



International Tribunal for the Prosecution of
Persons Responsible for Serious Violations of
International Humanitarian Law Committed in
the Territory of Former Yugoslavia since 1991

Case No. IT-04-83-T

Date: 20 March 2008

Original: English

IN TRIAL CHAMBER I

Before: Judge Bakone Justice Moloto, Presiding
Judge Frederik Harhoff
Judge Flavia Lattanzi

Registrar: Mr. Hans Holthuis

Decision of: 20 March 2008

PROSECUTOR

v.

RASIM DELIĆ

PUBLIC

**DECISION ON PAUL CORNISH'S STATUS AS AN
EXPERT**

The Office of the Prosecutor

Mr. Daryl A. Mundis
Ms. Laurie Sartorio
Mr. Matthias Neuner
Mr. Kyle Wood
Mr. Aditya Menon

Counsel for the Accused

Ms. Vasvija Vidović
Mr. Nicholas David Robson

1. Trial Chamber I (“Trial Chamber”) of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seized of the “Defence Submission of Expert Report of Mr Paul Cornish Pursuant to Rule 94 *bis*”, filed publicly on 14 February 2008 (“Submission”) with two public annexes (“Report” and “Curriculum Vitae”) and hereby renders its Decision.

I. SUBMISSIONS OF THE PARTIES

2. The Report submitted by the Defence states that it “proposes a framework with which to understand and analyse the functions and limitations of the higher levels of military command in modern armed conflict”.¹ Moreover, the Report claims that it “is intended to serve as an objective description of aspects of the organised use of armed force” and as such “does not address in any comprehensive way the facts of specific incidents or legal cases, whether historical or contemporary, nor does [it] enter any particular debate regarding the use of armed force in specific circumstances”.²

3. On 11 March 2008, the Prosecution publicly filed the “Prosecution Response to Defence Submission of Expert Report of Mr Paul Cornish Pursuant to Rule 94 *bis*” (“Response”), indicating that it does not accept the Report and challenging the qualifications of Dr. Cornish as an expert in the areas of “leadership, command and control in contemporary warfare and military discipline”.³ The Prosecution also challenges the relevance and probative value of the Report in its entirety.⁴

4. In the event that the Trial Chamber allows this Report to be admitted into evidence the Prosecution requests the opportunity to cross-examine Dr. Cornish. Additionally, should the Defence lead evidence not contained in the report during its examination-in-chief, the Prosecution also requests 30 days from the conclusion of examination-in-chief to prepare for cross-examination.⁵

5. The Prosecution submits the following arguments in support of its submissions:

- a) The Defence has failed to show that Dr. Cornish has specialised knowledge, skills or training in the area of military command and control. The Prosecution submits that “[c]ommand and control” or “military discipline” neither appear on the list of research

¹ Report, para. 3.

² Report, para. 5.

³ Response, para. 1.

⁴ *Ibid.*

⁵ *Ibid.*

interests in his Curriculum Vitae nor as a topic of his publications. Moreover, Dr. Cornish never served operationally during his tenure in the British Army and therefore never commanded or controlled any men in battle.⁶

- b) The Report is so vague that it lacks any relevance or probative value to any controversial issues. The Prosecution submits that the Report does not contain reference to any doctrine or practice of the ABiH or the former Yugoslav People's Army, nor does it establish any link with the incidents in the Indictment. Moreover, the Prosecution claims that any attempt to have Dr. Cornish apply his theory to the situation in Bosnia during examination-in-chief would be the equivalent of submitting a second expert report under Rule 94 *bis* of the Rules of Procedure and Evidence ("Rules"), to which the Prosecution must be afforded 30 days to prepare and respond.⁷
- c) Dr. Cornish's conclusions in the Report are so insufficiently supported by sources that they can only be considered the personal opinions of the author himself.⁸

6. On 17 March 2008, the Defence publicly filed its "Defence Reply to Prosecution Response to Submission of Expert Report of Paul Cornish" with Annex "Response", whereby it requests leave to file the Reply and opposes the Prosecution's request to exclude the Report.⁹ The Defence seeks permission for Dr. Cornish "to attend to testify on the issues outlines in the Rule 65 *ter* Witness Summary, and to require the Prosecution to cross-examine the expert witness immediately after direct examination".¹⁰

7. The Defence submits the following arguments in support of its submissions:

- a) Dr. Cornish's expert knowledge and experience is based on over twenty years' work and he is in the rare position of having both served as an officer in an army and having worked on defence policy and strategy issues at the highest level.¹¹ The Defence points out particularly Dr. Cornish's positions as the Carrington Chair in International Security and Head of the International Security Programme at Chatham House as well as his chairing a NATO panel since 2004.¹² Furthermore, the Policy Research Interests section of Dr. Cornish's Curriculum Vitae shows that his specialist areas include US-European security and defence

⁶ Response, para. 15.

⁷ Response, paras 11, 13.

⁸ The Prosecution especially moves the Trial Chamber's attention to paras 17, 23 and 31 of the Report, Response, para. 14.

⁹ Reply, para. 21.

¹⁰ *Ibid.*

¹¹ Reply, para. 7.

¹² Reply, paras 6-7.

relations, the role and future of NATO, political-military relations and security sector governance as well as strategy, military doctrine and the future of armed conflict.¹³ Finally, as an indicia of Dr. Cornish's expertise, the Defence refers to some of his relevant publications.¹⁴

- b) The Report is relevant and has probative value. The Report explains the concepts of leadership, command and control and how they apply as universal concepts in all armies not only in the ABiH.¹⁵ The Report is also clearly linked to the key allegation in the case that Rasim Delić exercised command and control over the ABiH forces that perpetrated the crimes alleged in the Indictment.¹⁶ Finally the Defence submits that the Report is properly referenced as “[t]he concepts and principles applicable to armies have developed over more than 2,500 years” and some “concepts of ‘unity of command’, ‘chain of command’ and ‘levels of war’ are so fundamental and basic to the idea of the army” that they need not be specifically referenced.¹⁷
- c) The Prosecution has received adequate notice of what the issues are that Dr. Cornish will discuss during his testimony.¹⁸ The Defence submits that the 30 day period contained in Rule 94 *bis* applies only following the disclosure of the expert report and it does not give the Prosecution the right to have 30 days to respond to live testimony given by the expert.¹⁹

II. APPLICABLE LAW

8. Rule 94 *bis* of the Rules reads as follows:

Rule 94 *bis*
Testimony of Expert Witnesses

- (A) The full statement and/or report of any expert witness to be called by a party shall be disclosed within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge.
- (B) Within thirty days of disclosure of the statement and/or report of the expert witness, or such other time prescribed by the Trial Chamber or pre-trial Judge, the opposing party shall file a notice indicating whether:
- (i) it accepts the expert witness statement and/or report; or
 - (ii) it wishes to cross-examine the expert witness; and

¹³ Reply, para. 7.

¹⁴ Reply, para. 9.

¹⁵ Reply, para. 14.

¹⁶ Reply, paras 15-16.

¹⁷ Reply, paras 10-12.

¹⁸ Reply, para. 19.

¹⁹ *Ibid.*

(iii) it challenges the qualifications of the witness as an expert or the relevance of all or parts of the statement and/or report and, if so, which parts.

(C) If the opposing party accepts the statement and/or report of the expert witness, the statement and/or report may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.

9. The term “expert” has been defined by the jurisprudence of the Tribunal as “a person whom by virtue of some specialised knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute”.²⁰ In determining whether a particular witness meets these criteria, the Trial Chamber should take into account the witness’ former and present positions and professional experience through the reference to the witness’ curriculum vitae as well as the witness’ scholarly articles, other publications or any other pertinent information about the witness.²¹

III. DISCUSSION

10. The analysis of Dr. Cornish’s Curriculum Vitae establishes that he possesses scholarly experience in the following fields: defence and conflict studies, policy research in strategy, military doctrine and the future of armed conflict. In addition, Dr. Cornish has gained military experience in the ranks of the British Army. Against this backdrop, it seems that Dr. Cornish would be able to further the Trial Chamber’s understanding of the general principles of command and control, as well as military discipline. His experience might also be of assistance in comprehending how these principles relate to the organised use of an armed force.

11. At the same time, the Trial Chamber notes that the scope of the witness’ proposed testimony, as set out in the Defence Rule 65*ter* submissions, goes beyond such general principles and that Dr. Cornish is called to apply his expertise to the facts of the present case, such as “unity of command in the ABiH” and “General Delić’s steps to bring the EMD within the system of command and control”.²²

12. The Trial Chamber is of the view that for an expert witness to apply his expertise to the situation in Bosnia and Herzegovina, that person must have specialised knowledge of the military aspects of the conflict in Bosnia and Herzegovina in general, and of the situation in Central Bosnia in particular. Based on the material presented by the Defence, the Trial Chamber is not persuaded that Dr. Cornish possesses a level of expertise that would allow him to apply his theory to the

²⁰ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps, 3 July 2002, p. 2.

²¹ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Expert Status of Reynaud Theunens, 12 February 2008, para. 28, with further references; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Defence Expert Witnesses, 21 August 2007 (“*Milošević Decision*”), para. 6, with further references.

²² Defence Submission Pursuant to Rule 65 *ter*, 19 February 2008, Confidential Annex B, pp 5-6.

situation in Bosnia and Herzegovina. As a result, the examination of Dr. Cornish by the Defence shall be strictly limited to the issues raised in the Report.

13. The Trial Chamber notes that the Defence has not sought the admission of the Report into evidence at this stage. In view of a future request to this effect, the Trial Chamber would already now make the following remarks.

14. First, the content of the report must fall within the expertise of the expert witness.²³ Second, the jurisprudence of the Tribunal requires that sources used to support the statements made in a report must be clearly indicated and accessible in order to allow the other party and/or the Trial Chamber to test or challenge the basis on which the expert witness reached his conclusions.²⁴ Absence of such clear references or accessible sources might have its impact on the weight given to the report.²⁵ The Trial Chamber, however, finds that this failure can be remedied when the witness appears to testify before the Tribunal.²⁶

²³ *Milošević* Decision, para. 12.

²⁴ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision on the Prosecution Motion for Reconsideration of the Admission of the Expert Report of Prof. Radinović, 21 February 2003, para. 9. *See also Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Defence's Submission of the Expert Report of Professor Smilja Avramov Pursuant to Rule 94bis, 9 November 2006 ("*Martić* Decision"), para. 9; *Milošević* Decision, para. 7.

²⁵ *See Milošević* Decision, para. 7, with further references.

²⁶ *See Martić* Decision, para. 19.

IV. DISPOSITION

15. **FOR THE FOREGOING REASONS** and **PURSUANT TO** Rules 54, 94 *bis* and 126 *bis* of the Rules, **THE TRIAL CHAMBER**

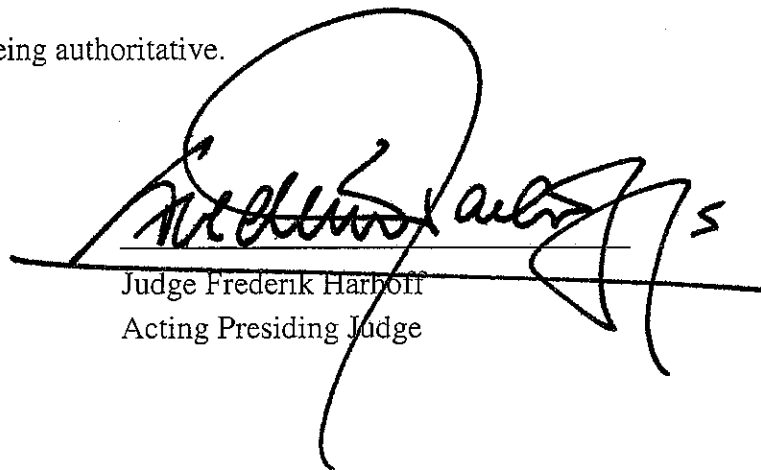
GRANTS leave to the Defence to file the Reply;

DECLARES that the expertise of Dr. Paul Cornish is restricted to the areas at large of leadership and command and control in contemporary warfare;

ORDERS that the examination of Dr. Paul Cornish by the Defence shall be limited to the issues raised in the Report and shall not exceed 3 hours;

ORDERS the Prosecution, should it wish to cross-examine Dr. Paul Cornish, to do so immediately after the examination-in-chief.

Done in English and French, the English version being authoritative.



Judge Frederik Harhoff
Acting Presiding Judge

Dated this twentieth day of March 2008

At The Hague

The Netherlands

[Seal of the Tribunal]