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The European Convention on Human Rights: A Threat to United States-European Security Relations and the United States Military Justice System?

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THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A
THREAT TO UNITED STATES-EUROPEAN SECURITY
RELATIONS AND THE UNITED STATES MILITARY
JUSTICE SYSTEM?

by

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A Research Report Submitted to the Faculty

In Partial Fulfillment of the Graduation Requirements

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Preface

Numerous authors have pointed out the propensity of the legal practitioners in the United States (US) and US courts to ignore developments occurring in foreign national courts of other nations and in international tribunals. In 1989, in the case of *Soering v. United Kingdom*, the European Court of Human Rights found that the United Kingdom would violate the prohibition in Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms against “inhuman and degrading” punishment by extraditing Soering to the United States where he would be tried for a capital offense and faced the possibility of “suffering” the conditions on death row. While the *Soering* case has been described as having widespread effects, following the trend of other US practitioners, I remained unaware of the potential impact of the case until much later.

In 1997, while enrolled in the University of Georgia’s International Masters of Law Program, I became much more aware of the international legal landscape. As a result, almost immediately after it was issued, I became aware of the case of *Findlay v. United Kingdom*. In *Findlay*, the European Court found that the British court-martial system violated the guarantee to a fair trial contained in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Because of the similarities between the US and British courts-martial systems existing at the time of *Findlay* and because of the perceptions of some military members and civilians that the

US court-martial system is unfair, I began to think about the potential outcome of a review of the US courts-martial system.

While I have talked to a number of colleagues regarding the potential for a US military member to challenge the fairness of the US military justice system under the rational that the member-nation would violate its duties under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms by turning over the military member to the US, I am aware of no one that has written on the topic. Additionally, I am not aware of any such challenge by a military member and am unsure why there have not been any such challenges. It may be that military members do not perceive that they would benefit from a challenge under the fair trial guarantees while an individual facing the imposition of the death penalty undoubtedly would benefit from a successful challenge. Alternatively, it may be that the right case has simply not occurred. I hope that the reason is not that military justice practitioners and their clients are unaware of the possibility. In an attempt to ensure that others are not, as I was for a significant period of time, unaware of the developments in European human rights law, I feel compelled to write this on this topic.

Although it has been almost 5 years since the *Findlay* opinion was issued, I believe the current time is most opportune for this paper. First, because on the anniversary of the Uniform Code of Military Justice in 2000 presented an opportunity for review of the US military justice system. This review acknowledged the perceptions that system is in need of reform and made recommendations for such reform. These recommendations address some of the same concerns addressed by the British reform of its military justice system after *Findlay*. Second, the European Court of Human Rights

recently issued a decision in the case of *Morris v. United Kingdom* finding that the British courts-martial system continues to violate fair trial guarantees. This decision is likely to renew debate on this topic. Finally, given the suggested use of military tribunals to try terrorist following the events of September 11, I anticipate additional scrutiny of the US military justice system. This paper addresses the likely outcome of scrutiny in one important forum, the European Court of Human Rights.

I would like to thank a number of people who have assisted, directly and indirectly in the writing of his paper. First, I'd like to thank Professor Douglas Peifer, who was intrigued enough by the subject of this paper to agree to be my research advisor. I'd next like to thank Major Thomas Herthel, a member of the faculty at the Air Force Judge Advocate School. Though he was fully engaged in numerous duties of his own, he gladly responded for my plea for assistance, agreeing to serve as my legal research advisor. He provided invaluable information regarding various research resources and information on the potential structure of the proposed military tribunals. I must also thank Wing Commander Stephen Kell, who in 1999 took time to discuss the changes occurring in the British system with me. I am also indebted to Major Brynn Morgan, who worked to obtain a translated copy of the *Short* case from the military justice files on that case. I'd also like to Lieutenant Colonel Albert Klein. As member of the US delegation to North Atlantic Treaty Organization, he provided great insight into the atmosphere and the thoughts of US and other nations representatives regarding human rights. Finally, I'd like to thank my husband Scott, who worked to remove the many distractions arising during the research and writing of this paper, and my two sons, Nathan and Jacob.

Abstract

Much attention has been paid to the perceived unfairness of the US court-martial system and the need for its reform. Some scholarly works addressing the need for improvement have cited changes in the British court-martial as examples of successful reform. The transformation of the British system was, in part, brought about by the findings of the European Commission and European Court of Human Rights in *Findlay v. United Kingdom* that the United Kingdom system violated the fair trial guaranteed contained in the European Convention of Human Rights and Fundamental Freedoms. However, few have considered the possibility that the US system could undergo a similar review by the European Court of Human Rights. At least one author has cited among his reasons for not making a comparative analysis between the British and the American military justice systems the fact that the protection offered under the Convention for the Protection of Human Rights and Fundamental Freedoms are not identical to the protections offered to US citizens under the United States Constitution. While this is true, it does not rule out the possibility that the European Court of Human Rights could examine the US system to ensure that the protections guaranteed by the European Convention are provided prior to allowing an exercise of jurisdiction over an individual accused of committing an offense in a nation which is a signatory to the Convention. This paper considers this possibility and addresses the potential affects of such a review on US-European security relations.

Chapter 1

Introduction

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.¹

—Article 6 of the European Convention for the Protection
of Human Rights and Fundamental Freedoms

In 1996, the British courts-martial system underwent significant changes. The European Commission on Human Rights² and the European Court of Human Rights findings in the case of *Findlay v. United Kingdom*,³ in part, spearheaded this change. Following the Commission's findings, the European Court of Human Rights (ECHR) determined that the British courts-martial system, prior to the changes implemented by the Armed Forces Act of 1996,⁴ violated the fair trial guarantee contained in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECPHRFF).⁵ The British courts-marital system, prior to 1996, was remarkably similar to the current US courts-martial system.⁶ Given this situation, one must question whether the US courts-martial system would also fail scrutiny by the ECHR.

While the US is not a signatory of the ECPHRFF, and as such would not be a party to a case before the ECHR, the US criminal justice system has been examined by the ECHR. In *Soering v. United Kingdom*,⁷ it was contended that the extradition of a

German national to the US by the United Kingdom (UK), would constitute a violation of Article 3 of the ECPHRFF because the extradition would likely result in Soering being subjected to “inhuman or degrading treatment or punishment.”⁸ Rather than claiming that the death penalty violated the prohibition on inhuman or degrading punishment, the ECHR found, that because of the exceptional delay in the carrying out of the death sentence, Soering, if extradited to Virginia and sentenced to the death, would be subjected to “death row phenomenon.”⁹ In finding that the extradition would indeed violate Article 3 of the ECPHRFF, it was this phenomenon on which the ECHR concentrated.

The *Soering* decision, while important, involved a German national, who because of his nationality and Germany’s status as a signatory to the ECPHRFF, was granted protection by the terms of the treaty. However, the question remained whether these protections would extend to US citizens. That question was raised in 1991 in *Short v. Kingdom of The Netherlands*.¹⁰ In *Short*, the Netherlands, relying on *Soering*, refused to extradite a US service member charged with murder. The High Court of the Netherlands (Hoge Raad) found that signatories to the ECPHRFF were obligated to protect the interest of **all** individuals, not just the nationals of signatories.¹¹

Consequently, this raises several issues and questions. First, would the European Court of Human Rights undertake an examination of the US courts-martial system based on a complaint by a US service facing trial for an offense committed in an ECPHRFF signatory nation that the US courts-martial system fails to provide the right to a fair trial as required under Article 6 of the ECPHRFF? Second, if such an examination were undertaken, what would be the likely outcome? Third, if the ECHR determined that the

US courts-martial system violated fair trial guarantees, how would the issue of conflicting treaty obligation between the ECPHRFF and the North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA)¹² be resolved? Fourth, what potential effects on the US security alliances would an ECHR finding that the US courts-martial system violated fair trial guarantees have? Finally, would recommended reform actions in the US prevent a contrary ruling by the ECHR? This paper will attempt to address each of these issues.

Notes

¹European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. TS No.5, 213 UNTS 221 [hereinafter European Convention on Human Rights].

² The Council of Europe drafted the European Convention for the Protection of Human Rights and Fundamental Freedoms for the purpose of providing a European instrument for the enforcement of human rights. The Convention created a Court composed of the judges equal to the number of states adhering to the Convention. Decisions of the Court are binding on the states. Originally, cases were referred to the Court through a Commission that considered admissibility and prepared an initial report on the case if no friendly settlement had been reached. The report was transmitted to the Committee of Ministers. Within an established period after the transmission of the report, the Commission or any member state could bring the case before the court if the respondent state had accepted the compulsory jurisdiction of the Court. In 1998, Protocol 11, that permits individuals to bring suit against governments directly to the Court, entered into force. The European Court of Human Rights: Historical background, organization, and procedure at [www.echr.coe.int/Eng/edocs/infodocrevised2 .htm](http://www.echr.coe.int/Eng/edocs/infodocrevised2.htm).

³*Findlay v. United Kingdom*, 24 Eur. Ct. H.R. 221 (1997), available at <http://www.echr.coe.int/eng>.

⁴ Armed Forces Act, 1996, ch. 46 (Eng.).

⁵ European Convention on Human Rights, *supra* note 1.

⁶ David A. Schlueter, *Military Criminal Justice -- Practice and Procedure*, §1-5(A) (5th ed. 1999).

⁷ *Soering v. United Kingdom*, 161 Eur.Ct.H.R. (ser A)(1989).

⁸ European Convention on Human Rights, *supra* note 1, Article 3.

⁹ *Soering v. United Kingdom*, *supra* note 7, at para 105-109. In considering whether the “death row phenomenon” constituted “inhuman” treatment, the ECHR considered the likely length of detention prior to execution, the conditions of detention, and the age and mental state of the Soering. Because of the six to eight year period between conviction and execution, the young age of Soering (eighteen at the time of the offense), the production of some evidence of Soering’s diminished capacity, and the possibility that

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Soering could be the victim of violence and sexual abuse due to his color, age, and nationality, the court determined that extradition to the US would expose him to a real risk of inhuman treatment.

¹⁰ *Short v. Kingdom of the Netherlands*, 29 I.L.M. 1375, 22 NETH. Y.B. Int'l L 432 (1991).

¹¹ *Id.* at 1381, 1382.

¹² Agreement between the Parties to the North Atlantic Treaty regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67.

Chapter 2

Is Review Appropriate?

*Aside from its effects on the future ability of the United States (and many other countries) to obtain the extradition from Council of Europe Countries of persons charged with offenses carrying the death penalty, the judgment in Soering has implications of a far wider nature for international criminal law, the law of state responsibility, the jurisprudence of the European Convention and international human rights law in general.*¹

—Richard B. Lillich

Courts of many states refuse to inquire into the standards of criminal justice to which a subject of prosecution is likely to be subjected if extradited.² This rule of law, known as the rule of non-inquiry, has numerous justifications. Perhaps the foremost reason cited for such a rule is that it does not serve the “interest of international comity.”³ Also cited as support for such a rule is the difficulty posed by obtaining knowledge about a foreign legal system and how the foreign system is practically administered.⁴ Similarly, it may be difficult for a judge trained in one legal system to assess the fairness of a trial in another state with a differing system. Thus, a judge in a common law system would have difficulty assessing the fairness of a trial in a state that has a civil law system.⁵ Despite numerous reasons for the rule, national courts in several nations, including the United States,⁶ have indicated that the rule is not absolute and may not be followed if the treatment in the state requesting extradition is such that it appears “manifestly unjust.”⁷

Another somewhat similar approach is for the national court to apply a “rule of anti-inquiry” rather than a rule of non-inquiry.⁸ Under the “rule of anti-inquiry” a national court would refuse to review judicial or penal conditions within the state requesting jurisdiction, if the law in the state requesting jurisdiction clearly contradicts the law within the requested state.⁹ Such a situation is exemplified in the case of *In re Venezia*.¹⁰ Venezia, an Italian national, came to the US and established a profitable restaurant in Florida. After becoming involved in bribery and a tax scandal, he shot and killed a local tax official. He fled to Italy and the US requested his extradition.¹¹ Under Italian law and the US-Italian extradition treaty,¹² the Italian Justice Minister reviewed and approved request for extradition. The Justice Minister approved the extradition request after receiving assurances from the US federal government that the death penalty would not be imposed.¹³ Nonetheless, an Italian Regional Administrative Tribunal blocked the extradition order and the case was forwarded to the Italian Constitutional Court.¹⁴ The Italian Constitutional Court held that the prohibition on the death penalty in the Italian Constitution was absolute and prevented extradition irrespective of determinations by Italian officials and courts that the assurance of the US that the death penalty would not be imposed was sufficient.¹⁵ Yet, because Italy agreed to prosecute Venezia in Italy, the application of the “anti-inquiry” concept could have been viewed by some as facilitating the needs of international cooperation.¹⁶ However, there were nonetheless concerns raised that decisions such as *Venezia* would make nations applying the anti-inquiry concept a refuge for criminals and terrorists.¹⁷

There has also been some debate about whether the ECHR would support application of the rule of non-inquiry by the courts of signatory nations of the ECHR.

In *Soering*, the ECHR stated that the facts did not present a case under Article 6 of the ECPHRFF, however, the ECHR stated that it did not “exclude that an issue might be exceptionally raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of fair trial in the requesting country.”¹⁸ This statement bolsters an argument that the ECHR would not accept a national decision to follow the rule of non-inquiry and would indeed itself conduct a review of the national justice system of a requesting extradition to determine if such would violate the responsibilities of a member state under the ECPHRFF.

However, in *Drozd and Janousek v. France and Spain*¹⁹ the ECHR stated:

the Convention does not required the Contracting Parties to impose its standards on third States or territories, France was not obliged to verify whether the proceedings which resulted in the conviction were compatible with all of the requirements of Article 6 of the Convention. To require such a review of the manner in which a court not bound by the Convention had applied the principles enshrined in Article 6 would thwart the current trend towards strengthening international cooperation in the administration of justice.²⁰

Notwithstanding this language, the Court, citing *Soering*, specifically cautioned that Contracting Parties are “obligated to refuse co-operation if it emerges that the conviction is the result of a flagrant denial of justice.”²¹ Additionally, the facts in *Drozd* may have influenced the ECHR’s reluctance to require review of a national justice system.

Drozd and Janousek were both convicted of armed burglary in Andorra. Because Andorra was not yet a sovereign state, the trial was held before a court composed of judges appointed by a number of different authorities.²² As Andorra had no prison facilities, those sentenced in Andorra served their sentence in either France or Spain. Both Drozd and Janousek choose to serve their sentence in France. Once confined in France, both complained that their sentences could not be enforced because they had not

been pronounced by a proper court of law as required under Article 6 of the ECPHRFF. In denying the claim, the ECHR specifically commented that if it were to rule in favor of the complainants, the result would be somewhat “paradoxical,” as it would require the country with responsibility for breaching the Article 6 requirements to enforce the sentence itself.²³ Additionally, the Court pointed out that the transfer had not been accomplished without some review by the French system and that France had declared it “could and in fact would refuse its customary co-operation if it was a question of enforcing an Andorran judgment which was manifestly contrary to the provisions of Article 6 or the principles embodied therein.”²⁴

The somewhat conflicting nature of these cases has lead one commentator to conclude that the determination may turn on whether extradition is being requested for a person who has already been convicted and sentenced in the state requesting his extradition or extradition is being requested for a person who has not yet been tried.²⁵ If a trial has already occurred and there has been a conviction (as in the *Drozd and Janousek v. France and Spain*), the determination regarding the fairness of the trial is more easily made. Additionally, under these circumstances, the state from which extradition is being requested may more easily place conditions on extradition. For example, it may condition extradition on the granting of a new trial.²⁶

If, however, there has not yet been a trial (as in *Soering*), there is less consensus regarding whether the rule of non-inquiry should be applied. This is, in part, because there is a lack of agreement between nations regarding the “international norms of fairness” required. Thus, some have concluded that when a conviction has not yet been acquired, the ECHR will likely interpret the convention to require denial of extradition

only where is “clear evidence of a flagrant and systematic denial of fair trial rights in the requesting state.”²⁷ A review to determine if there is clear evidence of a systematic denial of the fair trial guarantee is nonetheless a review.

Given the similarities between the US and the British court-martial systems and the ECHR’s *Findlay* opinion, it is likely that the ECHR would inquire into the fairness of the US courts-martial system. This review would be triggered by a claim that allowing the US to exercise jurisdiction over a military member held in a state which is a signatory to the ECPHRFF would result in denial of the fair trial guaranteed by Article 6 of the ECPHRFF.

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¹ Richard B. Lillich, *The Soering Case*, 85 A.J.I.L. 128 (Jan 1991).

² John Dugard and Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 A.J.I.L. 187, 189 (Apr 1998).

³ *Id.*

⁴ *Id.* at 204.

⁵ *Id.* at 203.

⁶ See *Id.* at 190 citing as an example *Ahmad v. Weigen*, 910 F.2d 1063 (2d Cir.1990) and *Jhirad v. Ferrandina*, 536 F.2d 478 (2d Cir. 1976).

⁷ Dugard and Wyngaert, *supra* note 2, at 189, 190.

⁸ Mark E. DeWitt, *Extradition Enigma: Italy and Human Rights vs. America and the Death Penalty*, 47 Cath.U.L. Rev. 535, 585 (1998).

⁹ See *Id.* at n.231.

¹⁰ *Venezia v. Ministero di Grazia e Giustizia*, Corte cost., 27 June 1996, n.223, 79 RIVISTA DI DIRITTO INTERNAZIONALE 815 (1996).

¹¹ DeWitt, *supra* note 8, at 565.

¹² *Id.* at 568

¹³ *Id.*

¹⁴ Andrea Bianchi, *International Decision: Venezia v. Ministero Di Grazia E Giustizia*, 92 A.J.I.L. 727 (1997).

¹⁵ *Id.*

¹⁶ While not discussing the anti-inquiry concept, Andrea Bianchi suggest a similar idea stating that the Italian Constitutional Court’s “refusal to extradite in the name of a constitutional principle that imposes an absolute prohibition on the death penalty, when combined with the subsequent prosecution of the fugitive in Italy, can be seen as a way to reconcile the needs of international judicial cooperation with the constitutional tradition of the forum state.” *Id.* at 732.

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¹⁷ DeWitt, *supra* note 8, at 587. Similar arguments had been raised in *Soering v United Kingdom*, 161 Eur.Ct.H.R. (ser A)(1989) at para 83.

¹⁸ *Soering*, *supra* note 16, at para.110.

¹⁹ *Drozd and Janousek v. France and Spain*, 240 Eur. Ct. H.R. (ser A)(1992), available at <http://www.echr.coe.int/eng>. [hereinafter *Drozd*].

²⁰ *Id.* at para 110.

²¹ *Id.*

²² The Tribunal de Corts was composed of one judge appointed by the French President, one judge appointed by the Episcopal co-prince and one judge appointed by the Bishop of Urgel. *Id.* at para 51, 52 and Dugard and Wyngaert, *supra* note 2, at n. 132.

²³ *Drozd*, *supra* note 19 at para 109.

²⁴ *Id.* at para 110. However, in his partly dissenting opinion Judge Cremona states that France knew that the Amborran sentencing panel could be neither independent nor impartial based on the fact that the joint head of police was entitled to sit as a member of the panel.

²⁵ Dugard and Wyngaert, *supra* note 2, at 203.

²⁶ *Id.*

²⁷ *Id.* at 204.

Chapter 3

What Is A Fair Trial?

Although the International Covenant of Civil and Political Rights, with its list of the rights of the accused, has the potential to lead the development of a global body of constitutional criminal procedure, its promise remains largely unrealized.¹

—Diane Marie Amann

As noted, there remains a great deal of debate concerning what criminal procedural requirements must be met in order to preserve human rights, particularly in the area of fair trial. If the ECHR were to determine that review of the US courts-martial system was appropriate, what standards would it apply? While somewhat speculative, the wording of Article 6 of the ECPHRFF, the *Findlay* case, other decisions of the ECHR provide some guidance the Court would likely follow. Article 6 of the ECPHRFF provides that the right to a fair trial includes the right “to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”² In determining the *Findlay* case, the ECHR further expounded upon the standards required for an “independent and impartial” tribunal.

In *Findlay*, based on his guilty plea, a Scottish Guard was convicted and sentenced for assault, conduct to the prejudice of good order and military discipline, and communicating a threat.³ Factually, this resulted from Findlay’s holding members of his unit at gunpoint and threatening to kill them.⁴ There was some evidence that the behavior

was partially brought about by Findlay's physical problems, his reaction to mental stresses resulting from combat, and his intoxication.⁵ After conviction, Findlay petitioned two levels of reviewing authorities and the Divisional Court for relief.⁶ He then filed an application for review with the European Commission of Human Rights which referred the case to the ECHR.⁷ The ECHR found that the British courts-martial system, as established by law prior to 1996, provided less than an "independent and impartial tribunal" because the military courts were not sufficiently separate from the convening authority.⁸

In so holding, the ECHR set forth the considerations for determining the independence of a tribunal. The ECHR stated, "to establish whether a tribunal can be considered as 'independent' regard must be had inter alia to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence."⁹ Additionally, the ECHR set forth two considerations in determining the impartiality of a tribunal. "First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect."¹⁰ These considerations had been previously espoused by the ECHR in *Pullar v. United Kingdom*.¹¹ In *Pullar*, the Court stated that while personal impartiality is "presumed unless there is some evidence to the contrary," where it would not generally be possible to adduce evidence of personal partiality, the objective requirement provided additional protection.¹²

In a recently decided case, *Morris v. United Kingdom*,¹³ notwithstanding the changes made subsequent to the *Findlay* case, the ECHR again found that the British courts-martial system violated the fair trial guarantee contained in Article 6 of the ECPHRFF. In *Morris*, after pleading guilty a member of British Army was convicted of being absent without leave.¹⁴ He later applied for review of his conviction and sentence by the Court Martial Appeal Court.¹⁵ His petition was denied.¹⁶ He then filed a complaint under the ECPHRFF claiming a number of structural defects in the British courts-martial system. The ECHR espousing the same standards set forth in *Findlay*, concentrated its decision on the fact that although there were some safeguards in place, the safeguards were insufficient to ensure exclusion of “the risk of outside pressure being brought to bear on the two relatively junior serving officers who sat on the applicant’s court-martial.”¹⁷ The ECHR specifically noted that the officers had not been legally trained, were “subject to army discipline and reports,” and that there were “no statutory or other bar to their being made subject to external army influence when sitting on the case.”¹⁸ The ECHR also noted that the possibility of external pressure was of particular concern given the nature of the case, which involved a “breach of military discipline.”¹⁹ Finally, the ECHR stated that the review of the case by a non-judicial reviewing authority with the power to alter the decision of the court-marital, regardless of the government’s arguments that the review served the interest of the convicted individual or was accomplished through a fair procedure, also violated the principle of independence.²⁰

The next chapter will examine the likely outcome of applying the standards discussed in this chapter to the US court-martial system.

Notes

¹ Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 Ind. L.J. 809, 825 (2000).

² European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. TS No.5, 213 UNTS 221 [hereinafter European Convention on Human Rights].

³ *Findlay v. United Kingdom*, 24 Eur. Ct. H.R. 221, at para 19 (1997), available at <http://www.echr.coe.int/eng>.

⁴ *Id.* at para 10.

⁵ *Id.* at para 12.

⁶ *Id.* at para 26-29.

⁷ *Id.* at para 59.

⁸ *Id.* at para 80.

⁹ *Id.* at para 73.

¹⁰ *Id.* However, in his concurring opinion, Judge de Meyer states, “we should never decide anything on the basis of ‘appearances’ and that we should, in particular, not allow ourselves to be impressed by them determining whether or not a court is independent and impartial. We have been wrong to do so in the past, and we should not do so in the future.”

¹¹ *Pullar v. United Kingdom*, (1996) 22 EHRR 391, para 30 (1996), available at <http://www.echr.coe.int/eng>.

¹² *Id.*

¹³ *Morris v. United Kingdom*, available at <http://www.echr.coe.int/eng> (decided on Feb. 26, 2002).

¹⁴ *Id.* at para 9. The applicant had been only sixteen when he joined the British Army. He claimed that he went absent after suffering a medical injury during training and suffering physical abuse from non-commissioned officers.

¹⁵ *Id.* at para 18. There was evidence that the defending officer, who had no legal training, had erroneously advised Morris about his appellant rights. Morris, nonetheless, filed the appeal on the advice of a solicitor later engaged to represent him. *Id.* at para 16.

¹⁶ *Id.* at para 18.

¹⁷ *Id.* at para 72.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at para 73-75.

Chapter 4

Does the US Courts-Martial System Meet European Human Rights Fair Trial Standards?

*As you read this, another U.S. service member is being railroaded ACT
NOW TO REFORM THE MILITARY INJUSTICE SYSTEM¹*

—Citizens Against Military Injustice (CAMI) Website

There are some who believe that the US military justice system does not provide for justice and would not meet international scrutiny. Would the European Court of Human Rights agree? This chapter will attempt to answer that question by applying the standards and rational in *Findlay* and *Morris* to the US courts-martial system.

As enumerated by Judge J.W. Rant, the Judge Advocate General of the Armed Forces of the United Kingdom, the three issues in *Findlay* were:

(1) The convening officer appeared to be at least in part a prosecutor; (2) The post-trial procedure did not cure this difficulty because it was held in private; (3) The requirement that the members took an oath did not guarantee the independence of the members of the court-martial, nor did the presence of a judge advocate because he was not a member of the court.²

In reality, these issues are interrelated. As examination of *Findlay* reveals, the role of the convening authority is the primary issue. The other issues are raised because the procedures in place did not overcome the appearance of impartiality created by the broad roles of the convening authority.

ROLE OF THE CONVENING AUTHORITY

Prior to the revisions brought about as a result of the Armed Forces Act of 1996, the convening authority in the British military justice system was responsible for convening the courts-martial, charging the accused with the appropriate crimes, appointing the prosecutor, appointing the panel members from within the command, confirming the verdict, and reducing the sentence if such action was warranted.³ Similarly, in the US courts-martial system, the convening authority is responsible for convening the courts-martial,⁴ determining the appropriate charges and forum,⁵ appointing the panel members from within the command,⁶ confirming the verdict,⁷ and reducing the sentence if appropriate.⁸ Given the similarity of broad powers previously held by the British convening authority and those currently held by the US convening authorities, it appears likely that the ECHR would determine that the US convening authority holds a prosecutorial role. In fact, should the ECHR desire to accept evidence that such a conclusion has been drawn by “experts” on the US system, such evidence already exists. David Schlueter, a well recognized author on military criminal practice writes, “during the post-trial review of a case, the convening authority must shed his prosecutorial role and take a position similar to an impartial judicial officer.”⁹ If the convening authority is indeed acting in a prosecutorial role, as suggested, it is unlikely that the US courts-martial system would meet the objective test espoused by the ECHR in *Findlay*. Following that line of reasoning, absent significant corrective action, a court-martial convened within the current framework would fail to meet the fair trial guarantee of the ECPHRFF.

LACK OF EFFECTIVE CORRECTIVE ACTION OR PREVENTATIVE MEASURES

In *Findlay*, the ECHR considered whether the taking of oaths by the members of the court-martial or the presence of the law officer would be sufficient to correct any improper appearance. The Court determined that neither was sufficient.¹⁰ Similarly, in *Morris*, the ECHR recognized that while there were safeguards in place, such as the presence of a legally qualified civilian judge advocate, the presence of a “Permanent President” on the courts-martial panel, the existence of rules governing the eligibility for selection for membership to the court-martial, and the taking of an oath by court members, these safeguards were nonetheless insufficient. Given these findings, it is unlikely that taking an oath¹¹ or the presence of a military judge in the US system would overcome the difficulty of perceived partiality.

PRESENCE OF A JUDGE

Like the judge advocate in the UK system, the judge in the US courts-martial system is not a member of the decision-making panel. Thus, while the judge instructs the panel members on the law, the judge is not present during deliberations and voting on either guilt or sentence.¹² One author has suggested that the absence of a legally qualified officer as a member of the decision-making panel may be the primary source of concern for the justices of the ECHR.¹³ She attributes this in part to the fact that justices of the ECHR may be influenced by their “largely civil law background, where the jury system ...does not exist and decisions as to guilt or innocence are not made by laymen.”¹⁴

The fact that judges within the US court-martial system do not have tenure or a term of office might also contribute to a determination that the US military justice system does

not meet fair trial standards.¹⁵ While the US Supreme Court has found that the lack of a term of office for military judges is not violative of the US Constitution, international bodies have continually determined that such is an essential element of an independent tribunal.¹⁶ For instance, Principle 22 (a) of the Johannesburg Principles, drafted by experts on international law, national security, and human rights and endorsed by the UN Commission on Human Rights, provides that trial of persons accused of security-related crimes by judges without tenure constitutes a *prima facie* violation of the right to be tried by an independent tribunal.¹⁷ The ECHR, in *Findlay*, while not speaking of a term of office for the British judge advocate who serves many of the same duties as a military judge in the US military justice system, but for the court-martial panel, stated, “the submission by the Government that the convening of courts-martial on an ad hoc basis enhances their independence is inconsistent with the constant view of the Court that an established term of office is an important guarantee of a tribunal’s independence.”¹⁸

Even granting a short term of office is not sufficient to overcome the appearances of a lack of independence by military judges. In *Incal v. Turkey*,¹⁹ a military judge was appointed to sit with civilian judges on the Turkish National Security Court. This Court was established to assist in dealing with prosecution of terrorist. Noting that military judges are still soldiers under the control of the Executive; that their military superiors assess, discipline, and influence their careers; and that their term of office is only relatively short (four years),²⁰ the courts concluded that there was a “legitimate cause to doubt the independence and impartiality of the ... Court” on which the military judge served.²¹ Generally, security courts involve the trial of civilians rather than military members. The ECHR might nonetheless find similar circumstances involving US military

judges without a term of office in the US military justice system also assists in creating an appearance that the court is incapable of being independent or impartial.

STATUTORY BAR TO INFLUENCE

If the presence of the military judge is not sufficient to prevent undue or unlawful influence, would the ECHR consider a statutory bar to attempts to influence members sufficient to overcome improper appearances? As suggested in the previous chapter, in *Morris*, one of the factors which the ECHR mentioned in finding that there were insufficient safeguards was the lack of “statutory or other bar” to the two junior members of the panel “being made subject to external army influence when sitting on the case.”²² US statutory provisions do provide such a bar. Section 837 of Title 10 of the United States Code (10 U.S.C. § 837), or Article 37 of the Uniform Code of Military Justice (UCMJ), prohibits convening authorities, as well as others subject to the UCMJ, from taking action against members of the court, the military judge or counsel on the basis of their participation in courts-martial.²³

While the ECHR factored the lack of such a prohibition into its decision, it is not apparent that if such a prohibition had been present that this would be determinative of the issue. At least one commentary on the US military justice system has suggested that the prohibition is not functional in the current atmosphere because “commanders can easily harm the careers of court members by taking action against members that stop short of violating Article 37.”²⁴ One example would be to “damn with faint praise” the member in his efficiency report as he competes for promotion.²⁵ Thus, while the statutory bar on actions against court members may provide some protection, several of

the concerns raised in the *Incal* case regarding the military judge would seem to apply to court members in the US military justice system.

REVIEW BY THE CONVENING AUTHORITY OR JUDGE ADVOCATE GENERAL

In accordance with Article 60 of the UCMJ, the convening authority may review the findings and sentence imposed in a court-martial and may dismiss a charge or specification by setting aside the finding of guilt or may “approve, disapprove, commute, or suspend the sentence in whole or in part.”²⁶ In taking such action, the convening authority will consider matters timely submitted by the accused as well as the written recommendations of the staff judge advocate.²⁷

Additional review may be accomplished under Article 69 of the UCMJ. According to UCMJ, Article 69, general courts-martial not reviewed by the Courts of Criminal Appeals are to be reviewed by the office of the Judge Advocate General.²⁸ Additionally, an accused can apply for review by the Judge Advocate General on the grounds of “newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.”²⁹

It is unlikely that review by either the convening authority or the Office of the Judge Advocate General would be deemed by the ECHR to address concerns over the independence and impartiality of the trial court. In *Findlay*, the ECHR observed that reviewing authorities existed within the British military justice system; however, the ECHR’s opinion reflected little confidence in the review system. This may be due, in part, to the fact that the ECHR did not believe that the review would be sufficient to overcome the “defects” of the system, despite how it was procedurally accomplished.

Such a sentiment is clearly stated in the ECHR's opinion that the "defects" could not be "corrected by any subsequent review proceedings."³⁰ Since the applicant's hearing "concerned with serious charges classified as 'criminal' under both domestic and Convention law, he was **entitled to a first instance tribunal which fully met the requirements of Article 6(1).**"(emphasis added)³¹

REVIEW BY A JUDICIAL BODY

In *Incal*, noting the improper appearance created by the involvement of the military judge, the ECHR concluded that review by the Court of Cassation was not sufficient to dispel concerns regarding the independence and impartiality because it "did not have full jurisdiction."³² The ECHR was referring to the fact that on review the Court was limited to reviewing questions of law and procedure.³³ By inference, the ECHR seems to indicate that sufficient judicial review could potentially overcome the appearance that a court was not impartial or independent.

Unlike the Turkish Court of Cassation, appeal through the US military justice system is not limited to issues of law and procedure. Article 66 of the UCMJ provides the each Judge Advocate General shall establish a Court of Criminal Appeals which "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law **and fact** and determines, on the basis of the entire record, should be approved," (emphasis added).³⁴ Because the Court of Criminal Appeals provides an additional review of the facts, the US system is not as limited as the Turkish system and the ECHR might consider review by the service Courts of Criminal Appeals in a more favorable way. However, it should be noted that not all US cases are reviewed under this

authority.³⁵ Additionally, because military judges are conducting the review authorized by Article 66, more favorable consideration is unlikely.

While the *Ismal* opinion indicates the possibility that review by a judicial body may overcome difficulties, in *Findlay*, the ECHR seems to indicate that review may not be sufficient because a subsequent review could not correct the perception that the tribunal of first instance was neither impartial nor independent.

SUMMATION

In summary, it appears that while the US military justice system has a number of safeguards not present in other systems examined by the ECHR, including a prohibition on influencing participants in courts-martial and the additional fact-finding ability of the Service Courts of Appeals, there remains a question regarding whether these additional safeguards would be sufficient. Given the ECHR's finding in *Morris* that the transformed British courts-martial system continues to violate the fair trial guarantee, it seems unlikely that the ECHR would find that the US courts-martial system, which in comparison to the British system has not been significantly modified, provides a fair trial. Additionally, taking into account the ECHR's finding in *Morris* that review by the non-judicial reviewing authority is violative of the principle of independence of the court, the US practice of convening authority review further suggests that the US system would fail scrutiny by the ECHR.

Notes

¹ Citizens Against Military Injustice at <http://www.militaryinjustice.org>.

² James W. Rant, Findlay, The Consequences: Remarks Given at the Judge Advocate General School, November 1997, Reporter Sep 98.

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³ Comment, Reforming Court-martial Panel Selection: Why Change Makes Sense For Military Commanders and Military Justice, 7 Geo. Mason L. Rev. 1013 (1999).

⁴ Manual for Courts-Martial (2000 ed.) [hereinafter MCM], Part II, Ch. V, Rule for Courts-Martial 504.

⁵ MCM, Part II, Ch. VI, Rule for Courts-Martial 601.

⁶ MCM, Part II, Ch. V, Rule for Courts-Martial 503.

⁷ MCM, Part II, Ch. XI, Rule for Courts-Martial 1107(b).

⁸ MCM, Part II, Ch. XI, Rule for Courts-Martial 1107(d).

⁹ David A. Schlueter, *Military Criminal Justice -- Practice and Procedure*, §6.6(A) (5th ed. 1999).

¹⁰ *Findlay v. United Kingdom*, 24 Eur. Ct. H.R. 221, at para 78 (1997), available at <http://www.echr.coe.int/eng>.

¹¹ MCM, Part II, Ch. VIII, Rule for Courts-Martial (RCM) 807b provides that court-martial personnel, including the members of a general or special court-martial “shall take an oath to perform faithfully.” The wording of the oath as provided in the Discussion of RCM 807 is as follows: Do you (swear)(affirm) that you will answer truthfully the questions concerning whether you should serve as a member of this court-martial; that you will faithfully and impartially try, according to the evidence your conscience, and the laws applicable to trial by court-martial, the case of the accused now before this court; and that you will not disclose or discover the vote or opinion of any particular member of the court (upon a challenge or) upon the findings or sentence unless required to do so in due course of law (, so help you God)?

¹² MCM, Part II, Ch. IX, Rules for Courts-Martial 920-921 (on findings) and MCM, Part II, Ch. X, Rule for Courts-Martial 1005 & 1006 (on sentence).

¹³ Ann Lyon, *After Findlay: A Consideration of Some Aspects of the Military Justice System*, (1998) Crim.L.R. 109, 114.

¹⁴ *Id.* at n. 23.

¹⁵ However, the Army has granted a term to Army judges. Eugene R. Fidell, *A World-Wide Perspective On Change In Military Justice*, 48 A.F. L. Rev. 195, 203 and n. 43 citing, Dep't of the Army, *Legal Services: Military Justice*, Army Reg. 27-10, ch. 1.

¹⁶ See *Weiss v. United States*, 114 S.Ct. 752 (1994).

¹⁷ The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39. It should be noted that Principle 22 provides for trial, at the option of the accused, by either jury or judges who are “genuinely independent.” The statement regarding the lack of tenure providing a prima facie case of lack of independence of the tribunal follows this statement. Thus, it could be argued that only if the tribunal were composed of judges rather than a judge presiding over a jury trial would a lack of tenure serve as prima facie evidence of a lack of independence.

¹⁸ *Findlay v. United Kingdom*, *supra* note 10, at para. 105.

¹⁹ *Incal v. Turkey*, 1998-IV Eur Ct. H.R., available at <http://www.echr.coe.int/eng>.

²⁰ *Id.* at para. 68.

²¹ *Id.* at para. 73.

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²² *Morris v. United Kingdom*, available at <http://www.echr.coe.int/eng> (decided on Feb. 26, 2002).

²³ Uniform Code of Military Justice, 10 U.S.C. 837 (2001).

²⁴ Michael I. Spak and Jonathon P. Tomes, *Courts-Martial: Time To Play Taps?* 28 Sw. U. L. Rev. 481, 535 (1999).

²⁵ *Id.*

²⁶ Uniform Code of Military Justice, 10 U.S.C. 860 (2001).

²⁷ MCM, Part II, Ch. XI, Rules for Courts-Martial 1107(b)(3).

²⁸ Uniform Code of Military Justice, 10 U.S.C. 869 (2001).

²⁹ *Id.*

³⁰ *Findlay*, *supra* note 10, at para. 79.

³¹ *Id.*

³² *Id.* at para. 72.

³³ *Id.* at para. 25.

³⁴ Uniform Code of Military Justice, 10 U.S.C. 866 (2001).

³⁵ *Id.* Only those cases in which the sentence includes death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad conduct discharge, or confinement for more than one year will be reviewed by the Courts of Criminal Appeals.

Chapter 5

Which Obligation Takes Priority?

In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms...any interpretation of the rights and freedoms guaranteed has to be consistent with the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of democratic society.¹

—Soering Judgment
European Court of Human Rights

If the ECHR determines the US courts-martial system fails to provide a fair trial, signatories of the ECPHRFF and the North Atlantic Treaty Organization Status of Forces Agreement may find they have competing obligations. In such a case, should obligations under the ECPHRFF always take precedence? The answer to this question may depend upon the court before which the case is being heard. As the quote above indicates, if the case is before the ECHR, the ECHR will likely find that the “special character” of the ECPHRFF will require that its provisions be given precedence over other conflicting treaty obligations. Some explain this observation by saying “[t]he problem of choosing between conflicting treaty obligations is one that does not confront international human rights courts such as the UN Human Rights Committee, as they apply the treaty to which they owe their existence.”²

National courts, however, may treat the issue differently, as is evidenced in the case of *Short v. Kingdom of The Netherlands*.³ Short, an American sergeant stationed in the

Netherlands, was accused of murdering his wife and dismembering her body. Under Article VII of the NATO SOFA⁴, the US requested his surrender from Dutch authorities. Short applied to the District Court at the Hague for an injunction prohibiting the State of the Netherlands from extraditing him to the US. When the US refused to give assurance that the death penalty would not be imposed, the District Court ordered the state to refrain from handing Short over to US authorities. However, on appeal, the District Court's decision was reversed. On further consideration, the High Court (Hoge Raad) ultimately ruled that absent an assurance from the US regarding the death penalty, granting the US request would result in the Netherlands committing a "tort" against Short.⁵

In reaching its decision, the Hoge Raad addressed the issue of incompatible treaty obligations. Citing the Vienna Convention on Treaties,⁶ the opinion, incorporating the opinion of the Dutch Advocaat-General, stated that the rule of *lex posterior derogat legi* did not apply.⁷ Under this rule, a later law supercedes an earlier inconsistent law. However, the rule did not apply in this case because the US and the Netherlands were not both parties to each treaty.⁸ Rather, the Hoge Raad determined that the NATO Status of Forces Treaty was not "directly applicable" because the effect of a violation of that treaty prejudiced the US, not a party to the case, while the ECPHRFF was "directly applicable" because the effect of the violation would be on Short who was a party to the case.⁹ Finally, the Court inquired into whether the state's relinquishment of Short was justified based on its obligation under the NATO SOFA.¹⁰ The Dutch Advocaat-General opined, "[i]t is difficult for the State to justify violation of the European Convention by invoking its internal legislation as to justify such violation by invoking treaties it has concluded with other States."¹¹ Thus, rather than finding that the Sixth Protocol to the ECPHRFF,

which abolishes the death penalty, took precedence over the NATO SOFA, the approach of the Netherlands was to balanced the competing interest of the parties and found that Short's interest should prevail over the Dutch national interest in extraditing him.¹²

Similarly, in the *Venezia* case, previously discussed in Chapter 2, the Italian Constitutional Court did not directly address the issue of conflict between Italy's obligations under the ECPHRFF and the US–Italy Extradition Treaty.¹³ Nor did the Italian Constitutional Court address whether the refusal to extradite Venezia amounted to a breach of the extradition treaty between the US and Italy. This has led to some commentary that “notwithstanding the long-established principle that a state may not invoke its municipal law to justify a violation of international law, ...respect for the fundamental principles of a state's constitution may represent a circumstance precluding wrongfulness of a breach of the extradition treaty under international law.”¹⁴ This argument, although not yet tested in international practice, may be “persuasive when applied to the protection of fundamental human rights enshrined in national constitutions, especially when domestic constitutional values provide a higher standard of protection than the applicable international standard or can be grounded in some established trends of international practice.”¹⁵

Regardless of the reasoning applied by the ECHR or national courts,¹⁶ the conclusions reached were similar; extradition was precluded. Thus, regardless of the approach taken, the US should expect that human rights will be found to take priority over other treaty obligations. Thus, at least one article has concluded that in some cases there may be a preference “to base refusal to grant extradition, where the individual's

human rights are involved, on notions of justice and fairness rather than on human rights conventions ...”¹⁷

Notes

¹ *Soering v. United Kingdom*, 161 Eur.Ct.H.R. (ser A)(1989) at para 87.

² John Dugard and Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 A.J.I.L 187, 195(April 1998)

³ *Short v. Kingdom of the Netherlands*, 29 I.L.M. 1375, 22 NETH. Y.B. Int'l L 432 (1991).

⁴ Agreement between the Parties to the North Atlantic Treaty regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67. [Hereinafter NATO SOFA]. Paragraph 1 of Article VII provides: Subject to the provisions of this Article, (a) the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State; (b) the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offenses committed within the territory of the receiving State and punishable by the law of that State. Paragraph 2 states: (a) The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offenses...punishable by its law but not by the law of the receiving State. (b) The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offenses...punishable by its law but not by the law of the sending State. Paragraph 3 provides for the allocation of the primary right of jurisdiction in concurrent jurisdiction cases as follows:(a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or a civilian component in relation to (i) offenses solely against the property or security of that State, or offenses solely against the person or property of another member of the force or civilian component of that State or of a dependent; (ii) offenses arising out of any act or omission done in the performance of official duty. (b) In the case of any other offense the authorities of the receiving State shall have the primary right to exercise jurisdiction. (c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other state for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

⁵ *Short*, *supra* note 3, at 1387.

⁶ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S 331 (entered into force Jan 27, 1980).

⁷ *Short*, *supra* note 3, at 1385.

⁸ *Id.*

⁹ *Id.* at 1386.

¹⁰ *Id.* at 1387.

Notes

¹¹ *Id.*

¹² Dugard and Wyngaert, *supra* note 2, at 193.

¹³ This was the case even though Venezia had filed an application before the European Commission on Human Rights and the Commission communicated to the Italian Government its desire that the extradition not be approved until the Commission could examine the case. Venezia's case was discontinued after the Italian Constitutional Court's ruling made it evident that he would not be extradited. Andrea Bianchi, *International Decision: Venezia v. Ministero Di Grazia E Giustizia*, 92 A.J.I.L. 727, 730-731 (1997).

¹⁴ *Id.* at 732.

¹⁵ *Id.*

¹⁶ Given that Article 35 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. TS No.5, 213 UNTS 221, provides that the ECHR "may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law," a national court will almost assuredly deal with the issue prior to the ECHR. Additionally like the United Kingdom's Human Rights Act, 1998, c. 42 (Eng.), member states may incorporate the ECPHRFF into their domestic legislation and provide guidance on how to deal with incompatible legislation, acts, or obligations.

¹⁷ Dugard and Wyngaert, *supra* note 2, at 194.

Chapter 6

Adverse Attention on the US Military Justice System and its Potential Effects

The United States the world knew has changes so dramatically since September 11 that many people and nations are wondering what is happening to statesmanship and their core values of defending human rights and freedoms.¹

—Daily Trust
Nigerian Newspaper

There are, of course, potential effects on the NATO alliance of a finding by the ECHR that the US court-martial system does not provide a fair trial. First, there is the potential that the US could reduce or withdraw its troops from signatory nations of the ECPHRFF. While unlikely, there is some precedent for the US disengagement with countries refusing to enter into or abide by status of forces agreements (SOFAs) which allow the US to prosecute service members for alleged misconduct. For example, in January 1997, the Military Departments were advised that the Government of the Philippines had terminated its SOFA. As a result, US operational activities were suspended.² The suspension of activities was consistent with US Government policy as expressed in Secretary of State Correspondence:

It has long been U.S. Government policy to maximize the exercise of criminal jurisdiction by U.S. Forces over its personnel assigned to duty in foreign countries through the negotiation of status of forces agreements ...This policy stems from the concerns of commanders at all levels who are responsible for discipline and the welfare of their troops as well as

from congressional concerns. Disciplinary control over military personnel and morale are fundamental to command effectiveness which can be impaired when personnel are subject to prosecution in foreign courts. This is particularly prevalent when judicial procedures are delayed or unfamiliar, the foreign language is not understood, local judicial process appears to deny equal protection and cultural standards are so different that there is an apparent lack of due process of law.³

However, the denial of jurisdiction by a NATO ally based on the potential that the US service member would not receive a fair trial would not likely entail a situation like that described in the Secretary of State's message. Rather, the NATO ally would likely argue that its court system provides additional rather than less protection to the US military member.

It should also be considered that during the dispute over jurisdiction in the *Short* case,⁴ previously discussed in Chapter 5, there is no evidence that the US threatened or considered withdrawal of its troops from the Netherlands. Yet, the current situation in Europe is obviously different than it was in 1988 when the *Short* case arose. In 1988, while Russian influence had already begun to decline, the Berlin Wall still stood and the world had not yet entered into the Post Cold War period. Additionally, US overseas security concerns were still primarily focused on Europe. Since then, the United States defense concerns have become more concentrated in Asia and the Persian Gulf region. In light of this shift, Europe has engaged in initiatives designed to increase its own self-defense.⁵ While this environment may make US disengagement easier, it remains unlikely that NATO would be dissolved over these issues. As pointed out in a 1999 Institute for Security Studies Paper, NATO has overcome numerous issues that appear more challenging than the tension placed on the alliance by a debate regarding standards

for fair trial.⁶ According to the paper:

The North Atlantic Treaty Organization has a solid basis for a claim to be the most effective and durable military alliance in history. The alliance has overcome deep divisions and crises at several stages over the almost 50 years since the Washington Treaty was signed: the integration of the Federal Republic of Germany in 1954-55; ... the Suez crisis; repeated Berlin crisis...the debate over the deployment of cruise missiles ... the fall of the Berlin Wall and the reunification of Germany together with the collapse of the Warsaw Pact and the Soviet Union, which had compromised what many considered to be NATO's original reason for being; and Bosnia. Indeed; based on that incomplete review, one could argue that NATO's history is one of continuing crisis and division, overcome only by a combination of compelling need on one hand, and constant attention and statesmanship on the other.⁷

Further, as will be discussed in more detail in the next chapter, because calls for US courts-marital reform can also be found within the US, it is unlikely that the US would take drastic measures against its alliance partners simply because they advocate a similar position. This discussion should not be taken to mean that such an issue would not be viewed as important to either side of the debate. In fact, the US would undoubtedly see any attempt by another nation to control jurisdiction over its service members as an attack against US sovereignty. Thus, one commentator writes, "the United States stands as an archetypical example of how, despite many elements of harmony, perceived threats to national sovereignty can strike discord in the trend toward convergence in criminal procedure."⁸

Additionally, the US sensitivity regarding its human rights efforts continues to grow and is a source of stress between alliance members. For example, in May 2001, the US did not receive enough votes to remain on the United Nations Human Rights Committee.⁹ Some claimed that the exclusion of the US resulted in part resulted from a lack of support of its European allies.¹⁰

Finally, one must consider how the events of September 11 have affected the attention that may be paid to this issue. As the quote at the beginning of this chapter indicates, people around the world are wondering if the US will continue to advocate for worldwide human rights. While the military tribunals proposed by President Bush would undoubtedly be conducted under rules different than courts-martial, the procedural rights granted to an accused in a military tribunal will no doubt be looked at by the world.¹¹ In light of the military participation in the upcoming tribunals, it is likely that interest in the US military justice system will also increase. The National Institute of Military Justice's web page inclusion of materials on military tribunals is illustrative of this increasing interest.¹² Additionally, after the DOD issued procedures for the military commissions, a Denver Post editorial stated that it was, "reassuring that the new guidelines for trying accused foreign terrorists before military tribunals closely follow the practice of conventional U.S. courts-martial and will safeguard the rights of the accused."¹³ Also, the Bar Association of the District of Columbia adopted a resolution regarding the military commissions stating, "[o]ur allies who are signatories to the European Convention on Human Rights are only too aware of cases such as *Findlay* and their implications. They look at the order for these military commissions and they do not see a tribunal with adequate independence or structural integrity."¹⁴ Similarly, a resolution approved by the American Bar Association (ABA) called on the President and Congress to ensure that the laws and regulations governing the tribunals ensure compliance with the International Covenant on Civil and Political Rights including the provisions providing for a independent and impartial tribunal.¹⁵ The ABA further urged consideration of the precedent the tribunals might establish regarding "the prosecution of

U.S. citizens in other nations and the use of international legal norms in shaping other nations' responses to future acts of terrorism.”¹⁶

Given that there is already some comparison between the treatment received by US citizens and the treatment of citizens of other countries receive,¹⁷ greater attention is likely to be forthcoming. If the ECHR were to conclude that the US military justice system does not provide basic rights to its own service members, imagine the concern that would be expressed regarding the quality of protection the US would provide for trial of non-US citizens. Thus, adverse attention on the US military justice system could serve as another hindrance to bringing international criminals to justice.¹⁸

Notes

¹ *Human Rights Since September 11*, Daily Trust (Nigeria), Dec. 4, 2001, available at LEXIS, News Library.

² Suspension of Military Activities in the Philippines, USDP letter, 17 Jan 97.

³ Status of Forces Protection for U.S. Forces Personnel Participating in PfP Exercises, SECSTATE message 051527ZJAN96.

⁴ *Short v. Kingdom of the Netherlands*, 29 I.L.M. 1375, 22 NETH. Y.B. Int'l L 432 (1991).

⁵ The European defense force is an example of European initiative in the area of self-defense. See *McCain: U.S. isolationism 'is a concern'*, The Prague Post, Sep 5, 2001, available at LEXIS, News Library, for a discussion of the tensions caused by the European initiative.

⁶ Joseph R. Wood, *NATO: Potential Sources of Tension*, Institute of National Security Studies Paper. Available at <http://www.usafa.af.mil/inss/ocp23.htm>.

⁷ *Id.* at 1. Ironically, however, it is indirectly a human rights issue which some estimate as the most likely to serve as a significant source of tension. This issue is environmental standards. E-mail from Albert Klein, US Representative to the NATO Military Committee to Darla Jackson (Jan 30, 2002, 12:38 CST). (On file with author)

⁸ Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 Ind. L.J. 809, 873 (2000).

⁹ Barbara Crossett, *For First Time, U.S. Is Excluded From U.N. Human Rights Panel*, N.Y. Times, May 4, 2001, at A1.

¹⁰ *Id.*

¹¹ Department of Defense Military Commission Order No. 1, provides that the procedures for the commissions will be “implemented and construed so as to ensure that any such individual receives a full and fair trial” In accordance with the DOD procedures the commissions will be composed of at least 3 but no more than 7 officers of

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the US Armed Forces as appointed by the Secretary of Defense or an Appointing Authority selected by the Secretary of Defense. The Presiding Officer, a member of the commission, will be a judge advocate of the U.S. Armed Forces and is responsible admission and exclusion of evidence. Evidence will be admissible if it judged to “have probative value to a reasonable person.” The accused is permitted discovery; however, disclosure may be limited for enumerated reasons including protection of national security and participants in the proceedings. Review of the commission findings and sentence will be conducted by a three-member panel of Military Officers, which may include civilians commissioned pursuant to national emergency provisions of the U.S. Code. At least one of the members of the Review Panel must have had experience as a judge. The findings and sentence of the commissions do not become final until approved by the President, or if designated, the Secretary of Defense, but an acquittal cannot be changed to a conviction. DoD Military Commission Order No. 1, March 21, 2002, *available at* <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>.

The Military Commission Procedures Act of 2002, S. 1937, 107th Cong. (2002) contained requirements for trials and sentencing by military commissions. The bill provides that a military commission would be composed of not less than five members; however, it does not state if these members would be legally trained or would be civilians or military members. The Bill further provides for discovery by the accused. It does not address whether hearsay evidence will be admissible. It does, nonetheless, require a determination of guilt based on proof beyond a reasonable doubt. It further provides for a right to representation equivalent to that of a person accused in a general court-martial. Finally, it provides for review of convictions by the United States Court of Appeals for Military Commission which is to be established which is to be composed of three judges designated by the Chief Justice of the US from among the US Courts of Appeals. Military Tribunal Authorization Act of 2002, S. 1941, 107th Cong. (2002) contains similar provisions.

¹² National Institute of Military Justice, at <http://www.nimj.org/>

¹³ Editorial, *Tribunals Pass the Test*, Denv. Post, Mar 23, 2002, at B-07, available at LEXIS, News Library. While the editorial takes a positive position regarding the commissions, it notes as a weakness the limited “appeals mechanism” established by the procedures.

¹⁴ Resolution on Military Commissions, Bar Association of the District of Columbia, adopted Dec 10, 2001, *available at* www.nimj.org/documents/ABA-MilCommRec-BADC.htm.

¹⁵ Resolution of the American Bar Association, adopted Feb 4, 2002, *available at* www.nimj.org/documents/ABARESOLUTION.doc.

¹⁶ *Id.*

¹⁷ Article pointing out this view include Andrew West, *Aussies See US Double Standard*, The Christian Science Monitor, Jan 25, 2002, at 6, *available at* LEXIS, News Library and Peter Kononczuk, *Britons Detained in Cuba Should Face Justice at Home*, Agence France Press, Jan 24, 2002, available at LEXIS, News Library.

¹⁸ Regarding the treatment of the suspected terrorist, it has been suggested that the US “would quickly forfeit the support of its closest allies” if it was not seen as

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“respecting international human rights” Trevor Royle, *Why the next big battle for Bush is on the Home Front*, The Sunday Herald, Jan 27, 2002, at 13, *available at* LEXIS, News Library (citing a Washington Post article).

Chapter 7

Proposed Changes to the US System

Speaking of Findlay –The lesson learned is that it is vitally important if there is an outside threat to the system, to carefully assess the threat to see if it is justified. If it appears to be justified, no amount of wriggling will save the situation, and rapid steps should be taken to remedy it. Such steps should be taken by the armed forces themselves. Waiting is fatal, for it means that the solution will be enforced by an outside authority, whose understanding of the needs of the Services may not be sufficient to ensure that the system survives in an acceptable state.¹

—HIS HONOR JUDGE JAMES W. RANT,
JUDGE ADVOCATE GENERAL
OF THE ARMED FORCES OF THE UNITED KINGDOM

As previously discussed, many of the criticisms of the US courts-martial system are based on features of the system which were also present in the British system prior to 1996. On the fiftieth anniversary of the implementation of the US Uniform Code of Military Justice, a commission sponsored by the National Institute of Military Justice reviewed, and attempted to address, many of the criticisms of the UCMJ. They further made recommendations for changes to the US military justice system. The Commission, often referred to as the Cox Commission because Senior Judge Walter T. Cox III, formerly Chief Judge of the US Court of Appeals for the Armed Forces, chaired it, concluded that there were four areas in the US military justice system which required immediate action. Not surprisingly, two of the four recommendations for immediate action were related to two issues raised by the ECHR's review of the British system in

Findlay. The Commission recommended modification of “the pre-trial role of the convening authority in both selecting court-martial members and making other pre-trial legal decisions” and an increase in the “independence, availability, and responsibility of military judges.”²

In addition to the Commission’s, many others involved with the US military justice system, including the Air Force Judge Advocate General (AF TJAG), have identified that changes may need to be made to the US military justice system.³ While changes may need to be made, the AF TJAG has opined that while many of the criticisms are recurring, this does not mean that consideration of recommended changes is unwarranted. Rather, he concludes instead that lack of novel issues reflects positively on the “basic soundness” of the current military justice system.⁴ However, the long-standing nature of many of these issues may prompt questions regarding the absence of change. Perhaps the lack of Congressional interest in some areas of military justice may have contributed to the lack of study and reform.⁵

SELECTION OF MEMBERS

There has, however, not been a lack of Congressional interest in one area, reform of the member selection process. As part of the 1999 Strom Thurmond Defense Authorization Act, Congress directed the Secretary of Defense to submit a report on the method of selection of members to serve on courts-martial.⁶ Congress further specified that any alternative considered by the report be consistent with member selection criteria contained in Article 25 of the UCMJ.⁷ The Joint Service Committee, at the request of the DOD General Counsel, studied the issue and concluded that the current practice best applies the criteria of Article 25.⁸ Such a determination is consistent with other

commentary that the use of Article 25 criteria precludes use of a random selection method for jurors.⁹ However, at least one case counters that conclusion. In *U.S. v. Yeager*,¹⁰ a list of prospective jurors were selected from personnel data files and placed on a Master Juror List. Each individual on the list was required to complete a questionnaire regarding his qualifications to serve as a court-martial member. The list was then screened to eliminate unqualified and exempt individuals. The individuals not eliminated by the screening process were considered qualified and were eligible for selection, at random, for court-martial duty. The court upheld Yeager's conviction but noted, "[t]he program in question was not completely 'random' as the selection of court-martial members was subject to the approval of the convening authority. This exception was necessary to ensure compliance with Article 25(d)(2)"¹¹

TERM OF OFFICE

With the exception of the Army's granting a three-year term of office for its judges, initiatives addressing judicial independence are lacking. This may be explained, in part, by the *Weiss v. U.S.*¹² and *U.S. v. Graf*¹³ decisions finding that the military judicial structure, including a lack of tenure for military judges, does not violate the US Constitution. However, as Eugene Fidell, a well-recognized expert on military justice expressed, "a judicial finding of constitutionality should not deter Congress, the President and the Judge Advocate General from doing more than the Constitution requires to foster greater public confidence in the system."¹⁴ Given the ECHR's emphasis on the objective portion of the test regarding the appearance created by the operation of the military justice system in *Findlay* and the potential for review of the US system, this aspect of public confidence takes on additional importance.

Fidel notes that the “pervasiveness of deference” which military judges are given by the appellate courts also contributes to the need to exceed what may be constitutionally required.¹⁵ Thus, simply providing a fixed term of office has been judged by some as an “inadequate guarantee of independence in this system where the judges are military officers, subject to performance evaluations, to further assignment (both as judges and otherwise), and in many cases are hopeful of receiving further promotion as well.”¹⁶

Whatever the reasons for inaction, as James Rant, the British Judge Advocate, points out, a continued failure to make some changes may result in change being imposed from the outside.¹⁷ For example, due to the perceived unfairness of the system, two former Army Judge Advocates have advocated that during peacetime, Congress should abolish courts-martial in the United States.¹⁸ Nonetheless, they do not advocate abolishing courts-martial overseas because “the court-martial system, even at its worst, provides service members a fairer trial than the legal systems would in many of the countries in which they serve.”¹⁹ Another alternative to courts-martial might be amending the 2001 Military Extraterritorial Jurisdiction Act,²⁰ to allow US servicemen to be tried by US civilian courts for crimes committed overseas.²¹

As discussed, ECHR decisions may also serve as a challenge to the US military justice system. Yet, because the question of the fairness of the US courts-martial system has not yet been tested before the ECHR, now is the best time to take action to improve the system. As one author points out, change is best when there is not a crisis; this is because during crisis “reasoned and balanced change” is more difficult to achieve.²²

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¹ James W. Rant, Findlay, *The Consequences: Remarks Given at the Judge Advocate General School*, November 1997, Reporter Sep 98.

² Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice, May 2001, available at <http://www.badc.org/index.htm>.

³ William A. Mormon, *Fifty Years of Military Justice: Does the Uniform Code of Military Justice Need To Be Changed?* 48 A.F.L. Rev 185, 192 (2000).

⁴ *Id.* at 193.

⁵ Court of Appeals for the Armed Forces Senior Judge Cox has commented on the general lack of lack interest in military justice displayed by academics and most Congressmen. Walter M. Hudson (interviewer), *Two Senior Judges Look Back and Look Ahead: An Interview with Senior Judge Robinson O. Everett and Senior Judge Walter T. Cox, III.*, 165 Mil L. Rev 42, 64 (2000).

⁶ The Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, 112 Stat.2023 (1998).

⁷ *Id.*

⁸ John P. Saunders, *The Emperor's New Clothes: Developments in Court-Martial Personnel, Pleas and Pretrial Agreements, and Pretrial Procedures*, 2000 Army Law. 14, 15 (2000) and Captain Gregory E. Maggs, *Cautious Skepticism About the Benefit of Adding More Formalities to the Manual For Courts-Martial Rule-Making Process: A Response to Captain Kevin J. Barry*, 166 Mil. L. Rev 1 (2000) at fn. 61.

⁹ James A. Young III, *Revising the Court Member Selection Process*, 163 Mil L. Rev 91, 92 (2000).

¹⁰ *United States v. Yager*, 7 MJ 171 (C.M.A.1979).

¹¹ *Id.* at fn. 1

¹² *Weiss v. United States*, 114 S.Ct. 752 (1994). However, Justice Scalia's concurring opinion in *Weiss* states that "The present judgment makes no sense except as a consequence of historical practice...No one can suppose that similar protections against improper influence would suffice to validate a state criminal law system." *Id.* at 198. Kevin Barry has also commented on Scalia's opinion. Kevin J. Barry, *A Reply to Captain Gregory E. Maggs's "Cautious Skepticism" Regarding Recommendations to Modernize the Manual for Courts-Martial Rule-Making Process*, 166 Mil. L. Rev. 37, 46 (2000).

¹³ *United States v. Graf*, 35 MJ 450 (1992).

¹⁴ Eugene R. Fidell, *Going on Fifty: Evolution and Devolution in Military Justice*, 32 Wake Forest L. Rev. 1213, 1227 (1997)

¹⁵ *Id.* See also Saunders, *supra* note 8, at 14 asserting that CAAF has become more deferential to military judges and convening authorities.

¹⁶ Kevin J. Barry, *supra* note 12, at 46, 47.

¹⁷ Rant, *supra* note 1.

¹⁸ Michael I. Spak and Jonathon P. Tomes, *Courts-Martial: Time To Play Taps?* 28 Sw. U. L. Rev. 481, 536 (1999).

¹⁹ *Id.*

²⁰ Military Extraterritorial Jurisdiction Act, Pub. L. No 106-523, 114 Stat. 2488 (2000).

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²¹ Currently the act provides jurisdiction to prosecute members of the armed forces only when they are no longer subject to the Uniform Code of Military Justice but were on active duty (and subject to the code) at the time the alleged acts were committed or when they are being tried with a co-defendant not subject to the UCMJ. Mark J. Yost and Douglas S. Anderson, *The Military Extraterritorial Jurisdiction Act of 2000: Closing the Gap* 95 A.J.I.L. 446, 450 (2001).

²² Barry, *supra* note 12, at 65.

Chapter 8

Conclusion

The right to be tried by a proper court of law and the right to a fair trial are among the most important civil and political rights. On several occasions the European Court of Human Rights has held that these rights hold such a prominent place in democratic society that they cannot be sacrificed to expedience, not even in the case of very serious crimes, such as terrorism.¹

— John Dugard and Christine Van den Wyngaert

While the US is not a signatory to the European Convention for the Protection of Human Rights and Fundamental Freedoms,² this paper has attempted to assess the possibility of the European Court of Human Rights examining the US courts-martial system to ensure that the protections guaranteed by the ECPHRFF are provided. This is likely to occur prior to allowing the US to exercise jurisdiction over an individual accused of committing an offense in a signatory nation to the ECPHRFF. Additionally, this paper examines the potential effects on US-European security relations resulting from an ECHR review. In doing so, I have attempted to answer the five questions set out in the introduction. This chapter tries to succinctly review the conclusions reached regarding each question.

WOULD THE EUROPEAN COURT OF HUMAN RIGHTS UNDERTAKE AN EXAMINATION OF THE US COURTS- MARTIAL SYSTEM?

It appears that the ECHR would undertake an examination of the US courts-martial system. While there continues to be some debate about whether the rule of non-inquiry would be applied, at a minimum, the ECHR would likely inquire into whether there is “clear evidence of a flagrant and systematic denial of fair trial rights...”³ To determine if there is such evidence, a review is necessitated.

WHAT CONCLUSION WOULD THE ECHR REACH IF IT UNDERTOOK AN EXAMINATION OF THE US COURTS- MARTIAL SYSTEM?

Examination of *Findlay*,⁴ *Morris*,⁵ and other ECHR cases illustrates that the ECHR would likely conclude that the US courts-martial system violates the fair trial guarantee contained in Article 6 of the ECPHRFF. While the US system has a number of safeguards in place to help ensure that courts-martial are and appear fair, the appearance created by features such as the broad role of the convening authority and the lack of a term of office for military judges would not likely be viewed favorably by the ECHR.

HOW MIGHT THE ISSUE OF CONFLICTING TREATY OBLIGATION BE RESOLVED?

While national courts may consider the issue of which treaty obligation takes priority, it is unlikely that the ECHR will engage in a lengthy debate on this issue. Rather, it is most likely that the “special character” of the ECPHRFF will require that it take precedence over conflicting treaty obligations. The predominance of the ECPHRFF is supported by the fact that the purpose of the ECHR is to enforce the ECPHRFF.

WHAT POTENTIAL EFFECTS ON THE US SECURITY ALLIANCES WOULD AN ADVERSE ECHR FINDING HAVE?

Given the reduction in emphasis the US has placed on security in Europe, the effect of an adverse ECHR finding on the North Atlantic Treaty Organization (NATO) is potentially significant. Such a ruling by the ECHR could prevent not only the return of US servicemen to the US for trial, but could prevent future cooperation in the effort against terrorism. However, given the nature of other issues which NATO has overcome and the continuing need for cooperation, it is highly unlikely that such a ruling would result in the termination of NATO or a major change in US-European security relations.

WOULD RECOMMENDED REFORM ACTIONS IN THE US PREVENT A CONTRARY RULING BY THE ECHR?

The two most recommended reforms of the US military justice system are the institution of a random selection of court-members and the establishment of a term of office for military judges. Yet, in light of the *Morris* case,⁶ it appears unlikely that these actions alone would be deemed sufficient to overcome the improper appearance created by other features of the system. This may, in part, be due to the fact that the European justices are influenced by their civil law backgrounds and as a result are unable to appreciate the US system. However, despite a judge's background, as long as it appears that the convening authority or other officials in the military chain of command may improperly influence court members, it remains unlikely that the US system will gain the respect it desires.

FINAL OBSERVATION

In conclusion, an examination of ECHR recent case history evidences the truth of the quote beginning this chapter. If the ECHR is willing, even in the case of terrorist activities, to strictly enforce the right to a fair trial, it seems likely that it would similarly work to ensure such rights should a US service member challenge the fairness of the US court-martial system. Further, given the *Findlay*⁷ case and the similarities between the US system and the pre-1996 British system, it is likely that the protections provided by the US system would be found by the ECHR to be insufficient to guarantee a fair trial. Such an outcome seems increasingly likely given that the ECHR's findings in *Morris*⁸ that even the measures taken to reform the British system were insufficient to guarantee a fair trial.

Notes

¹ John Dugard and Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AJIL 187, 202 (1998).

² European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. TS No.5, 213 UNTS 221.

³ Dugard and Wyngaert, *supra* note 1, at 204.

⁴ *Findlay v United Kingdom*, 24 Eur. Ct. H.R. 221 (1997), available at <http://www.echr.coe.int/eng>.

⁵ *Morris v. United Kingdom*, available at <http://www.echr.coe.int/eng> (decided on Feb. 26, 2002).

⁶ *Id.*

⁷ *Findlay v. United Kingdom*, *supra* note 4.

⁸ *Morris v. United Kingdom*, *supra* note 5.

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