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ICTR-98-44D-T
25-11-2011
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER III

Before Judges: Solomy Balungi Bossa, Presiding
Bakhtiyar Tuzmukhamedov
Mparany Rajohnson

Registrar: Adama Dieng

Date: 25 November 2011

THE PROSECUTOR
v.
Callixte NZABONIMANA
Case No. ICTR-98-44D-T

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**DECISION ON DEFENCE MOTION
FOR PROCEEDINGS AGAINST OTP INVESTIGATORS**
(Rules 77 and 91 of the Rules of Procedure and Evidence)

Office of the Prosecutor
Paul Ng'arua
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INTRODUCTION

1. On 19 May 2010, the Defence filed a motion requesting the appointment of an *amicus curiae* to investigate allegations of contempt against Prosecution Witness CNAI in relation to alleged intimidation and violation of protective measurements of Defence Witness T36.¹ Although this motion was denied by the Trial Chamber,² a renewed motion providing further particulars was granted by the Chamber on 8 December 2010,³ and the *amicus curiae* subsequently appointed by the Registry filed his final report on 1 April 2011,⁴ which was released to the parties on 13 May 2011 (“CNAI Amicus Report”).
2. On 24 May 2011, the Defence filed a motion seeking to institute contempt proceedings against Office of the Prosecutor (“OTP”) Investigator Djibo Moumouni, based on certain contents in the CNAI Amicus Report (“Moumouni Motion”).⁵
3. Defence Witness Jean Marie Vianney Mporanzi testified before the Trial Chamber in the instant proceedings on 25, 26, 27 and 31 May 2010. During his testimony he alleged that when he was interviewed by investigators from the OTP of the Tribunal in 1998 in Gitarama *préfecture*, certain monies were disbursed to him through the intermediary of the local government by a *sous-préfet* named “Marguerite”.⁶
4. On 10 August 2010, the Prosecution filed a motion seeking to admit, *inter alia*, an “affidavit” by OTP Chief of Investigations Alfred Kwende,⁷ denying the allegations

¹ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana’s Urgent Motion for Appointment of An *Amicus Curiae* to Investigate Contempt by Witness CNAI and for Supplementary Protective Measures for Witness T36, 19 May 2010.

² *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Nzabonimana’s Urgent Motion for Appointment of Amicus Curiae to Investigate Contempt by Witness CNAI and for Supplementary Protective Measures for Witness T36, 9 July 2010.

³ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Nzabonimana’s Renewed and Confidential Motion for Appointment of Amicus Curiae to Investigate Allegations of Contempt of the Tribunal Against Prosecution Witness CNAI, 8 December 2010.

⁴ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Report of the Amicus Curiae on Allegations of Contempt of the Tribunal by Witness CNAI and/or a Member of the Prosecution Office pertaining to Defence Witness T36, 1 April 2011.

⁵ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Motion for Contempt Proceedings, 24 May 2011.

⁶ See generally, Transcript of Trial Proceedings (English), 25-27 and 31 May 2010 (“Transcript”).

⁷ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor’s Motion for admission of Marguerite Mukansanga and Alfred Kwende’s affidavits pertaining to the testimony of Jean-Marie Mporanzi, 10 August 2010.

raised by Mr. Mporanzi during his testimony. However, the Trial Chamber denied the motion in a decision issued on 16 September 2010.⁸

5. On 21 January 2011, the Prosecution filed a motion seeking to recall Mr. Mporanzi for further cross-examination regarding the alleged disbursements.⁹ In support of its motion, the Prosecution attached “affidavits” from OTP Investigators Adamou Allagouma and Almahamoud Sidibe, each denying that any disbursements were made to witnesses via Rwandan officials. On 14 February 2011, the Trial Chamber granted the motion.¹⁰
6. On 2 March 2011, the Defence filed a motion seeking disclosure of records pertaining to disbursements paid to Mr. Mporanzi when he was interviewed by OTP Investigators in 1998.¹¹ On 28 March 2011, the Prosecution disclosed to the Defence several documents outlining, *inter alia*, the transfer of 245,000 Rwandese Francs between Prosecution Investigator Adamou Allagouma; a *sous-préfet* of Gitarama *préfecture*; and the Finance Section of the Tribunal on 25 August 1998 (“Mporanzi Receipts”).
7. On 1 April 2011, the Defence filed a motion in which it sought to summon OTP Investigators Adamou Allagouma and Almahamoud Sibide to testify before the Trial Chamber, for the purpose of providing further particulars of the financial arrangements exposed by the Mporanzi Receipts.¹² On 7 April 2011, the Trial Chamber issued a decision denying the motion, reasoning in part that the issue of any potential malfeasance by the named investigators was ancillary to the determination of the guilt or innocence of the Accused and thus would more appropriately be addressed via Rules 77 or 91 of the Rules of Procedure and Evidence (“Rules”).¹³

⁸ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Prosecutor’s Motion for the Admission of Marguerite Mukansanga and Alfred Kwende’s Affidavits Pertaining to the Testimony of Jean Vianney Mporanzi, 16 September 2010.

⁹ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor’s Motion for the Recall of Defence Witness Jean-Marie Vianney Mporanzi, 21 January 2011.

¹⁰ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Prosecutor’s Motion for the Recall of Defence Witness Jean-Marie Vianney Mporanzi, 14 February 2011.

¹¹ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana’s Urgent Motion for Inspection and Disclosure of Evidence Pertaining to Mr. Mporanzi’s Recall, 2 March 2011.

¹² *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Callixte Nzabonimana’s Motion for summon of OTP Investigators Adamou Allagouma and Almahamoud Sidibe, *sous-préfet* Ms. Immaculée Mukamasabo, 1 April 2011.

¹³ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on “Callixte Nzabonimana’s Motion for summon of OTP Investigators Adamou Allagouma and Almahamoud Sidibe, *sous-préfet* Ms. Immaculée Mukamasabo”, 7 April 2011, para. 25.

8. On 12 October 2011, the Defence filed a motion seeking the institution of proceedings against Messrs. Allagouma, Sidibe and Kwende for providing false testimony before this Chamber pursuant to Rule 91, as well as a renewal of its prior request of 24 May 2011 that Mr. Moumouni be subject to proceedings under Rule 77 for contempt of the Tribunal (“Instant Motion”).¹⁴
9. On 18 October 2011 the Prosecution filed a response to the Instant Motion (“Response”).¹⁵
10. On 21 October 2011, based upon the recommendation of the CNAI Amicus Report, the Trial Chamber issued a decision in which it accepted that there existed no *prima facie* case against CNAI or any Prosecution official for the instigation of contempt proceedings (“Amicus Report Decision”).¹⁶
11. On 18 November 2011, the Trial Chamber issued a decision on the Moumouni Motion, concluding that Mr. Moumouni had been absolved of contempt against this Tribunal in the Amicus Report Decision, and deeming the Defence’s attempt to initiate contempt proceedings against Mr. Moumouni moot (“Moumouni Decision”).¹⁷

SUBMISSIONS OF THE PARTIES

Instant Motion

12. The Defence moves the Trial Chamber under Rule 91 (C) (ii) to issue an order against Messrs. Allagouma and Sidibe for false testimony; or to appoint an *amicus curiae* under Rule 92 (B) (ii) to investigate these two individuals as well as Mr. Kwende.¹⁸
13. Regarding OTP Investigators Allagouma and Sibide, the Defence argues that the Mporanzi Receipts demonstrate conclusively that they lied when they denied having ever disbursed funds to potential Prosecution witnesses via the intermediary of the Rwandan

¹⁴ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana’s Motion against OTP Investigators Alfred Kwende, Adamou Allagouma, Almahamoud Sidibe and Djibo Moumouni, 12 October 2011.

¹⁵ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor’s Response to Nzabonimana’s Motion Against OTP Investigators Alfred Kwende, Adamou Allagouma, Almahamoud Sidibe and Djibo Moumouni, 18 October 2011.

¹⁶ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision Following *Amicus Curiae* Report Pertaining to Allegations of Contempt of the Tribunal by Prosecution Witness CNAI and/or a Member of the Prosecution Office, 21 October 2011.

¹⁷ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Motion for Contempt Proceedings Against OTP Investigator Djibo Moumouni, 18 November 2011.

¹⁸ Instant Motion, paras. 1, 47-48, prayer for relief.

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government.¹⁹ As for OTP Chief of Prosecutions Kwende, the Defence avers that “[t]here are serious doubts that [he] lied”²⁰ in his statement, as he “could not have ignored what was going on” with respect to the alleged behaviour of his subordinates.²¹ The Defence contends it is “clear” that “these perjured affidavits were created with the intent to undermine the credibility of witness Jean-Marie Vianney Mporanzi, and to confirm [the Prosecution’s] statement in Court that [it] was not working hand in hand with the Rwandan authorities”,²² thus demonstrating “that there is no limit to what the Prosecution and its investigators are willing to do to obtain convictions before this Tribunal”.²³

14. Finally, the Defence renews its prior request for Rule 77 contempt proceedings against OTP Investigator Djibo Moumouni, by reiterating the arguments contained in the Moumouni Motion.²⁴

Response

15. The Prosecution argues that the Defence has failed to demonstrate that the OTP Investigators “knowingly and willingly” gave false testimony, and that “the issue concerned, that is, the inconsistencies in the investigators [sic] affidavits bears no connection with a relevant or material issue in the case, neither does it affect the rights of the Accused”.²⁵ Nevertheless, the Prosecution “respectfully leaves the question of the institution on [sic] Rule 91 proceedings... at the discretion of the Trial Chamber”.²⁶

16. On the first point, the Prosecution underscores that “[a] party seeking to initiate an investigation into allegations of false testimony must establish ‘strong grounds for believing that a witness has knowingly and wilfully given false testimony’”,²⁷ and that “[a] mere mistake in a witness’s sworn testimony... is not sufficient to meet this standard”.²⁸ The Prosecution contends that the OTP Investigators prepared their statements for the purpose of refuting allegations of bribery, rather than with the intent to

¹⁹ Instant Motion, paras. 10-12, 15, 28-31, 34-42.

²⁰ Instant Motion, p. 11, sub-heading “b”.

²¹ Instant Motion, paras. 43-44, 49.

²² Instant Motion, para. 45.

²³ Instant Motion, para. 45.

²⁴ Instant Motion, paras. 2, 50, prayer for relief.

²⁵ Response, para. 2.

²⁶ Response, para. 3.

²⁷ Response, para. 22.

²⁸ Response, para. 22.

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deny the existence of an administrative arrangement that was not known to them.²⁹ While conceding that the OTP Investigators “should have been more diligent” in preparing their statements, the Prosecution nevertheless submits that “there is absolutely no evidence to suggest” that they had actual knowledge of archived documents pertaining to “one isolated payment made 12 years earlier”, and therefore “strong grounds” to initiate a Rule 91 investigation are not present.³⁰

17. As to its second point, the Prosecution argues that “no investigation should be commenced because the Defence has had a full opportunity to impeach the investigators based on their mistaken assertion[s]... [and therefore] the allegedly ‘false’ statement[s] could have no material impact on the rights of the accused”.³¹ This is because “[s]ince the discovery of the [Mporanzi Receipts], the Defence has had full use of them in presenting its case and supporting its unsubstantiated theory that witnesses allegedly have been bribed”.³² Moreover, the Prosecution notes that Mporanzi was extensively cross-examined on the issue and his testimony does not support “the only possible inference” that he was given financial inducements to provide false testimony.³³

18. Regarding possible contempt by OTP Investigator Moumouni, the Prosecution notes that an existing motion relating to this matter, which has been comprehensively briefed by both parties, is already before the Chamber and thus the Defence’s rekindled Rule 77 request against Moumouni ought to be “dismissed *ab initio*” as duplicitous.³⁴

DELIBERATIONS

Preliminary Matters

19. The Trial Chamber first addresses two preliminary matters. First, regarding whether the Defence has filed a duplicitous motion seeking to initiate contempt proceedings against OTP Investigator Moumouni, the Chamber recalls that it has now issued two decisions in which it has declined to initiate contempt proceedings against Mr. Moumouni,³⁵ and therefore considers this aspect of the Defence Motion to be moot.

²⁹ Response, para. 23.

³⁰ Response, paras. 24-32.

³¹ Response, para. 33.

³² Response, para. 34.

³³ Response, paras. 35-38.

³⁴ Response, paras. 4-5, 39-43.

³⁵ See Amicus Report Decision and Moumouni Decision.

20. Second, the Trial Chamber observes that in seeking to proceed directly to the issuance of an order to prosecute the OTP Investigators for false testimony, the Defence has ignored the plain wording and structure of the relevant Rules, which clearly envision the appointment of an *amicus curiae* under Rule 91 (B) (ii) before any prosecution may be commenced pursuant to Rule 92 (C) (ii). As the Appeals Chamber has noted in *Karemera*, “[o]n completion of the process envisaged in Rule 91(B) of the Rules, the Chamber will then consider whether there are ‘sufficient grounds’ [under Rule 91 (C)] to proceed against a witness for false testimony”.³⁶ Consequently, the Chamber shall limit the present analysis to whether the Defence has established the requisite “strong grounds” to believe that the OTP Investigators provided false testimony before this Tribunal when they submitted their written statements, thus warranting the appointment of an *amicus curiae* to further investigate this allegation.

Applicable Law

21. Rule 91 (B) provides that:

If a Chamber has strong grounds for believing that a witness has knowingly and wilfully given false testimony, it may...

(ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating proceedings for false testimony.

22. The Appeals Chamber of this Tribunal has

reiterated that a decision to initiate this type of proceedings falls within a Trial Chamber’s discretion, as evidenced by the wording of Rule 91 (B)... In exercising this discretion, a Trial Chamber will take into account certain factors, such as (i) indicia as to the *mens rea* of the witness, including his intent to mislead and cause harm; (ii) the relationship between the statement in question and a material matter in the case; (iii) the possible bearing of the statement in question on the Chamber’s final decision. In other words, a Chamber will have to consider carefully if these proceedings are the most effective and efficient way to ensure compliance with obligations flowing from the Statute or the Rules in the specific circumstances of the case.³⁷

³⁶ *Prosecutor v. Karemera et al.*, ICTR-98-44-AR.91, Decision on “Joseph Nzirorera’s Appeal from Refusal to Investigate [a] Prosecution Witness for False Testimony”, and on Motion for Oral Arguments, 22 January 2009, para. 18 (“Karemera 2009 Decision”). See also *Karemera et al. v. Prosecutor*, ICTR-98-44-AR91.2, Decision on Joseph Nzirorera’s and the Prosecutor’s Appeals of Decision not to Prosecute Witness BTH for False Testimony”, 16 February 2010, para. 17, where the Appeals Chamber affirms: “Rule 91(C) of the Rules provides that ‘[i]f the Chamber considers that there are sufficient grounds to proceed against a person for giving false testimony, the Chamber may [where it had appointed an *amicus curiae* to investigate the matter pursuant to Rule 91(B)(ii) of the Rules], issue an order in lieu of an indictment and direct *amicus curiae* to prosecute the matter”.

³⁷ Karemera 2009 Decision, para. 21. (internal citations omitted)

Moreover, consistent Trial Chamber jurisprudence has established that “[f]alse testimony may be defined as a false statement given under oath [or solemn declaration], and it can consist of either an affirmation of a false fact or a negation of a true fact”.³⁸

Analysis

23. As the Instant Motion does not allege that the OTP Investigators provided false *viva voce* testimony before this Chamber, as a threshold inquiry it must be established whether the “affidavits” by Messrs. Allagouma, Sidibe and Kwende contain “false testimony” within the meaning of Rule 91. Recalling that “false testimony” requires an oath or solemn declaration,³⁹ the Chamber notes that Black’s Law Dictionary defines an “affidavit” as “[a] written or printed declaration or statement of facts, made voluntarily, and confirmed by oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation”.⁴⁰ Moreover, as the Appeals Chamber of the ICTY has affirmed, the use of affidavits “includes strict procedural protections”, one of which is that such “statements must be executed ‘in accordance with the law and procedure of the State in which such affidavits or statements are signed’”.⁴¹

24. Bearing the above in mind, the Trial Chamber notes that while all three statements at issue are labelled and referred to as “affidavits”, there is no evidence that any of these

³⁸ *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Decision on Defence Motion Seeking the Appointment of Amicus Curiae to Investigate Possible False Testimony by Witnesses GFA, GAP and GKB, 23 July 2008, para. 5; citing *Prosecutor v. Akayesu*, ICTR-96-4-T, Decision on the Defence Motions to Direct the Prosecutor to Investigate the matter of False Testimony by Witness “R”, 9 March 1998, p. 3; *Prosecutor v. Rutaganda*, ICTR-96-3-T, Decision on the Defence Motion to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness “E”, 10 March 1998, p. 3.

³⁹ See e.g., *Bizimungu*, para. 5; *Akayesu*, p. 3; *Rutaganda*, p. 3, *Prosecutor v. Bagilishema*, Decision on the Request of the Defence for the Chamber to Direct the Prosecutor to Investigate a Matter with a View to the Preparation and Submission of an Indictment for False Testimony, 11 July 2000, p. 3; *Prosecutor v. Bagosora*, ICTR-98-41-T, Decision on Defence Request for an Investigation into Alleged False Testimony of Witness DO, 3 October 2003, para. 8.

⁴⁰ Black’s Law Dictionary, 6th ed., 1990.

⁴¹ See *Prosecutor v. Kordić and Čerkez*, IT-95-14/2, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000, para. 21; *Kordić and Čerkez*, Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and one Formal Statement, 18 September 2000, para. 26. The Trial Chamber recognises that the Appeals Chamber of the ICTY was making these remarks in reference to Rule 94 *ter* of that Tribunal’s Rules of Procedure and Evidence. However, this Rule bears strong similarities to the ICTR’s Rule 92 *bis* (B), which, without using the term “affidavit”, outlines strict procedural criteria to be observed when tendering out of court statements that are essentially identical to those required of affidavits (“A written statement under this Rule shall be admissible if it attaches a declaration by the person making the written statement that the contents of the statement are true and correct to the best of that person’s knowledge and belief and (i) the declaration is witnessed by: (a) a person authorised to witness such declaration in accordance with the law and procedure of a state; or (b) a Presiding Officer appointed by the Registrar of the Tribunal for that purpose”).

documents were witnessed by any person whatsoever, let alone solemnly affirmed before a competent official. Rather, in each case the deponent himself has merely initialled, signed and dated the document in question.⁴² Consequently, the Chamber finds that the superficial act of labelling an unsworn, unwitnessed statement an “affidavit” is not in itself sufficient to afford it the juridical weight a true affidavit commands, in keeping with the jurisprudence of this Tribunal.⁴³ In sum, the Trial Chamber concludes that the statements provided by Messrs. Kwende, Allagouma and Sidibe are not affidavits containing solemn declarations for the purpose of Rule 91 and therefore concludes that the Defence has failed to demonstrate that “strong grounds” exist to believe that these individuals provided false testimony before this Chamber.

25. While the Chamber acknowledges that it has considered such “affidavits” in dispensing with certain previous interlocutory motions throughout this trial, this practice is fully consonant with the Chamber’s prerogative under Rule 89 (C) to “admit any relevant evidence which it deems to have probative value”. However, in the Instant Motion the Defence alleges a very specific criminal offence which requires the demonstration of certain mandatory elements as outlined in the governing jurisprudence. One such element is that false testimony requires that a statement be made under oath or solemn affirmation, which is clearly not the case with respect to the statements of Messrs. Kwende, Allagouma, and Sidibe. While these statements may evince a regrettable lack of diligence on the part of the OTP that is not in keeping with the highest standards expected of officers of this court, such questionable professional practices fall well short of the elevated threshold required to establish criminally culpable behaviour.

26. For these reasons, the Trial Chamber declines to exercise its discretion in appointing an *amicus curiae* to investigate alleged false testimony by the impugned OTP Investigators.

⁴² Instant Motion, Annex A.

⁴³ See, e.g., *Akayesu*, pp. 2-3; *Rutaganda*, p. 2. The Trial Chamber notes, as an aside, that the former authority was in fact cited approvingly by the Defence in the Instant Motion. Moreover, this strict interpretation of what constitutes a proper affidavit is in keeping with the Defence’s own prior pronouncement on this very issue. See *Nzabonimana v. Prosecutor*, ICTR-44D-T, Interlocutory Appeal on the Decision on Nzabonimana’s Urgent Motion for Appointment of Amicus Curiae to Investigate Contempt by Witness CNAI and for Supplementary Protective Measures for Witness T36, 10 August 2010, paras. 21-22, where the Defence, alleging disparate treatment by the Chamber in its requirement that the Defence provide sworn affidavits in support of its amicus curiae request in relation to CNAI, remarked: “In support of [a Prosecution motion to appoint an *amicus curiae*], the Prosecutor had [annexed] four statements which were signed only by the person making the statement... The Prosecutor wrote “Affidavit” as the title of each statement, followed by [a declaration to tell the truth in recognition of the penalties for false testimony]. However, the statements were not signed by a lawyer, a commissioner of oaths or a notary. Those statements... were not affidavits.” (emphasis added)

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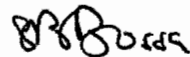
27. However, the foregoing analysis should not in any way be construed as condoning the oftentimes lax Prosecution practice of submitting before the Trial Chamber written statements bearing the trappings of "affidavits" which do not, strictly speaking, adhere to the formal requirements such juridical documents command. To this end, the Chamber concludes that counsel for the Prosecution ought to have been more vigilant in ensuring that statements provided by OTP investigators before this Chamber did not have the potential to mislead the Chamber as to their juridical status. Consequently, the Chamber finds the behaviour of the Prosecution in these circumstances to be contrary to the interests of justice and thus imposes a Rule 46 (A) warning upon the Prosecution.

**FOR THESE REASONS, THE TRIAL CHAMBER
DENIES** the Defence Motion in its entirety.

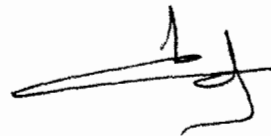
Arusha, 25 November 2011, done in English.



Solomy Balungi Bossa
Presiding Judge

pp. 

Bakhtiyar Tuzmukhamedov
Judge
(Absent at the time of
signature)



Mparany Rajohnson
Judge

[Seal of the Tribunal]



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