAO may be best described as the implementation of the Comprehensive Approach in a military context. In general, EBAO seeks to create a more holistic picture of the operational environment to enhance military planning, the conduct of operations, and the assessment of the efficacy of those operations.¹² Within this broader view, commanders and staffs at all levels should then be able to synchronize their efforts with those of other governmental, international, and non-governmental organizations.¹³ This synchronization of actors is intended to allow the military headquarters personnel to focus effectively on the objectives directed by their political leaders for accomplishment. These political objectives must be met in order to succeed in the military phases of an operation and to create “effects.” “Effects” here meaning changes to perceptions, behavior, and capabilities, that must be brought about among the various actors in the operational environment to accomplish these objectives.¹⁴ The concepts behind EBAO are neither new¹⁵ nor applicable only to military

Comprehensive Approach (CA) and Effects Based Approach to Operations (EBAO), meeting report, ¶ 6b, Enclosure 1, INT’L MIL. STAFF, IMSTAM(P&P)-0039-2007 (Dec. 20, 2007) (unpublished, on file with NATO).

10. Petersen, *supra* note 4.

11. Williams, *supra* note 8.

12. Romba & Thiele, *supra* note 8, at 32.

13. BI-STRATEGIC COMMAND PRE-DOCTRINAL HANDBOOK (EFFECTS BASED APPROACH TO OPERATIONS), Supreme Allied Commanders, Europe and Transformation 1-1 to 1-3 (Oct. 1, 2007) [hereinafter PRE-DOCTRINAL HANDBOOK]. “Bi-Strategic” refers to the two strategic-level commands within NATO, Allied Command Operations (better known as Supreme Headquarters Allied Powers Europe, or SHAPE) located in Mons, Belgium, and Allied Command Transformation, located in Norfolk, Virginia. This term came into common usage after the reorganization in 2003, though it has not formally been adopted.

14. *Id.* at 2-1 to 2-4.

15. See Justin Kelly & David Kilcullen, *Chaos Versus Predictability: A Critique of Effects-Based Operations*, 2 AUSTL. ARMY J., Winter 2004, at 88, available at http://www.defence.gov.au/army/lwsc/docs/AAJ_Winter_2004.pdf. These authors suggest that the modern formulation of EBAO has its roots in early Soviet strategic thinking. See *id.* Others note that the concept itself dates back at least to the writings of

operations.¹⁶ EBAO assessment mechanisms are particularly important, because they should allow adjustments in the strategies and actions used to generate these “effects” more quickly than traditional military planning and assessment techniques.¹⁷

Before these holistic methodologies can be effectively implemented within NATO, however, the personnel who are to use them must be trained in their use. Proper training will require well-developed education and training programs, which in turn must be based upon empirically validated and intellectually accessible doctrine. As the U.S. military determined in writing its new counterinsurgency manual, doctrine appropriate for dealing with the new international security environment requires a holistic approach in its construction.¹⁸ Similarly, the holistic nature of EBAO suggests that the development of EBAO doctrine should also reflect the operational holism which it is intended to help implement. Ideally, therefore, the reference bases upon which the doctrine is constructed should themselves be operationally holistic, and should, for example, address the impact of law on contemporary military operations. This article argues that the theories of 19th century Prussian general Carl von Clausewitz, as found in his major work, *On War*, meet these criteria and should be a fundamental reference base for NATO EBAO doctrine.

the ancient Chinese military thinker, Sun Tzu. See, e.g., Joshua Ho, *The Dimensions of Effect Based Operations: A View From Singapore*, 2 AUSTL. ARMY J., Winter 2004, at 99, http://www.defence.gov.au/army/lwsc/docs/AAJ_Winter_2004.pdf.

16. For example, Los Angeles has had a problem with gangs for a number of years. The police have recently been implementing a new strategy that does not focus on eliminating gangs, but instead upon changing their criminal behavior. First, the police publicly focused attention on eleven gangs that were particularly troublesome. The attention did not consist of direct law enforcement action, but rather of indirect, harassing action. Violent gangs found themselves subject to measures that disrupted their organizations rather than confronting them with force, such as civil injunctions and the rigorous enforcement of probation restrictions. Gangs whose behavior was less violent did not attract the same degree of police attention. Further, the police strategy addressed the behavior of ordinary, law-abiding citizens as well. A map that showed the territories of the various gangs was distributed, which allowed prospective homebuyers to determine whether the properties they were looking at were located in particular gang areas. As a result of this approach, one significant indicator of gang violence, gang murders, has dropped almost 30 percent. See *Living with Cockroaches*, ECONOMIST, Aug. 2, 2007, at 26. The use of law in this police strategy, including both criminal and civil legal processes rather than just direct law enforcement actions such as arrests, reflects the recognition of law’s extensive impact upon operations of this nature.

17. PRE-DOCTRINAL HANDBOOK, *supra* note 13, at 7-1 to 7-11.

18. See Posting of John Nagl to Small Wars Journal, <http://smallwarsjournal.com/blog/2007/06/the-evolution-and-importance-of/> (June 27, 2007 19:35 EST). The new U.S. Stability Operations manual also reflects this approach. See Michael R. Gordon, *New Weight in Army Manual on Stabilizing War-Torn Areas*, N.Y. TIMES, Feb. 8, 2008, at A1, available at 2008 WLNR 2437729.

Clausewitz's theories have been both lauded and criticized since *On War* was first published in 1832, and they have been interpreted in many different ways by political and military writers across the spectra of nationality and political persuasion.¹⁹ To the extent that *On War* can be generalized, it reflects a keen appreciation on Clausewitz's part of the importance of the study of history in understanding political and military affairs,²⁰ and Clausewitz's admiration of Niccolò Machiavelli's forthright description of the political and military realities of his time. Like Machiavelli, Clausewitz focused on these realities, rather than ethical considerations, as being determinative in the exercise of political power in the relationships between different nations.²¹ Despite having been written over 175 years ago, Clausewitz's theories continue to enjoy significant currency with contemporary theorists and writers on military, political and business strategy.²² In particular, recent commentators have recognized the strong relationships between Clausewitz's theories and the field of non-linear dynamics, or so-called "chaos theory."²³ Non-linear dynamics recognize that in complex systems, such as armed conflicts, small differences in initial starting conditions can lead to trends which produce results that are both very different from and also disproportionate to the initial events from which they sprang.²⁴ This is in part because of feedback loops that exist in these systems that act to reinforce the impact of the original small differences in the starting conditions, causing trends to develop in an exponential, non-linear fashion.²⁵ An appropriate illustration of this is the old saying, "For want

19. CLAUSEWITZ AND MODERN STRATEGY 12, 214-15 (Michael I. Handel ed., 1986); Michael Howard, *Introduction to CARL VON CLAUSEWITZ, ON WAR* 27-44 (Peter Paret & Michael Howard eds., 1976).

20. See Jon Tetsuro Sumida, *The Relationship of History and Theory in On War: the Clausewitzian Ideal and its Implications*, 65 J. MIL. HIST. 333, 340 (2001) (describing the significance of history in Clausewitz's writings).

21. See PETER PARET, *CLAUSEWITZ AND THE STATE: THE MAN, HIS THEORIES, AND HIS TIMES* 170-77 (Princeton Univ. Press 1985).

22. See, e.g., *CLAUSEWITZ ON STRATEGY: INSPIRATION AND INSIGHT FROM A MASTER STRATEGIST* (Tiha von Ghyczy et al. eds., 2001); BEATRICE HEUSER, *READING CLAUSEWITZ* (2002); Steve Michael, *Air Force Doctrine and Leadership*, 15 AEROSPACE POWER J. 86 (2001). But see, e.g., Bruce Fleming, *Can Reading Clausewitz Save Us from Future Mistakes?* PARAMETERS, U.S. ARMY WAR COLL. Q., Spring 2004, at 62; Jeff Huber, *Clausewitz is Dead*, 117 U.S. NAVAL INST. PROC. 119 (2001).

23. See Alan Beyerchen, *Clausewitz, Nonlinearity and the Unpredictability of War*, 17 INT'L SEC. 59 (1992).

24. Linda P. Beckerman, *The Non-Linear Dynamics of War*, Sci. Applications Int'l Corp. ASSET Group 3, 8 (Apr. 20, 1999) (unpublished paper), available at <http://www.calresco.org/beckermn/nonlindy.htm>.

25. *Id.* at 6. As Dr. Beyerchen argued in his influential article, "[m]y claim here is not that Clausewitz somehow anticipated today's 'chaos theory,' but that he perceived and articulated the nature of war as an energy-consuming phenomenon involving

of a nail the shoe was lost, for want of a shoe the horse was lost, and for want of a horse the rider was lost.”²⁶ A more modern example is the concept of the “strategic corporal,” that is, the possibility of tactical level actors behaving in such a way that their actions have strategic level impacts.²⁷ Other writers have noted the relationship between non-linear dynamics and EBAO,²⁸ and the relationship between EBAO and Clausewitz’s theories.²⁹ This broad acceptance of his work suggests that *On War* could be a likely candidate for inclusion into a NATO EBAO doctrine base. From a doctrinal perspective, however, there is a problem: Clausewitz’s theories appear to almost completely discount the role of law in military operations. As he states near the beginning of *On War*,

[W]ar is thus an act of force to compel the enemy to do our will. Force, to counter opposing force, equips itself with the inventions of art and science. Attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, for they scarcely weaken it. Force—that is physical force, for moral force has no existence save as expressed in the state and law—is thus the means of war, to impose our will on the enemy is its object.³⁰

Regardless of the need for EBAO doctrine and the theoretical and historical credibility Clausewitz’s theories enjoy with contemporary audiences, is it sound to base NATO EBAO doctrine, even in part, on a body of work which seems so out of touch with the reality of the role of law in today’s international security environment? As stated above, this article argues that the answer to this question is an unequivocal “yes.” Firstly, in resolving this apparently fundamental inconsistency, this article will expand upon the necessity for doctrine, and the development of EBAO within NATO, to explain more fully the need for operationally holistic doctrine upon which to base NATO education and training.

competing and interactive factors, attention to which reveals a messy mix of order and unpredictability.” Beyerchen, *supra* note 23, at 70.

26. BENJAMIN FRANKLIN, POOR RICHARD’S ALMANAC (1757), *quoted in FAMILIAR QUOTATIONS* (John Bartlett ed., 10th ed. 1919).

27. Lynda Liddy, *The Strategic Corporal: Some Requirements in Training and Education*, 2 AUSTL. ARMY J., Autumn 2005, at 139-41, *available at* http://www.defence.gov.au/army/lwsc/docs/AAJ_Autumn05.pdf. The actions of certain U.S. soldiers at Abu Ghraib who abused Iraqi detainees is a negative example of this concept in practice. *See THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 383-1165 (Karen Greenberg & Joshua Dratel eds., 2005).

28. Kelly & Kilcullen, *supra* note 15, at 90; Ho, *supra* note 15, at 103.

29. Antulio J. Echevarria II, *Clausewitz’s Center of Gravity: Changing Our Warfighting Doctrine—Again!* 13 (Strategic Studies Institute, Sept. 2002), *available at* <http://www.strategicstudiesinstitute.army.mil/pdf/files/PUB363.pdf>; Kelley & Kilcullen, *supra* note 15, at 97.

30. CARL VON CLAUSEWITZ, *ON WAR* 75 (Peter Paret & Michael Howard eds., 1976).

Secondly, it will explore some concerns regarding the use of EBAO in order to more completely illustrate the challenges presented in developing doctrine for these methodologies. Thirdly, Clausewitz's education and experiences will be reviewed, to provide the reader with a better appreciation of the context within which he developed his theories. The following section will briefly describe his theories and ideas, primarily as set out in *On War*, and specifically focus on what he perceived the impact of law upon military operations to be. Against this backdrop, the fifth section will assess the development of international law up to the time of his last refinements of the draft of *On War* to demonstrate the consistency of his views on law with the state of its development at that time. Finally, this article will factor the current role of law in military operations into his theories on armed conflict to show how they can be accommodated without warping them to such an extent that they would lose their identity and their value for modern doctrine writers, educators and trainers, and students.

II. The Necessity for NATO EBAO Doctrine and its Current State of Development

Certain NATO headquarters today, such as the International Security Assistance Force (ISAF) in Afghanistan, are using some form of EBAO to plan, conduct and assess their missions.³¹ Within NATO, work is also underway not just to formulate a doctrinal basis acceptable to all the Allies, but to provide useful guidance to commanders and staffs on how to work with EBAO concepts and systems as well.³² For example, a Bi-Strategic Command working group, in cooperation with the Joint Warfare Centre (JWC) in Stavanger, Norway, has drafted the Pre-doctrinal EBAO Handbook for NATO forces³³ and has also drafted the Engagement Space Assessment Handbook.³⁴ In Stand Alone Experiment (SAE) Enabler 08, an experiment conducted at the JWC in February 2008, a military staff, including a legal advisor, engaged in operational planning using the NATO EBAO lexicon and concepts found in these staff guides to determine whether the documents were useful in EBAO

31. Williams, *supra* note 8, at 2-3.

32. Charles Newbegin, *NATO Effects Based Approach to Operations (EBAO) Concept*, 11 THE THREE SWORDS 5 (2007).

33. See PRE-DOCTRINAL HANDBOOK, *supra* note 13; see also JOINT WARFIGHTING CTR. ET AL., COMMANDER'S HANDBOOK FOR AN EFFECTS-BASED APPROACH TO JOINT OPERATIONS (2006).

34. HEADQUARTERS, SUPREME ALLIED COMMAND TRANSFORMATION, ENGAGEMENT SPACE ASSESSMENT HANDBOOK, VERSION 1, ENCLOSURE 2 TO 5000 TI-35/SER: NU OCT 07 (Oct. 2007).

planning, and whether improvements in both could be made.³⁵ This developmental work is of interest to jurists because the implementation of EBAO could significantly expand the role of law and the role of legal advisors in contemporary military operations.³⁶ Because EBAO should result in military organizations working more closely with governments³⁷ and other civilian organizations, military headquarters would need to be more aware of the laws and regulations pertinent to the functioning of these non-military actors. This suggests a broader staff role for military legal advisors in EBAO, and a requirement for them to undergo more specialized legal training and education in the fields of international and comparative law.³⁸ Likewise, it also suggests a need for legal advisors working for the civilian actors to become better acquainted with the practice of operational law, and with military staff working procedures in general.³⁹

Although there are widespread efforts to develop EBAO in a practical fashion,⁴⁰ much of the existing general literature on EBAO focuses instead on its theoretical bases⁴¹ and its application at the higher levels of command.⁴² From a doctrinal perspective, certain influential military organizations outside NATO have expressed reservations with the implementation of EBAO at the strategic and operational levels. For example, the command responsible for training and the development of

35. Author's notes, SAE Enabler 08, Ulsnes Training Centre, Hundvåg, Norway, February 25-29, 2008.

36. PRE-DOCTRINAL HANDBOOK, *supra* note 13, at 6-4 to 6-5.

37. PRE-DOCTRINAL HANDBOOK, *supra* note 13, at Annex C (discussing examples of EBAO Thinking Applied to NATO Operations).

38. PRE-DOCTRINAL HANDBOOK, *supra* note 13, at 6-4 to 6-5; Jody M. Prescott, *EBAO and Its Implications for ACT*, 6 THE THREE SWORDS 11, 14 (2006).

39. *Id.*; Jody M. Prescott, *Training EBAO and Humanitarian Considerations in Operations: Blue Force Looks Within*, 8 THE THREE SWORDS 25, 28-29 (2007).

40. For example, in March 2008 the Baltic Defence College in Tartu, Estonia, hosted a two-day conference entitled "Effects-Based Approach to Operations: Challenges and Perspectives," which included EBAO presentations from the U.S., the U.K., France, Denmark, Sweden, Finland, Estonia, Latvia, and Lithuania. See Baltic Defence College, <http://www.bdcol.ee/?id=16> (last visited March 14, 2008).

41. See, e.g., Andrew Ilachinski, *Land Warfare and Complexity, Part II: An Assessment of the Applicability of Nonlinear Dynamics and Complex Systems Theory to the Study of Land Warfare* (Center for Naval Analyses, 1996), available at <http://www.cna.org/isaac/lw1.pdf>; Edward A. Smith, *Complexity, Networking, and Effects Based Approaches to Operations* (Dep't of Defense Command and Control Research Program, July 2006), available at http://www.dodccrp.org/files/Smith_Complexity.pdf.

42. See, e.g., EFFECTS-BASED APPROACH TO MULTINATIONAL OPERATIONS, CONCEPT OF OPERATIONS (CONOPS) WITH IMPLEMENTING PROCEDURES, VERSION 1.0, U.S. Joint Forces Command, Joint Experimentation Directorate (July 7, 2006) (copy on file with author); DOCTRINAL IMPLICATIONS OF OPERATIONAL NET ASSESSMENT (ONA), JOINT DOCTRINE SERIES, PAMPHLET 4, U.S. Joint Forces Command, Joint Warfighting Center (Feb. 24, 2004) (copy on file with author).

doctrine in one branch of the U.S. military has found some aspects of EBAO useful, but has postponed training on it until more work is done to develop the concept, validate it, and write doctrine on its use.⁴³ The requirement for training and education packages based on well-developed and empirically validated doctrine is noted by several militaries as being necessary prior to comprehensive implementation of EBAO.⁴⁴ This concern appears well founded. In the national context, within a joint headquarters for example, this could lead to commanders and staffs of different branches of a country's armed forces using inconsistent terminology and definitions, and not fully understanding the EBAO processes and products they are supposed to be using. Within a multinational headquarters, depending upon the different military cultures, the language skills, the differing national interpretations of EBAO, and the training and experiences of individual commanders and staff officers, a lack of doctrinal uniformity would likely increase the risk of miscommunication and misunderstanding of problems.⁴⁵ The lack of well-developed NATO EBAO doctrine, therefore, not only complicates putting effective EBAO systems into place, but it also handicaps the human operators needed to make the systems work. Given the confusion that the lack of doctrine could cause among military personnel, it would be unrealistic to expect officials and representatives of civilian organizations unfamiliar with the concept to understand EBAO and participate in EBAO planning and execution in a meaningful way. Unlike military personnel, these individuals would not necessarily be

43. Memorandum from Director of Futures Center, U.S. Army Training and Doctrine Command, to Commandants of Training and Doctrine Command Schools, Regarding Effects Based Concepts and Doctrine in Army Education 3-4 (Dec. 22, 2005) (copy on file with author). General Mattis, the commander of U.S. Joint Forces Command and of Supreme Allied Command Transformation, has assessed the complex systems of analysis used by U.S. Joint Forces Command ("USJFCOM") in support of Effects Based Operations as ineffective, and has directed their use be discontinued. James N. Mattis, *USJFCOM Commander's Guidance for Effects-based Operations*, 51 JOINT FORCES Q. 105, 108 (2008). He specifically noted, however, that NATO's use of effects-based concepts is different because it is part of the comprehensive approach. Accordingly, General Mattis stated that he "did not address NATO's use of EBAO in this USJFCOM commander's guidance." *Id.* at 106.

44. See Ministry of Defence of Great Britain, THE UK MILITARY EFFECTS-BASED APPROACH, JOINT DOCTRINE NOTE 1/05 1-12 (2005); Australian Defense Force, Effects Based Operations Discussion Paper 30 ¶¶ 101, 102 (Nov. 25, 2003), available at http://www.defence.gov.au/strategy/fwc/documents/ebo_dp.pdf.

45. See Ion Vlad & Iulian Berdila, *Effects-Based Operations: A New Approach to Armed Conflict*, 2 ROM. MIL. THINKING 57, 58 (2006) (noting the potential negative effects when new concepts are misunderstood and the need to avoid "raw copying" of military concepts into other languages and military cultures); SAE Enabler, *supra* note 35 (even a well trained experiment audience from a multinational headquarters staff who were experienced in working with EBAO expended precious planning time revisiting and discussing the provided EBAO concepts and terms definitions).

able to rely upon their staff experiences and operational art to help them muddle through a convoluted military staffing process.⁴⁶ They would need training and education, based upon doctrine, in order to understand how EBAO are supposed to work at the various levels of command.⁴⁷ As noted previously, in keeping with the holistic nature of EBAO, this sort of doctrine should ideally include reference bases that reflect operational holism.

Currently, NATO defines its EBAO as “the coherent and comprehensive application of the various instruments of the Alliance combined with the practical cooperation along with non-NATO actors, to create effects necessary to achieve planned objectives and ultimately the NATO end state” in the operational environment.⁴⁸ The operational environment itself is called an “engagement space.”⁴⁹ The engagement space is divided into military, political, economic and civil “domains.”⁵⁰ For example, the political domain includes the use of diplomacy, and the civil domain includes the areas of public information and governmental infrastructure.⁵¹ An “action” is the use of “any Alliance instrument at any level” which seeks to achieve an “effect,” or behavioral change, in a domain.⁵² At the tactical level of operations, actions are translated into specific tasks and activities conducted by NATO units.⁵³ The aggregation of effects in the domains leads to the accomplishment of “objectives,” or intended outcomes, agreed upon by the North Atlantic Council (NATO’s governing body).⁵⁴ These objectives support

46. Of course, individual career civil servants may have had military staff experience, and even those who have not will likely have had significant staffing experience within their own agencies. However, as discussed *infra*, notes 45 through 81, an EBAO can be a complex, self-contained system of interrelated systems of concepts, hardware, and software – it is not necessarily intuitive. See *infra* notes 54-81.

47. De Coning, *supra* note 3; Prescott, *supra* note 38. Importantly, EBAO planners must always be mindful that many civilian international organizations and non-governmental organizations will be wary of appearing to compromise their impartiality or independence by working too closely with military organizations. De Coning, *supra* note 3.

48. MC Position on an Effects Based Approach to Operations, Secretary General, North Atlantic Treaty Organization, MCM-0052-2006, at 2 ¶ 5 (4th Draft) (June 6, 2006) (unpublished, on file with NATO) [hereinafter “MC Position”].

49. *Id.* ¶ 6a.

50. *Id.*

51. *Id.* at 4 ¶ 8.

52. *Id.* at 2-3 ¶¶ 6d, 6e. “Effects can be physical and non-physical. Although all physical effects will lead to some form of non-physical effect, their primary purpose will be to influence the capabilities of actors, while non-physical effects are principally directed towards an actor’s behaviour[.]” PRE-DOCTRINAL HANDBOOK, *supra* note 13, at 2-4.

53. PRE-DOCTRINAL HANDBOOK, *supra* note 13, at 2-5, 7-4.

54. MC Position, *supra* note 48, at 2 ¶ 6b.

achieving the end state.⁵⁵ For example, if an objective is “Rule of Law is Established in Country A,” a desired effect could be “Country A ceases support of terrorist organizations.” This effect could be created in part within the political domain through the action of diplomatic pressure by NATO partners on Country A. Effects include both positive, i.e., desired effects, and negative, i.e., undesired effects, which are those that “disrupt or jeopardize the achievement of the objectives.” These effects must be “identified and mitigated if possible” to ensure the success of an EBAO.⁵⁶ Horizontal coordination between the actors in the different domains (military, political, economic and civil) can assist in the mitigation of undesired effects, but “it cannot mitigate all undesired effects due to the nature of the action and systems. Undesired effects related to a soldier committing a heinous crime against a civilian . . . for example, are very hard to mitigate through horizontal coordination.”⁵⁷

To determine whether the intended effects are in fact being created, two types of assessment criteria are used, “measures of performance” and “measures of effectiveness.”⁵⁸ Measures of performance seek to answer the question whether planned actions and their supporting tasks and activities are being conducted properly.⁵⁹ At the next level of analysis, measures of effectiveness seek to determine whether the actions being conducted are indeed the proper ones to bring about the desired effects.⁶⁰ To continue with the example above, a measure of performance could be “Do meetings with Country A officials consistently address NATO’s policy on terrorism?” An appropriate measure of the effectiveness of these discussions could be “Decreased frequency of official statements by Country A officials supporting terrorists.” The purpose of EBAO is not to make military operations more predictable, but rather to make military units more adaptable through determining which actions are having positive results, and which are not.⁶¹ The collection of relevant information within the engagement space, its timely and accurate analysis, and its subsequent flow through the military organizational hierarchy is crucial to the effectiveness of EBAO.⁶² Translating these concepts into a holistically-aware, functioning system, however, presents challenges of which EBAO doctrine writers, trainers, and educators must be aware.

55. *Id.*

56. PRE-DOCTRINAL HANDBOOK, *supra* note 13, at 2-4.

57. PRE-DOCTRINAL HANDBOOK, *supra* note 13, at Annex F5, Figure H-6 and accompanying text.

58. PRE-DOCTRINAL HANDBOOK, *supra* note 13, at 7-1 to 7-3.

59. *Id.*

60. *Id.*

61. Newbegin, *supra* note 32, at 7.

62. PRE-DOCTRINAL HANDBOOK, *supra* note 13, at 7-4 to 7-11.

III. Concerns Regarding the Use of EBAO

The previously noted reservations on the part of certain military organizations to EBAO on the basis of lack of doctrine are also reflected in the concerns of various writers as to the efficacy of EBAO and the scopes of work in different EBAO-related projects. Commentators have noted the significant technological and financial challenges of developing and maintaining a suite of computer hardware and software sufficient to support the holistic picture of the engagement space required in EBAO.⁶³ Others doubt whether such a picture can ever really be fully developed given the nature of armed conflict,⁶⁴ and some question what they see as the current lack of emphasis on incorporating human elements into EBAO.⁶⁵ One project in particular seeks to address the gap in information and analysis flow between the tactical and higher levels of command, a gap which must be bridged to ensure vertical coherence in EBAO application throughout a military organization.⁶⁶

To best appreciate the merits of these concerns, oddly enough, it is useful to consider them against the backdrop of two successful U.S. field-level EBAO-like initiatives in Afghanistan and Iraq: the field Political Advisor (POLAD) and the Human Terrain Team (HTT). As to the use of POLADs in the field, the U.S. Department of State now has personnel serving on Provincial Reconstruction Teams (PRTs) in Afghanistan and Iraq.⁶⁷ While some of these personnel are attached to conventional forces, others are collocated with special operations forces,

63. Ho, *supra* note 15, at 103-04. See also PONTUS HORLING ET AL., SWE. MINISTRY OF DEFENCE, A SURVEY OF SOME INFORMATION FUSION RESEARCH FIELDS APPLICABLE IN OPERATIONS OTHER THAN WAR (2006), available at <http://www.foi.se/infofusion/bilder/FOI-R--2000--SE.pdf>.

64. Kelly & Kilcullen, *supra* note 15, at 87, 95, 97.

65. Ho, *supra* note 15, at 102, 104. "To date, US attempts to implement EBO have been focused mainly on the technological dimension of war. Successful conduct of EBAO requires more than the acquisition of sophisticated software and hardware systems. Despite all human efforts to instrumentalize war, a Clausewitzian fog remains inevitable in human conflict. As a result, it will continue to focus strongly on the human dimension of war." *Id.* at 104.

66. See *An Assessment Methodology for Effects Based Operations*, in Proposals Submitted to Dep't of Defense Small Business Innovation Research, <http://www.dodsbir.net/solicitation/sbir072/army072.htm> (last visited Aug. 28, 2008).

67. Dan Green, *Counter-Insurgency Diplomacy: Political Advisors at the Operational and Tactical Levels*, MIL. REV., May-June 2007, at 24. PRTs are usually national teams ordinarily composed of military personnel and civilian government agency personnel with expertise in a wide range of disciplines. The Kandahar PRT, for example, is a Canadian 330-member team that includes "diplomats, developments experts, the Canadian police . . . and the military. It supports key initiatives in the province and carries out a broad range of enabling roles such as police training and strengthening local governance capacity." Kandahar Provincial Reconstruction Team, <http://www.canadainternational.gc.ca/canada-afghanistan/kandahar/kprrt-eprk.aspx> (last visited Aug. 28, 2008).

along with U.S. Agency for International Development (USAID), U.S. Department of Agriculture, Civil Affairs, and contract police advisor personnel.⁶⁸ These civil-military interface groupings bring perspectives, contacts, and skills to the field that are especially relevant to accomplishing objectives for which the conventional military forces are not ordinarily trained and equipped, such as establishing the rule of law.⁶⁹ The field POLAD, for example, can help facilitate governance at the local level in Afghanistan through helping to organize provincial *shuras*.⁷⁰ As one PRT POLAD found, bolstering the provincial *shura* in his area had effects that rippled outside of improving governance.⁷¹ When special forces in his area detained local Afghans, *shura* members would often provide him with useful information regarding the individuals, and why their detention was unnecessary.⁷² The *shuras* also provided opportunities for local communities to express their concerns regarding military security efforts, which sometimes allowed the military to alter their plans so as to minimize the potential impact on civilians.⁷³ The same PRT also helped organize a chamber of commerce in the provincial capital.⁷⁴ The chamber's meetings eventually became monthly, and helped provide the PRT with information about the local economy, and the local businessmen with an opportunity to address complaints to local officials.⁷⁵ As this particular PRT POLAD noted:

Though not often viewed as the type of activity considered integral to a successful counterinsurgency strategy (bolstering indigenous security forces and the local government being the usual means), the creation of a viable civil society that can improve living conditions and government responsiveness is a useful supplement to kinetic operations.⁷⁶

Similarly, in the estimation of one U.S. brigade commander, the use of an HTT, an embedded team of specialists including at least one anthropologist, decreased his unit's need for combat operations in his area of responsibility by 60% in the eight months since the team had

68. Green, *supra* note 67, at 25.

69. *See id.* at 25-26.

70. *Id.* at 26 (defining a "shura" as a traditional meeting of Afghan elders).

71. *Id.* at 26-27.

72. *Id.*

73. *See* Green, *supra* note 67, at 27.

74. *Id.* at 28.

75. *Id.*

76. *Id.* The "use of information is frequently referred to as 'soft-power' or 'non-kinetic' as contrasted with the military use of kinetic (both lethal and non-lethal) means to physically attack a target." U.S. ARMY WAR COLLEGE, INFORMATION OPERATIONS PRIMER, DEP'T OF MILITARY STRATEGY, PLANNING AND OPERATIONS 2 (2007), available at www.au.af.mil/au/awc/awcgate/army-usawc/info_ops_primer.pdf.

arrived.⁷⁷ For example, during a battalion-level combat operation in the summer of 2007, an anthropologist determined that one village had an unusually high proportion of widows.⁷⁸ These women naturally looked to their sons for financial support, and in the anthropologist's view, this could put pressure on the young men to join the relatively well-paid insurgents.⁷⁹ In response, and on the anthropologist's advice, the U.S. military developed a job training program for the widows.⁸⁰ In addition to advising commanders, the team also maintained a database of local leaders and tribes, and social, economic, and political disputes.⁸¹ Recognizing the self-perpetuating cycle of kinetic operations against insurgents alienating the civilian population and creating more insurgents, one anthropologist described her job as going "back and enhance[ing] the military's understanding . . . so that we don't make the same mistakes we did in Iraq."⁸²

The database developed by the HTTs described above is likely very useful to the U.S. forces at the tactical level. However, even if the financial and technological challenges to effective integration of this database and its contents into systems at higher levels of command are solved, there is still a need for doctrine. The doctrine will guide the users of this information and guide analysis at the different command levels in their actual work with it. Similarly, both the field POLADs and the embedded anthropologists show the necessity for EBAO to incorporate human elements as seen from multidisciplinary perspectives to be successful. Without doctrine to guide the development of educational and training programs, it would likely be difficult to create instructional packages that would uniformly deal with these sorts of subjects—subjects that are not ordinarily part of military education or training.⁸³ Further, the success of these innovations also illustrates the need to create new tools for use in the field to support and implement the EBAO

77. See David Rohde, *Army Enlists Anthropology in War Zones*, N.Y. TIMES, Oct. 5, 2007, at A1, available at 2007 WLNR 19493172.

78. *Id.*

79. *See id.*

80. *Id.*

81. *See id.*

82. Rhode, *supra* note 77. The use of HTTs is controversial. Certain anthropologists believe the use of these teams is unethical, and damaging to the conduct of anthropological research in the field. Sharon Jayson, *Anthropologists' War Role Is Hardly Academic*, USA TODAY, Nov. 28, 2007, at 10D, available at 2007 WLNR 23469837.

83. Training for EBAO will likely need to include familiarizing the "strategic corporal" with her role in this methodology, so that she understands the significance of completing her tasks properly and the information from the field that she will need to feed into the assessment mechanism. *See* Liddy, *supra* note 27.

processes and products at the higher levels of command.⁸⁴ Efficient development of these tools will cost money, and their conceptual templates will require empirical validation and authoritative guidance to ensure their coherent development and integration into EBAO systems. Finally, confirming the previously mentioned criteria for EBAO doctrine, these examples show that the doctrine itself will likely need to be qualitatively different from typical military doctrine; specifically, it needs to be more holistic to be fully effective.

IV. Clausewitz's Military, Political and Educational Experiences

Clausewitz spent nearly his entire adult life in the Prussian Army, having joined as a cadet in 1792 at the age of twelve.⁸⁵ Such a lengthy military career was not uncommon at the time.⁸⁶ The wide range of military, political and educational experiences that he had in his 40 years of service, most of them at a relatively young age, were atypical, however. The opportunities that Clausewitz had to reflect upon and study his experiences, and the use he made of that time to commit his research and thinking to writing, further distinguish him from his contemporaries. Most importantly for purposes of this article, the sum of these circumstances imbues *On War* with a degree of holism, both in content and in construction, matched by few other historical military writings.

A. *During the French Revolution and the Early Napoleonic Wars*

By the time he was admitted in 1801 to the school in Berlin that would become the Prussian War College,⁸⁷ Clausewitz was already the veteran of two years of small unit combat against French forces in the Rhineland and Alsace-Lorraine. His time at the War College proved to be very important in the formulation of his ideas, for he soon became the prize pupil of the college's new director, the military reformer General Gerhard von Scharnhorst.⁸⁸ To the aristocracy of the absolutist state that

84. See Jody Prescott, *EBAO and NATO Operational Claims*, 10 *THE THREE SWORDS* 5, 9 (2007). Such "tools" could include measures such as increasing the number of diplomatic personnel available at the higher levels of command. Nicholas Kralev, *State Doubles Military Advisors*, *WASH. TIMES*, Jan. 18, 2008, at A1, available at 2008 WLNR 1047733.

85. PARET, *supra* note 21, at 19.

86. Willerd R. Fann, *On the Infantryman's Age in Eighteenth Century Prussia*, 41 *MIL. AFF.* 165, 166 (1977). In fact, two thirds of Frederick the Great's grenadiers, the Prussian Army's shock troops, would have been too old for the U.S. draft in World War II. *Id.* at 167.

87. PARET, *supra* note 21, at 68.

88. *Id.* at 74-75.

he served, Scharnhorst's ideas on reforming the Prussian military were disquieting, perhaps even radical.⁸⁹ Scharnhorst advocated better military education, advancement based on merit, the use of conscription rather than mercenaries, and the more just application of military discipline.⁹⁰ As a teacher, Scharnhorst encouraged the study of history and the critical analysis of the various theories of war. In Clausewitz's words, "[h]e taught that part of war which until then had scarcely been dealt with on the lecture platform and in books, war as it actually is."⁹¹ Equally important, Clausewitz developed an appreciation for the social, political and military energy that the French Revolution had liberated by involving the entire nation, rather than just a governing elite, in France's wars.⁹²

Clausewitz excelled at his studies, and was appointed adjutant to Prince August, a nephew of the Prussian king, who commanded a grenadier battalion in Berlin.⁹³ This position brought him into close contact with the ruling Prussian aristocracy, contact that had a significant impact upon the development of his views on social and political issues.⁹⁴ Importantly, the new social circles in which he moved also allowed him to meet his future wife, the Countess Marie von Brühl, a lady in waiting to the Prussian queen mother.⁹⁵ Despite their differences in temperament and the disapproval of her mother,⁹⁶ the attraction between them was apparently immediate.⁹⁷ Over time, Marie's anti-French views and nationalism reinforced the similar views held by Clausewitz, views that were increasingly at odds with the opinions of the francophilic Prussian monarchy.⁹⁸

Clausewitz was captured along with Prince August by French forces in 1806 following the Prussian army's disastrous defeats at Auerstaedt and Jena. The two were interned together in France for the better part of a year.⁹⁹ Clausewitz and the prince were allowed great freedom of movement, and what he observed of French politics and culture had a profound impact upon him.¹⁰⁰ It also provided Clausewitz the opportunity to take a more objective look at Prussian society, and

89. See W.B. GALLIE, *PHILOSOPHERS OF PEACE AND WAR: KANT, CLAUSEWITZ, MARX AND TOLSTOY* 38 (1978).

90. PARET, *supra* note 21, at 65.

91. *Id.* at 71 (citation omitted).

92. CLAUSEWITZ, *supra* note 30, at 9.

93. PARET, *supra* note 21, at 78.

94. *Id.* at 98.

95. *Id.* at 98-99.

96. RAYMOND ARON, *CLAUSEWITZ, PHILOSOPHER OF WAR* 15 (1983).

97. See PARET, *supra* note 21, at 98-103.

98. See *id.* at 104, 109.

99. Handel, *supra* note 19, at 191.

100. PARET, *supra* note 21, at 126.

reassess its shortcomings in political and military matters.¹⁰¹ Meanwhile, back in unoccupied Prussia, Scharnhorst had been put in charge of the commission set up to reorganize the shattered Prussian army. When in 1808 Clausewitz finally made his way to Königsberg, the temporary seat of the Prussian government, he became Scharnhorst's personal assistant.¹⁰² Although he was given military positions of ever increasing importance during this time,¹⁰³ Clausewitz continued his studies of philosophy and history, and continued to write essays on military theory and strategy, politics and history.¹⁰⁴ Through his work with Scharnhorst and his involvement in the reform movement,¹⁰⁵ Clausewitz also received a practical education in the often-contentious politics involved in transforming the Prussian army into a modern force based on merit and competence rather than noble privilege.¹⁰⁶

B. From Napoleon's Invasion of Russia to the Polish Uprising

In 1812, to protest the Prussian government's decision to provide troops to Napoleon and to allow him to use Prussia as a staging area for his invasion of Russia, Clausewitz resigned his Prussian commission and joined the Russian general staff as an advisor.¹⁰⁷ He played a pivotal role in securing the defection of the Prussian troops under General Yorck von Wartenburg from Napoleon's army during its retreat from Moscow, which further hastened the retreat of French forces back towards France's borders.¹⁰⁸ Clausewitz informally rejoined the Prussian forces by working in Field Marshal Gebhard von Blücher's staff, and was wounded in the battle of Lützen in 1813.¹⁰⁹ His intellectual and political independence had not endeared him to the Prussian authorities,¹¹⁰

101. *Id.* at 126-36.

102. Handel, *supra* note 19, at 192.

103. Clausewitz found himself involved at all levels of the reconstruction of the Prussian army, from instructing officers at the War College on small unit tactics, to rewriting the operational regulations for the infantry and the cavalry, and even serving as the crown prince's personal tutor. See PARET, *supra* note 21, at 145-46, 188.

104. See Handel, *supra* note 19, at 194 n.6; PARET, *supra* note 21, at 466 (indexing Clausewitz's writings).

105. Handel, *supra* note 19, at 192-93.

106. See CLAUSEWITZ, *supra* note 30, at 145-46; Peter Paret, *The Genesis of On War*, in CLAUSEWITZ, *supra* note 30, at 3-5, 10.

107. Handel, *supra* note 19, at 195; PARET, *supra* note 21, at 230.

108. ARON, *supra* note 96, at 29.

109. *Id.* at 30. Clausewitz drafted a plan for guerilla operations against the French in Silesia, which was not apparently well received by the Prussian authorities. See PARET, *supra* note 21, at 239; see also GALLIE, *supra* note 89, at 39.

110. Handel, *supra* note 19, at 195.

however, and he was not allowed to formally rejoin the Prussian army until shortly before Napoleon's final defeat at Waterloo in 1815.¹¹¹

In the long peace that followed, Clausewitz found the time to begin writing again.¹¹² In 1818, he was assigned to the directorship of the War College in Berlin.¹¹³ The directorship was basically an unchallenging administrative position, but it provided him with a promotion to major general, economic security and a great deal of free time to write.¹¹⁴ Marie appears to have played a very important role in her husband's writing of *On War*, which he began in 1819.¹¹⁵ The reform movement in Prussian politics and the military had largely dissipated by this time,¹¹⁶ and Clausewitz's reputation as a reformer and a maverick led to him being denied diplomatic posts that he had sought.¹¹⁷ Disappointed, Clausewitz increasingly withdrew from society and socialized primarily with old friends.¹¹⁸ Marie's privileged status at the Prussian court and their similar political ideals, however, provided him with both social legitimacy in the Prussian capital and a trusted sounding board for his ideas and writings.¹¹⁹ Leaving unfinished the body of writing that would become *On War*, Clausewitz left the War College in 1830 to become an Inspector of the Artillery.¹²⁰ His last field assignment was as the chief of staff for the forces mobilized to guard the frontier with Russian-controlled Poland during the Polish Uprising that began in 1830.¹²¹ Clausewitz died in Breslau on November 16, 1831, shortly after the successful conclusion of the operation.¹²² Marie's deep familiarity with his work is seen as being instrumental in her efforts after his death to gather together the drafts and revisions of *On War*, find the appropriate editors, and have them published in 1832.¹²³

111. *Id.*

112. PARET, *supra* note 21, at 327, 330 (listing Clausewitz's post-war works).

113. *Id.* at 270-71.

114. *Id.* at 307. Clausewitz also had time to attend lectures at the University of Berlin on various topics, but especially science. *Id.* at 310.

115. Handel, *supra* note 19, at 196-97.

116. See WALTER M. SIMON, *THE FAILURE OF THE PRUSSIAN REFORM MOVEMENT* (1971); see also PARET, *supra* note 21, at 409. In particular, his efforts to modify the instruction given at the War College were unsuccessful. GALLIE, *supra* note 89, at 40.

117. See PARET, *supra* note 21, at 320-23.

118. *Id.* at 323.

119. *Id.* at 309-10.

120. ARON, *supra* note 96, at 9.

121. PARET, *supra* note 21, at 399.

122. See *id.* at 429.

123. See Marie von Clausewitz, *Preface* to CLAUSEWITZ, *supra* note 30, at 65, 65-67.

V. *On War*

As a brief review of Clausewitz's career and experiences shows, *On War* is the product of a wide-ranging intellect; one shaped during a time of enormous social, political and military change. Motivated both professionally and emotionally to understand the nature of armed conflict, Clausewitz's purpose in writing *On War* also included finding ways to apply this understanding in a practical fashion. It is perhaps a reflection of *On War*'s holism that it has lent itself to so many different interpretations over the years. This depth likely also explains the continued acceptance of Clausewitz's theories by contemporary audiences. To better highlight the relationships between his theories, the role of law in military operations, and EBAO, for purposes of this article it is useful to distinguish between Clausewitz's theories on the conceptual nature of armed conflict, and his ideas and observations on how armed conflict was actually conducted.

A. *Theory of Armed Conflict*

Clausewitz called his theoretical model of armed conflict "absolute war," which he defined as the escalating application of opposing nations' full power against each other until one compelled the other's submission.¹²⁴ This model has sometimes been confused with the later concept of "total war," in the writings of both those who agree and those who disagree with his theories.¹²⁵ As noted previously, in theory at least,

124. CLAUSEWITZ, *supra* note 30, at 47.

125. Handel, *supra* note 19, at 12, 214-15. "Total War" has been defined in many different ways. Sometimes it means "the mobilization of all resources, economic and military, by a society in support of a war effort; this was the American description of its own engagement during World War II. It has also been used to mean a willingness to engage the enemy in any geographic zone, or with any available weaponry, or sometimes a willingness to fight a scorched-earth campaign, even on one's own territory. It has also been used to mean war conducted against an enemy's military and economic infrastructure, across all of its territory, in order to cripple the enemy's ability to wage war; Great Britain used the term in this sense in both World Wars." CRIMES OF WAR 355 (Roy Gutman & David Rieff eds., 1999); *see also* Peter Rowe, Total War, Crimes of War Project The Book webpage, <http://www.crimesofwar.org/thebook/total-war.html> (last visited May 29, 2008). Perhaps the most recent definition, and one which particularly lends itself to EBAO, is that of Professor John Waghelstein, who defines it as follows:

Total war means you use all the elements of national power []. It's at the grass-roots level that you're trying to win. You can kill enemy soldiers—that's not the only issue. You also need to dry up their support. You can't just use the military. It's got to be a constant din of propaganda; it's got to be economic support; it's got to be electrons. As long as you only go after the guy with the weapon, you're missing the most important part.

Peter Maas, *Professor Nagl's War*, N.Y. TIMES MAG., Jan. 11, 2004, available at <http://query.nytimes.com/gst/fullpage.html?res=9902E6D61531F932A25752C0A9629C8B63>.

he believed that the only limitations in reaching this extreme state were physical factors. Moral forces, such as law, had little or no impact.¹²⁶ For Clausewitz, an understanding of these physical forces flowed from the critical examination of the dynamic relationships between the many variable aspects of war.¹²⁷ He looked at three different types of interaction in particular, each representing a different perspective of war, to describe the processes that lead to variability in its conduct and results.

From his first perspective, Clausewitz described war as a duel between two opponents. War, therefore,

[i]s not an action of a living force upon a lifeless mass (total non-resistance would be no war at all) but always the collision of two living forces. The ultimate aim of waging war . . . must be taken as applying to both sides. Once again, there is interaction. So long as I have not overthrown my opponent I am bound to fear he may overthrow me. Thus, I am not in control: he dictates to me as much as I dictate to him.¹²⁸

From his second perspective, Clausewitz saw war as always being impacted by the dynamic tension between three components of varying influence: the people, representing the natural forces of “violence, enmity, and hatred;” the commander and his army, representing the “play of chance and probability within which the creative spirit is free to roam;” and the political aims of the government, representing the “element of subordination, as an instrument of policy, which makes it subject to reason alone.”¹²⁹ In his view,

[t]he passions that are kindled in war must already be inherent in the people; the scope which the play of courage and talent will enjoy in the realm of probability and chance depends upon the particular character of the commander and the army; but the political aims are the business of the government alone.¹³⁰

Interestingly, Clausewitz likened these three components to “three different codes of law, deep-rooted in their subject and yet variable in their relationship to one another,” and he believed “[a] theory which

126. See CLAUSEWITZ, *supra* note 30, at 75. Clausewitz does address moral factors generally in Book II, *see id.* at 115-31, and Book III, *see id.* at 216-18, but his understanding of what he calls moral factors—“*the skill of the commander, the experience and courage of the troops, and their patriotic spirit,*” *id.* at 218 (emphasis in the original)—is not completely akin to a common understanding of these terms today.

127. *Id.* at 132-42.

128. *See id.* at 77.

129. *Id.* at 89. As to the emotion of the people, Clausewitz noted, “[e]ven the most civilized of peoples, in short, can be fired with a passionate hatred for each other.” *See id.* at 76.

130. *Id.* at 89.

ignores any of them or seeks to fix an arbitrary relationship between them would conflict with reality to such an extent that for this reason alone it would be totally useless."¹³¹

Finally, from his third perspective, Clausewitz focused on an aspect he believed to be of vital importance: Politics. Clausewitz regarded a decision by a state to go to war as a legitimate form of political discourse for a nation-state, and a valid outcome of the state's political decision-making process.¹³² For Clausewitz, war was not just "a mere act of policy but a true political instrument[.]"¹³³ In his view,

[i]t is of course, well known that the only source of war is politics—the intercourse of governments and peoples, but it is apt to be assumed that war suspends that intercourse and replaces it by a wholly different condition, ruled by no law but its own. We maintain, on the contrary, that war is simply a continuation of political intercourse, with the addition of other means. We deliberately use that phrase, 'with the addition of other means' because we also want to make clear that war in itself does not suspend political intercourse or change it into something entirely different.¹³⁴

As to any restraint in the use of force exercised by parties to a conflict, Clausewitz saw this as having a functional grounding, rather than a legal basis: Restraint among the more developed societies in not committing atrocities against prisoners and civilians, for example, was the result of having learned more effective ways to apply force "than the crude expression of instinct."¹³⁵ Importantly, he saw these functionally based restraints in the use of force as having arisen from the environment created by the dynamic political relationships between nations.¹³⁶

131. CLAUSEWITZ, *supra* note 30, at 89.

132. *See id.* at 579, 584.

133. *Id.* at 87.

134. *Id.* at 605.

135. *Id.* at 76.

136. CLAUSEWITZ, *supra* note 30, at 76. Later in *On War*, Clausewitz elaborated on his views as to the development of restraints on the use of force during the Enlightenment:

It ceased to be in harmony with the spirit of the times to plunder and lay waste the enemy's land, which had played such an important role in antiquity, in Tartar days and indeed in medieval times. It was rightly held to be unnecessarily barbarous, an invitation to reprisals, and a practice that hurt the enemy's subjects rather than their government—one therefore that was ineffective and only served permanently to impede the advance of general civilization.

Id. at 590-91. *Cf.* The "Martens Clause," Hague Convention Respecting the Laws and Customs of War on Land (IV) pmbl., Oct. 18, 1907, 36 Stat. 2277, T.S. 539; *also cf.* Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Victims of International Armed Conflicts art. 1, para. 2, June 8, 1977, 1125

B. *Reality of War*

In contrast to his theoretical model of absolute war and his perspective of war as a duel, Clausewitz noted that actual “[w]ar can be of two kinds, in the sense that either the objective is to *overthrow the enemy*—render him politically helpless or military impotent, thus forcing him to sign whatever peace we please; or *merely to occupy some of his frontier-districts* so we can annex them or use them for bargaining at the peace negotiations.”¹³⁷ Within this range, he noted that “wars can have all degrees of importance and intensity, ranging from a war of extermination down to a simple armed observation.”¹³⁸ As Clausewitz saw it, the more limited the objective of a war, the more likely politics were at play in accomplishing that objective,¹³⁹ and the more that the conflict was to seem political in nature.¹⁴⁰

In real war, Clausewitz noted that “[f]rom the enemy’s character, from his institutions, the state of his affairs and his general situation, each side, using the *laws of probability*, forms an estimate of its opponent’s likely course and acts accordingly.”¹⁴¹ Although he believed that the political object of the military operation was the most important factor to be considered in both the theory and the reality of war,¹⁴² he identified two other factors which worked to keep real war from approaching his theoretical extreme: “imperfect knowledge of the situation”¹⁴³ and “friction.”¹⁴⁴ Lack of accurate information about an operational area, for example, led commanders to be cautious and inefficient in the use and disposition of their forces as they sought to provide against the different possibilities that could occur.¹⁴⁵ Clausewitz defined “friction” as those elements present on every battlefield that impeded the smooth operation of military forces, such as weather, fatigue, and fear.¹⁴⁶

Clausewitz’s focus on the human element in war is another commonality between his theories and EBAO. Because of the variable

U.N.T.S. 3, [hereinafter “AP I”] (“In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity, and from the dictates of public conscience.”).

137. CLAUSEWITZ, *supra* note 30, at 69 (emphasis in original).

138. *Id.* at 81.

139. *Id.*

140. *Id.* at 88.

141. *Id.* at 80 (emphasis in original).

142. CLAUSEWITZ, *supra* note 30, at 80-81.

143. *Id.* at 84.

144. *Id.* at 119.

145. *Id.* at 84-85.

146. *See id.* at 113, 115, 119-21.

impacts of these factors upon operations, a commander could never really be sure that he had properly allocated enough resources to the most important point of the battlefield, or whether sufficient supplies could be moved through mud or snow.¹⁴⁷ Importantly, Clausewitz noted the feedback loop in which the results of military operations conducted under these conditions influenced subsequent political decision-making as to the continued use of force, and which tended therefore to further restrain its use.¹⁴⁸ In this sense, “friction” acts upon operations in much the same way that undesired effects do in EBAO.

Clausewitz believed that the unpredictable disorder of real war could be reduced, if not managed, through training and education. Effective training required approaching war from two different aspects: training and planning according to routine and procedures designed to mitigate the impact of friction, lack of reliable information and the other factors he identified,¹⁴⁹ and training that included these factors so that commanders and soldiers could sharpen their judgment in dealing with the inevitable chaos of the battlefield.¹⁵⁰ Clausewitz recognized that

[r]outines . . . represent a general way of executing tasks as they arise based . . . on average probability. They represent the dominance of principles and rules, carried through to actual application. As such, they may have a place in the theory of the conduct of war, provided they are not falsely represented as absolute, binding frameworks for action (systems); rather, they are the best of the general forms, short cuts, and options that may be substituted for individual decisions.¹⁵¹

He noted that the use of routines is “essential and inevitable when we consider how often action is based on pure conjecture or takes place in pure ignorance, either because the enemy prevents us from knowing all the circumstances that might affect our dispositions, or because there is not enough time.”¹⁵² Clausewitz recognized that even at the lowest levels of an army a feedback loop existed between even rote training and the exercise of judgment in the heat of battle, noting that “[regulations and drills] will steady [soldiers’] judgment, and also guard against eccentric and mistaken schemes, which are the greatest menace in a field where experience is so dearly bought.”¹⁵³ At the same time, however,

147. See CLAUSEWITZ, *supra* note 30, at 113, 115, 119-21.

148. *Id.* at 87.

149. *Id.* at 153.

150. *Id.* at 122.

151. *Id.* at 153.

152. CLAUSEWITZ, *supra* note 30, at 153.

153. *Id.* at 153. Clausewitz also asserted that “[r]outine, apart from its sheer inevitability, also contains one positive advantage. Constant practice leads to *brisk*, *precise* and *reliable* leadership reducing natural friction and easing the working of the

Clausewitz noted the importance of incorporating uncertainty into training:

No general can accustom an army to war. Peacetime maneuvers are a feeble substitute for the real thing; but even they can give an army an advantage over others whose training is confined to routine, mechanical drill. To plan maneuvers so that some of the elements of friction are involved, which will train officers' judgment, common sense and resolution is far more worthwhile than inexperienced people might think.¹⁵⁴

It is also clear from the content of the book itself.¹⁵⁵ *On War* is several hundred pages long, and the bulk of it deals not with theory, but how war is and had been fought. Similarly, when Clausewitz suspended his writing of *On War* in 1827, he focused on writing analytical historical studies of campaigns in Italy in 1796 and 1799, and the final campaigns of the Napoleonic era.¹⁵⁶ When published, these historical writings amounted to over 1,500 printed pages, and made up four of the ten volumes of his collected works.¹⁵⁷

C. Summary—EBAO and Clausewitz's Views on War

Understanding Clausewitz's ideas on how to best deal with uncertainty and friction in military operations is significant in assessing their potential value in developing EBAO doctrine because it is not clear that Clausewitz believed that a methodology like EBAO would actually work. Following his observation that the lack of accurate intelligence and time were two reasons why military action was so often based on conjecture, he noted that "even if we did know all the circumstances, their implications and complexities would not permit us to take the necessary steps to deal with them. Therefore, our measures must always be determined by a limited number of possibilities."¹⁵⁸ Given a choice,

machine." *Id.* at 153 (emphasis in original). As recognized in the "Pre-Doctrinal Handbook," this mechanical synchronization can have a positive effect upon the mitigation of undesired effects, but it cannot eliminate them completely. See PRE-DOCTRINAL HANDBOOK, *supra* note 13, at F5.

154. CLAUSEWITZ, *supra* note 30, at 122.

155. Clausewitz begins Chapter 6, Book II, of *On War* with the statement, "[h]istorical examples clarify everything and also provide the best kind of proof in the empirical sciences. This is especially true of the art of war." *Id.* at 199.

156. Peter Paret, *An Unknown Letter By Clausewitz*, 55 J. MIL. HIST. 143, 150 (1991); Paret, *supra* note 106, at 27.

157. Paret, *supra* note 106, at 27.

158. CLAUSEWITZ, *supra* note 30, at 153. This practical simplification of a non-linear problem through the use of linear measures is reflected in his concept of the "center of gravity" as well. Clausewitz believed that any opponent has a dominant characteristic

Clausewitz would have likely preferred a commander who, tempered by education and experience, exercised sound judgment in the absence of complete information rather than one who believed he had actually achieved complete knowledge of the engagement space.¹⁵⁹ In keeping with the need for holistic EBAO doctrine, this critical perspective would be useful in educating and training commanders and staffs to understand the limitations of EBAO. Rather than revealing a stark dichotomy between the conceptual nature of war and its actual practice, a review of Clausewitz's theories instead shows an insightful appreciation of the way in which each is the result of dynamic relationships of varying intensity between the actors and the factors to be found in any military operation. His appreciation of the non-linear nature of war, and his identification of insufficient actionable information and friction as the impediments that keep war from being tidy and predictable show the significant linkages between his theories and EBAO. In Clausewitz's view, the conceptual and actual natures of war are linked by the overwhelming importance in each of politics—the source of war, the primary influence upon its conduct, and the means by which it ends. Importantly, Clausewitz's sober assessment of the role of politics in armed conflict foreshadows the means by which law, in essence a political construct, began to become truly relevant to military operations within 25 years after his death.

VI. *On War* and Law During Clausewitz's Lifetime

To be of full value today in the development of EBAO doctrine, Clausewitz's ideas must be flexible enough to incorporate the modern role of law in operations without becoming so distorted that they are not really his theories anymore. The first step in examining his theories in this manner, however, must be to determine whether Clausewitz's assessment of the role of law was accurate at the time he was writing.

upon which its fighting effectiveness depends, and that identification of this factor was important in devising strategy against the opponent. Beyerchen, *supra* note 23, at 84.

159. Clausewitz believed strongly in what he called "military genius," or the ability of good commanders to make the right decisions at the right times despite the disorder of the battlefield. CLAUSEWITZ, *supra* note 30, at 100. One of the qualities of military genius was the possession of a "sensitive and discriminating judgment;" "a skilled intelligence to scent out the truth." Clausewitz, *supra* note 30, at 101. Contemporary research in the fields of behavioral finance and behavioral economics has tended to confirm what modern commanders and staffs have recognized for quite some time—it is risky to rely solely upon human intuition and personal experiences in making decisions in complex environments. See *Freud, Finance and Folly*, *ECONOMIST*, Jan. 24, 2004, at 5-6. Complementary, objective systems, such as EBAO, are also required, but as Dr. Beyerchen notes, "in a profoundly unconfused way, [Clausewitz] understands that seeking exact analytical solutions does not fit the nonlinear reality of the problems posed by war, and hence our ability to predict the course and outcome of any given conflict is severely limited." Beyerchen, *supra* note 23, at 61.

Marked inconsistency between the law at the time he was writing and his understanding of law would suggest that his theories are perhaps of limited usefulness in developing EBAO doctrine, because he would have failed to deal with what is now a very important aspect of military operations, namely, international law.

A. *Grotius, Montesquieu, and Vattel*

In assessing Clausewitz's likely understanding of international law at the time he was writing, it is important to remember that first and foremost, it was the law of nations. Writing during the 30 Years War (1618-1648), Hugo Grotius, one of the most influential writers on international law, defined it as "that body of law . . . which is concerned with the mutual relationships among states or rulers of states, whether derived from nature, or established by divine ordinances, or having its origins in custom or tacit agreement" between such rulers.¹⁶⁰ Although he did not address international law in detail, the work of the French philosopher Charles de Montesquieu had a profound effect upon Western legal and political thought during the Enlightenment,¹⁶¹ and Clausewitz acknowledged Montesquieu's influence in his writing of *On War*.¹⁶² Montesquieu believed the basic principle of international law was "that different nations ought in time of peace to do one another all the good they can, and in time of war as little injury as possible, without prejudicing their real interests."¹⁶³ With regard to war, victory was its object, and the object of victory was conquest. In the end, the object of conquest was simply self-preservation by the state.¹⁶⁴

Among the writers of the later Enlightenment, the writings of the Swiss diplomat Emmerich de Vattel stand out as perhaps the most optimistic in terms of the role of law in moderating the actions of the state.¹⁶⁵ Vattel's *Law of Nations Or the Principles of Natural Law* had a significant impact on legal thinking in France, Great Britain and the United States, but its influence in Germany appears to have been

160. HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRE TRES* (1625), *reprinted in* 2 THE CLASSICS OF INTERNATIONAL LAW 9 (James Brown Scott ed., Francis W. Kelly trans., 1964).

161. *Biographical Note, Charles de Montesquieu, 1689-1755*, 35 GREAT BOOKS OF THE WESTERN WORLD x (1993).

162. Clausewitz, *supra* note 30, at 19-20.

163. CHARLES DE MONTESQUIEU, *THE SPIRIT OF LAWS*, *reprinted in* 35 GREAT BOOKS OF THE WESTERN WORLD 3 (Mortimer J. Adler ed., Thomas Nugent trans., J.V. Prichard rev. 1993).

164. *Id.*

165. Burrus M. Carnahan, *Reason, Retaliation, and Rhetoric: Jefferson and the Quest for Humanity in War*, 139 MIL. L. REV. 83, 85 (1993).

primarily in the field of diplomacy.¹⁶⁶ Given Clausewitz's internment in France, his fluency in French,¹⁶⁷ and his (unrealized) desire to become a diplomat,¹⁶⁸ it is likely that he was familiar with Vattel's work. Writing over 125 years after Grotius, Vattel also defined international law as the "law of sovereigns,"¹⁶⁹ with natural law as its primary source.¹⁷⁰ Vattel further defined international law as "the science of the rights which exist between nations or states, and of the obligations corresponding to those rights."¹⁷¹ Within such a system, the rights of a sovereign state were paramount, and Vattel defined war as the prosecution of those rights by force¹⁷² in the event less coercive means failed to resolve an issue of contention between states.¹⁷³

With regard to the law of war, however, Vattel's emphasis on the humanitarian aspects of restricting the use of force marks a significant departure from the work of Grotius. Grotius in large part derived restrictions on the use of force from historical examples from antiquity, paying particular attention to the practices and writings of the Romans and ancient Greeks, as well as from the Bible.¹⁷⁴ While he sought to ameliorate the effects of war on both combatants and noncombatants, he did so primarily by identifying a baseline standard of humanitarian conduct grounded on the practices of the past—which, admittedly, were likely better than what he had observed during the 30 Years War.¹⁷⁵ Vattel, on the other hand, wrote during the Seven Years' War (1756-63), a period of conflict marked by the use of limited warfare by relatively small professional armies.¹⁷⁶ In keeping with the customs of his time, Vattel took a much more expansive view of the protections afforded prisoners of war, captured enemy civilians and property than Grotius.¹⁷⁷

Importantly, though, Vattel's work deals pragmatically with the four interrelated aspects of the law of armed conflict which have continued to frustrate the law's application and observance even into recent times: sovereignty, implementation, enforcement and the concept of military

166. ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 160-63 (1947).

167. PARET, *supra* note 21, at 19.

168. *Id.* at 325.

169. EMMERICH DE VATTEL, *THE LAW OF NATIONS, OR THE PRINCIPLES OF NATURAL LAW* 12 (Charles D. Fenwick trans., 1964) (1758).

170. *Id.* at x.

171. *Id.* at 3.

172. *Id.* at 235.

173. *See id.* at 222-32.

174. GROTIUS, *supra* note 160, at 23-29.

175. *Id.* at 20.

176. LARRY D. ADDINGTON, *THE PATTERNS OF WAR SINCE THE EIGHTEENTH CENTURY* 2-7 (2d ed. 1994).

177. Albert de Lapradelle, *Introduction to Vattel*, *supra* note 159, at xlviiii-liii.

necessity. With regard to sovereignty, Vattel believed that nations had the primary responsibility to ensure their own preservation as independent entities in the international community, and the right to do as they wished so long as their actions were not detrimental to other countries.¹⁷⁸ In Vattel's view, "[s]trength or weakness, in this case, counts for nothing. A dwarf is as much a man as is a giant; a small republic is no less a sovereign state than the most powerful Kingdom."¹⁷⁹ Although sovereign states had no right to interfere in the government of an independent state,¹⁸⁰ Vattel recognized that there were certain instances when such action was allowable, such as providing relief in response to natural disasters,¹⁸¹ or intervening on behalf of an oppressed people against a tyrannical ruler.¹⁸²

Vattel recognized that reciprocity, whether in the positive sense of shared interests in its application among the states,¹⁸³ or in its negative sense of reprisal for violations of international law,¹⁸⁴ was the only way to implement and enforce the law of war. Enforcement of the law through judicial procedures was unlikely, save perhaps when a nation's military disciplinary code was violated.¹⁸⁵ Although Prussian discipline in this regard was legendary,¹⁸⁶ the restrictions on the use of force in these codes against prisoners, civilians, and private property appear to have been primarily based upon the need for a trained and disciplined army rather than humanitarian concerns.¹⁸⁷ With regard to the concept of military necessity, and in keeping with his appreciation of the limits of enforcement, Vattel held that:

A lawful end confers a right only to those means which are necessary to attain that right. Whatever is done in excess of such measures is

178. VATTEL, *supra* note 169, at 6-7.

179. *Id.* at 7.

180. *Id.* at 132.

181. *Id.* at 115.

182. *Id.* at 131.

183. *See* VATTEL, *supra* note 169, at 6-9.

184. *See id.* at 231-32.

185. *Id.* at 241. The trial of Peter von Hagenbach at Breisach in 1474 by a tribunal of "representatives of the Hanseatic cities" for "having administered occupied territory in a manner contrary to 'the laws of God and of man,'" and his subsequent execution was an isolated exception to this rule. *See* L.C. Green, *Enforcement of the Law in International and Non-International Conflicts—The Way Ahead*, 24 DENV. J. INT'L L. & POL'Y 285, 291 (1996).

186. In an incident with which Clausewitz was possibly familiar, Prussian troops in the Jena campaign in 1806 reportedly froze to death rather than burn nearby woodpiles of uncertain ownership in their campfires. A. HILLARD ATTERIDGE, *THE GERMAN ARMY IN WAR* 114 (1915).

187. CHARLES CLODE, *ADMINISTRATION OF JUSTICE UNDER MILITARY AND MARTIAL LAW, AS APPLICABLE TO THE ARMY, NAVY, MARINES, AND AUXILIARY FORCES* 74-75 (2d ed. 1874).

contrary to the natural law, and must be condemned as evil before the tribunal of conscience. Hence it follows that certain acts of hostility may be justifiable or not, according to the circumstances.¹⁸⁸

Vattel appears to reinforce this idea with a list of proscribed practices, including killing prisoners of war, maltreating civilians and using poison in assassination,¹⁸⁹ but upon closer examination it becomes obvious that many of the proscriptions are themselves qualified. For example, Vattel states that “[a]s soon as an enemy submits and hands over his arms we no longer have the right to take away his life.”¹⁹⁰ However, he notes that “a prince, or his general, is justified in sacrificing the lives of his enemies to his own safety and that of his people,” and that on this basis reprisal against prisoners of war would be allowed if one’s own soldiers were maltreated by their captors.¹⁹¹ Further, captors who could not adequately feed or guard prisoners of war could put them to death so long as “no promise has been made to spare their lives” and “the captor is very certain that his safety demands the sacrifice.”¹⁹² Similarly, although enemy civilians were ordinarily protected from death and maltreatment under contemporary European military practice, they could still be held hostage in order to coerce their ruler to yield.¹⁹³

B. Hegel

In general, the law of armed conflict developed little during the wars and social upheaval of the Napoleonic Age.¹⁹⁴ Further, by the end of the 18th century, influential German philosophers and writers had begun to question the basic worldview of the Enlightenment and its natural law tradition.¹⁹⁵ Perhaps the most prominent of these Counter-Enlightenment, or German Movement, thinkers was Georg Hegel.¹⁹⁶ On the subject of international law, Hegel’s writings reflect a positivist approach as compared to the natural law approach of Vattel. Not surprisingly, given the conservative political reaction and retrenchment that followed the Congress of Vienna in 1815, the primacy of the principles of sovereignty and survival of the nation remained

188. VATTEL, *supra* note 169, at 279.

189. *Id.* at 287.

190. *Id.* at 280.

191. *Id.* at 280-81.

192. *Id.* at 285.

193. VATTEL, *supra* note 169, at 283.

194. See L. OPPENHEIM, *INTERNATIONAL LAW—A TREATISE* 226 (H. Lauterpacht ed., 7th ed. 1952).

195. AZAR GAT, *THE ORIGINS OF MILITARY THOUGHT: FROM THE ENLIGHTENMENT TO CLAUSEWITZ* 142 (1989).

196. *Id.* at 232-33.

undiminished in Hegel's views of international law. Hegel lectured at the University of Berlin from 1818 until his death in 1831,¹⁹⁷ the same period of time that Clausewitz was Director of the Prussian War College. It is possible that the two men met,¹⁹⁸ and given Hegel's reputation as a lecturer and writer, it is a reasonable assumption that Clausewitz was familiar with Hegel's ideas and writings.¹⁹⁹ In his *Philosophy of Right*, published in 1821, Hegel defined international law as springing from "the relations between autonomous states."²⁰⁰ Accordingly, "that which is absolute in it retains the form of an ought-to-be, since its actuality depends on different wills each of which is sovereign."²⁰¹ Hegel saw the notion that treaties ought to be kept as being of fundamental importance in international law, but he realized that as sovereign entities, nations made and broke treaties regularly.²⁰² In Hegel's view, therefore, the primary rule governing the relations between states was self-interest, and in actual practice "what really happens is that international relations in accordance with treaties alternate with the severance of these relations."²⁰³

C. Summary—Clausewitz's Understanding of Law

Clausewitz likely knew the more significant writings on international law, as briefly reviewed above, when he wrote *On War*. This familiarity suggests that he was aware that international law was, as in Hegel's words, essentially regarded as an "ought-to-be." Sovereignty, and the imperative to maintain sovereignty, would in the end determine the course of action to be taken in a given situation, and not the parts of international law relevant to the conduct of war. Although Vattel's emphasis on natural law tends to obscure this reality, his highly qualified

197. T.M. Knox, *Biographical Note* to GEORG W.F. HEGEL, *THE PHILOSOPHY OF RIGHT* vi (T.M. Knox trans., 1952).

198. At the very least, they had a mutual social acquaintance: Karl von Meusebach. PARET, *supra* note 21, at 316.

199. Lenin believed that Clausewitz's ideas "were fertilized by Hegel." Azar Gat, *Clausewitz and the Marxists: Yet Another Look*, 27 J. CONTEMP. HIST. 363, 376 (1992). Clausewitz's method of dialectical analysis is often described as Hegelian, but Paret points out that this form of analysis was commonly used among the Prussian social class to which Clausewitz belonged. PARET, *supra* note 21, at 149-51. Further, Gat notes that Clausewitz had already demonstrated "Hegelian" thinking in his writings prior to the time that Hegel became well known. GAT, *supra* note 195, at 233.

200. HEGEL, *supra* note 197, at 212.

201. *Id.*

202. *Id.* at 213.

203. *Id.* at 109. Perhaps reflecting more of Vattel's approach, the U.S. Constitution made international treaties entered into by the U.S. part of the supreme law of the nation. U.S. CONST. art. VI, § 2. See also Carnahan, *supra* note 165, at 84 n.4 (concerning the reception of Vattel's work in early American legal thinking).

list of forbidden practices shows he could not ignore its determinative impact. From a positivist viewpoint, “international law” was not really “law” at all, because it was not a “command or rule imposed by a determinate sovereign to a subject or subjects, and enforceable by a determinate sanction in the case of non-compliance.”²⁰⁴ As Hegel noted, “[t]here is no Praetor to judge between states; at best there may be an arbitrator or a mediator, and even he exercises his functions contingently only, i.e., in the dependence of the particular wills of the disputants.”²⁰⁵ Finally, and perhaps fatally, the law of armed conflict at the time carried within it the exception that could trump the application of all its mitigating principles as states struggled with each other as each sought to maintain its sovereignty: the complete justification of military necessity.

As a matter of theory, Clausewitz’s conception of “law” appears to reflect the positivism of Hegel:

*Law is the broadest concept applicable to both perception and action. In its literal sense the term obviously contains a subjective, arbitrary element, and yet it expresses the very thing on which man and his environment essentially depend. Viewed as a matter of cognition, law is the relationship between things and their effects. Viewed as a matter of the will, law is a determinant of action; at that point it is synonymous with decree and prohibition.*²⁰⁶

The consistency of Clausewitz’s understanding of international law with the state of law as it existed at the time of his writing of *On War* is perhaps best shown in an anonymous letter he wrote to a German newspaper in 1831 defending “unofficial” support given to Russia by nominally neutral Prussia during the Polish Uprising that had begun in 1830.²⁰⁷ In it, he refuted allegations by a senior Polish military official that Prussia was supplying Russia with food and materiel, and that Prussian military personnel were serving with Russian units. Responding that only private Prussian merchants had made sales to the Russians, Clausewitz stated,

One must be very ignorant in the history of international law to find a breach of neutrality in such actions, if indeed it is possible to apply the concept of neutrality to an insurgent power that is not recognized by a single government in the world. [] If such traffic were to be in the nature of an intervention, how would one have to characterize the active help by means of money, arms and volunteers that other

204. THOMAS ALFRED WALKER, A MANUAL OF PUBLIC INTERNATIONAL LAW 8 (1895).

205. HEGEL, *supra* note 197, at 213.

206. CLAUSEWITZ, *supra* note 30, at 151 (emphasis in the original).

207. PARET, *supra* note 21, at 418.

countries have tolerated in order to give a boost to the Belgian and Polish rebellions?²⁰⁸

On its face, Clausewitz's reply sounds quite lawyerly. The Polish rebels had no standing under international law to claim they were being prejudiced by a Prussian violation of neutrality, and regardless, the support being given was not official, but rather bought by Russia from private Prussian vendors and not the neutral Prussian state. The last sentence in this passage is the most telling, however, for Clausewitz is specifically referring to the decisions of other European powers to ignore the assistance the French were providing to both the Polish and Belgian rebels in apparent contravention of the law of neutrality.²⁰⁹ As historian Peter Paret notes, Clausewitz's implication is clear: "if states were sufficiently powerful, or otherwise favored by circumstance, the laws of neutrality could be bent with impunity, in the 19th century as well as earlier times."²¹⁰ For Clausewitz then, international law was not so much "law" as it was a policy tool, and a tool of limited utility at best. Clausewitz's assessment of the impact of law upon the conduct of armed conflict at the time he was writing may have been blunt, but it was not inaccurate.

VII. The Role of Law in Contemporary Military Operations

If Clausewitz's views on the role of law in military operations are consistent with the state of the law at the time he was writing, then the last test they must pass to be of value in developing NATO EBAO doctrine is whether they can accommodate the contemporary role of law in military operations without losing their conceptual integrity. International law and national law relevant to the conduct of military operations has changed significantly in the last 150 years. Importantly, these changes resulted first from the political decisions of nations' governments to affirmatively bind themselves by lasting treaties to restrict the circumstances under which military force can be used.²¹¹ Secondly, as this body of treaty law grew, nations also began to see themselves as being bound by the customary international law that

208. *Id.* at 419 (quoting *STAATS UND GELEHRTE ZEITUNG DES HAMBURGISCHEN UNPARTEISCHEN CORRESPONDANTEN (Hamburg)*, July 26, 1831, at 3).

209. *Id.*

210. *Id.*

211. *See, e.g.*, Protocol on Blinding Laser Weapons (Protocol IV), Vienna, Oct. 13, 1995, 35 I.L.M. 1218 [hereinafter *Blinding Laser*]; Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg, Nov. 29 and Dec. 11, 1868, A.T.S. 125 (reflecting over 125 years of specific treaties of this nature).

developed as a result of state acceptance and practice in this area.²¹² Third, as nations have grouped themselves in multinational organizations like the U.N. and the European Union, they have often committed themselves to new laws in this area.²¹³ Finally, the lobbying efforts of international organizations and private international groups concerned with the use of force have resonated with the governments of the world's nations, and have resulted in important treaties like the Ottawa Convention banning landmines,²¹⁴ and the Statute of Rome establishing the International Criminal Court.²¹⁵ All of these developments have had a significant effect upon the four factors mentioned above that traditionally kept international law from being more like "law": sovereignty, implementation, enforcement and the concept of military necessity. To assess the conceptual integrity of Clausewitz's theories in light of these developments, it is useful to first briefly review how the law relating to these four factors developed.

A. *Sovereignty*

During the last 150 years, the nations of the world have increasingly limited their sovereign rights regarding the use of military force both in the context of determining whether to use force and the actual use of force once the decision to engage in armed conflict is made. As to the issue of nations deciding to use military force in their relations with one another, the brutal experiences of World War I resulted in a number of

212. See Jianming Shen, *The Relativity and Historical Perspective of the Golden Age of International Law*, 6 INT'L LEGAL THEORY 15, 20-27 (2000); see generally JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES (2005).

213. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; European Convention on Human Rights, Rome, Nov. 4, 1950, E.T.S. 5.

214. Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sep. 18, 1997, 2056 U.N.T.S. 241. See E-Mine Electronic Mine Information, International Anti-Personnel Mine Ban Treaty, <http://mineaction.org/overview.asp?o=1116> (last visited Sept. 16, 2007) (describing the International Campaign to Ban Landmines).

215. See Rome Statute of the International Criminal Court art. 5, para. 1(a)-(c), July 17, 1998, 2187 U.N.T.S. 90; see also Amnesty International, Introduction to the NGO Coalition for an International Criminal Court (CICC), <http://www.amnesty.org/en/library/asset/IOR40/018/2000/en/dom-IOR400182000en.pdf> (last visited Sep. 16, 2007).

initiatives to try to prevent war from happening again on such a destructive scale.²¹⁶ Perhaps the most notable of these efforts from a legal perspective, irrespective of their actual efficacy, were the Kellogg-Briand Pact of 1928 and the League of Nations. In the Kellogg-Briand Pact, the signatory nations all agreed to renounce war as a means to settle disputes amongst themselves.²¹⁷ In hindsight, the notion that war would be outlawed at the stroke of a pen seems naïve, but the treaty did form the basis for the charges of waging illegal aggressive war against the major German war criminals at the International Military Tribunal at Nürnberg after World War II.²¹⁸ As such, even though the treaty did not stop war itself, its impact has at the very least become part of non-treaty, or customary, international law.

In the same spirit of preventing another horrific international armed conflict as World War I, the League of Nations was created to provide, among other things, a mechanism for the peaceful settlement of disputes among members.²¹⁹ Among its powers, it could use measures such as economic sanctions to compel a return to peaceful behavior by nations acting aggressively towards another nation.²²⁰ The League of Nations was hobbled from the beginning by the failure of the United States to join, and therefore crumbled fairly quickly in the face of Italian, German and Japanese intransigence regarding their expansionist policies in the 1930s.²²¹ The example of the League of Nations, however, did provide the model for a more lasting, although imperfect, international congress of nations, the United Nations. The signatories to the U.N. Charter agree

216. See, e.g., Anti-War Treaty of Non-Aggression and Conciliation, Rio de Janeiro, Oct. 10, 1933, 49 Stat. 3363 (1935-36), T.S. 906; Treaty Agreeing to a Limitation of Naval Armament, Feb. 6, 1922, 43 Stat. 1655, 729 U.N.T.S. 161 (the Washington Treaty). In addition, other peace movement organizations include the National Council for the Prevention of War, see FREDERICK J. LIBBY, *TO END WAR: THE STORY OF THE NATIONAL COUNCIL FOR THE PREVENTION OF WAR* (1969), and the Women's International League for Freedom and Peace ("WILPF"). Founded in 1915, WILPF has had consultative status with the UN since 1948. See The WILPF-United States, http://www.wilpf.org/US_WILPF (last visited Aug. 30, 2008).

217. Renunciation of War as an Instrument of National Policy art. 1, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

218. The Avalon Project, Yale Law School, Judgment: Violations of International Treaties, 30 Sept. and 1 Oct., 1946, <http://www.yale.edu/lawweb/avalon/imt/proc/judviol.htm> (last visited Aug 20, 2008) (Judgment of the International Military Tribunal for the Trial of German War Criminals explaining that defendants violated international treaties).

219. League of Nations Covenant, arts. 10-15.

220. *Id.* art. 16.

221. See Klinton W. Alexander, *Ignoring the Lessons of the Past: The Crisis In Darfur And the Case For Humanitarian Intervention*, 15 J. TRANSNAT'L L. & POL'Y 1, 6 (2005); Byard Q. Clemmons & Gary D. Brown, *Rethinking International Self-Defense: The United Nations' Emerging Role*, 45 NAVAL L. REV. 217, 232-33 (1998).

to abide by restrictions on their sovereignty regarding the use of force.²²² U.N. members agree to settle their disputes by peaceful means,²²³ and to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes” of the U.N.²²⁴ The U.N. Security Council has the “primary responsibility for the maintenance of international peace and security,”²²⁵ and may impose economic sanctions²²⁶ or even call upon member states to provide forces for military operations as necessary.²²⁷ The U.N. Charter also provides for regional organizations to assist in keeping the peace,²²⁸ including the use of enforcement action as needed.²²⁹ For members of the U.N., aggression by one state against another is now no longer a continuation of politics by other means, it is illegal.²³⁰ In practice, of course, the situation is more complicated. The U.N. Charter also recognizes that nations retain the inherent right of individual and collective self-defense.²³¹ Some scholars believe that Article 51 only allows the use of force in self-defense when there has been an actual attack.²³² Others believe that the Article 51 right of self-defense includes the customary law principle of anticipatory self-defense, which would allow force to be used to repel imminent armed attacks.²³³

As to the actual use of force in a conflict, nations have increasingly bound themselves by treaties that restrict the means by which force may be applied.²³⁴ Many of these treaties, starting with the Paris Declaration Respecting Maritime Law of 1856, which abolished privateering,²³⁵

222. See U.N. Charter, art. 2(3).

223. *Id.*

224. *Id.* art. 2(4). These principles were amplified in the U.N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, Gen. Ass. Res. 2625 (XXV), Oct. 24, 1970.

225. U.N. Charter, art. 24(1).

226. *Id.* art. 41.

227. *Id.* art. 42.

228. *Id.* art. 52.

229. *Id.* art. 53.

230. U.N. Charter, art. 2(4); THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 31 (D. Fleck ed., 1995).

231. U.N. Charter, art. 51.

232. Leo van den Hole, *Anticipatory Self-Defence Under International Law*, 19 AM. U. INT'L L. REV. 69, 80-81 (2003).

233. THE JUDGE ADVOCATE GENERAL'S LAW CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK, JA 422, 4-5 (2006). The classic formulation of this position is the *Caroline* Doctrine. See *Caroline Incident*, 2 MOORE DIG. INT'L L. 412 (1906); Letter from Mr. Webster to Mr. Fox (Apr. 24, 1841), in 29 BRIT. AND FOREIGN ST. PAPERS 1129, 1138 (1857).

234. See generally, *Blinding Laser*, *supra* note 211.

235. *Declaration of Paris*, Apr. 16 1856, 1 AM. J. INT'L L. 89 (Supp. 1907), available at <http://www.yale.edu/lawweb/avalon/diana/undocs/war-03.htm>.

address the use of particular means of warfare. Other treaties, such as the 1949 Geneva Conventions, have strengthened the protections given prisoners of war and other non-combatants, and have set out in detail the specific rights afforded and the processes to be followed in handling these groups of people.²³⁶ Importantly, the enactment of Common Article Three to each of the conventions requires the basic humanitarian treatment of individuals effectively out of combat even in situations not involving international armed conflict.²³⁷ Further, treaties have also codified the principles to be applied by those using force against enemy targets, such that force may only be used against military targets so long as the anticipated military advantage to be gained is not outweighed by excessive incidental injury and damage to protected civilians and property.²³⁸ Finally, as the body of treaty law has grown, and a pattern of state practice in conformance with the treaties has developed, nations have recognized the binding effect of customary international law on the use of force in military operations.²³⁹

The horrors of World War II also led to the development of a body of law that is playing an increasing role in modern military operations: human rights law.²⁴⁰ Beginning with the Convention for the Prevention and the Punishment of the Crime of Genocide of December 9, 1948,²⁴¹ nations have also started restricting their sovereignty with regard to their treatment of their own populations. When coupled with binding domestic legislation and effective enforcement mechanisms, human rights laws which would ordinarily only be enforceable within a nation's

236. 1949 Geneva Conventions, *supra* note 213. *See also* AP I, *supra* note 136. In many respects AP I merged the law with respect to means and methods of warfare with the law applicable to victims of armed conflict.

237. JEAN PICTET, DEVELOPMENT AND THE PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW, 32 (1967).

238. *See, e.g.*, AP I, *supra* note 136, art. 51(5).

239. *See* Jean-Marie Henckaerts, *Study on Customary International Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. RED CROSS 175, 187 (2005) (stating that the vast majority of the 1949 Geneva Convention provisions, including common article 3, are now considered part of customary international law); *see also* Prosecutor v. Tadic, case no. IT-94-1-AR72, Appeal on Jurisdiction (Oct. 2, 1995), *reprinted in* 35 I.L.M. 32, 67 (1996) (the International Criminal Tribunal for the former Yugoslavia held that, although "the detailed regulations of international armed conflict" are inapplicable to cases of armed conflict, the customary rules of the law of war are applicable under customary international law.").

240. Importantly, international organizations that have military components have chosen to require the military forces operating under their command to follow this body of law when engaged in operations. The Secretary-General, *Observance by United Nations Forces of International Humanitarian Law*, SECRETARY-GENERAL'S BULLETIN, ST/SGB/1999/13 (Aug. 6, 1999), available at http://www.un.org/peace/st_sgb_1999_13.pdf.

241. 78 U.N.T.S. 277.

territorial boundaries may in fact now be applicable to that nation's military operations in foreign countries. An example of this is a case brought by families of Iraqi individuals detained by British forces in Iraq.²⁴² The British House of Lords has held that the European Charter of Human Rights may be applicable in territory effectively occupied by British forces, and therefore an independent investigation into the injuries suffered by a detainee who died while in British custody must be undertaken.²⁴³ As a matter of policy, many nations will choose to apply the law of armed conflict (even if not required legally)²⁴⁴ and promote human rights law in military operations,²⁴⁵ further blurring the line between these two related bodies of law, and increasing the impact of law on military operations.

B. Implementation

The conclusion of treaties restricting the use of military operations, or the use of force in military operations, may have little meaningful effect in the actual conduct of operations until commanders and forces can be effectively trained to understand them and apply them practically. The 1949 Geneva Conventions recognize this problem, as does the later Additional Protocol I to the conventions, and therefore require signatories to train their personnel on the requirements of the law of armed conflict, and to have legal advisors made available to commanders and staffs to assist them in proper decision making.²⁴⁶ Today, many

242. Richard Norton-Taylor, *UK Admits Breaching Human Rights Convention Over Detainee's Death*, THE GUARDIAN, Mar. 28, 2008, available at <http://www.guardian.co.uk/world/2008/mar/28/humanrights.military>.

243. Matthew Weaver, *Human Rights Law Applies in Iraq Killing, Lords Rule*, GUARDIAN.CO.UK., June 13, 2007, <http://www.guardian.co.uk/iraq/story/0,,2101835,00.html>; see also Farah Stockman, *Justices Open US Courts to Detainees*, BOSTON GLOBE, June 13, 2008, at A1.

244. See, e.g., CHAIRMAN, JOINT CHIEFS OF STAFF INSTRUCTION 5810.01B, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (Mar. 25, 2002) ("Unless directed otherwise by competent authorities, [U.S. forces] will apply law of war principles during all operations that are categorized as Military Operations Other Than War."); Major Timothy P. Bulman, *A Dangerous Guessing Game Disguised As Enlightened Policy: United States Law Of War Obligations During Military Operations Other Than War*, 159 MIL. L. REV. 152, 164 (1999) (translating *Humantares Volkrecht In Bewaffneten Konflikten Handbuch*, para. 211, DSK AV207320065 (Aug. 1992)).

245. See, e.g., The New Zealand Government's Defence Policy Framework—June 2000 ¶¶ 11, 18, <http://www.nzdf.mil.nz/downloads/pdf/public-docs/defencepolicyframeworkjune2000.pdf> (last visited Sep. 16, 2007) (discussing New Zealand's foreign policy that is committed to the maintenance of human rights, and how New Zealand forces will neither exercise nor cooperate "with the armed forces of states which sanction the use of their armed forces to suppress human rights").

246. Geneva Convention III, *supra* note 213, art. 127. See also Geneva Convention I, *supra* note 213, art. 47; Geneva Convention II, *supra* note 213, art. 48; Geneva Convention IV, *supra* note 213, art. 144; AP I, *supra* note 136, arts. 82, 87.

nations have developed sophisticated programs of instruction for their personnel.

Recognizing that the pertinent knowledge of the law of armed conflict will vary depending on a particular soldier's level of command responsibility and occupational specialty, these programs often provide basic education and training for everyone, and subsequent education and training at higher levels as soldiers progress in their military careers.²⁴⁷ Importantly, nations have recognized that with the stresses of armed conflict, even thorough academic instruction in the law of armed conflict is insufficient to imbue soldiers with the necessary knowledge to ensure correct application in the field.²⁴⁸ Many nations have developed complex and realistic situational training programs for soldiers that challenge them to apply what they have learned about the law of armed conflict in simulations involving living role players.²⁴⁹ Importantly, given the complexity of modern military organizations, these sorts of exercises are not only used with the soldiers who will actually interact with civilians and potential adversaries on the ground, but with operational level commanders and staffs in computer and role player assisted headquarters exercises as well.²⁵⁰ The rules of engagement (ROE) play an integral part of any training exercise as they can be tailored to any command level.²⁵¹ NATO ROE are defined as the "directives to military forces (including individuals) that define the circumstances, conditions, degree, and manner in which force, or actions which might be construed as provocative, may be applied."²⁵² In many armed forces ROE serve as the principle mechanism to ensure that the forces comply with the requirements of domestic and international law.²⁵³

247. Jody M. Prescott, *Training in the Law of Armed Conflict—A NATO Perspective*, 7 J. MIL. ETHICS 66, 68-71 (2008).

248. *Id.* at 71-72.

249. See, e.g., DEP'T OF THE ARMY, FIELD MANUAL 3-0, OPERATIONS paras. 6-29, 9-16 (June 2001). See also David Axe, *Iraq Training, Hollywood Style*, LEATHERNECK MAG., Nov. 2006, at 24, 27; Larry Lane, *Role Playing for Bosnia*, SOLDIERS, Mar. 1998, at 20, 21.

250. See Bernhard Köffel & Philipp Heger, *NATO-PfP Exercises "Cooperative Longbow and Lancer 2006"*, TRUPPENDIENST, Ausgabe 1, 2007, at 295 available at <http://www.bmlv.gv.at/truppendienst/ausgaben/artikel.php?=554>; Are Rannem Johansen, *The Final Exam*, Joint Warfare Centre Media Center, June 17, 2004, <http://www.jwc.nato.int/article.php?articleID=37>.

251. Mark S. Martins, *Deadly Force is Authorized, But Also Trained*, 25 ARMY LAW. 1, 2-4 (2001); OPERATIONAL LAW HANDBOOK, *supra* note 233, at 92-93.

252. NORTH ATLANTIC TREATY ORGANIZATION, MILITARY COMMITTEE, MC 362/1, NATO RULES OF ENGAGEMENT 2 (2003).

253. Richard J. Grunawalt, *The JCS Standing Rules of Engagement: A Judge Advocate's Primer*, 42 A.F.L. REV. 245, 246-47 (1997).

C. *Enforcement*

Rather than relying upon reciprocity as the primary basis for use of international law in a conflict, or in its breach, reprisal,²⁵⁴ treaty provisions can affirmatively require states to repress violations of the Law of Armed Conflict, to cooperate with UN actions to investigate violations, and to pay compensation when appropriate.²⁵⁵ Perhaps most importantly, however, within the last 15 years, formal judicial mechanisms have begun to provide increasingly effective means of enforcement.²⁵⁶ Beginning with the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993,²⁵⁷ a number of international courts have been established to try violations of the law of armed conflict and human rights law that occurred in specific countries, including Rwanda,²⁵⁸ Sierra Leone²⁵⁹ and Cambodia.²⁶⁰ As of 2006, the ICTY had tried 94 of 161 individuals accused of international crimes in the Yugoslavian conflicts.²⁶¹ The ICTY moved quickly to assert its jurisdiction over alleged war crimes resulting from the conflict

254. Reprisal, always of questionable efficacy, is no longer seen as valid option to make an opponent comply with international law. See AP I, *supra* note 136, arts. 51(6), 52(1), 53(c), 54(4), 55(2), and 56(4); see also Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1 (1972).

255. See, e.g., AP I, *supra* note 136, arts. 85-91.

256. The International Court of Justice (the successor to the Permanent Court of International Justice created in 1922 under League of Nations auspices), established in 1945 as part of the U.N., has only limited jurisdiction over issues involving armed conflict. *Introduction to DOCUMENTS ON THE LAW OF WAR* 33 (Adam Roberts & Richard Guelff eds., 1982).

257. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, S.C. Res. 827 U.N. Doc. S/RES/508 (May 25, 1993), available at http://www.un.org/icty/legaldoc-e/basic/statut/S-RES-827_93.htm.

258. Adam Roberts, *The Law of War: Problems of Implementation In Contemporary Conflicts*, 6 DUKE J. COMP. & INT'L L. 11, 72 (1995).

259. Agreement for and Statute of the Special Court for Sierra Leone, S.C. Res. 508, U.N. Doc. S/RES/1400 (Mar. 28, 2002) available at <http://daccessdds.un.org/doc/UNDOC/GEN/N02/309/07/PDF/N0230907.pdf>.

260. Agreement between The United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During The Period Of Democratic Kampuchea, G.A. Res. 57/228, U.N. Doc. A/RES/57/228 (Feb. 27, 2003) available at <http://daccessdds.un.org/doc/UNDOC/GEN/N02/554/25/PDF/N0255425.pdf>.

261. International Criminal Tribunal for the Former Yugoslavia, Thirteenth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Republic of Yugoslavia since 1991, G.A. Res. 61/271, U.N. Doc A/RES/61/271 (Aug. 21, 2006), available at <http://www.un.org/icty/rappanu-e/2006/AR06.pdf>. When appropriate, the ICTY will cede jurisdiction back to national courts to try alleged war criminals. See, e.g., *Croat General Jailed for War Crimes*, CNN.com-Europe, May 30, 2008, <http://edition.cnn.com/2008/WORLD/europe/05/30/croat.war.ap/index.html>.

in Kosovo in 1999, and in fact subjected the NATO operation in that conflict to a degree of scrutiny.²⁶² Although it is still relatively in its infancy, the world's first standing war and human rights crime tribunal, the International Criminal Court, has begun the process of holding its first trials against perpetrators of alleged war crimes and crimes against humanity from the Democratic Republic of the Congo, Sudan, and Uganda.²⁶³

The history of national courts trying alleged war criminals and human rights violators, particularly after major conflicts, has been uneven.²⁶⁴ After World War I, the victorious Allies were spectacularly ineffective in their efforts to have alleged German and Turkish war criminals tried by either their own courts or German and Turkish courts.²⁶⁵ War crimes trials in the Balkans fared no better.²⁶⁶ World War II ended with the Allies fully occupying Germany and Japan; in addition to the Nürnberg and Tokyo international tribunals, there were numerous national military and civilian trials of alleged war criminals.²⁶⁷ Regardless, political considerations impacted the administration of post-war justice, and led to many controversial trials, such as the French trials of German and Alsatian soldiers belonging to the 2nd SS *Panzer (Das Reich)* Division.²⁶⁸ Despite the intensity and brutality of many of the Cold War era conflicts, there were relatively few trials for acts that were war crimes per se or criminal acts that likely constituted war crimes but were tried in ordinary courts-martial.²⁶⁹ Today, however, the military

262. See Office of the Prosecutor, International Criminal Tribunal for the former Yugoslavia, *Final Report to the Prosecutor by the Committee Established to review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, June 13, 2000, 39 I.L.M. 1257.

263. International Criminal Court, Situations and Cases, <http://www.icc-cpi.int/cases.html> (last visited Sept. 15, 2007).

264. See, e.g., *Croat General Jailed for War Crimes*, *supra* note 247 (discussing two retired commanders tried for alleged war crimes during the Croatian-Serbian conflict of 1991-95, one of which was convicted but the other was acquitted because "though he was formally commander, his real authority had been reduced at the time").

265. JAMES WILLIS, PROLOGUE TO NUREMBERG 132-40, 154-62 (1982).

266. *Id.* at 153.

267. See PHILLIP R. PICCIGALLO, *THE JAPANESE ON TRIAL* 14 (1979); Maximilian Koessler, *American War Crimes Trials in Europe*, 39 GEO. L.J. 18 (1950).

268. See MAX HASTINGS, *DAS REICH: THE MARCH OF THE 2ND PANZER DIVISION THROUGH FRANCE* 230 (1981); *Massacre in French Village; Former S.S. Men on Trial*, THE TIMES (London), Jan. 13, 1953, at 5.

269. Of the 91,000 Pakistani military personnel captured by Indian and Bangladeshi forces in the Bangladeshi War of Independence, 195 were specifically identified as alleged war criminals. In the political settlement after the war, all Pakistani prisoners were repatriated without any commitment that Pakistan would prosecute any alleged war crimes. Jordan J. Paust & Albert P. Blaustein, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 VAND. J. TRANSNAT'L L. 1, 2-35 (1978). No war crimes trials appear to have been held as a result of the Iran-Iraq War of 1980-1988,

justice systems of nations involved in the Iraqi and Afghani conflicts are significantly engaged in trying instances of alleged soldier misconduct.²⁷⁰ Further, in the exercise of universal jurisdiction over certain kinds of offenses, the ordinary criminal courts of many countries now have the authority to try cases such as alleged war crimes that may have occurred thousands of miles outside their ordinary criminal jurisdictions.²⁷¹

A discussion of enforcement cannot ignore the role played by various international and non-governmental organizations that closely follow the use of force in military operations, and who publicize what they see as potential violations of the law of armed conflict and human rights law in the media.²⁷² The media's impact has been boosted by modern communications technology, and in a non-linear fashion, it shapes public opinion and political positions at a speed unimaginable in Clausewitz's day.²⁷³ As Major General Lewis MacKenzie, a former U.N. Protection Force commander in Sarajevo, noted regarding his own use of EBAO:

Wherever the media goes, a lot of serious violations of human rights either move away or stop. The media was the only major weapon system I had. Whenever I went into negotiations with warring parties, it was a tremendous weapon to be able to say: "Okay, if you don't want to do it the UN's way, I'll nail your butt on CNN in about 20 minutes." It worked, nine times out of ten.²⁷⁴

and few from the Gulf War of 1990-1991. See Roberts, *supra* note 204, at 46, 51. The trials of three U.S. soldiers for the massacre of civilians at My Lai in Viet Nam, for example, were tried as violations of the U.S. Uniform Code of Military Justice, not war crimes per se. See *United States v. Calley*, 48 C.M.R. 19 (1973).

270. See, e.g., Jamie Doward and Mark Townsend, *Army Faces New Claims Over Iraq Brutality*, THE OBSERVER, Jan. 23, 2005, at 1 available at <http://www.guardian.co.uk/uk/2005/jan/23/military.iraq>; Laura Parker, *Court-Martial Begins for Abu Ghraib Figure*, USA TODAY, Jan. 6, 2005, at 3A, available at http://www.usatoday.com/news/world/iraq/2005-01-05-graner-court-martial_x.htm.

271. See Lisa Abend & Geoff Pingree, *Spain Opens Case Against US Soldiers*, CHRISTIAN SCI. MONITOR, Jan. 25, 2007, at 7, available at <http://www.csmonitor.com/2007/0125/p07s02-woeu.html> (case brought by family of Spanish journalist killed by U.S. forces during fighting in Baghdad); Brandon Smith, *Germany Rejects Rumsfeld War Crimes Probe*, JURIST.COM, Feb. 10, 2005, http://jurist.law.pitt.edu/paperchase/2005/02/germany_rejects_rumsfeld_war_crimes.php (action sought in German court against U.S. Secretary of Defense by attorneys for Abu Ghraib prisoners).

272. See LARRY MINEAR ET AL., THE NEWS MEDIA, CIVIL WAR AND HUMANITARIAN ACTION (1996); see also Landmine Monitor, <http://www.icbl.org/lm> (cooperative and systematic efforts of non-governmental organizations to monitor implementation of Ottawa Convention) (last visited Sep. 16, 2007).

273. See, e.g., Donald H. Rumsfeld, Sec. of Defense, Address to Council on Foreign Relations (Feb. 17, 2006), available at <http://www.defenselink.mil/search/> (search in speeches database for "Rumsfeld" and "Harold Pratt House").

274. Minear, *supra* note 272, at 59.

D. *Military Necessity*

Finally, one of the most important changes in the law of armed conflict since Clausewitz's time has been in the definition of "military necessity." Prior to World War II, there was a difference in opinion between British and U.S. jurists and their German counterparts.²⁷⁵ The prevailing Anglo-American view was that military necessity "should be limited to those circumstances in which the law has in advance given an express sanction for its use."²⁷⁶ Some German writers, however, believed that military necessity allowed violation of the laws of armed conflict when "the ultimate safety of the state" was at issue.²⁷⁷ During World War II, the primacy of the concept of state preservation over compliance with the law of war was consistent with the National-Socialist dogma of the Third Reich that glorified the survival of the Aryan race as an end to be achieved regardless of the means.²⁷⁸ Defense counsel at the International Military Tribunal at Nürnberg argued that the need for self-preservation was a defense to charges of war crimes,²⁷⁹ and the issue was not truly settled until the subsequent trials of lower ranking German officials.²⁸⁰ As understood currently, military necessity authorizes the use of only that force which is actually necessary to complete a mission. Such force may include only "those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible."²⁸¹

E. *Summary—Clausewitz's Theories and the Modern Role of Law*

The role of law in contemporary military operations is very different from the role it played when Clausewitz was writing. International law is no longer merely an imperceptible limitation upon a government's policy decisions regarding the use of force.²⁸² Although it is still

275. The 1902 manual used by the German Army, *Kriegsbrauch im Landkrieg*, reflected the view of General von Moltke that application of the law of war depended on the circumstances, and was therefore a matter of discretion. See MANFRED LACHS, *WAR CRIMES* 11 (1945).

276. BURLEIGH C. RODICK, *THE DOCTRINE OF NECESSITY IN INTERNATIONAL LAW* 59 (1928).

277. *Id.* at 59-60.

278. See Handel, *supra* note 19, at 233, 256.

279. TELFORD TAYLOR, *ANATOMY OF THE NUREMBERG TRIALS* 487 (1992).

280. *The Hostage Case* (United States v. List), XI TRIALS OF WAR CRIMINALS 1252-54 (1948); William O'Brien, *The Meaning of Necessity in International Law*, 1 Y.B. OF WORLD POLITY 109 (1957).

281. DEP'T OF THE ARMY, FIELD MANUAL 27-10, *THE LAW OF LAND WARFARE*, CHANGE 1 ¶ 3 (1956).

282. See *After Smart Weapons, Smart Soldiers*, *supra* note 1 (discussing senior military leader who recognizes impact of law, or at least lawyers, on operations); see also

evolving, international law has become much more law-like even in a positivist sense that would register in Clausewitz's understanding of international law.²⁸³ There are important areas in which governments and commanders retain significant discretion whether to engage in armed conflict, such as in self-defense, or the amount of force to be used against a target, as found in the proportionality analysis under the Law of Armed Conflict.²⁸⁴ However, there are very important, unalterable restrictions on the use of force, such as the definition of military necessity. As an exercise of national sovereignty, in giving effect to their own political decision-making processes, the vast majority of the world's nations have subscribed to these restrictions.²⁸⁵ Further, judicial mechanisms are in place and they are being used to ensure that these restrictions are enforced. Significantly, the nature of politics has changed to a degree as well, and particularly among the world's democracies, political constituencies expect these rules to be followed by their governments and their militaries. In a theoretical sense, law represents a strong, linear influence on the dynamic relationship between a people, their government, and their military. It brings an element of predictability to the relationship, and while it by no means eliminates the fluctuations in the theoretical system, it tends to constrict changes in the pace and the content of the policy decisions that are one of the major outputs of this relationship. The dynamism of the relationship between the three components and the primacy of the role of politics remain, however—it is the nature of the politics that has changed, and international law is in a very important sense one result of that change. From a practical perspective, although the role of law is certainly more than just another element of friction in the engagement space, its effect is very similar in certain respects. It restrains the use of force by the military, and the failure to follow it leads to real friction in terms of damaged international relationships, the diversion of scarce resources to investigations and

ICRC webpage, International Humanitarian Law—Treaties and Documents, <http://icrc.org/ihl.nsf/CONVPRES?OpenView> (last visited May 30, 2008) (listing the Geneva Conventions of 1949 ratified by 194 state parties); Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, June 17, 1925, 26 U.S.T 571, 94 L.N.T.S 65 (ratified by 135 state parties); ICRC webpage, International Humanitarian Law—Geneva Protocol 1925, available at <http://icrc.org/ihl.nsf/intro/280?OpenDocument>.

283. See Anthony Aust, *MODERN TREATY LAW AND PRACTICE* (2000) (discussing the impact of the Vienna Convention on the Law of Treaties on treaty creation, implementation, and interpretation).

284. See Fleck, *supra* note 230, at 178-79 (discussing commanders' requirements to weigh various factors on a case-by-case basis to determine whether use of weapons under the circumstances is lawful).

285. See, e.g., Geneva Conventions of 1949, *supra* note 213; Poisonous Gases Protocol, *supra* note 282.

judicial proceedings, and most importantly, the loss of hearts and minds among civilian actors and populations who may be the centers of gravity in contemporary international security operations.

VIII. Conclusion

There are a number of very strong political drivers behind the continued use and development of NATO EBAO. Military operations are expensive, and EBAO would appear to be a way to potentially reduce costs in an operation both in the short term and in achieving the desired political end state. EBAO appears to offer more effective ways for the military to communicate and coordinate with other government agencies and even international organizations, many of whom will have their own political agendas and constituencies. Further, and perhaps most importantly from an international law perspective, EBAO appears to be a promising means to reduce the amount of force needed in an operation. This reduction should result in fewer casualties and less damage, and coupled with non-kinetic measures, such as repairing roads and schools, operations should be shorter, and more focused.²⁸⁶

Continued development requires doctrine, however; doctrine based on theory and practice that resonates with both military and civilian educators, trainers, planners and operators. Because of the very central role that politics play in Clausewitz's ideas, and his appreciation of the significance of political and political-like effects in the non-linear systems that armed conflicts tend to be, it is unnecessary to modify Clausewitz's theories substantially to accommodate the role of law today in either their theoretical or practical aspects. The soundness of Clausewitz's holistic analysis of armed conflict and his appreciation of its non-linear nature make his theories consistent with the theoretical underpinnings of EBAO. His identification of politics as the most important factor in understanding armed conflict allows the modern reader to easily factor the current role of law in military operations into his theories without distorting their conceptual integrity. These factors, combined with the widespread familiarity with his theories amongst contemporary audiences, validate Clausewitz's theories for inclusion into a NATO EBAO doctrine reference base. Finally, such inclusion would promote a better understanding of the roles of law and lawyers in this evolving approach to operations in the contemporary security environment.

286. Kelly & Kilcullen, *supra* note 15, at 89.