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UNITED NATIONS  
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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER II**

**Before:** Judge William H. Sekule, Presiding  
Judge Arlette Ramaroson  
Judge Solomy Balungi Bossa

**Registrar:** Mr Adama Dieng

**Date:** 15 September 2006

**The PROSECUTOR v. Sylvain NSABIMANA et. al.**  
*Case No. ICTR-97-29-T*  
*Joint Case No. ICTR-98-42-T*

JUDICIAL ARCHIVES  
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**DECISION ON NSABIMANA'S MOTION TO ADMIT THE WRITTEN  
STATEMENT OF WITNESS JAMI IN LIEU OF ORAL TESTIMONY PURSUANT  
TO RULE 92bis**

**Office of the Prosecutor**

Ms Silvana Arbia, Senior Trial Attorney  
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Mr. Arsin Raoul Djamfa, Legal Assistant  
Mr. Jean Michel Youmbi, Legal Assistant

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (the “Tribunal”),

**SITTING** as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the “Chamber”);

**SEISED** of the Strictly Confidential “*Requête en extrême urgence de Sylvain Nsabimana en admission de la déclaration écrite du témoin JAMI en application de l’Article 92bis du Règlement de Preuve et de Procédure,*” attached to which is Witness JAMI’s statement of 13 July 2006, an Attestation of 28 July 2006 delivered by Mr. Dunia, an advocate in Goma (DRC) and an identification sheet for Witness JAMI, filed on 31 July 2006 (the “Motion”);

**CONSIDERING** the

- i) “Prosecutor’s Response to the “*Requête en extrême urgence de Sylvain Nsabimana en admission de la déclaration écrite du témoin JAMI en application de l’Article 92bis du Règlement de Preuve et de Procédure,*” of 2 August 2006 (the “Prosecutor’s Response”)
- ii) «*Duplique de Sylvain Nsabimana au Prosecutor’s Response to the ‘Requête en extrême urgence de Sylvain Nsabimana en admission de la déclaration écrite du témoin JAMI en application de l’Article 92bis du Règlement de Preuve et de Procédure,’*» filed on 7 August 2006 («Nsabimana’s Reply to the Prosecution Response»); and
- iii) «*Corrigendum à la Duplique de Sylvain Nsabimana au Prosecutor’s Response to the ‘Requête en extrême urgence de Sylvain Nsabimana en admission de la déclaration écrite du témoin JAMI en application de l’Article 92bis du Règlement de Preuve et de Procédure’*», filed on 7 August 2006 (the «Corrigendum»);
- iv) «*Réponse de Arsène Shalom Ntahobali à la requête de Sylvain Nsabimana afin de déposer la déclaration du témoin JAMI en vertu de l’Article 92bis,*» filed on 2 August 2006 («Ntahobali’s Response»);
- v) «*Duplique de Sylvain Nsabimana à la ‘Réponse de Arsène Shalom Ntahobali à la requête de Sylvain Nsabimana afin de déposer la déclaration du témoin JAMI en vertu de l’Article 92bis’*» filed on 14 August 2006 (Nsabimana’s Reply to Ntahobali.»)

**CONSIDERING** the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”), specifically Rule 89 (C) and 92bis of the Rules;

**NOW DECIDES** the Motion on the basis of the written submissions of the Parties pursuant to Rule 73 (A).

**SUBMISSIONS OF THE PARTIES***Defence for Nsabimana*

1. The Defence recalls that it started presenting its evidence on 27 June 2006.<sup>1</sup> On the eve of calling Witness JAMI, the said witness, a member of a religious order, indicated his

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<sup>1</sup> Para. 4 of the Motion

unwillingness to give testimony because his hierarchy refuses that he testifies on the events of 1994.<sup>2</sup> Nonetheless, the Witness has accepted to give his testimony in writing.

2. On the basis of Rules 89 (C) and 92 bis(i)(a) and the jurisprudence of the Tribunal and the ICTY in the *Bagosora*,<sup>3</sup> *Muhimana*<sup>4</sup> and *Blagojevic and Jokic*<sup>5</sup> cases, the Defence requests the admission of Witness JAMI's written statement in lieu of his oral evidence.<sup>6</sup> The Defence argues that Witness JAMI's statement has probative value because it relates the Accused's humanitarian efforts.<sup>7</sup> The Defence argues that Witness JAMI's statement does not talk of any of the acts for which the Accused or any one of his co-Accused in the Butare trial is charged with.<sup>8</sup>

3. The Defence points out that some of the evidence found in Witness JAMI's statement are cumulative to the testimony of its forthcoming Witness UMA<sup>9</sup>

4. The Defence submits that the statement may be admitted because it is attested.<sup>10</sup>

5. The Defence recalls the jurisprudence of the ICTY in the *Blagojevic and Jokic* Decision and submits that Witness JAMI's statement is sufficiently detailed not to require any cross-examination. In any case, admitting the statement without cross-examination will be in the interests of judicial time because of the absence of excessively long examinations of the witness.<sup>11</sup>

**Prosecutor's Response**

6. In objection to the Motion, the Prosecution mainly relies on the *Bagosora* Decision of 9 March 2004<sup>12</sup> and argues that the Defence has not satisfied the requirements of Rule 92bis (A).

7. The Prosecution submits that contrary to the provisions of Rule 92bis<sup>13</sup>, Witness JAMI's statement will essentially refute the allegation of Prosecution Witness TQ and also

<sup>2</sup> Para. 6 of the Motion

<sup>3</sup> *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, (TC) Decision on Prosecutor's Motion for the Admission of Written Statements under Rule 92bis of 9 March 2004

<sup>4</sup> *Prosecutor v. Muhimana*, ICTR-95-1B-T, (TC), Decision on the Prosecution Motion for Admission of Witness Statements (Rule 89(C) and 92bis), of 20 May 2004, at para. 23, (the "*Muhimana* Decision of 20 May 2003")

<sup>5</sup> *Prosecutor v. Blagojevic and Jokic*, IT-02-60-PT, (TC), First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony pursuant to Rule 92bis of 12 June 2003, (the "*Blagojevic and Jokic* Decision")

<sup>6</sup> Paras. 9 – 11 of the Motion

<sup>7</sup> Para. 16 – 18, 24 of the Motion

<sup>8</sup> Para. 19 of the Motion

<sup>9</sup> Witness UMA is scheduled to testify for the Accused during the forthcoming session; Paras. 21 and 22 of the Motion

<sup>10</sup> Para. 23 of the Motion

<sup>11</sup> Paras. 29 – 32 of the Motion

<sup>12</sup> *Prosecutor v. Bagosora et al.*, ICTR-97-28-T, (TC) Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92bis, of 9 March 2004 (the "*Bagosora* Decision of 9 March 2004") at para. 16.

<sup>13</sup> *Prosecutor v. Galic*, (AC) Decision on Interlocutory Appeal Concerning Rule 92bis (C), of 7 June 2002 (the "*Galic* Appeals Chamber Decision") at para. 31, which was referred to in the *Prosecutor v. Nyiramasuhuko et al.* ICTR-98-42-T, (TC), Decision on the Prosecutor's Motion to Remove from her Witness List Five Deceased Witnesses and to Admit into Evidence the Witness Statements of four of said Witnesses, of 22 January 2003, (the "*Nyiramasuhuko* Decision of 22 January 2003") at para. 20.

goes to contradict paragraph 6.60 of the Indictment which alleges that the Accused knew of the massacres and yet took no steps to assist the refugees.

8. Referring to the *Blagojevic* and *Jokic* Decision, the Prosecution submits that the admission of Witness JAMI's statement would amount to admitting the repetitive evidence of Defence witnesses UMA and OYO.

9. Recalling Witness JAMI's statement that civil leaders lacked authority when faced with the atrocities committed by the *Interahamwe*,<sup>14</sup> the Prosecution refers to the *Bagosora* Decision of 9 March 2004 on the meaning of "conduct" under Rule 92bis and argues that such a statement is reminiscent of the whole defence case and thus contrary to its provisions.

10. The Prosecution alternatively argues that, if the Chamber decides to admit the statement, then the reason given for the witness's refusal to testify – because of his religious community – should not be accepted since other means for procuring the witness' testimony can be had.

11. In any event, the Prosecution submits that Witness JAMI should be cross-examined because the Witness speaks to the pivotal issue of what forms of authority could and were exercised by the Accused.

12. Citing the *Serugendo* Decision of 1 June 2006,<sup>15</sup> the Prosecution submits that even if a statement is admissible under Rule 92bis, a consideration should still be made whether it should be admitted or otherwise. Here, the content of the witness testimony is contested and in the interests of justice, at the very least, Witness JAMI should be cross-examined by the other Parties.

13. The Prosecution disagrees with the Defence interpretation of the *Blagojevic* and *Jokic* Decision, and submits that there is no general rule that in any case where the statement is detailed, there would be no need for cross-examination. It argues that cross-examination is the only avenue to challenge the credibility of a witness.

14. The issues to which Witness JAMI speaks, such as the location of roadblocks, the presence of Robert Kajuga, and the presence of *Interhamwe* in Butare, are important to this case and therefore, such pivotal matters require that Witness JAMI be present in person to give evidence before the Trial Chamber.

### ***Ntahobali Response***

15. The Defence of Ntahobali objects to the Defence of Nsabimana's request arguing that parts of Witness JAMI's statement contain facts concerning the co-Accused.<sup>16</sup> The Defence argues that although the statement does not make direct allegations against the Accused Ntahobali, it effectively affects his defence.<sup>17</sup>

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<sup>14</sup> See para. 12 of the Prosecution Response

<sup>15</sup> *Prosecutor v. Serugendo*, ICTR-05-84-I, (TC) Decision on Defence Motion for the Admissibility of Written Statements Under Rule 92bis, of 1 June 2006 (the "*Serugendo* Decision of 1 June 2006") at para. 5.

<sup>16</sup> Para. 3 of Ntahobali's Response

<sup>17</sup> Para 13 of Ntahobali's Response



16. The Defence submits that, since the Prosecution alleges that the Accused had an association with Robert Kajuga and the *Interahamwe*,<sup>18</sup> it should be given an opportunity to cross-examine Witness JAMI.<sup>19</sup>

17. In the Defence's opinion, Witness JAMI's statement, contrary to the provisions of Rule 92bis, goes to prove the positive acts of the Accused Nsabimana during the events of 1994 contrary to his Indictment.<sup>20</sup> This situation goes to establish the negative acts of the co-Accused.<sup>21</sup> It recalls the *Bagosora* Decision of 9 March 2004, and submits that it respects Nsabimana's rights to bring evidence which exculpates him but it argues that this does not authorise Nsabimana to bring evidence which affects the defence strategy of the Accused Ntahobali particularly when they are prejudicial to him.<sup>22</sup> The Defence argues that the general interests demand that the Witness gives testimony orally before the court.<sup>23</sup>

18. Regarding the reasons why Witness JAMI cannot testify,<sup>24</sup> the Defence argues that the Witness' religious order must adhere to the Rule of Law and the fundamental obligations found within the society that surround it.<sup>25</sup> Furthermore, Rule 54 gives the Trial Chamber the power to issue orders or summonses that may be necessary for the preparation or conduct of the trial.<sup>26</sup> Consequently, if the testimony of the Witness is essential, the Chamber should issue the appropriate orders to ensure his oral testimony.<sup>27</sup>

19. The Defence questions the authority of the person who attested the statement of Witness JAMI.<sup>28</sup>

20. The Defence thus prays that the Chamber reject the Motion, or alternatively that the Chamber assure the Defence an opportunity to cross-examine Witness JAMI.

### *Nsabimana's Replies to the Prosecution and Ntahobali's Responses*

21. Recalling the Prosecution argument that Witness' JAMI's statement goes to prove or refute certain facts for which the Accused is charged within the Indictment, the Defence counters the argument submitting that whereas the Prosecution mission's is to prove the charges against the Accused, the Defence has the mission of proving his innocence.<sup>29</sup> The

<sup>18</sup> Para. 8 of Ntahobali's Response

<sup>19</sup> Paras. 4, 5, 7, 11 and 12 of Ntahobali's Response; The Defence submits that Witness JAMI should be cross-examined on: the suggested statement that Robert Kajuga and the *Interahamwe* were staying at the Hotel Faucon from the beginning of the events in April 1994, contrary to the Defence case that Kajuga arrived in Butare towards May 1994; and the advice of Father Gahamanyi to Witness JAMI that he stay close to the priests to avoid attacks from the *Interahamwe*. This is particularly as nowhere in the statement is it stated what type of people these *Interahamwe* referred to in Witness JAMI's statement were; The Defence should also be given an opportunity to cross-examine Witness JAMI on: the new allegation that there were 1600 orphan children at the *Groupe Scolaire* in Butare and the allegations that the massacres were committed by 'a group of people' or 'an angry group'

<sup>20</sup> Para. 16 of Ntahobali's Response

<sup>21</sup> Para. 18 of Ntahobali's Response

<sup>22</sup> Paras. 19, 20 and 21 of Ntahobali's Response

<sup>23</sup> Para. 22 of Ntahobali's Response

<sup>24</sup> Para. 24 of Ntahobali's Response

<sup>25</sup> Para. 25 and 26 of Ntahobali's Response

<sup>26</sup> Para. 27 of Ntahobali's Response

<sup>27</sup> Para. 28 of Ntahobali's Response

<sup>28</sup> Para. 29 of Ntahobali's Response

<sup>29</sup> Paras. 4 - 7 of the Reply to the Prosecution

Defence thus submits that Rule 92*bis* has been enacted to protect the interests of the Accused and not those of the Prosecution.<sup>30</sup> For this reason, the Defence requests the admission into evidence of witness statements which talk to the Accused's conduct during the Rwandan events of April to July 1994.<sup>31</sup>

22. In the Defence's opinion, the *Bagosora* Decision of 9 March 2004, which is erroneous, is the only one in which it was opined that Rule 92*bis* excludes all evidence which tends to prove or refute the acts and conduct of the accused.<sup>32</sup> The Defence underscores that it will be bringing evidence of events of April to July 1994 which will always have an impact on the allegations found within the Indictment.<sup>33</sup>

23. The Defence disagrees with the Prosecution submission that Witness JAMI will essentially refute the allegation of Prosecution Witness TQ,<sup>34</sup> and it argues that Witness JAMI's statement goes to prove mitigating circumstances.<sup>35</sup>

24. Regarding paragraph 6.60 of the Indictment, the Defence submits that this paragraph does not support any of the charges in the Indictment.<sup>36</sup>

25. Regarding the Prosecution argument that Witness JAMI's statement essentially encapsulates the whole Defence case, the Defence argues that the Chamber is free to decide to admit in whole or in part the said witness' statement.<sup>37</sup> Accordingly, the Defence requests the Chamber to admit Witness JAMI's statement save for the part objected to by the Prosecution in paragraph 12 of its Response.<sup>38</sup>

26. Regarding the allegations that Witness JAMI's statement is repetitive of the testimony of other witnesses, the Defence argues that the said statement contains supplementary information to that which Witnesses OYO and UMA.<sup>39</sup>

27. Regarding the Prosecution objection to the Defence request that Witness JAMI's statement be admitted without him being cross-examined, the Defence essentially submits that had it been its wish, it would have wanted Witness JAMI to testify orally in Arusha or even by video-conference.<sup>40</sup>

<sup>30</sup> Para. 8 of the Reply to the Prosecution

<sup>31</sup> Paras. 9 and 10 of the Reply to the Prosecution; The Defence notes that in the *Serugendo* Decision cited, the situation is different from the instant case because therein was a request to admit statements which went to the acts and conduct of the Accused which occurred prior to the events of 1994.

<sup>32</sup> Para. 12 of the Reply to the Prosecution

<sup>33</sup> Para. 15 of the Reply to the Prosecution

<sup>34</sup> Para. 17 – 21 of the Reply to the Prosecution ; Para. 1- 5 of the Corrigendum of the Reply to the Prosecution;

<sup>35</sup> Para. 26 of the Reply to the Prosecution

<sup>36</sup> Para. 27 – 29 of the Reply to the Prosecution

<sup>37</sup> Para. 30 – 32 of the Reply to the Prosecution

<sup>38</sup> Para. 12 of the Prosecution Response states: The Prosecution notes that the witness makes statement about the supposed lack of authority of the civil authorities when faced with the atrocities of the *Interahamwe*. Thus it is stated: "Personnellement, j'ai eu l'impression que les autorités civiles n'ont eu rien à dire face à toute puissance des *Interahamwe*."

<sup>39</sup> Paras. 33 – 36 of the Reply to the Prosecution Response; Witness JAMI's statement has the supplementary information regarding his proposal to the Accused and Bourgmestre Kanyabashi to move the refugees to the Brothers of *St. Croix* in Rango

Paras. 41, 42 and 45 of the Reply to the Prosecution Response

28. Regarding the Defence of Ntahobali's objection to the mention of the leadership of the *Interahamwe* during the events of April 1994, the Defence points out that nowhere in the statement of Witness JAMI is there mention of the Accused Ntahobali.<sup>41</sup> In any case, the Defence recalls its request at para. 25 above.<sup>42</sup>

29. Regarding the Defence of Ntahobali's submissions on Mr. Dunia's authority, the Defence recalls Rule 92 *bis* and argues that this Rule is very straightforward.<sup>43</sup>

30. Regarding Witness JAMI's reasons hindering him from giving testimony on the events of 1994, the Defence submits that it is the Chamber's discretion to decide whether the reasons provided for the inability of giving oral testimony are sufficient for it to decide to admit a statement under Rule 92 *bis*.<sup>44</sup>

### HAVING DELIBERATED

31. The Chamber notes that the Motion is premised under Rules 89(C) and 92 *bis* whose relevant provisions state:

- Rule 89: General Provisions**
- [...]  
(C) A Chamber may admit any relevant evidence which it deems to have probative value.  
[...]
- Rule 92 *bis*: Proof of Facts Other Than by Oral Evidence**
- (A) A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.  
[...]  
(ii) Factors against admitting evidence in the form of a written statement include whether:  
[...]  
(c) there are any other factors which make it appropriate for the witness to attend for cross-examination.  
[...]
- (E) [...]The Trial Chamber shall decide, after hearing the parties, whether to admit the statement or transcript in whole or in part and whether to require the witness to appear for cross-examination.

Recalling the *Galic*<sup>45</sup> Decision, the Chamber finds that statements sought to be admitted under Rule 92 *bis* must also comply with the requirements of relevance and probative value required by Rule 89 (C).

<sup>41</sup> Paras. 19 and 20 of the Reply of Ntahobali

<sup>42</sup> Para. 21 of the Reply of Ntahobali

<sup>43</sup> Paras. 31 - 35 of the Reply of Ntahobali; Rule 92*bis* imposes no other requirements other than that a certifying officer needs to certify the written statement sought to be admitted.

<sup>44</sup> Paras. 36 and 37 of the Reply to Ntahobali

<sup>45</sup> *Galic*, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C) (AC). 7 June 2002, para. 31; See also *Segugendo*, Decision on Defense Motion for the Admission of Written Witness Statements Under Rule 92 *bis*, 1 June 2006, para. 3.

32. The Chamber notes, that the Defence requests it to admit only parts of the written statement of Witness JAMI: the Defence seeks to exclude those parts where the Witness mentions the lack of authority of the civil leaders when they were faced with the atrocities committed by the *Interahamwe*. Accordingly, the Chamber shall consider only those portions of the statement sought to be admitted.<sup>46</sup>

33. The Chamber recalls that the threshold requirement for evidence to be admitted under Rule 92 *bis* are those found in sub-Rule (A) - whether that evidence goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.<sup>47</sup>

34. After a careful perusal of the statement sought to be admitted, the Chamber notes that, not only does it concern the conduct of the Accused Nsabimana when he allegedly assisted in the evacuation of children during the events of 1994 it also includes conduct of other co-Accused persons and specifically mentions the conduct of the Accused Kanyabashi during the same event. This statement also concerns the aid the Accused Nsabimana allegedly gave to the witness and other refugees while they were at the *prefectural* office. In the Chamber's opinion, the statement goes to prove the acts and conduct of the Accused and thereby to refute allegations laid against him particularly those found at Paragraph 6.60 of the Indictment, which essentially alleges that the Accused knew of the massacres and yet took no steps to assist the refugees.<sup>48</sup> The Chamber thus finds that the portions sought to be admitted fail to meet the threshold requirement of Rule 92*bis* (A).

35. Pursuant to Rules 92 *bis* (A)(ii)(c) and (E), outlined above, the Chamber is of the view that the party seeking to produce a witness' statement in lieu of his oral testimony must satisfy it that there is no other way of admitting the witness' evidence, which is relevant and has probative value, except by way of Rule 92 *bis*. In the Chamber's opinion, the said party must provide the Chamber with compelling reasons why said witness should not be cross-examined, if that is its request.

36. The Chamber notes that the Defence not only requests that the statement be admitted under Rule 92 *bis*, it also requests that Witness JAMI not be cross-examined because; (1) his hierarchy does not allow him to give testimony on the events of 1994; and (2) the statement is so complete that it does not require cross-examination.

37. On the basis of the provisions of Rule 90(A), which provides that witnesses should be heard directly by the Chamber, the Chamber finds that the Defence has not demonstrated the reasons why Witness JAMI's hierarchy, would prevent him from testifying. Furthermore, the Chamber is not convinced that the Defence has considered all the available avenues provided under the Rules and in particular those under Rule 75 which would enable further protection of a witness and thus facilitate the oral testimony of a protected witness, such as Witness JAMI.

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<sup>46</sup> See also para. 25 of the *Nyiramasuhuko* Decision of 22 January 2002

<sup>47</sup> See para. 21 of the *Nyiramasuhuko* Decision of 22 January 2003 ; See also para. 24 of the *Galic* Decision.

<sup>48</sup> Para. 6.60 of the Indictment states: Knowing that massacres of the civilian population were being committed, political and military authorities, including Sylvain Nsabimana and Alphonse Nteziryayo took no measures to stop them. On the contrary, they refused to intervene to control and appeal to the population as long as a cease-fire had not been declared. This categorical refusal was communicated to the Special Rapporteur via the Chief of Staff of Rwandan Army, Major-General Augustin Bizimungu.

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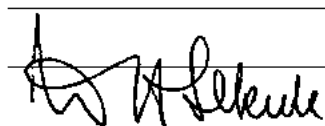
38. The Chamber underscores that cross-examination is a fundamental right enshrined under Article 20(4)(e) of the Statute, whose purpose is to *inter alia* test the credibility of the witness. On this basis, the Defence's submission that Witness JAMI's statement is complete in and of itself such that it does not require cross-examination would infringe upon the other Parties' fundamental rights to confront the witness in a bid to challenge his credibility or to present their cases, pursuant to Rule 90(G).

39. Accordingly, the Chamber denies the Defence request to admit any portion of the statement of Witness JAMI and therefore dismisses the Motion in its entirety.

**FOR THE ABOVE REASONS, THE TRIBUNAL**

**DISMISSES** the Motion in its entirety.

Arusha, 15 September 2006

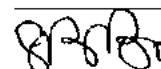


William H. Sekule  
Presiding Judge





Arlette Ramaroson  
Judge



Solomy Balungi Bossa  
Judge

[Seal of the Tribunal]