



Conference Brief

INTERNATIONAL LAW DEPARTMENT
Center for Naval Warfare Studies
United States Naval War College

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The Law of War in the 21st Century: Weaponry and the Use of Force

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From 22 – 24 June, 2005 the Naval War College and its co-sponsor The Lieber Society, invited 130 renowned international scholars and practitioners, military and civilian, and students representing government and academic institutions to participate in a colloquium to examine international legal standards applicable to the use of force and weapons deployment and employment in the 21st Century.

Highlights:

- Conference participants debated the measure of importance and authority to be properly accorded the recently published International Committee of the Red Cross “Customary International Humanitarian Law” Study, and called for interested states to more fully examine and clearly articulate the precise nature and extent of their reservations regarding the ICRC Study as well as Additional Protocol I to the 1949 Geneva Conventions so as to advance international understanding and consensus regarding customary law in relation to the law of war.
- Participants pointed out the importance of careful and timely legal review of weapons development programs to ensure their consistency with international law.
- Conference participants recognized that the realities of asymmetrical conflict inherent in the ongoing global struggle against terrorism raised unique issues of international law which demand serious examination.
- Participants underscored the crucial importance of multi-state coalitions in future world conflicts and emphasized the need to develop a common methodology for such operations particularly with regard to rules of engagement and detainee operations.
- Participants reviewed an array of challenges to established law based on technological and related developments affecting future navies which require careful discussion and analysis.



KEYNOTE ADDRESS:

Professor David Kennedy
Manley O. Hudson Professor of Law,
Harvard Law School and Director of
the European Law Research Center

In his challenge to the Conference during the keynote address, Professor Kennedy observed that the ultimate goals and aspirations of both practitioners of international humanitarian law and the military arts are intentionally intertwined. Dr. Kennedy observed that evolving principles of the law of war have forged an alliance between military and civilian practitioners, and between warriors and their lawyers.

Recognizing that war is more than a set of easily recognizable legal problems, Dr. Kennedy raised profound questions concerning the future direction to be taken in the development of the law of war by challenging the Conference to develop prospective answers. He asked whether the principles of the law of war might differ depending upon the nature of a conflict; whether the survival of a nation was at stake, or whether a coalition of nations was simply enforcing a United Nations mandate in order to preserve or restore peace in a conflict of lesser intensity. Dr. Kennedy questioned whether war is more than a complex set of legal problems resolved by application of a discrete set of principles and procedures, or whether the application of the modern law of war also required moral judgments using a broader interpretive framework. Dr. Kennedy concluded by inviting the Conference to build new answers to these and other questions, recognizing that “Law doesn’t provide the answers...we do.”

PANEL I:

**“Customary International
Humanitarian Law”**
International Committee of the Red
Cross Study

In his opening remarks, panelist Jean-Marie Henckaerts, a legal adviser with the ICRC, and co-author of the ICRC Study, explained the principal reasons for publication of the Study: treaties on international humanitarian law can only bind states which ratify them, the contents of such treaties on internal armed conflict are not always well developed, and a characterization of any conflict is required before a determination of which treaty provisions apply. At the request of the 26th International Conference of the Red Cross and the Red Crescent in Geneva, the Committee conducted extensive consultations, including review of 47 reports on state practice, of ICRC archives of more than 40 international and non-international conflicts, and of 35 academic and governmental law of war experts. The Committee used an inductive reasoning process by reviewing state practices to produce 161 rules, most of which cover both international and non-international conflicts.

Mr. Henckaerts emphasized that certain aspects of international humanitarian law are in existing treaties, but not all states have signed, nor are all issues included in, such treaties. Current treaties do not reflect the development of a normative framework for non-international conflicts, most of the legal principles of which are the same as for international conflicts.

Lieber Society member and panelist, Professor Tim McCormack, the Australian



Red Cross Professor of International Humanitarian Law at Melbourne University and the Director of the Asia-Pacific Centre for Military Law in Australia, characterized the ICRC Study as an invaluable primary source of information on the practice of States in international humanitarian law but predicted criticism of the study because any attempt to identify the content of customary international law is invariably controversial and because the authors of the study have relied on official documents which in some cases were drafted and tabled with no thought to their status as examples of State Practice.

Panelist Joshua Dorosin, Assistant Legal Adviser for Political-Military Affairs in the U.S. State Department Office of the Legal Adviser, noted the ICRC Study is an indispensable resource but he too expressed concern over the methodology of formulating the rules in the Study. In his view, the rules are not adequately analyzed and do not reflect a separate consideration of state practice versus *opinio juris*. In some parts of the Study, there are very few references to state practice.

Panelist and former Stockton Professor Yoram Dinstein from Tel Aviv University, also a distinguished member of the Lieber Society, expressed grave concern over the ICRC Study's reliance on numerous statements that have no bearing upon the practice of States which is the bedrock of customary international law. He referred as examples to various reports submitted by rapporteurs to United Nations bodies, to comments made by persons not representing States, etc. Professor Dinstein also observed that, whereas military Manuals are indeed a primary source of customary international law, at least two

of the so-called Manuals referred to in the Study are not real Manuals. He also pointed out a number of inconsistencies and errors in both the black-letter rules and commentary of the Study.

In a follow-up afternoon session, Mr. Henckaerts acknowledged that the ICRC Study was never intended to be the last word on customary international humanitarian law but, rather, the Study is the place to begin a discussion about further development and clarification of the subject.

In the questions and comments session which followed, conference attendees pointed out a clear distinction between mere state practice, on the one hand, and customary international law, on the other hand. Professor Dinstein stressed the need to distinguish between State practice as such and *opinio juris*, a distinction which in his opinion was not adequately made in the ICRC Study. He also contested the leap from treaty law to customary law, and emphasized that – whereas treaties can stimulate custom – the evidence must be found in the practice of or vis-a-vis non-contracting Parties. Comments from others noted that the ICRC Study cannot be bootstrapped into evidence of a substantive body of customary international law merely by the fact that some states have signed Additional Protocol I to the 1949 Geneva Conventions. In this regard, it was widely agreed that evidence of state practice in support of the existence of customary international law, if any, must be formulated independent of the voluntarily assumed treaty obligations of signatory states.



PANEL II:
Law of Armed Conflict
Dissemination

Panelists who commented upon the present state of and future plans for improving the dissemination of and public awareness and appreciation for international humanitarian law included Dr. Mohammed Al-Hadid, President of the Jordanian National Red Crescent Society, Ms. Lucy Brown, Senior Adviser, International Humanitarian Law, American National Red Cross Society, and Mr. David Lloyd Roberts, MBE, formerly of the International Committee of the Red Cross (ICRC). The commentators emphasized that the Red Cross and Red Crescent Societies are founded and operate upon the fundamental principles of humanity, neutrality and impartiality.

Dr. Hadid, in particular, emphasized that there is no religious connotation associated with either the Red Cross or the Red Crescent emblems, and that both are meant to be purely humanitarian symbols. However Dr. Hadid provided his support for the creation of a third additional protocol to the 1949 Geneva Conventions, the purpose of which would be to create and adopt a new emblem – the Red Crystal – and thus to enhance protection of victims and of humanitarian assistance especially in armed conflict, where in recent year an erosion of the respect for the emblems has emerged, and to make it possible for the RCRC Movement to achieve the principle of universality. The protocol would hopefully also overcome the objection of certain states to the use of the two existing symbols, which some National Societies have requested.

Ms. Brown emphasized the need to increase public awareness of and support for the principles of international humanitarian law, particularly among school age children and youth. Ms. Brown introduced the “Exploring Humanitarian Law” curriculum to the Conference, and noted that it is being piloted or implemented in the U.S. as well as in 94 other countries. Ms. Brown observed that a necessary by product of dissemination is the reinforcement of principles of peaceful coexistence and facilitation of a return to peace in the event of an armed conflict.

Mr. Roberts focused on the efforts of the ICRC to bring IHL training to the members of the armed forces. He emphasized the importance of the supporting role played by the ICRC in this regard, and urged conference participants to ensure that the training is completed during peacetime because, “Once the fighting has started, it’s too late.” Mr. Roberts outlined certain potential obstacles to successful implementation of IHL training and mentioned the lack of support for IHL principles among senior military personnel, skepticism concerning its effectiveness, and the difficulty of adapting such training to the realities and pressures of combat.

PANEL III:
Modern Weaponry and
Warfare

Panelist Mr. Ed Cummings, Assistant Legal Adviser for Arms Control in the Office of the Legal Adviser, U.S. State Department, began the session by noting the substantial development of principles in the area of conventional weapons over the last 100 years. Mr. Cummings noted



that a political environment is always present when states engage in negotiations on weapons treaties. He counseled that the U.S. desires consensus in treaties with an overriding goal of reducing human suffering in warfare. Mr. Cummings noted that originally rules concerning weapons focused on the effect of a weapon on combatants. He observed, however, that, more recently, rules tend to concentrate on the effect of weapons on civilians. Mr. Cummings explained that the new trend towards the reluctance of States to become too technical in negotiating agreements exists because technological advances may make the definitions and descriptions of the weapons obsolete soon after agreements are completed.

Mr. Cummings observed that advances in technology can improve the reliability of weapons and reduce casualty rates. He observed that the U.S. Department of Defense has directed at least a 99% rate of non-production of duds in submunitions and proposed an amendment to the treaty on anti-vehicle mines to include a requirement for a detection device.

Doctor Marie Jacobsson, Principal Legal Adviser on International Law to the Swedish Ministry for Foreign Affairs, discussed Sweden's method of compliance with Article 36 of the 1977 Protocol I to the 1949 Geneva Conventions regarding development of new weapons. Article 36 requires a determination as to whether its employment would be prohibited by Protocol I or any other rule of international law applicable to the state which develops the weapon. She observed that very few states complete studies on new weapons as required by Article 36, and there has been recent discussion within the International Committee for the Red Cross as to what

should be the parameters for such studies. Sweden seeks to balance its interests in developing neutrality and its own national defense. In 1974, Sweden established a Delegation to review conventional weapons with regard to unnecessary suffering and indiscriminate use. The Delegation became a separate entity in 1994 and considers humanitarian law, human rights law and disarmament law in completion of its studies. It may set conditions on development of weapons as to primary, secondary and indiscriminate effects and on occasion proposes alternative designs or limits the use of a weapon in either military or law enforcement applications.

In 2003, Sweden pledged to review whether international humanitarian law should be considered in the evaluation of the export of weapons. Dr. Jacobsson commented that challenges in evaluation of weapons under Article 36 have arisen due to the absence of a clear distinction between interstate armed conflict and other operations such as peacekeeping.

Colonel Ken Watkin, Deputy Judge Advocate General/Operations for the Canadian Defense Forces offered his views as a legal practitioner on the issue of whether principles of the law of war, developed for conflicts between states, apply to asymmetric warfare, such as conflicts between states and non-state actors. Colonel Watkin framed the issue in regard to two weapons, chemical agents and expanding bullets. A large body of well developed treaty law bans the use of chemical weapons in armed conflict, but not in law enforcement activities. Yet, he argued, it may be more humane to use prohibited riot control agents to clear a cave in combat than to use a flame thrower or grenade for the same purpose. Certain



chemical agents, such as malodorants, calmatives and darts, though prohibited by treaty law, may offer non-lethal alternatives to deadly force in armed conflict. Colonel Watkin observed that expanding bullets were banned in the 1899 Hague Declaration. He queried, however, whether their use should be prohibited in all aspects of non-international armed conflict particularly where the military forces are carrying out a law enforcement function. If their use by police in domestic law enforcement is considered humane, how is it inhumane to use them for similar purposes in armed conflict?

Panel member Mike Schmitt, Professor of International Law at the George C. Marshall European Center for Security Studies in Garmisch-Partenkirchen, Germany, and Lieber Society member, observed that law and conflict are in a mutually affective relationship and asked how future military technology may affect the existence, application and interpretation of the law of war. Technology must include both the weapon and the system which support the weapon. Professor Schmitt noted that in addition to a substantial number of treaties which already exist on specific weapons, future agreements may cover depleted uranium shells, computer network attacks, and space-based offensive operations.

The U.S. Defense Advanced Research Projects Agency (DARPA) in February 2005 published a report which lists likely future developments in U.S. military technology, including detection and destruction of elusive surface targets, robust tactical networks, networked manned and unmanned systems, urban area operations, detection of underground structures, assured use of space, cognitive computing and the bio-revolution.

Developments like these will increase precision capabilities, coordinate command and control, make the battle space more transparent and result in autonomous unmanned attack platforms.

In the context of the law of war, these developments will increase the asymmetry between the technologically advantaged and disadvantaged combatants. Professor Schmitt commented that asymmetry disrupts the balance between military necessity and humanitarian concerns because the law does not operate equally for both sides. Thus, the disadvantaged combatant may resort to tactics prohibited under the law of war as a logical method to survive and to prevail in battle, since legal tactics will likely be futile. Such tactics may include use of civilian clothes, use of human shields and of protected places, perfidy, marking mustering points with protected symbols of the International Committee of the Red Cross, and suicide bombers.

A technologically disadvantaged combatant may not disregard the law of war but instead compensate for its disadvantage by broadly defining military objectives while undervaluing collateral damage. A technologically advantaged combatant may engage in effects based operations rather than a serial destruction of the enemy's military force. During the question and answer session, Professor Schmitt said that many critics are "captured by technology" and have proposed that a state reduce the asymmetry in armed conflict by foregoing use of advanced weapons.

Doctor Jacobsson, Colonel Watkin and Professor Schmitt each discussed the ramifications of a mixture of military and law enforcement capabilities in a military force. Experience of some armed forces,



such as the British Army in Northern Ireland, may make them more comfortable with such a mixture, which may lead to the salutary development of common rules of engagement (ROE).

PANEL IV: Coalition Warfare

Discussion concerning issues surrounding coalition warfare began with comments by panelist Brigadier General Charles Dunlap, Jr., USAF, Staff Judge Advocate, Headquarters, Air Combat Command, Langley Air Force base, Virginia. General Dunlap noted that the nature of 21st century warfare is increasingly legalistic and complex, and that coalition warfare is no exception. General Dunlap identified a number of challenges facing coalition partners including disparity in which treaties each coalition nation might be party to, disagreement over what constitutes customary international law, and differences in domestic implementing legislation, among others. General Dunlap emphasized the importance of attempting to develop common rules of engagement for all coalition forces, but noted the obvious difficulty in achieving this goal, particularly with regard to the definition of self-defense and the meaning of hostile intent.

General Dunlap cautioned that the legal hurdles facing coalition forces, for example, the inability of US forces to provide logistical support to its coalition partners absent creation of an international agreement concerning reimbursement for costs, have important operational effects which cannot be ignored by military commanders. General Dunlap commented that creation of formal judge advocate

general corps among common coalition partners would be a possible development. He observed that when coalition partners deploy JAGs with their operational forces, coordination is facilitated and synergies result. The General cautioned, however, that military commanders must understand and internalize the proper role of their military legal advisers, instructing that “JAGs provide advice. Commanders make decisions.”

General Dunlap concluded his remarks by cautioning the conference regarding the development of the phenomenon of “lawfare” which he described as the use of legal principles such as those contained within the law of war to mischaracterize and undermine a state’s actions. The General emphasized the importance of recognizing the practice of “lawfare,” and encouraged the US and its coalition partners to meet it head-on by actively and publicly providing their own legal analysis and justification for their actions.

Panelist Commander Dale Stephens of the Royal Australian Navy, liaison officer to the International Law Department, US Naval War College, and a Lieber Society Member, echoed General Dunlap’s comments concerning the importance of harmonizing rules of engagement among coalition partners, and briefly summarized the process through which such ROEs might be developed. CMDR Stephens cautioned against a purely formalistic approach to the development of coalition ROEs, however, and emphasized a more realistic approach is required. Among the considerations pertinent to the development of coalition ROEs, CMDR Stephens mentioned the importance of exercising “calibrated discretion on key operational law concepts,” the value of the socializing experience achieved by



participation in international coalition operations, and the need to globalize the training of military officers.

CMDR Stephens also identified a number of challenges to the effective development of common coalition rules of engagement, including difficulties associated with translating the principles of the law of war into a state's domestic law, and the pressing need to reinforce a commonality of language between international military lawyers and internal government agencies. He concluded his presentation with a quote from renowned author and professor Louis Henkin stating, "Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."

Panelist Professor Charles Garraway, the current Charles H. Stockton Professor of International Law, US Naval War College, and member of the Lieber Society, observed that, in order for a multi-national coalition to work, the principles underlying the reason for coming together in the first place must be internally and externally consistent. Professor Garraway wisely commented that, "If there is no coalescing, there is no coalition." Professor Garraway emphasized that the distinctiveness of each coalition partner need not be sacrificed in order to achieve the goals of a successful coalition. Rather, he noted, the secret is to work around those distinctions.

Professor Garraway expressed his concern with the current state of affairs with regard to the US and its position on whether and which of the principles of the law of war codified in Additional Protocol I are considered by it to be customary international law. Professor Garraway noted that the only existing description of

the US position in this regard, articulated by Michael J. Matheson in his article entitled, "The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions," 2 AM. U. J. INT'L L. & POL'Y 419 (1987), is no longer considered authoritative. He called for the US to clarify its position as to which of the provisions of Additional Protocol I are considered to be customary international law, or at least acceptable by the US.

Professor Garraway concluded his remarks by questioning whether the principles of human rights law, codified, for example, in the International Covenant of Civil and Political Rights, coexisted with or are replaced by the principles of the laws of war during times of armed conflict. His analysis of the subject concluded that the language of the various human rights conventions made it clear that the two legal regimes were intended to co-exist despite the fact that the former is *lex generalis* and the latter is *lex specialis*. Professor Garraway again noted a lack of clarity in the US position on this matter, and called for the US to articulate its position more clearly.

Professor Leslie Green, former Stockton Professor of International Law at the US Naval War College and University of Alberta, Canada, Professor Emeritus, picked up where Professor Garraway left off, opining that the law of war prevails in situations of armed conflict where its principles deviate from those contained in human rights law. Professor Green agreed with the previous commentators, however, in calling for the development of common rules for international coalition operations, particularly where rules of engagement and detainee operations are concerned.



Professor Green also commented that it was time for a new treaty to replace the current NATO treaty. In his view, NATO has, over the years, morphed into an international organization which has transcended its original mandate on behalf of the north Atlantic states comprising its membership. Professor Green argued that a new treaty would more accurately reflect the current goals and aspirations of the NATO organization, and would be more representative of its current membership.

PANEL V: Future Navies

Panelist RADM Robert Cox, Associate Director, Assessment Division (N81D), Office of the Chief of Naval Operations, tracked the progression of operational concepts in the ongoing transformation of the U.S. Navy. From a task group centric concept in the 1950s with specific missions through a platform centric concept in the 1970s with multi-mission battle groups, the Navy is evolving into a network centric force focused on anti-access capabilities.

A 21st century Navy must be joint, distributed, netted, persistent, surge-based and surge-ready at home. Realities are changing. Planning now occurs in minutes and hours rather than in days. Naval forces must be fully netted with the required kinetic and non-kinetic capability, employable when directed by the Combatant Commander. In this context, sea-basing does not consist only of technology. There should be doctrine to support the best use of forces in an effects-based environment. A move from a platform centric to a network centric environment raises challenges as to UAVs,

civilian mariners, use of the frequency spectrum and of the maritime commons as the U.S. maintains its global naval presence through doctrinal and technological transformation.

Panelist Rear Admiral Raydon Gates of the Royal Australian Navy spoke of a future navy from the perspective of an operator in the medium sized Royal Australian Navy. The trend for the future is projection of naval power at home and offshore, wherever Australia's interests are at stake.

Australia's participation in coalition operations may reflect its compatible interests in the endeavor rather than its common interests with other participants. Different national objectives reflect different national priorities, and military commanders must manage and harmonize these varied interests early on.

Joint application of power is another future trend. National military forces must work with each other and the entire government to assure maximum effect. There will be a maritime element to future security issues, particularly in the littoral environment, such as ROEs and targeting decisions. Technological developments in weapons systems are ripe for consideration of legal issues, such as missiles with artificial intelligence and development of corresponding ROE. Australian forces must balance full implementation of network centric warfare with existing technology based on financial considerations. The future Royal Australian Navy will likely be smaller with no likely increase in its budget or any reduction in its workload. Future ships will feature more automation and lower levels of human manning. Greater use of contractors to support naval forces raises issues of whether to characterize them as



combatants and of appropriate methods of discipline.

Panelist Captain Jane Dalton, Assistant Judge Advocate General (Civil Law) and Commanding Officer, Naval Civil Law Support Activity, discussed several areas of interest in future navies that require present review by military lawyers.

The use of civilian mariners aboard naval ships in billets historically held by military members grows out of the CNO's effort to move sailors from non-war fighting jobs into direct support of fleet and combat operations.

The proposed Maritime Prepositioning Force cargo ship is a key part of the Sea Basing concept and will serve as a floating logistics center. Use of this ship in an "assault echelon" with combat forces and aircraft aboard raises the question of whether civilian mariners can manage engineering, navigation and deck functions. Under international law, a warship must be "manned by a crew which is under regular armed forces discipline." Yet this phrase is undefined and calls into question whether the civilian crew must be subject to the same system of discipline as the military members.

Whether civilian mariners could be considered unlawful combatants depends upon whether they take a direct or active part in hostilities. Would manning a weapons system or navigating a ship constitute direct activity? The Navy has developed a legislative proposal which includes Navy Reserve affiliation as a requirement for detailing civilian mariners to a warship.

Unmanned airborne and undersea vehicles are already engaged in combat operations. Should they be treated like their manned counterparts? Is an unmanned undersea vehicle a "vessel"

under international rules to prevent collisions at sea and are they required to comply with the innocent and transit passages regimes under the UN Convention on the Law of the Sea?

Hospital ships are protected by law from capture or intentional attack, yet they may not use secret codes for communication. However, changes in technology, domestic laws on privacy and national communications policy has prompted the Navy to insist that its two hospital ships deploy with secure, encrypted communications facilities in order to complete their humanitarian mission and comply with domestic law.

The Law of the Sea Convention supports Sea Power 21 and the Proliferation Security Initiative. It will not interfere with U.S. intelligence gathering activities. The reference in the Convention to use of the high seas for other internationally lawful uses permits the U.S. to stage forward deployed sea bases in areas which include exclusive economic zones of coastal states. Each use of a sea base will be situation dependent and will be conducted in accordance with the law whether the operation is humanitarian relief, UN sanctions enforcement or international armed conflict.

Panelist and Lieber Society member Professor Doctor Wolff Heintschel Von Heinegg of the University of Frankfurt-Oder and the University of Augsburg, Germany, reviewed the current state of the Law of Naval Warfare and future challenges in the field. Dr. Heintschel Von Heinegg noted that the current provisions regarding encryption and arming of hospital ships have been challenged and are to some extent outdated; and Rules regarding deception must be adjusted to



reflect developments in the electronic environment.

The concept of blockade remains settled but must be distinguished from other methods of naval warfare such as maritime interception zones, control of enemy commerce and operations under a UN Security Council resolution.

Zones, including exclusion zones, are distinct from blockades, warning zones and “defensive bubbles.” Zones must be analyzed to determine if in fact they are an illegal free fire zone or, in some cases, a legal ruse of war. A zone must have a legitimate purpose and must limit the area of naval warfare, protect neutral and innocent shipping and high value targets and subject neutral shipping and aviation to extensive control measures. The principle of maritime neutrality is operable and well established, though it may be disregarded in actual state practice.

Future challenges to the Law of Naval

Warfare include excessive maritime claims to well-defined geographical areas. Challenges regarding normative asymmetries include different interpretations of basic concepts, confusion of political aims and legal targets and the impact of Human Rights Law.

Challenges regarding asymmetric actors are based on the increasing multitude of terrorists, non-state actors, and civilian actors in armed forces. The technology gap in naval warfare has raised the technological inferiority argument and the decreasing readiness to accept legal regulation of warfare, along with the illusion of “clean warfare.” There is an increasing necessity for justification, or “lawfare,” by combatant states in regard to use of certain types of weapons.

The challenges to the Law of Naval Warfare, however, do not justify calls for new rules.

CHAIRMAN’S COMMENTS

We sincerely appreciate the support provided for this year’s conference by The Lieber Society on the Law of Armed Conflict of the American Society of International Law, the Naval War College Foundation, and The Israel Yearbook on Human Rights. Congratulations on a highly successful conference to our Conference Committee, which was under the leadership of Charles Garraway and Major Richard Jaques, USMC.

We welcome any constructive criticism of this year’s event and recommendations for next year’s conference, which is scheduled for June 21-23, 2006. You can reach me at dennis.mandsager@nwc.navy.mil.

All the best,

Dennis Mandsager
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