RESPONSE SYSTEMS PANEL

OPENING REMARKS

Lord Thomas of Gresford QC

Chair, Association of Military Advocates (UK)

At the very end of his submission, in response to a question from Colonel Cook, Col Borch, the regimental archivist, said that the British were forced to modify their systems by the ECtHR and by some other appellate courts that have overarching authority. He asserted that the European Court had held that the Commander could not be part of the system because it would violate the Convention on Human Rights. The changes in Britain, he said, were externally driven.

I concede that decisions of the European Court were the trigger for change but any impression that either Parliament or the military were reluctant to reform would not be correct. The core case is that of *Findlay –v- UK.* Sergeant Findlay's pleas of guilty in 1991 to a number of charges of common assault, threats to kill and conduct prejudicial to good order and military discipline were accepted by the Prosecutor. His complaint was as to sentence. But his claim to the English appeal court that the procedures were in breach of natural justice was dismissed in 1992 on the basis that they had a statutory foundation in the Army Act of 1955 and that therefore the court had no power to declare them void. He appealed to the ECtHR.

Before the European Commission, which gave a preliminary view of his petition in 1995, the British Conservative government argued that there were sufficient guarantees in place in a Court-martial as then constituted, to meet the requirement of Article 6 (1) of the Convention – the right to "a fair and public hearing [by] an independent and impartial tribunal established by law". Their argument failed. The whole structure of military justice was clearly out of date and non-compliant.

Britain is bound by treaty obligation to "abide by" the final decision of the ECtHR . The government, anticipating the decision of the full Court, took steps to enact the 1996 Act which abolished the role of the Convening Officer and introduced into the system an independent Prosecuting Authority outside the chain of command. It should be noted that neither the CO's summary jurisdiction nor his powers to dismiss more serious charges had been in issue in *Findlay* and the Act did nothing to alter them.

When the *Findlay* case came up for a full hearing in 1997 before the European Court, the government did not contest the breaches of Article 6 (1) guarantees but drew the Court's attention to the changes Parliament had already effected.

Following the General Election of 1997, the New Labour government of Mr Blair, enthusiastically incorporated the European Convention into British domestic law, by the Human Rights Act 1998. Shortly thereafter, Parliament passed the Armed Forces Act of 2000. That Act granted a right to an accused to avoid the CO's summary jurisdiction by choosing trial by Court- martial at the outset. Further, if the accused decided to take his chance with his CO, he was given the right to appeal the CO's decision to a Summary Appeal Court, headed by a Judge Advocate. These provisions obviously diminished the CO's powers but his power to dismiss more serious charges was not affected.

The debates show that the retired Field Marshalls and Chiefs of Staff in the House of Lords strongly opposed these changes – it was said that they eroded the status and authority of the commanding officer. However, the government had cleverly sought out the prior backing of the then current Chief of the Defence Staff, Sir Charles Guthrie, later Lord Guthrie, who had authorised the Minister to tell Parliament in terms that – "The services at all levels wish to introduce compliant disciplinary procedures as soon as possible." The Minister added in the debate: "Ideally, they would like revised procedures introduced during the current legislative Session. [Sir Charles] emphasises that this is the firm recommendation of the Chiefs of Staff."

It was not therefore the scrutiny of the European Court of Human Rights, but the furore surrounding the *Trooper Williams* case between 2003 and 2005 which cast the spotlight upon the CO's powers to dismiss more serious charges - in his case, they were the alleged murder of an Iraqi civilian. I have dealt with that and other cases extensively in Sections 9 and 10 of my Submission and set out the resultant parliamentary debates concerning the abolition of that power in the Armed Forces Act 2006.

To those who ascribe to the view that there is a unique, almost mystical, linkage between the Commander and his troops, I commend the speech of Admiral the Lord Boyce, C in C of British forces in the Second Iraq War. I set it out in full at Paragraph 9.5 of my Submission. I have the highest regard for the noble and gallant Lord, not least for his refusal to commit his troops to the invasion of Iraq without a cast iron guarantee from the Attorney General that it was legal to do so. But, as he knows, I disagree with him - and not through the "political correctness" which he charges against lawyers laying "legal siege", as he sees it, to the operations of those who are required to fight and win battles.

A modern, non-conscript, professional military with increasing demands for skills and aptitudes which are very marketable in the wider world, must concern itself with both recruitment and retention. Service discipline is an essential part of military life, but both for new entrants and for those who are making their careers in the services, it must be, and be seen to be, fair. Perceived unfairness leads to discontent, poor morale and indiscipline. The subjective decisions of Commanding Officers, even with the assistance of legal advisers, can not hope to achieve consistency and parity in every unit across all the services. It seems from these Panel Hearings that the US Defense Department is now largely persuaded, in so far as the Article 60 power is concerned.

In my country and in my Parliament, lawyers may not be too popular, but we have the training to be objective, to assess facts, to come to conclusions on set principles of law, and to deal with individuals with parity.

This I believe, is the success of the Director of Service Prosecutions and his department in the United Kingdom. He does not operate in some remote and arcane legal world. He is required to take account both of the effect of a prosecution on operations and of the importance of maintaining military discipline. The Commanding Officer still has a role to play in that he may draw to the attention of the DSP any factors he considers relevant in relation to the accused and his military experiences, before the DSP makes his decision on prosecution. The CO also maintains his responsibility of dealing with minor offences, mainly of a military character. He has no jurisdiction with regard to sexual offences.

If reforms to the system have been prompted by concern for the fair trial of the accused, there is an increasing recognition that the rights of victims must be at the core of the criminal justice system. The existence of a prosecuting authority independent of the chain of command, does mean that complaints across the board will be taken seriously, that the fear of retaliation or of a blighted career is lessened, that anonymity and special measures where desired can be ensured, and that perpetrators, particularly of senior rank, can not expect any favours. Further, the DSP has the resources to monitor the proper investigation of such allegations by the service police.

If victims have confidence and trust in a system independent of the chain of command, they are more likely in my view to report offences. On the other hand, the present discretion of a US Commanding Officer to dismiss serious allegations of sexual assault must be a disincentive. The figures for non-reporting spoken to by Professor Lynn Addington on Day 1 of the Hearings, so suggested.

Finally, the military are the servants of the public. The public has the right to expect for their sons and daughters who enlist, the same standards of fairness in the military system of justice as would be their entitlement in civilian life.

LORD THOMAS OF GRESFORD QC

House of Lords

18th September 2013