



Conference Brief

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Global Legal Challenges: Command of the Commons, Strategic Communications, and Natural Disasters

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From 28 – 30 June, 2006 the Naval War College and its co-sponsors The Lieber Society and Roger Williams University School of Law invited 180 renowned international scholars and practitioners, military and civilian, and students representing government and academic institutions to participate in a colloquium to examine US and international perspectives on command of the global commons, public perceptions and the law, the challenges of strategic communications, and global responses to natural disasters.

Highlights:

- Assistant Secretary of Defense for Homeland Defense Paul McHale opened the conference by reminding participants that the challenge of the post-September 11 world is to properly employ the military while preserving the civilian nature of democratic governments.
- One of the top priorities for Legal Adviser to the Secretary of State John B. Bellinger, III, is to effectively promulgate the truth about U.S. policies and values, while learning from colleagues, opinion makers and the public world-wide their views on critical legal issues.
- Panelists and participants emphasized the importance of international legal and operational cooperation to counter threats emanating from the global commons.
- Legal commentators in the media are an increasingly important phenomenon, leading panelists and participants to agree on the critical need for effectively communicating coherent legal rationales for U.S. and coalition government policies.
- Panelists and participants identified the lack of both domestic and international legal frameworks as negatively impacting the ability of governments to respond to global-scale natural disasters in a timely and effective manner.



KEYNOTE ADDRESS:

The Honorable Paul McHale
Assistant Secretary of Defense for
Homeland Defense

In his address opening the Conference, Secretary McHale reflected, in the light of the extraordinary challenges of the post-September 11th world, upon the role of the US military within domestic society, the historic and statutory constraints upon that role, and the appropriate occasions in which the US military can contribute to the domestic physical security of the American people. Going back to Hamilton's *Federalist* Number 8, Secretary McHale pointed out the cautionary message contained therein (regarding the use of the military). Even the "ardent love of liberty" by a free people will ultimately yield to demands for "safety from external danger." To be "more safe," a free people might choose to be "less free."

Hamilton was prescient. For transnational terrorists, the US is now the preeminent part of a global battlespace. Their goal is to commit acts of brutality within the US and, by bringing death and destruction there, to impact our political will and consciousness. In Hamilton's words, however, if citizens are "habituated" to look to the military for protection because of the "perpetual menacings of danger" they can become disproportionately dependent upon the military for internal security. The civilian character of governance can thus be displaced. The nature of our present challenge is to properly employ the military while preserving the civilian nature of our government. Therefore, some missions within our borders simply must remain civilian in character.

September 11th demonstrated the need for enhanced physical security at home. Rapid reaction forces were established domestically and placed on alert, but their use must be consistent with the Posse Comitatus Act and the Military Purpose doctrine. Military "consequence management," such as the response to Hurricane Katrina, also presents unique challenges: lead-agency responsibilities statutorily assigned to DHS cannot lawfully be simply re-delegated to DOD. In light of the current transnational terrorist threat, such things as the terminology of both the Posse Comitatus and the Insurrection Acts should be examined as a prudential matter to ensure their continued relevance. Meeting the intelligence requirement of domestic military missions requires particularly careful balancing. The deployment of forces domestically under extreme circumstances raises serious legal and public policy concerns over liability. Finally, our web of authorities, whereby liberty is preserved through competition and diffused power, obviates "unity of command" (between federal military forces and the National Guard of a State operating under the command and control of the Governor). What is vital, though, is "unity of effort" through close coordination and integrated planning among civil and military authorities.

PANEL I:
Command of the Commons –
The US Perspective

Vice Admiral Lowell E. Jacoby, USN, (Ret.), Director of the Defense Intelligence Agency from 2002-2005, opened the panel by observing that the global commons must be very broadly defined and



encompass the domains of space, air, surface, subsurface, sea beds and cyberspace if it is to be a useful construct in an era of globalization, rapid information-age advancements, and threats of terrorism and proliferation of WMDs. Indeed, such threats have redefined the commons, the domains of which are interconnected, interdependent and mutually reinforcing. The expanse and complexity of the global commons presents problems of scale, scope and a convenient operating space for highly accomplished, sophisticated and dedicated foes, whose intentions and capabilities combine to create a threat.

The threat of terrorists with WMD capabilities is one of inestimable proportions, and the global commons plays a key role in the generation of this threat. The intelligence communities of the US and allies are integral to efforts to counter such threats by dominating the global commons, although “command” of the commons in a traditional sense is unachievable. Intelligence capabilities must be simultaneously broad and deep, but we cannot attempt to know “everything about everything” lest we spread ourselves too thin. Intelligence capabilities must be agile, and responsive to changing needs. Intelligence will be derived from a broad variety of sources from unclassified data that is publicly available to highly sensitive data collected by highly classified means. The most modern information management techniques must be applied to the data and the data must reside on secure networks employing the most modern tools and capabilities. Finally, the key to dominance in the global maritime commons will be an ability to provide persistent surveillance – that is, the ability to linger on a problem

for as long as it takes to fully understand it. This effort can involve considerable international cooperation, just as it must involve partnership between legal counsel and intelligence officers.

The US Coast Guard’s Assistant Commandant for Policy and Planning, Rear Admiral Joseph Nimmich, observed that transparency of information breeds self-correcting behavior, especially in the oceans, the primary global commons. The maritime domain is a vital source of food, minerals, recreation, and commerce, but maritime transportation lacks a coherent governing policy structure and a system that supports the efficient flow of commerce and addresses the need for system safety, security and stewardship.

Moreover, the oceans contain a culture of secrecy, from fishermen not wanting other fishermen to know where they are fishing, to the principle of anonymous “innocent passage” that allows ships to pass close aboard, but not notify, coastal states en route from one location to another, regardless of the hazard or threat they may pose to that coastal state. Improved maritime security, safety and stewardship, without hampering the free flow of commerce, is only possible through increased transparency, or “Maritime Domain Awareness,” which allows enforcement authorities to focus their scarce forces on apprehensions more than on screening and patrol. It is a patchwork of global understanding based on a “unity of effort.”

Vice Admiral John G. Morgan, Jr., USN, Deputy Chief of Naval Operations for Information, Plans and Strategy, indicated that the world order today is economy-based, and conflict over competition for scarce resources is inevitable. The US Navy will increasingly



turn to lawyers to help interpret claimed economic zones as we also work to maintain safe and open access to the world's oceans and ports. One of the greatest dangers we face is a potential collapse of the global economy. Continued global economic growth is not inevitable. As long as such growth continues, so will relative stability, but conflict will nonetheless come. When it does, de-escalation of conflict will be a key role for naval forces, as ninety percent of the world's commerce goes by sea. The US Navy can contribute greatly to limiting and localizing conflict. A catastrophic crisis impacting the global economy must be avoided. In addition, domination of a region by any particular power should be prevented; and no significant part of the oceans should be allowed to become ungovernable.

The related specific legal challenges will be varied and include: acceptance and enforcement of economic zones and territorial claims; illicit trade, migration, trafficking, and piracy; transport by sea of WMDs or related components; terror at sea; and interdependence and coordination of diplomatic, information, military, and economic interests across the global commons.

PANEL II:

Command of the Commons – the International Perspective

Professor Stuart Kaye of the University of Wollongong spoke on “Challenges and Developments in Offshore Security” and considered a number of potential threats to security arising from the global commons. Professor Kaye focused on challenges posed by possible action against maritime

activity taking place outside the territorial sea and national airspace. Vulnerabilities in the global commons include threats to international maritime trade and fisheries, possible attacks on offshore oil and gas installations, and interference with pipelines and submarine cables. There are significant limitations on the ability of a coastal state to respond within international law. Prior to the SUA Convention, the universal jurisdiction over piracy had no rough equivalent with respect to maritime terrorist acts. Since 9/11, SUA state-party participation has grown markedly, but still falls short of universal application. Moreover, oil and gas pipelines are not covered by SUA or its 2005 Amendments, and submarine cables enjoy even less protection. States have tended to respond to threats by cooperation in surveillance and, when possible, enforcement. In this respect, the SUA Convention and its amendments are representative of the way ahead.

Professor Bakhtiyar Tuzmukhamedov of the Diplomatic Academy, Moscow addressed the Russian perspective on “Preemption by Armed Force of Trans-boundary Terrorist Threats.” In a conspicuous departure from the Soviet-era official and narrow interpretation of the Article 51 right of self-defense, senior Russian officials have, since 2002, increasingly been indicating that it might be permissible to use armed force against extra-territorial sources of imminent terrorist threat to Russian security in the absence of an actual armed attack originating from those sources. The targets would be terrorists and their infrastructure rather than the state where the terrorists have found refuge. The new Russian Federal law “On Counteracting Terrorism” explicitly comprehends



counter-terrorist actions by the Russian military, to include actions in international waters and airspace, although foreign territory is not mentioned. The principles of proportionality and necessity, traceable to the *Caroline* case, may be discerned in the new law.

While the *Caroline* doctrine has not been formally accepted by Russia, some of the official statements regarding pre-emptive use of force could be construed as falling within the purview of *Caroline* which, if properly adapted, could add legitimacy to current approaches. As Lord Ashburton indicated, the “inviolable character of the territory of independent nations” could be suspended. In the Russian counter-terrorist context, in concert with *Caroline*, targets should be limited to the immediate source of threat in the space adjacent to Russian territory. The gravity of the threat and consequences of inaction must be weighed. The Security Council would have to be notified under Article 51 and sufficiently apprised of the information that justifies the pre-emptive action against the imminent or ripening threat.

Next, Professor Yann-huei Song, Research Fellow and Fulbright Visiting Scholar at Stanford University detailed the efforts to enhancing security in the Straits of Malacca. Professor Song related that, although the Straits is one of the most vital shipping lanes in the world, regional, political and economic instability, insufficient resources, and the weak maritime law enforcement capacity of Straits littoral states made the Straits a target for piracy and armed robbery against vessels. The nations that depend on the Straits for cargo transit, especially energy supplies, expected the littoral states to take additional law-enforcement action,

while maritime states worried about transnational crime, maritime terrorism, and armed attacks against their vessels. The three littoral states, some considering the US-devised Regional Maritime Security Initiative (RMSI) partnership an attempt by foreign powers to “internationalize” the Straits security and, thus, a threat to their territorial sovereignty, launched their own domestic, bi-lateral, and tri-partite efforts to patrol the straits more effectively.

These efforts were sometimes in cooperation with Straits user-states. The three littoral states have also urged for the establishment of a burden-sharing arrangement to help cover the increasing cost of providing essential maritime infrastructure in the Straits. Finally, other states in the region are engaged in on-going discussions with the littoral states on the understanding that the littoral states shoulder the primary responsibility for enforcing security, but that the user-states and the international community have a significant role to play; and that new cooperative measures should be forged in a manner respectful of sovereignty and consistent with international law.

Rear Admiral (retired) Jorge Balaesque, Chilean Naval War College, spoke on Chile’s approach to threats emanating from the commons, observing that strategic solutions to these threats have to be feasible. Regarding threats at sea, there will always be a conflict between freedom of the seas and effective control measures, with good order at sea requiring maritime awareness, maritime policy, and integrated maritime governance. Chile is essentially and increasingly dependent on the sea, not only because of the size of its territorial sea and EEZ and its growing reliance on



resources from the sea, but also because 90 percent of all foreign trade and 100 percent of all fuel required are transported by sea. Chile is the fourth biggest user of the Panama Canal and its availability is essential to Chile's economy. The Drake Passage and Straits of Magellan are increasingly used and are an important alternative to the Panama Canal.

Chile is both increasingly integrated in the new global economy and also working to confront new, non-conventional threats in the maritime realm. The "Presential Sea" concept, envisioned as a solution for illegal fishing and which reflects a will to be "present" in the High Seas adjacent to the EEZ in order to project maritime interests, could also be suitable to enable Coastal States to enforce the necessary control of that area—in total conformity with international law- to protect the rightful use of the sea and its resources and to meet new threats. Maritime Domain Awareness, international cooperation, and voluntary agreements are also vital in this effort, and appropriate measures such as declaring WMD proliferation and terrorism at sea global crimes like slavery and piracy should be considered. The Presential Sea approach, however, would facilitate surveillance of high seas areas and would effectively determine a "responsibility area" for states to provide the necessary control of that sea space to counter threats.

Professor Yoram Dinstein, Tel Aviv University, addressed computer network attacks ("CNAs") occurring in that part of the commons known as cyberspace. However, Prof. Dinstein first warned that there is a danger of inaccuracy and over-breadth of definition when a new terminology like the "global commons" is used. In his opinion, such terminology

should not be employed unless absolutely necessary – and when so, precision is warranted. CNAs constitute a relatively new method of warfare and they present a lacuna—a gap—in the law. As far as the *jus in bello* (LOAC) is concerned, CNAs do not come within the framework of the usual definition of an attack as an act of "violence." With respect to the *jus ad bellum*, the crucial question is whether a CNA by itself can amount to an "armed attack." Of course, the Security Council under Chapter VII of the UN Charter can determine that any act (including a CNA) constitutes a threat to the peace. However, absent a Security Council determination, can a CNA against a state trigger a lawful forcible response – in individual or collective "self-defense" – under Article 51 of the Charter?

Realistically, a CNA is usually perceived as a means of intelligence gathering or a way to blind the enemy and otherwise disrupt its communications. Yet, a CNA can also produce devastating and deadly effects if a belligerent party gains actual control of an opponent's computer network (e.g., by launching the opponent's missiles against its own assets; opening the sluices of dams in order to cause a flood; or even causing a melt-down of the adversary's nuclear power reactors). It must be appreciated that identifying the party actually responsible for a CNA can be time-consuming and fraught with difficulties. Hence, responding promptly to a CNA from an ostensible source is very dangerous, for a terrorist organization could use a CNA – through a third party's computer network – with a view to war-mongering (i.e. inducing State A to respond against State B which is actually an innocent party).



In terms of response to a CNA, in the exercise of the right of self-defense, it is necessary to draw a distinction between a CNA causing catastrophic effects and a run-of-the-mill CNA that only causes some disruptive damage. The appropriate proportionate response to lesser effects would be “defensive armed reprisals” which may include kinetic weapon countermeasures. By contrast, the proper response to a CNA causing calamitous results may be a full-fledged war.

On the whole, the CNA issue is complex, the possibilities are enormous, and international lawyers are decidedly behind in their study of the full dimensions of this new phenomenon.

PANEL III: Public Perceptions and the Law

Professor Harvey Rishikof, National Defense University, opened this panel by putting the issue in the context of public diplomacy—to include the several publics involved in the War on Terrorism (US, European, Afghani, Iraqi, and other Middle-Eastern). Since 9/11, the US public’s approval rating for the war has steadily trended downward from 90 percent to about 40 percent. The media are central to shaping public perceptions, but the expectation that the media will always be “fair” is misplaced. The media has a job to do that does not include acting as a spokesperson for the government. The one-on-one relationships and mutuality that have largely governed media-government relations are becoming increasingly strained given the recent set of “leak” investigations. Informing the public accurately on legal issues is even

more problematic, especially given the growing gap between US and European views on relevant international law questions. The gap is largely a topic of conversation among elites, however, and the participation of the media and the public is not the center of gravity for these legal debates.

Nevertheless, legal commentators are a new, vibrant phenomenon; they and other shapers of public perceptions are delivering information very rapidly and in ever-new ways technologically. Commentators on the “blogosphere” now have tremendous power, as do the “dominant images” that ultimately become adopted as emblems of a conflict in the public consciousness. Finally, the academic role in “educating” the public is often equivocal: the academic search for long-term truths and guiding principles does not often yield information that readily affects public perceptions.

Colonel Jim Terry, USMC (retired), Chairman, Board of Veterans Appeals, focused on Iraq in considering the question: “Who does the media represent?” According to Col. Terry, this is a question of present concern to the US public, who perceive a climate of unease between the media and the US military. The magazine responsible for the incorrect story of Koran abuse by US military personnel, which led to rioting and numerous deaths, later declined US requests to help repair the damage caused by the false story. Dubious foreign sources regularly seem to be given greater credence by the media than US military personnel. The press seems unwilling to consider the rationality of Coalition efforts to prevail in Iraq. The current reporting on Haditha has a rush-to-judgment aspect to it



and reflects a tendency to believe the worst of the US military.

Indeed, with respect to perceptions of the law, media treatment of the law of armed conflict is one-sided: there is disproportionate focus on, and reckless reporting of, supposedly unlawful conduct by Coalition forces without any equivalent treatment of the inherent lawlessness of anti-Coalition forces (whom the media improperly label “insurgents”). The media, however, has a responsibility to explain law of armed conflict principles more carefully and accurately --especially as US national policy can be impacted by mere allegations of wrong-doing by US troops. Does the military have a role in assisting the media with questions of balance and accuracy generally, and the operational legal context in particular? The practice of embedding reporters with the military seems to have fostered greater public understanding, increased media credibility, and improved troops’ morale. When employed, embedding seems to have made the difference between fair coverage and something less. Unfortunately, given media casualty rates, media interest in continuing the embedding process has waned. To set the proper context for media –including the operational legal context— consideration should be given to allowing certain media representatives access to operations centers. Ultimately, an effective military-media dialogue is vital to reporting that is clear, accurate, and in context.

Ms. Linda Robinson, of U.S. News and World Report, held that the news media is the principal conduit and a key shaper of public perceptions of law and national security policy. Americans favor a strong independent press, which plays a “checks and balances” role. Assuming that a

skeptical and inquisitive press is desirable, there is wide room for debate on how the media should operate. The media is also changing. News-gathering is being defunded; news content is being shortened. Many print media outlets are disappearing, while privatized information services are on the rise, as are sound-bite and opinion journalism. 24-hour cable, with the often un-informed “talking head,” is a maw that must be fed. Financial pressures are producing quick-hit and sensationalist forms of journalism. There are also bias problems that must be acknowledged.

Ms. Robinson detailed media treatment of three issues: the NSA surveillance and data-mining; extraordinary renditions, “secret prisons” and interrogation techniques; and the Abu Ghraib scandal. Some of these involve complexities that the media has a burden to illuminate with the help of legal and subject-matter experts. Where policies are problematic, the press could be more helpful in identifying legal gray areas and exploring “why” rather than engaging in purely negative coverage. Providing ample and timely information to the media, however, can also help forestall negative coverage. National security reporting of necessity involves a cautious approach to classified information –and such sensitivities have increased markedly in recent years. In some regions, the media suffers from an over-reliance on untrained foreign nationals as freelance journalists. Typically, the military appreciates serious journalists who do their homework, but their opposite number, celebrity journalists, can pose difficulties. Embedding works and good-faith rules to protect operationally sensitive information are appropriate, but non-embedded media are also needed for scope of coverage.



Professor Robert F. Turner, Center for National Security Law, the University of Virginia, observed that the tragic conflict in Vietnam demonstrates that it is possible to win every major battle and nevertheless lose a war if the enemy destroys your national will through propaganda, public diplomacy, or what Leninists called “political struggle.” If the military strength of the US is unassailable, the only viable target will be the American national will. The vigorous US response to 9/11 surprised our enemies and may account in part for why there has been no second attack. Fortunately, journalists today are much more able than their predecessors reporting the Vietnam war, when the US readers were regularly peppered with misleading and often incorrect stories of wrong-doing by US troops. Detainee abuse issues aside, the biggest failures in Iraq have not been US policy decisions, but the incompetent way in which these decisions have been explained to the media and the American people.

Having the moral high ground is critically important to Americans, and their widespread ignorance – including members of the legal profession – about applicable laws of armed conflict is a major impediment. The principle that enemy combatants may be lawfully detained without charge for the duration of hostilities is lost on many who denounce our failure to accord enemy combatants Constitutional safeguards and a day in court. While public and media education about LOAC (as well as relevant Constitutional and statutory law) is important to this process, it is equally important that in all of our behavior we strive to obey our obligations under international law. Public support is

critically important in every sustained conflict, and the media is a primary source of information for the public. To maintain this support, we need to have moral authority on our side, and when mistakes are made, we need to be honest and open and promptly correct them.

LUNCHEON ADDRESS
Naval Station Officers’ Club

The Honorable John B. Bellinger, III
Legal Adviser, Department of State

Mr. Bellinger began by relating that one of his top priorities is to ensure that the Department of State effectively communicates its message to the rest of the world so that the world understands our commitment to international law and the rule of law, as well as the carefully considered legal bases and rationales underpinning our policy decisions. This is especially true in the war on terror, which is a new kind of war against a different kind of enemy and therefore involves many new and difficult questions and decisions, including critical legal questions and decisions.

Mr. Bellinger and his staff talk about the law to help counterparts in ministries of foreign affairs around the world, as well as international organizations, non-governmental organizations, opinion makers and publics, understand the U.S. legal rationales. At the same time, by listening to the views and paying attention to the concerns of colleagues, opinion makers and publics world-wide, he gains valuable information that assists him in providing better advice to the Secretary of State. Many people have expressed



gratitude for the increased dialogue about critical matters of law – even if there is only an agreement to disagree in some cases, the dialogue is essential.

Mr. Bellinger concluded by encouraging each of the U.S. military and government lawyers and officials — or future lawyers and officials — at the Conference to review their own work and consider how they, too, can engage in strategic dialogue about important legal issues as part of their work internationally. As the President has said, public diplomacy is an important part of each of our jobs, and we each need to see ourselves as international diplomats as we conduct our work.

PANEL IV:

Challenges of Strategic Communications

Rear Admiral Frank Thorp IV, USN, Deputy Assistant Secretary of Defense for Joint Communication, asserted that strategic communication is one of the most important things we have to fix, and yet there is misunderstanding over what it is. Strategic communication is primarily a “process” to ensure that everything we say and do are in sync – this is a “symphony-like” effort of every element of an organization, emphatically not just the communicators. This effort is extraordinarily difficult in the context of national security, public diplomacy, and international relations. Policy and actions must agree - inconsistency means failure - but our greatest strategic communication challenge is to create good policy in the first place. The legal community plays a crucial role at this point, because the actions of the legal community have

dramatic implications in the outcome of our strategic communications processes and results – due process has a cost in the communication domain. We must recognize that our legal efforts, whether concerning investigations or policy decisions, have an impact on our communication efforts.

Strategic communication must not be confused with certain of its sub-elements, like public affairs or information operations. Vigilance is required to ensure that our processes do not fail: Abu Ghraib was a strategic communications failure for various reasons. We must focus on and improve our processes to coordinate our communication in every aspect. Three objectives are essential: we must create a “culture of communication” within the DOD; we must define roles, responsibilities and relationships, and develop Strategic Communication doctrine; and the services and combatant commanders must be provided with resources to create processes to do strategic communication right. In the end, everyone has a role in strategic communication - coordinated information, themes, plans, programs, and actions synchronized with other elements of national power leads to good credibility. We pride ourselves on our credibility: “Do what we say, say what we do, mean what we say, and say what we mean.”

Next, Professor Gene E. Bigler, University of the Pacific, first underscored the importance of the audience – and audiences — in strategic communications. The US effort in the struggle among ideas today is reckoned by many to be quite poor. Being attuned to foreign audiences, and the differences among them, is essential for success in growing empathy for our ideas and cooperation with us. We



have to be mindful, in fact increase our systematic research, to the ways these different audiences relate to our policies, as well as our assumptions about them. For instance, the concept of a “war of ideas” in the Middle East context creates the specter of a US confrontation with Islam itself, rather than with extremist groups or terrorist organizations alone. With respect to legal messages, the challenge is to refine and limit the lawyerly complexity of the issues to the vision and capacity of the audience to comprehend them. Second, strategic communications must focus on “convergence” rather than the processes and consistency in messages alone. Strong executive leadership is necessary for such convergence, especially at a time when US policy on the War on Terror is being rejected by the majority of the world community. For instance, the complexity of the legal messages and the audience impact of such policy choices as respect for Geneva Convention protections need to be a basic component of the convergence process.

Third, resource support for strategic communications may be as important as convergence because of the complexity of the process. The demise of USIA and the reduction in US government support for so many of the most effective public diplomacy elements of the strategic communications process explains the crucial emphasis the Defense Science Policy Board and other authorities have placed on the need for multiplying resource commitments. Furthermore, communications resources disparities between departments may result in unexpected tilts in the processes, notwithstanding whoever is supposed to have the lead in managing convergence.

Finally, this problem is exacerbated by the importance of the “military as messenger” because it coincides with the preponderance of US resources available to the Department of Defense. The increasing public debate over the militarization of US foreign policy suggests that the military may actually be counterproductive as a messenger. Thus the potential for such negative impact must become an explicit consideration for strategic communications.

Brigadier General Mari K. Eder, Deputy Chief, US Army Public Affairs observed that the services are beginning to move ahead on strategic communications, despite the fact that the concept has heretofore been but broadly defined and often little understood. Strategic communications may seem to some in the military as “safer” than public affairs in the sense that it is mistakenly thought of as “one-way” communication, rather than dialogue. For its part, the media fears manipulation and propaganda when it hears the phrase “strategic communication.” The Army is working hard to adapt to the fact that communications is now a constant process that takes place throughout the development of a program, a policy, or a strategy. We do not “do communications” simply after an operation is complete.

A government should not deliver mixed messages, nor should governmental (particularly military) sub-elements be caught off guard in reacting to unexpected messages emanating from elsewhere in government. The goal is “one message, many voices” and it is the result of a collaborative effort and more than simply policy or strategy “applied” to communication. It is a synchronization of planned communication that is broad-



based, long-term, over-arching and that enables people to stay on, and deliver, their message.

Rear Admiral Michael A. Brown, US Navy, Director, Navy Information Operations, concluded the panel with an information operations perspective on strategic communication. Rear Admiral Brown pointed out that, of course, strategic communication is not the same as information operations, influence operations, or “shaping” – although IO professionals, capabilities, and expertise can be used in the strategic communication effort, which is a team effort. Using the capabilities we have to get the message out is not “propaganda” or in any way deceptive. In the Navy, there is newfound appreciation that regional and cultural expertise is needed to understand the effect we are going to have and ensure our message is out there. The goal is to incorporate strategic communication into all aspects of military strategy, policy, planning and operations.

Combatant commanders are now, at planning stages, focused on such questions as “How are we going to engage around the world?” and “What are the things that we want to have told about us?” It is a proactive process of identifying strategic communication themes and objectives in advance. Wider awareness of strategic communication across DoD and growing strategic communication expertise will eventually lead to broad, lower-level interaction, which then allows for greater accessibility and interaction with target audiences, increased timeliness and proactive responses to shorter news cycles, better use of non-traditional media, and maximizing emergent and short-fused opportunities.

PANEL V: Global Disasters

Brigadier General Ikram Ul Haq, Pakistan Senior National Representative to CENTCOM, commenced this last panel with a riveting presentation of the October 2005 earthquake in Pakistan, which affected 3.5 million people, left over 73,000 dead, and damaged nearly half a million housing structures. The scale of devastation was so great in the 30,000 square kilometer affected area as to overwhelm Pakistan’s ability to respond and essentially create an “institutional vacuum,” which was made worse by an “information vacuum” that hampered damage assessment and response. Existing infrastructure, where undestroyed, was nevertheless poor. The Pakistan military, assigned responsibility for rescue and relief, ultimately deployed 80,000 troops to the disaster zone.

These operations were conducted in three stages: immediate rescue and relief (e.g., rescue of survivors and removal of the dead), creation of stability (e.g., providing shelter, restoring local authority), and stability maintenance (e.g., ensuring continued food, water, medical provision). A follow-on phase aimed at reconstruction and rehabilitation is being led by civil authorities and implements a three-year, \$3.5 billion plan focusing on housing, health, education, and livelihood. International response was considerable; US and NATO military airlift and other relief efforts were particularly massive. In the event of future disasters, Pakistan is developing a permanent response framework at the national and provincial levels and a disaster-management strategy. Because disaster management is a race



against time, the military response (both domestic and from abroad) is also being studied to ascertain how to improve timely deployment in such a scenario.

Lieutenant Colonel Evan Carlin, Australian Defence Force, discussed the role of non-governmental organizations (NGOs) in working with military forces in relief efforts. Some natural disasters, such as the 2004 Indian Ocean tsunami, are of such a scale that they pose transnational challenges that require an international cooperative response. Thought must first be given, though, to the domestic legal framework of the country in which a disaster has occurred. What powers do various government departments have? Who pays the bills? What immunities are available? The charters of the NGOs themselves are also germane. The Geneva Conventions and the Additional Protocols refer to impartial relief societies concerned with providing humanitarian aid, and surely in this respect there is some common ground between NGOs and military forces in disaster relief. Assistance should be apportioned on the basis of need alone, but disaster relief operations in a politically sensitive region (such as Aceh in Sumatra, where Free Aceh forces regularly clash with Indonesian forces) must be tailored to their context. The humanitarian principle of impartiality does not mean that NGOs may ignore political realities in the region.

Managing diversity of NGOs, NGO expectations, and NGO interaction with military forces can be daunting. Some NGOs will be determined to do their own thing, and some of these may even become “secondary victims” of the disaster and require assistance. Similarly, many types of relief supplies from abroad will be impractical, yet stemming the tide of

“wrong aid” and finding the right form of aid is difficult. The best NGOs are largely self-sufficient and sensitive to the local context. Some NGOs are politically naïve and logistically inexperienced.

Captain Kurt Johnson, JAGC, USN, US Northern Command, began his discussion on disaster relief from an operational command perspective by discussing the unique NORAD-USNORTHCOM missions. NORAD’s traditional charge is the air defense of North America, to include ongoing Operation Noble Eagle missions, but there is also a new “maritime warning” mission that employs aerospace monitoring capabilities to watch our maritime approaches. The fact that USNORTHCOM, the newest combatant command, has a homeland AOR presents special considerations. It will take time to get used to a geographic combatant commander located at home. NORTHCOM has a statute-based mission of supporting civil authorities as needed (as with Hurricane Katrina), but also a Constitution-based defense mission.

At what point does a Department of Homeland Security lead or FBI lead become a DOD lead? Does a particular NORTHCOM mission fall under the Stafford Act or Article II of the Constitution? The Posse Comitatus Act does not apply to military operations in defense of the homeland, but does apply to defense support of civil authorities missions. The Insurrection Act provides important but rarely used exceptions. Could DOD ever be the lead in the wake of a natural disaster? Even if both local and state authorities are temporarily overwhelmed and lives are in danger, current law does not provide for a neat avenue by which federal military forces



can simply move in to stabilize the situation, absent a request from the Governor or circumstances authorizing the President to invoke his powers under the Insurrection Act.

Mr. David Fisher, of the International Disaster Response Laws, Rules and Principles (“IDRL”) Programme, International Federation of Red Cross and Red Crescent Societies, spoke on the legal framework of international disaster response. Unlike the domain of armed conflict, there is no centralized regime of international law governing the international response to disasters. There are several relevant treaties, a number of very important “soft law” documents, and some international institutional mechanisms that provide a level of guidance and direction to international cooperation, but this framework remains scattered and incoherent. The most comprehensive IDRL instruments are non-binding soft-law agreements, such as the Oslo Guidelines on the Use of Military and Civil Defense Assets in Disaster Relief, the Measures to Expedite International Relief adopted by the International Conference of the Red Cross and Red Crescent and the UN’s Economic and Social Council in 1977, and UN General Assembly Resolution 46/182 (1991), which established the UN’s Office for the Coordination of Humanitarian Affairs.

The IDRL Programme’s mission is to study and disseminate information on the existing legal frameworks on disaster response and to identify problem areas. Based on its research thus far, these appear to fall into two major categories: legal barriers to the access and efficient operation of international actors and problems due to the lack of effective

regulation of coordination, quality and accountability of international actors. There are recurring problems, for instance, involving the legal status and quality of relief actors, customs, potential taxing of aid, vehicle registrations, the importation and use of telecommunications equipment, distribution of medicines, qualifications of medical staff, and food importation issues. Relevant controls are important, but advance and increased coordination is in order. Unfortunately, it appears that national governments rarely enact detailed law on the foregoing issues in advance of a major disaster. At the same time, the operational context is becoming more complex, and the field of actors larger and more diverse, as time goes by: the UN’s coordinating powers and mechanisms are transforming, the Red Cross/Red Crescent movement has grown in size and field presence; the numbers of NGO’s becoming involved are mounting enormously; militaries are increasingly involved in disaster relief, as is the private sector on both individual and societal bases.

The last panel, and the Conference, closed with Mr. Gus Coldebella, Deputy General Counsel, US Department of Homeland Security, who observed that, while the nature and speed of communications now gives almost all large natural disasters a “global” character, all disasters are profoundly and basically local. The US approach is for disasters to be handled in the first instance at the lowest jurisdictional level possible. The National Response Plan (NRP), adopted only eight short months before Hurricane Katrina struck, provides the structure for federal, state, and local governments to work together. Given the plan’s adoption date, however, there was little opportunity



for NRP-based exercises pre-Katrina, and Katrina was the first disaster in which the NRP was employed.

Under the NRP and the Stafford Act (under which the President may declare an emergency or major disaster), the federal government will assist the state in its duties to its citizens when the state is overwhelmed; it does not generally “take over” the response. Katrina, however, caused a situation in which, at least for a time, there was no State or local apparatus to request, accept, and coordinate federal assistance, which caused initial difficulties.

By presidential directive, the Secretary of Homeland Security is the principal Federal official for responding to natural or man-made disasters, but, unlike in other countries, that does not mean that the Secretary has command authority over all response resources.

Federalism – which describes the relationship between the US federal government and the fifty states - is a factor in US disaster response that makes it unique in the world. Under the Tenth Amendment to the Constitution, states retain the police power, with the federal government supporting, not supplanting, state government. Because of the relationship between the federal government and the states, “unity of command” is not generally the goal; however, a “unified command” of the two sovereign responders working together in a “unity of effort” is the ideal. In the event of a true “catastrophe” like Katrina, when the first responders were incapacitated, the NRP allows federal assets to be moved where needed without waiting for a state request.

CHAIRMAN’S COMMENTS

We sincerely appreciate the support provided for this year’s conference by Roger Williams University School of Law, 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, under the leadership of Professor Jane Dalton and Major Richard Jaques, USMC.

Please send any constructive criticism of this year’s event and recommendations for next year’s conference, scheduled for June 20-22, 2007, to me at dennis.mandsager@nwc.navy.mil.

All the best,

Dennis Mandsager
Professor of Law