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16-05-2007  
(64252-64249)

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Mwamba



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

UNITED NATIONS  
NATIONS UNIES

OR: ENG

**TRIAL CHAMBER II**

**Before:** Judge Asoka de Silva, Presiding  
Judge Taghrid Hikmet  
Judge Seon Ki Park

**Registrar:** Mr Adama Dieng

**Date:** 16 May 2007

**The PROSECUTOR**  
v.  
**Augustin NDINDILYIMANA**  
**Augustin BIZIMUNGU**  
**François-Xavier NZUWONEMEYE**  
**Innocent SAGAHUTU**  
*Case No. ICTR-00-56-T*

JUDICIAL DEPARTMENT  
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**DECISION ON THE PROSECUTOR'S MOTION OPPOSING THE TESTIMONY  
OF WITNESS DE4-30 AS A FACTUAL WITNESS**

**Office of the Prosecutor:**  
Mr Ciré Aly Bâ  
Mr Moussa Sefou  
Mr Segun Jegede  
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**Counsel for the Defence:**  
Mr Gilles St-Laurent and Mr Ronnie MacDonald for **Augustin Bizimungu**  
Mr Christopher Black and Mr Patrick De Wolf for **Augustin Ndindiliyimana**  
Mr Charles Taku and Beth Lyons for **François-Xavier Nzuwonemeye**  
Mr Fabien Segatwa and Mr Seydou Doumbia for **Innocent Sagahutu**

## INTRODUCTION

1. The Defence for Bizimungu opened its case on 16 April 2007. On 3 May 2007, the Prosecution filed the current Motion opposing the testimony of Witness DE4-30 as a factual witness for the Bizimungu defence.<sup>1</sup> On 7 May 2007, the Defence for Bizimungu, Ndindiliyimana and Nzuwonemeye each filed a response opposing the Motion.<sup>2</sup> The Prosecutor filed a Reply on 9 May 2007<sup>3</sup> to which the Defence filed a Rejoinder on 14 May 2007.<sup>4</sup>

## SUBMISSIONS

2. The Prosecutor submits that the Bizimungu Defence intends to call Witness DE4-30 to testify on various issues including the history of Rwanda, the origins of the 1994 armed conflict in that country, and will touch upon other subjects such as linguistics, law, geopolitics, international relations and various other questions of a technical nature. He suggests that these issues require some expertise, and that a witness called to testify about them must express certain views and opinions. For these reasons, the Prosecutor submits that Witness DE4-30 should be required to produce his publications and academic references and to prepare an expert report in conformity with the provisions of Rule 94 *bis* of the Rules.

3. The Defence teams for Bizimungu, Ndindiliyimana and Nzuwonemeye submit that Witness DE4-30 has testified before the Tribunal as a factual witness on several occasions, and that in at least two cases, the Prosecutor had in fact opposed his testimony as an expert witness.

4. Bizimungu's Defence further argues that the summary of facts upon which Witness DE4-30 is expected to testify is based on his past experience and the privileged position he enjoyed with respect to authorities of the Tutsi monarchy. It is evident, argues the Defence, that Witness DE4-30 has personal knowledge of a large number of facts that occurred in Rwanda before and during the 1994 events, and that he will testify both to facts he knew personally and facts that were brought to his attention by those who possessed personal knowledge.

5. Finally, the Defence submits that the summary of facts contained in the pre-Defence brief refer to themes to which Witness DE4-30 will testify, rather than the precise facts that will form the subject-matter of his testimony.

<sup>1</sup> *The Prosecutor v. Ndindiliyimana et al*, Case No. ICTR -00-56-T, « *Requête du Procureur en vue de s'opposer à la déposition du témoin DE4-30 comme témoin des faits* », 3 May 2007.

<sup>2</sup> Augustin's Ndindiliyimana's Reply to the Prosecutor's Motion to Oppose the Testimony of Witness DE4-30(sic); Nzuwonemeye Defence Reply to « *Requête du Procureur en vue de s'opposer à la déposition du témoin DE4-30 comme témoin des faits* » ; « *Réponse de la Défense d'Augustin Bizimungu à la Requête du Procureur en vue de s'opposer à la déposition du témoin DE4-30 comme témoin des faits* ».

<sup>3</sup> « *Réplique du procureur à la réponse fournie par la défense d'Augustin Bizimungu au sujet du témoignage de DE4-30* ».

<sup>4</sup> *Duplique de la Défense d'Augustin Bizimungu à la « Réplique du procureur à la réponse fournie par la défense d'Augustin Bizimungu au sujet du témoignage de DE4-30 »*.

## DELIBERATIONS

6. The Chamber notes that Witness DE4-30 testified as a witness of fact in several cases before the Tribunal.<sup>5</sup> In particular, in the *Semanza* case, the Prosecutor interposed a specific objection to the proposed expert testimony of Witness DE4-30. In its Oral Ruling, Trial Chamber III stated that “on the basis of the witness’s curriculum vitae, the Chamber does not find that [Witness DE4-30] could be considered as an expert witness on any issues relevant to this case. He does not have the educational training or experience in any field of expertise relevant to the determination of the case at bar.”<sup>6</sup>

7. From the pre-Defence brief, it is clear that Witness DE4-30 is being called to testify to paragraphs 22-25, 59, 61, 68-70, 78, 110, and 119 of the Amended Indictment of 24 August 2004. Except for paragraphs 61, 78, 110, and 119 which relate respectively to the specific counts of genocide, murder as a crime against humanity, rape as a crime against humanity, and rape as a violation of common Article III of the Geneva Conventions, all the other paragraphs relate to specific factual allegations made by the Prosecution against Bizimungu and other accused persons. Ordinarily, all these paragraphs could constitute appropriate subject-matter for testimony by a factual witness.

8. On the other hand, the summary of Witness DE4-30’s expected testimony contained in the pre-Defence brief suggests a wide range of subjects including the following: “the origins of the Rwandan conflict”, “the lack of foundation for the concept of Hutu power”, “the alleged North-South regionalism in Rwanda”, “Uganda’s role in launching the war in October 1990”, “the impact of the RPF attack on Rwandan society”, “the intention of the RPF to forcibly take power while pretending to negotiate peace”, and “the role of the international community in the 1994 events.”<sup>7</sup> Some of these issues may not be within the personal knowledge of the witness, and may require expressions of opinion gathered from secondary sources or research. As a witness of fact, DE4-30 will be circumscribed in the extent to which he can express personal opinions or views during his testimony. As stated by the Chamber when discussing the scope of Witness DE4-30’s testimony in the *Zigiranyirazo* case, a factual witness should testify only to “things he knows by reason of use of his five senses”,<sup>8</sup> rather than what he thinks or what his opinions are.

9. The Chamber notes that there is nothing in the Rules of Procedure and Evidence preventing a highly qualified or otherwise skilled individual from giving testimony as a witness of fact. Where a Party chooses to call such an individual as a factual, rather than an expert, witness it implicitly makes a choice to limit the witness’ testimony to matters which he personally saw, heard, or experienced. In such circumstances, the Trial Chamber is duty bound to exercise control over the proceedings so as to prevent the witness from straying into irrelevant detail, matters of personal opinion or expertise falling beyond the remit of a factual witness.

10. The Chamber further reminds the Defence that it is the duty of the Prosecution to prove the guilt of the accused person beyond all reasonable doubt. In this context, the Defence must be mindful of the Appeal Chamber’s various holdings which, taken together,

<sup>5</sup> See *The Prosecutor v. P. Zigiranyirazo*, Case No. ICTR-2001-73-T, T. 12 March 2007; *The Prosecutor v. C. Bizimungu et al*, Case. No. ICTR- 99-50-T, T. 27 & 28 September 2006; *The Prosecutor v. L. Semanza*, Case No. ICTR-97-20, T. 7 February 2002.

<sup>6</sup> *The Prosecutor v. Semanza*, Oral Ruling, T. 7 February 2002, p58.

<sup>7</sup> *The Prosecutor v. Ndindiliyimana et al*, *supra*, Pre-Defence Brief filed by the Defence for Augustin Bizimungu, 16 April 2007, Annex 1.

<sup>8</sup> *The Prosecutor v. P. Zigiranyirazo*, *supra*, T. 12 March 2007, p5, per Judge Muthoga.

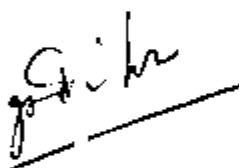





render it unnecessary to lead evidence on certain matters of common knowledge.<sup>9</sup> Consequently, in presenting the evidence of Witness DE4-30, the Defence must limit itself to the specific allegations made against Bizimungu.

**FOR THE ABOVE REASONS, THE CHAMBER**

**DENIES** the Prosecution Motion;

**HOLDS** that Witness DE4-30 can testify as a factual witness subject to the usual limitations for such witnesses including the prohibition on opinion evidence, personal views, matters requiring specialized knowledge and skill, and issues not relevant to the guilt or innocence of the Accused.

Arusha, 16 May 2007, done in English.		
		
Aso ca de Silva	Read and Approved by Taghrīd Hikmet	Seon Ki Park
Presiding Judge	(Absent Signature of [Signature])	Judge
		
	[Seal of the Tribunal]	

<sup>9</sup> *Laurent Senariza v. The Prosecutor*, Case No. ICTR-97-20-A, Judgement, 20 May 2005, paras. 192, 194; *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73(C), "Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice", 16 June 2006, paras. 22-37.