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TRIAL CHAMBER VI

Before: **Judge Robert Fremr, Presiding Judge**
Judge Kuniko Ozaki
Judge Chang-ho Chung

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR V. BOSCO NTAGANDA

Public redacted version of "Defence Request for stay of proceedings with prejudice to the Prosecutor", 20 March 2017, ICC-01/04-02/06-1830-Conf

Source: **Defence Team of Mr Bosco Ntaganda**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Counsel representing Bosco Ntaganda ("Defence") hereby submit to Trial Chamber VI ("Chamber") of the International Criminal Court ("Court") this

Defence Request for stay of proceedings with prejudice to the Prosecutor

"Defence Request"

OVERVIEW

1. Pronouncing on the Defence urgent request for an immediate adjournment, the Chamber held that "[t]he information, may of course, as already mentioned, impact aspects of Defence strategy" and "[i]t is undisputed that the Defence must have the opportunity to review the material to the extent relevant, as well as to consider the circumstances of the Prosecution's access to the material and, thereafter, to seek remedies for any such concrete prejudice which may have arisen".[1]

2. The acquisition by the Prosecution team in this case of 4,684 conversations of Mr Ntaganda, concurrent with trial proceedings, given the high relevance of those conversations to Defence strategy as well as to Mr Ntaganda's personal knowledge of the case amounts to an abuse of the Court's process, as a result of which Mr Ntaganda cannot receive a fair trial.

3. The Chamber has the inherent power to stay proceedings which amount to an abuse of the Court's process. In the present circumstances, ordering a stay of proceedings, with prejudice to the Prosecutor, is the sole adequate remedy available.

4. The Prosecution knew full well the type of information it would acquire as a result of its request to obtain all of Mr Ntaganda's non-privileged conversations from the Court's Detention Centre ("Detention Centre"), without any restraint or the implementation of any filter or review mechanism to safeguard the rights of the Accused. Yet, the Prosecutor proceeded with her request addressed to Pre-Trial Chamber II, blatantly ignoring due process requirements and failing to even consider internal segregation of the information sought from the Prosecution team in

[1] ICC-01/04-02/06-T-159-Red-ENG, p.5 lines 8-24.

this case. What is more, the Prosecutor proceeded to obtain all of the Accused's non-privileged conversations on an *ex parte* basis, in the absence of any legitimate requirement. This conduct damaged the fairness of the proceedings even before the beginning of the trial of the Accused.

5. Although the Chamber was informed of the Prosecutor's Article 70 investigation as early as 14 August 2015, the Prosecutor's request to obtain all of Mr Ntaganda's non-privileged conversations addressed to a different forum (Pre-Trial Chamber II) and the *ex parte* conduct of her investigation, not justified by legitimate requirements, deprived the Chamber of the possibility to safeguard the rights of the Accused.

6. Having obtained the totality of Mr Ntaganda's non-privileged conversations – revealing detailed confidential Defence information, which laid bare the identity of potential witnesses, the Accused's defence strategy, and other critical Defence arguments – the Prosecutor failed to immediately segregate this information from the Prosecution team in this case. What is more, the Prosecutor persisted in proceeding on an *ex parte* basis, hiding from the Accused the fact that she had obtained all of his non-privileged conversations. She also kept from the Accused that she was obtaining, in real time, and concurrent with these proceedings, the recordings of all of his non-privileged conversations with his wife and mother. Continuing with the presentation of its case while being in possession of such critical Defence information – voluntarily omitting to inform Mr Ntaganda's Defence team which had no knowledge of the Defence information in the possession of the Prosecution – the Prosecution violated the most basic principles of fairness and due process. No remedy can repair and/or salvage the resulting absence of fairness and colossal prejudice to the Accused.

7. Called upon in May 2016 to provide observations concerning the Chamber's review of the necessity of the restrictions imposed on Mr Ntaganda's non-privileged communications, the Prosecution placed before the Chamber, for its consideration,

highly prejudicial conversations of the Accused obtained as a result of its parallel *ex parte* investigation. To make matters worse, with a view to maintaining its undue advantage – presenting its case while in the possession of a vast quantity of detailed Defence information of which the Defence was unaware – the Prosecution submitted that it would rather withdraw these conversations if the Chamber took the view that they should be disclosed to the Defence. In addition, again, the Prosecutor displayed a clear intent to have the same members of her staff analyse and use the information drawn from the non-privileged conversations of the Accused – as well as the non-privileged conversations of Mr Thomas Lubanga – interchangeably in this case as well as in the context of her Article 70 investigation. The resulting prejudice to the Accused, having to present his defence while being completely in the dark, had become irreparable.

8. It is only in November 2016, as the presentation of the Prosecution's case was drawing to an end, that the Prosecutor finally informed the Defence of the detailed confidential defence information in the possession of the Prosecution team for more than 13 months. According to the Prosecutor, this information was "[…] material to the Defence's preparation of its case […] and to the selection of its witnesses" as she "also intends to rely on these communications".[2]

9. The Prosecutor's late disclosure – concurrent to the appeals proceedings in the *Bemba* case which addressed a similar issue - cannot repair the resulting prejudice to the Accused. Significantly, the Prosecution delaying the disclosure of information adverse to the Accused in its possession to gain an advantage is not a first. In fact, the Prosecution acted in the same manner when delaying its request seeking the suspension of Defence investigators on the eve of trial, on the basis of an event it was aware of and which had taken place three months earlier.[3]

10. The Prosecution's intention to rely on and use the vast and detailed confidential Defence information drawn from Mr Ntaganda's non-privileged

[2] ICC-01/04-02/06-1616, para.3.
[3] ICC-01/04-02/06-777-Conf-Exp.

conversations – as evidenced by (i) its 7 November 2016 Notice; (ii) its recent request to adduce non-privileged conversations of Mr Ntaganda from the bar table (denied); (iii) its recent request seeking additional Defence disclosure on the basis of non-privileged conversations of Mr Ntaganda containing vast and detailed confidential Defence information (denied); (iv) its response opposing the Defence request for additional time to prepare for the presentation of the Defence as a result of the need to review this material; and v) its current investigations attempting to meet with potential Defence witnesses mentioned in Mr Ntaganda's non-privileged conversations – illustrate the prejudice to the Accused. More importantly, the above leaves no doubt that it has become impossible for the Chamber to ensure a fair trial for Mr Ntaganda.

11. Lastly, by (i) submitting a large number of summaries of Mr Ntaganda and Mr Lubanga's non-privileged conversations to this Chamber, for its consideration on the merits; (ii) by making available to the Chamber some 600 audio-recordings and summaries of Mr Ntaganda and Mr Lubanga's non privileged conversations; (iii) by making it clear that it intends to rely on this material during the trial of Mr Ntaganda; and (iv) by submitting numerous requests to the Chamber – some of which remained *ex parte* until a few days ago – in which it referred to the contents of Mr Ntaganda and Mr Lubanga's telephone conversations in support of its arguments,[4] the Prosecution team's conduct created an irremediable apprehension of bias on the part of the Honorable Judges of this Chamber.

12. The egregious violations of the fundamental rights of Mr Ntaganda resulting from the conduct of the Prosecution to its Article 70 investigation, the ongoing and continuing nature of the violations of the fundamental rights of Mr Ntaganda and the resulting prejudice cannot be considered lightly. It is in the interests of justice that Mr Ntaganda's situation be redressed in the strongest possible terms. This is why ordering a stay of proceedings, with prejudice to the Prosecutor, is required.

[4] ICC-01/04-02/06-635-Conf-Red , 10 June 2015; ICC-01/04-02/06-780-Conf-Exp, 13 August 2015; ICC-01/04-02/06-1313-Conf-Exp-Red, 9 May 2016.

13. The continuation of the proceedings in this case would compromise the moral integrity of the international criminal justice system to such an extent that the proceedings against Mr Ntaganda must be stayed, with prejudice, notwithstanding the public interest in bringing his trial to conclusion. The Prosecution must be stopped in its tracks and the proceedings against Mr Ntaganda stayed forthwith.

CONFIDENTIALITY

14. Pursuant to Regulation 23*bis* (1) and (2) of the Regulations of the Court ("RoC"), this Defence Request as well as Annexes A and C are submitted confidentially as they refer to confidential filings as well as to sensitive and private information drawn from Mr Ntaganda's conversations from the Detention Centre. Annexes B and D are submitted confidentially and *ex parte* – only available to the Chamber and the Defence – as they provide detailed confidential and sensitive information directly related to the conduct of Defence investigations and preparations for the case for the Defence. Although Annexes B and D are submitted *via* the Registry, it is not to be communicated to the Victims and Witnesses Unit ("VWU").

EXTENSION OF PAGE LIMIT

15. Due to the complexity, importance, and number of issues to be addressed in this request, on 16 March 2017, the Defence sought and obtained an extension of the prescribed page limit by ten pages; hence this Request comprises 30 pages.[5]

THE CHAMBER HAS THE INHERENT POWER TO ORDER A STAY OF PROCEEDINGS WITH PREJUDICE TO THE PROSECUTOR

16. "There is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to

[5] Email from Defence to the Chamber *via* its Legal Officer dated 16 March 2017 at 12.25; Email from Chamber's Legal Officer to Defence dated 16 March 2017 at 17.28.

prevent the abuse of a court's process through oppressive or vexatious proceedings."[6]

17. While the statutory and regulatory framework of the Court does not explicitly regulate motions requesting a stay of proceedings, with prejudice, based on an alleged abuse of process, pursuant to Article 64(6)(f), the Chamber may as necessary '[r]ule on any other relevant matters'.[7]

18. Indeed, there exists a close relationship between the obligation of the Court to respect the human rights of accused persons appearing before it and its obligation to ensure due process of law. Indeed, on this basis, when due process and the rights of the accused can no longer be guaranteed, the Court has the inherent power to stay proceedings. In that context, the issue of respect for due process of law encompasses more than the mere duty to ensure a fair trial for Mr Ntaganda; it also includes questions such as how the Parties have been conducting themselves in the context of a particular case.[8]

19. The abuse of process doctrine may be relied on "where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct".[9] This doctrine will be resorted to only when it is clear that the rights of the accused person have been egregiously violated.[10] A stay of prosecution due to an abuse of process would be justified when it would be impossible to give the accused a fair trial or where it would amount to a misuse or a manipulation of process because it offends the

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[6] *R. v. Jewitt*, [1985] 2 SCR 128, quoting from *R. v. Young* (1984), 1984 CanLII 2145 (ON CA), 40 C.R. (3d) 289).

[7] *See* position adopted by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v. Stanišić and Župljanin*, Decision on Mićo Stanišić's Motion Requesting a Declaration of Mistrial and Stojan Župljanin's Motion to Vacate Trial Judgement, 2 April 2014, para.20

[8] *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002 ("Nikolić Decision"), para.111.

[9] *Prosecutor v. Barayagwiza*, Decision of the ICTR Appeals Chamber, 3 November 1999 ("Barayagwiza Decision"), paras.73, 77; *In the Case against Florence Hartmann*, Case IT.02-54-R77.5, Reasons for Decision on the Defence Motion for Stay of Proceedings for Abuse of Process, 3 February 2009, para.4.

[10] *Prosecutor v. Dragan Nikolić*, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, para.111; Barayagwiza Decision, paras.73, 77.

court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.[11]

20. In the words of the Appeals Chamber in the *Lubanga* case, "[u]nfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice."[12]

SEQUENCE OF RELEVANT EVENTS

21. The procedural history related to the imposition of restrictive measures on Mr Ntaganda's non-privileged communications from the Detention Centre and to the Article 70 investigation before the Single Judge of Pre-Trial Chamber I ("Single Judge") that ran in parallel and *ex parte* the Defence, is long and complex. The Defence refers in this Defence Request only to the most significant stages of these procedures. Confidential Annex A to this Defence Request provides a full and comprehensive review of the pertinent procedural background.

I. Restrictions imposed by the Chamber on Mr Ntaganda's communications from the Detention Centre

22. On 8 August 2014, the Prosecution first requested that the Chamber impose restrictions on Mr Ntaganda's communications from the Detention Centre, on the basis that it had reasonable grounds to believe that contact between the Accused and others had led to conduct falling within the enumerated grounds under Regulation 101(2) RoC.[13]

[11] *Bennett v. Horseferry Magistrates'Court and Another* [1993] 3 All E.R. 138, 151, HL.
[12] ICC-01/04-01/06-772, para.39.
[13] ICC-01/04-02/06-349-Conf-Red, paras.3-5. The six annexes were filed *ex parte* the Defence (but available to the Chamber). A redacted version of Annexes A-E (with Annex F still *ex parte*) was disclosed to the Defence on 19 December 2014. A second confidential redacted version was provided to the Defence on 14 March 2017.

23. On 8 December 2014, the Chamber [REDACTED].[14] [REDACTED].[15] [REDACTED];[16] [REDACTED].[17]

24. On 16 February 2015, the Chamber [REDACTED].[18] [REDACTED].[19]

25. On 13 March 2015, the Chamber [REDACTED]].[20]

26. On 29 April 2015, the Chamber [REDACTED].[21]

27. On 26 June 2015, the Defence filed an "Urgent motion on behalf of Mr Ntaganda seeking immediate adjournment of the proceedings until the necessary conditions are in place to ensure a fair trial", in which it argued that prevailing circumstances made it impossible to ensure that the trial proceedings against Mr Ntaganda would be fair and conducted with full respect for his fundamental rights.[22]

28. On 29 June 2015, the Chamber issued the "Decision on Prosecution request for access to Mr Lubanga's list of non-privileged contacts, call logs and visitation logs", granting the Prosecution's request to the same.[23]

29. On 10 July 2015, the Chamber [REDACTED].[24] [REDACTED].[25]

30. The Chamber issued its "Decision on Prosecution requests to impose restrictions on Mr Ntaganda's contacts" on 18 August 2015 ("18 August 2015 Restriction Decision"), wherein it deemed it necessary to continue the active monitoring of Mr Ntaganda's non-privileged telephone conversations with a limited

[14] [REDACTED].
[15] [REDACTED].
[16] [REDACTED].
[17] [REDACTED].
[18] [REDACTED].
[19] [REDACTED].
[20] [REDACTED].
[21] [REDACTED].
[22] ICC-01/04-02/06-677-Conf-Corr-Red, para.1.
[23] *See* ICC-01/04-02/06-785-red, para.9; ICC-01/04-02/06-603-Conf-Red.
[24] [REDACTED].
[25] [REDACTED].

number of persons for a maximum of one hour per week solely on private or family matters.[26]

31. Also on 18 August 2015, the Chamber issued the public "Decision on restrictions in relation to certain detainees", in which it held that the restrictions on telephone calls by any individual at the Detention Centre to the individuals named in the 9 June 2015 Request for Further Restrictions shall be maintained until further notice.[27]

32. On 7 September 2016, the Chamber issued a "Decision reviewing the restrictions placed on Mr Ntaganda's contacts" ("7 September 2016 Decision on Restrictions").[28] The Chamber noted that it was not in possession of any information which suggested that since the First Decision on Restrictions, Mr Ntaganda had, either directly or indirectly, attempted to further disclose confidential information or interfere with witnesses.[29] Nonetheless, in the Chamber's view, the restrictions imposed remained necessary.[30]

33. On 13 September 2016, the Defence sought leave to appeal the 7 September 2016 Decision on Restrictions.[31] The Chamber issued its "Decision on Defence request for leave to appeal the 'Decision reviewing the restrictions placed on Mr Ntaganda's contacts'" on 16 September 2016, in which, by majority, the Chamber granted the request in part, with regard to the requirement that ongoing restrictions be necessary and proportionate and the role of Regulation 101(2) RoC.[32]

34. On 8 March 2017, the Appeals Chamber of the Court ("Appeals Chamber") issued its "Judgement on Mr Bosco Ntaganda's appeal against the decision

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[26] ICC-01/04-02/06-785-Red, paras.60-63.
[27] ICC-01/04-02/06-786-Conf-Exp-Red, p.23.
[28] A confidential, *ex parte*, redacted version, available to the Defence and the Registry was filed that day, *see* ICC-01/04-02/06-1494-Red4. A public version was filed on 21 September 2016, *see* ICC-01/04-02/06-1494-Red4.
[29] ICC-01/04-02/06-1494-Red4, para.28.
[30] ICC-01/04-02/06-1494-Red4, paras.31-33.
[31] Request for leave to appeal decision maintaining restrictions on Mr Ntaganda's communications and contacts, ICC-01/04-02/06-1501-Conf-Exp.
[32] ICC-01/04-02/06-1513, paras.17-19.

reviewing restrictions on contacts of 7 September 2016", rejecting the Defence's appeal. The Appeals Chamber did consider, however "that the passage of time is a factor that could become more significant as more time elapses and the Trial Chamber must continue to actively review the restrictions in place and carefully balance the need for and proportionality of the restrictions against the important right accorded to detained persons to have contact."[33] The Appeals Chamber further emphasised that it "accepts that the restrictions on Mr Ntaganda's communications are significant and are likely to lead to hardship on his part, not least because of their length".[34] The Appeals Chamber also held that should Mr Ntaganda have concerns as a result of *ex parte* material later made available to him, he may file submissions before the Chamber within the context of the Chamber's periodic monitoring of the restrictions.[35]

II. Procedure under Article 70 before the Pre-Trial Chamber

35. On 13 August 2015, the Prosecutor filed a "Request for judicial assistance to obtain evidence for investigation under article 70" ("Article 70 Request").[36] The Prosecutor indicated that it was investigating suspected offences against the administration of justice under article 70 of the Statute in the case against Mr Ntaganda. In order to obtain material necessary to this investigation, the Prosecutor requested Pre-Trial Chamber II to issue an order pursuant to article 57(3) to the Registry to provide her with all of the Detention Centre non-privileged telephone recordings, call logs, and visitor logs of Mr Ntaganda and Mr Lubanga from 22 March 2013 until the time of the Article 70 Request and on an ongoing basis.[37] [REDACTED].[38]

[33] ICC-01/04-02/06-1817-Red, para.72.
[34] ICC-01/04-02/06-1817-Red, para.101.
[35] ICC-01/04-02/06-1817-Red, para.91.
[36] ICC-01/04-638-Conf-Red.
[37] ICC-01/04-638-Conf-Red, para.1.
[38] ICC-01/04-638-Conf-Red, para.67.

36. On 14 August 2015, the Prosecutor requested that part of the case record in these proceedings be transferred to Pre-Trial Chamber II, which request was granted by the Chamber on 19 August 2015.[39]

37. On 18 September 2015, the Single Judge designated for this matter, granted the Article 70 Request,[40] and on that basis, from 30 September 2015 onwards, the Registry provided the Prosecution with access to the requested audio files.[41] The Single Judge recalled that, on 3 June and 7 September 2016, the Chamber had declared that the Article 70 investigation could not be permitted to continue indefinitely and thus impact the proceedings in the *Ntaganda* case.[42]

38. On 2 November 2016, the Prosecution requested the Single Judge to order the Registry to provide Mr Ntaganda with immediate access to his and Mr Lubanga's non-privileged Detention Centre call records and recordings ("Conversations").[43] On 4 November 2016, the Single Judge granted the request.[44]

39. On 7 November, the Prosecution disclosed the material to the Defence.[45]

40. [REDACTED].[46]

SUBMISSIONS

I. <u>The Prosecutor's initiation of her Article 70 investigation ignored due process and fairness requirements thereby causing irremediable prejudice to Mr Ntaganda even before the beginning of his trial</u>

41. In her Article 70 Request, the Prosecutor moved Pre-trial Chamber II *ex parte* for unrestricted access to all of the Conversations. Not only did the Prosecutor know

[39] ICC-01/04-02/06-781-Conf (informing the Chamber of its request for unfiltered access to the Conversations (a public redacted version was filed on 30 November 2016, ICC-01/04-02/06-781-Red); ICC-01/04-02/06-788.
[40] ICC-01/04-729-Conf-Exp.
[41] ICC-01/04-02/06-1616, para.9.
[42] ICC-01/04-02/06-1616, paras.10-11, referring to ICC-01/04-02/06-1364-Conf-Exp, para.22 and ICC-01/04-02/06-1494-Conf-Exp-Red, para.24.
[43] ICC-01/04-02/06-1616, para.12, referring to ICC-01/04-737-Conf-Exp.
[44] ICC-01/04-02/06-1616, para.13, referring to ICC-01/04-738-Conf-Exp.
[45] ICC-01/04-02/06-1616, para.15.
[46] [REDACTED].

that this was a marked departure from the mechanism put in place by the Chamber, the Prosecution team in this case was very well aware that unfiltered access to all of Mr Ntaganda's non-privileged conversations would allow it to obtain confidential Defence information, without the Accused being aware, thereby gaining an undue advantage contrary to the most basic principles of fairness. Indeed, if only on the basis of one conversation partly made available to the Prosecution by this Chamber in the context of the restrictions litigation – [REDACTED] –[47] the Prosecution could not ignore the type of information it would obtain by having access to all of his conversations without the implementation of any safeguard mechanism.

42. Far from respecting the 'cautious approach' adopted by the Chamber – based on Defence submissions that conversations related solely to the Defence case should be redacted – [REDACTED],[48] the Prosecutor [REDACTED].[49] What is more, the Prosecutor remained silent [REDACTED].[50]

43. To make matters worse, the Prosecutor filed her Article 70 request *ex parte*. The *ex parte* status was, the Defence posits, not justified. First, the non-privileged conversations the Prosecutor was seeking to obtain – most of which going to the 2013-2014 period – already existed, were the object of audio-recordings, and were in the possession of the Registry. Second, further to the restrictions litigation, the Defence was already aware that some of Mr Ntaganda's non-privileged conversations had been provided to the Prosecution. Hence, there was nothing the Defence could have done to prejudice the integrity of the investigation on already existing calls. While it might have been necessary for the Prosecutor to maintain the confidentiality of additional investigative steps taken on the basis of the Conversations, no reason could justify keeping from the Accused the Prosecutor's request to obtain all of his non-privileged conversations. Third, severe restrictions had already been imposed on Mr Ntaganda's non-privileged communication rights.

[47] [REDACTED].
[48] [REDACTED].
[49] [REDACTED].
[50] [REDACTED].

There was thus no justification for *ex parte* proceedings on the basis of the need to investigate any recurrent or new offences.

44. Had the Defence been informed of the Prosecutor's request, it could have challenged the same in and of itself. More importantly, in the event the Prosecution request was granted, the Defence could have ensured that no confidential Defence information drawn from these conversations would be given to the Prosecution. Worthy of note, the Defence could also have strongly advocated the requirement for any conversations obtained by the Prosecutor not to be given to the Prosecution team in this case.

45. Further, while the Chamber was made aware on 14 August 2015 of the Article 70 Request, it was neither informed of the scope of the requested access nor of what was ultimately communicated to the Prosecutor/Prosecution team in this case. Thus, through its forum shopping, the Prosecutor deprived the Chamber of the possibility to safeguard the fair trial of Mr Ntaganda during the presentation of the Prosecution's case.

46. From the time of the Article 70 Request, the Prosecutor should have built walls between the main trial and the Article 70 investigation. The Prosecutor could for instance, have requested the appointment of an independent counsel to conduct the investigation or, at a minimum, ensured that different staff from her office would handle the two procedures. Instead, the responsibility for the Article 70 investigation remained with the Prosecution senior trial attorney in the main case.

47. Although not categorically prohibited at the Court, the involvement of a prosecuting trial team in a parallel Article 70 case against the same accused has been specifically disapproved:

> The fact that staff members of the OTP who were already familiar with the Bemba case also carried out the initial phases of article 70 proceedings arising from that case does not, on its own, give rise to reasonable doubts as to the Prosecutor's impartiality. However, despite the above finding, the Appeals Chamber wishes to underline that, notwithstanding any potential advantages of familiarity, it considers that

> it is generally preferable that staff members involved in a case are not assigned to related article 70 proceedings of this kind.[51]

48. In the *Bemba* case in which the Appeals Chamber made the above pronouncement, the Prosecution had, at one point in time declared that the 'Main Case' and the Article 70 proceedings would be composed of different lawyers and professional staff.[52] On other occasions, it even requested the appointment of independent counsel.[53]

49. Before other international courts, the practice, in similar instances, *i.e*: an Article 70 investigation running in parallel to a 'main trial' has been for Trial Chambers to appoint *amici curiae* investigators.[54]

50. There is no reasonable justification as to why the Article 70 investigation against Mr Ntaganda was carried out by the same Prosecution team as that assigned to this case. To preserve the integrity of both proceedings, the Prosecution should have ensured that Chinese walls were erected between the Article 70 investigation and the case against Mr Ntaganda from the beginning.

51. Adding to the resulting prejudice to the Accused, Mr Ntaganda was plainly unaware that all his Conversations were, or could be, disclosed to the Prosecution.

52. First, upon arrival at the Detention Centre, Mr Ntaganda as all incoming detainee, was provided with a documentation package which contained the RoC and the Regulations of the Registry, as well as a summarised compilation of all relevant provisions pertaining to telephone calls to and from the Detention Centre. While these provisions do refer in certain circumstances to the possible monitoring of non-privileged telephone calls by the Chief Custody Officer,[55] no mention is made of the

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[51] *Prosecutor v. Bemba et al*., Decision on the requests for the Disqualification of the Prosecutor, the Deputy Prosecutor and the entire OTP staff, ICC-01/05-01/13-648-Red3, 21 October 2014, para.40.
[52] ICC-01/05-01/13-48, para.7.
[53] *See* ICC-01/05-01/13-335-Red, referring to ICC-01/05-01/13-310-Conf.
[54] *See Prosecutor v. Bemba*, ICC-01/05-01/08-3483-Red, Public redacted version of Appellant's document in support of the appeal, 28 September 2016, para.101, for a review of international case law on this point.
[55] Regulation 101 RoC; Regulations 173, 174, 175 of the Regulations of the Registry.

possible disclosure of the contents of the non-privileged conversations to the Prosecution. On the contrary, Regulation 175(10) of the Regulations of the Registry provides: "Any offending conversation which is transcribed shall be retained by the Registrar. Such transcripts shall not be handed over as evidence of contempt of court without prior notice and disclosure to counsel for the detained person." In all other respects, the Court's legal framework is silent as to the disclosure to the Prosecution of non-privileged conversations of an accused person from the Detention Centre. Until the Defence was made aware in November 2016 of the disclosure of the Conversations to the Prosecution, Mr Ntaganda simply had no way of knowing that everything he had said in non-privileged conversations from the Detention Centre had been and continued to be provided to the Prosecution.

53. Second, in the context of the restrictions litigation before it, the Chamber put in place a screening mechanism to ensure that the Prosecution did not come into possession of information to which it was not entitled and that might undermine trial fairness. [REDACTED].[56] Being aware of this Chamber's practice in partially disclosing the contents of his non-privileged telephone conversations from the Detention Centre in the context of the restrictions litigation, Mr Ntaganda had no reason to imagine that the totality of his conversations would in fact be provided to the Prosecution, all the more that they would be provided unfiltered.

54. The facts demonstrate a clear abuse of process on the part of the Prosecution since the start of the Article 70 investigation process.

II. Being in possession of detailed confidential Defence information, without the Accused being aware, the Prosecution presented its case in violation of the most basic principles of fairness

55. Once the Prosecution had received the Conversations in September 2015, there was still time to build the necessary safeguards to protect the integrity of the main proceedings. The Prosecution failed to do so. When it commenced review of the Conversations, necessarily coming across information that revealed Mr

[56] [REDACTED].

Ntaganda's defence, strategy, and other confidential information, it was open to the Prosecution to immediately bring the matter to the attention of the Prosecutor for her to take steps to either segregate the information or request the appointment of independent counsel. Quite to the contrary, the Prosecution maintained the *ex parte* status of the Conversations, maintained the same staff members on the two procedures, and proceeded with the presentation of its evidence benefiting from undue advantage.

56. Such *ex parte* access by the Prosecution led to a situation whereby the Defence cross-examined Prosecution witnesses without knowing that the Prosecution was in possession of detailed confidential Defence information. Had the Defence been aware of the Defence information in the possession of the Prosecution, it could, and indeed would have, reconceptualised its whole defence strategy. All of the Prosecution's decisions pertaining to its selection of witnesses, their order of appearance, their preparation and questioning, and its choice as to whether to call them *viva voce* or pursuant to Rule 68(3) of the Court's Rules of Procedure and Evidence ("Rules"), were taken with detailed knowledge of confidential Defence information without Mr Ntaganda or the Defence being aware. This clearly constitutes an unfair and undue advantage for the Prosecution.

57. The breadth of the undue advantage obtained by the Prosecution from the Conversations is colossal. Given the volume of the Conversations received and the page limit imposed for this Defence Request, it is impossible for the Defence to refer to all instances where the Prosecution has obtained information, *via* the Article 70 investigation, it should not have had access to for the purpose of the proceedings in this case before the Chamber. The examples below represent an illustrative sample.

A. The Prosecution obtained sensitive Defence leads on material facts and events

58. Throughout the Conversations, Mr Ntaganda discussed in detail and at length particulars of his whereabouts at the times material to the charges against

him.[57] He and his interlocutors also provided details about the whereabouts of other individuals[58] and the timing of the presence of named military units in certain locations[59]. He sometime received information from his interlocutors as to the same.[60]

59. Mr Ntaganda also provided or received indications as to information that he considered useful in countering allegations made by the Prosecution and explained how such information could be obtained.[61] He indicated flaws in the Prosecution's theory.[62]

B. The Prosecution obtained sensitive information on Defence sources and potential Defence witnesses

60. It became clear with the Prosecution Request for Additional Defence Obligations that, with the benefit of the Conversations, the Prosecution was in possession of the identities of at least 11 individuals who had been referred to in the Conversations as persons who could potentially provide information in support of the Defence case. However, from a review of the Conversations summarised and/or transcribed by the Prosecution, it is apparent that the Prosecution became aware at an early stage of the presentation of its evidence of the identities of many more individuals whom Mr Ntaganda considered relevant to his case.[63]

61. Throughout the Conversations, Mr Ntaganda discussed with his interlocutors the names and identities of individuals he considered to be important to his defence. He related to his interlocutors the reasons why he deemed these individuals helpful

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[57] The Defence notes that where in addition to a summary, the Prosecution has provided a transcription in the original language of a Conversation as well an English/French translation of that transcription, the Defence refers to the translation of the said transcription. The Defence further notes that its references below to either Prosecution Summaries or Prosecution Transcriptions do not indicate in any way an acceptance on the part of the Defence of their accuracy or reliability. Where there is no English/French summary or transcription, the Defence refers to the number of the audio-recording in TRIM. [REDACTED].
[58] [REDACTED].
[59] [REDACTED].
[60] [REDACTED].
[61] [REDACTED].
[62] [REDACTED].
[63] [REDACTED].

and asked that they be found.[64] In doing so, he sometimes provided details as to where they lived or were staying.[65]

62. Some of his interlocutors also provided him with information on certain individuals that may be able to provide useful evidence on his behalf.[66]

C. The Prosecution obtained sensitive information on Defence documents

63. Throughout the Conversations, Mr Ntaganda discussed details about the provenance and contents of documents he considered important to his defence.[67]

64. Further, he provided information that he considered would assist in challenging documents brought against him and challenged some of those documents during the course of the Conversations.[68]

D. The resulting prejudice to Mr Ntaganda

65. The nature, type, and quantity of detailed confidential Defence information obtained by the Prosecution team during the presentation of its case in chief – and without the knowledge of Mr Ntaganda – not only provided the Prosecution with a significant undue advantage, it caused grave prejudice to Mr Ntaganda and as well as to the integrity of these proceedings. While the full scope of the ways in which this information was used by the Prosecution is difficult to assess, the least that can be said is that it may have included contacting sources identified in the Conversations, altering its examinations in chief of its witnesses, opting not to present certain evidence and/or choosing to present evidence it had originally not intended to present. It belies all common sense that the Prosecution proceeded to present its case with the benefit of such information without informing the Defence or the Chamber and/or taking any steps to ensure the fairness of the proceedings. The integrity of adversarial proceedings lies first and foremost on due process

[64] [REDACTED].
[65] [REDACTED].
[66] [REDACTED].
[67] [REDACTED].
[68] [REDACTED].

requirements being adhered to by the Parties. The Prosecution blatantly ignored this imperative.

III. The Prosecution sought to maintain its undue advantage when it requested the renewal of the restrictions on Mr Ntaganda's communications

66. The Chamber's direction inviting the Parties to file submissions on the need to maintain the restrictions imposed on Mr Ntaganda's communications rights on 1 April 2016,[69] provided the Prosecution with a genuine opportunity to redress the situation and salvage the integrity of the proceedings, bearing in mind that not even half of the Prosecution's case had been presented and more than 50 witnesses remained to testify. The Prosecution again failed to do so.

67. First, in its submissions, the Prosecution used, in *ex parte* annexes, the summaries of 10 of the Conversations it had obtained through its Article 70 investigation.[70] This material was new to the Chamber. In fact, it appears that until then, the Chamber had been left entirely in the dark as to the extent of the Prosecution's access to confidential Defence related information through the Conversations. Despite the confidential Defence information comprised in these Conversations, the Chamber remained unaware of the full breadth of the Prosecution's access to confidential Defence information without restrictions. The Chamber was therefore not in a position to ascertain the impact on the fairness of the proceedings of the confidential Defence information in the possession of the Prosecution.

68. As for the Prosecution, opposing the Defence urgent request to obtain access to the 10 Conversations in the *ex parte* annexes, it went as far as stating that, in the event the Chamber held that the Conversations had to be disclosed to the Defence, it was ready to "withdraw its reliance on them".[71] This is yet a further illustration of

[69] Email of the Chamber's Legal Officer to the Parties dated 1 April 2016 at 20h56.
[70] [REDACTED].
[71] ICC-01/04-02/06-1318-Conf-Exp-Red, para.5. *See also* the Defence request for such access, ICC-01/04-02/06-1315-Conf-Exp-Corr.

the Prosecution persisting to hide from the Defence the confidential Defence information it obtained through Mr Ntaganda's conversations.

69. Withholding from the Defence the ten Conversations and more importantly the fact that the Prosecution had obtained all of Mr Ntaganda's conversations, was not justified. Had the Defence been informed, it would have had no means to affect the integrity of the Article 70 investigation. However, the Defence was severely prejudiced as it was deprived of the ability at that stage to challenge the nature of the information obtained by the Prosecution team in this case. This could, and would, have allowed the Defence to react and adjust its strategy, more particularly, the manner in which it would cross-examine the remaining 52 witnesses. The prejudice to the Defence goes way beyond the names of potential Defence witnesses in the Prosecution's alleged coaching scheme. It is the sum and the nature of the detailed Defence confidential information in the possession of the Prosecution – of which the Defence had no knowledge – which is the source of the most important prejudice.

70. In its decision denying the Defence access to the 10 Conversations in the *ex parte* annexes on the basis that they were not necessary for the purpose of the restrictions litigation, the Chamber advised the Prosecution *ex parte* that its Article 70 investigation should not last indefinitely in a manner which could impact proceedings in the Ntaganda case.[72] The Prosecution did not yield to the Chamber's advice.

71. What is more, in its decision maintaining the restrictions on Mr Ntaganda on 7 September 2016, the Chamber, again, *ex parte*, recalled its guidance that the Article 70 investigation should not last indefinitely.[73] Yet again, the Prosecution continued with the presentation of its case being in the possession of a vast quantity of confidential Defence information without the Defence being aware.

[72] ICC-01/04-02/06-1364-Conf-Exp, para.22. The Defence notes that this paragraph of the decision remains redacted.
[73] ICC-01/04-02/06-1494-Conf-Exp-Red, para.24. The Defence notes that this paragraph of the decision remains redacted.

72. The Prosecution maintaining its undue advantage in these circumstances illustrates wilful disregard for due process requirements which lie at the heart of the integrity of the proceedings. This is antithetical to the principles of a fair trial.

IV. The *post facto* disclosure to the Defence of the Conversations in November 2016 is no cure for the Prosecution's abuse of the Court's process

73. In the wake of preparing its response to the appeal filed by the defence in the case against Mr Bemba, which argued that sharing privileged and otherwise confidential defence information with the prosecution trial team during trial proceedings caused Mr Bemba prejudice and warranted, *inter alia*, a declaration of mistrial,[74] the Prosecution requested the Single Judge on 2 November 2016 to provide the Defence with access to all of the Conversations.

74. In support of its request, the Prosecution argued that the Conversations are material to the Defence's preparation of its case and to the selection of its witnesses and that it intends to rely on them.[75] Surely, if the Prosecution deemed the Conversations material in November 2016, this was also the case in September 2015 when the Prosecution first received the Conversations. It was even more so when the Prosecution reviewed the Conversations and confirmed the vast quantity of confidential Defence information comprised therein. It was even more self-evident in May 2016 when the Prosecution was provided with a genuine opportunity to make things right. Evidently, the Prosecution voluntarily kept the Defence in the dark regarding the confidential Defence information in its possession and the materiality of the same to maintain its unfair and undue advantage.[76]

75. The Defence was gravely prejudiced by its inability to adapt its Defence strategy not having the knowledge that the Prosecution was in possession of all the Conversations. As for the Chamber, it appears that it was only in November 2016

[74] ICC-01/05-01/08-3472-Conf, paras.93-114.
[75] ICC-01/04-02/06-1616, para.3.
[76] The Defence notes that a large amount of information was redacted from the Article 70 related filings disclosed in November 2016. Since then, disclosure has been made in a piecemeal fashion [REDACTED].

that it was able to ascertain the full breadth of the information obtained by the Prosecution as a result of the Article 70 investigation.

76. If there existed any possibility to salvage the integrity of the proceedings with 21 Prosecution witnesses having yet to testify, the Defence was deprived of such opportunity when its request for an immediate adjournment was denied, and its subsequent requests for reconsideration of, and leave to appeal, this decision were denied.

77. In any event, in the presence of 4,684 telephone calls made by Mr Ntaganda alone, it was impossible for the Defence to go over the relevant confidential Defence information in the Conversations with Mr Ntaganda and to ascertain the contours of the critical information in the possession of the Prosecution before the end of the presentation of the case for the Prosecution. Contrary to the Prosecution's argument, the previous restrictions litigation before this Chamber and the information available in relation thereto did not allow the Defence to identify the Defence related information in possession of the Prosecution as a result of the *ex parte* Article 70 investigation.

78. In challenging the impact of its *ex parte* access of the Conversations, the Prosecution focuses on individuals to whom Mr Ntaganda spoke and who could become potential Defence witnesses. The Prosecution argues that the Defence was on notice of the allegations of coaching and interference as part of the restrictions litigation and therefore should have taken steps to adapt its strategy long ago.

79. The issue is not who Mr Ntaganda spoke to. The issue is not whether or not Mr Ntaganda coached Defence witnesses. The issue concerns the information in possession of the Prosecution in the main trial as a result of the *ex parte* Article 70 investigation, since they are one and the same Prosecutor. This is indeed what has created an unfair trial for Mr Ntaganda to date and this is what makes the trial impossible to proceed with. The Prosecution's abuse of the Court's process by failing to segregate the two procedures created an irremediable prejudice.

80. With the Conversations in its possession since September 2015, the Prosecution was able to integrate elements it deemed relevant into the presentation of its evidence without the knowledge of the Defence, or of the Chamber. The Prosecution became aware of details of the Defence strategy as well as of names or descriptions of potential witnesses or important documents, well in advance of any disclosure deadline by the Defence. This, the Defence claims, resulted in a gross violation of equality of arms in these proceedings and in an unfair advantage in favour of the Prosecution

81. An example of important information of which the Prosecution gained knowledge through the Conversations, is the video recorded with Mr Ntaganda's video camera during the events which gave rise to the charges. The existence, possible location, and contents of this video are amply discussed in the Conversations.[77] The Prosecution was thus fully informed of details pertaining to this important document [REDACTED].[78]

V. The Prosecution's conduct created an irremediable situation of apprehension of bias on the part of the Honourable Judges of the Chamber

82. The restrictions litigation triggered by the Prosecutor in August 2014 resulted in the Chamber gaining access to information on the basis of which it found that there were reasons to believe that Mr Ntaganda instructed his interlocutors to coach witnesses, or directly told his interlocutors which story to tell.[79] These conclusions led the Chamber to impose restrictions on Mr Ntaganda's non-privileged communications rights in March and September 2015 before the beginning of his trial. It is significant in this regard that the Prosecution's allegations of interference and the information considered by the Chamber when imposing these restrictions concerned Prosecution witnesses who later testified in Mr Ntaganda's trial.

[77] [REDACTED].
[78] [REDACTED].
[79] ICC-01/04-02/06-785-Red, para.57.

83. Whether at that stage a reasonable observer could conclude that the Chamber had already formed an opinion adverse to the Accused which could impact its assessment of the testimony of certain witnesses and of the Prosecution's case is a legitimate question. However, considering that the Court's Judges are professional Judges and that the restrictions litigation was a separate proceeding which the Chamber finalised before the start of trial, this is probably not the case.

84. The present situation is wholly different. As a result of its written pleadings practice, including numerous *ex parte* submissions and the material arising from its Article 70 investigation submitted to the Judges for their consideration on the merits, the Prosecution has created a situation which would lead a reasonable observer, properly informed, to apprehend bias on the part of the Honourable Judges of this Chamber.

85. The 'professional Judge' concept is not without limits. Indeed, when Judges are bombarded by allegations of wrong-doings and interference by the Accused before them and flooded with information and/or evidence drawn from parallel and distinct proceedings yet directly related to the reliability of the evidence before it, this may very well lead a reasonable observer, properly informed, to apprehend bias, whether or not the Judges harbour such bias.

86. The Prosecution made clear its intention to use the Conversations at trial. First, when it requested the disclosure from the Single Judge, it confirmed its intention to make use of the Conversations "in pursuit of the establishment of the truth"[80]. Second, it added audio-recordings of the Conversations as well as a number of witness summaries onto its lists of evidence.[81] Third, it attempted to tender the

[80] ICC-01/04-02/06-638-Conf-Red, para.67.

[81] Prosecution's Updated List of Evidence, ICC-01/04-02/06-1646, public with public Annex A, 23 November 2016 (wherein the Prosecution added 589 audio-recordings of conversations by Mr Ntaganda and Mr Lubanga from the Detention Centre to its list of evidence); Prosecution's Updated List of Evidence, ICC-01/04-02/06-1762, public with public Annex A, 30 January 2017 (wherein the Prosecution added 506 summaries of conversations by Mr Ntaganda and Mr Lubanga from the Detention Centre to its list of evidence).

Conversations into evidence as part of its case.[82] Finally, it made use of them as part of submissions requesting additional disclosure obligations from the Defence.[83]

87. Even if the Chamber has issued decisions in which it distances itself from the Conversations,[84] the Conversations are now in possession of the Chamber. The Chamber knows since August 2015 that there is an Article 70 investigation and that the same Prosecution team asked the Single Judge for additional material, including information that the Chamber had specifically refused to disclose. Furthermore, the Prosecution intends to use the information from the Conversations during the Defence case, which will involve the Chamber.

88. This, combined with not providing access to the Conversations in May 2015, has created a reasonable apprehension of bias against Mr Ntaganda on the part of the Judges.

89. The ongoing nature of the prejudice can be illustrated by the fact that the Defence has no way of knowing what the Prosecution reviewed or not. For example, [REDACTED].[85] [REDACTED]. Further, unfiltered disclosure of the Conversations to the Prosecution on a regular basis continues[86] and, as far as things currently stand, is scheduled to continue while the Defence prepares and presents its evidence.

VI. The fact that the Conversations obtained by the Prosecution are that of the Accused does not absolve the Prosecution's misconduct

90. Opposing the Defence request for an immediate adjournment for the purpose of taking stock of the Conversations obtained by the Prosecution 13 months prior, the Prosecution argued that the underlying issue "lies not in the Prosecution's disclosure of the Accused's telephone conversations but in the fact that the Accused

[82] ICC-01/04-02/06-1769.
[83] ICC-01/04-02/06-1783-Conf-Corr. A public redacted version was also submitted on 15 February 2017, ICC-01/04-02/06-1783-Red.
[84] ICC-01/04-02/06-1799; ICC-01/04-02/06-1818.
[85] [REDACTED].
[86] On TRIM, the latest date of disclosure of Conversations to the Prosecution is 1 December 2016.

entered into these discussions in the first place."[87] The Prosecution thus takes the view that because the Conversations it gained access to in the manner described in this Defence Request are that of Mr Ntaganda, and/or stem from Mr Lubanga as a close associate to Mr Ntaganda, he is responsible for the violation of his rights.

91. The Prosecution's stance defies legal reasoning. Regardless as to whether Mr Ntaganda was involved in the alleged coaching of witnesses, his fundamental rights to a fair trial and due process in both procedures must be respected. Further, whereas this Chamber has found reasonable grounds to believe that Mr Ntaganda was involved in some type of coaching as part of the restrictions litigation before trial. What is more, the confidential Defence information in the possession of the Prosecution was drawn from the 2013-2014 period, and not from recent calls. Lastly, Mr Ntagnda has neither been charged nor tried for such conduct and he was also not provided with an opportunity to challenge the Prosecution's allegations.

92. The allegations made by the Prosecution do not justify its misconduct or the violations of Mr Ntaganda's fundamental rights at least since before the commencement of his trial, including, *inter alia*: i) gaining undue advantage by knowingly obtaining detailed confidential Defence information without the knowledge of the Accused, ii) presenting its case in the possession of such critical Defence information; iii) contaminating the Chamber by making endless submissions referring to this information; and iv) submitting for the consideration of the Chamber prejudicial information obtained *via* forum shopping in a parallel and distinct *ex parte* proceeding.

VII. The proceedings must be stayed with prejudice to the Prosecutor

93. The doctrine of abuse of process allows a court to stay proceedings with prejudice when to proceed with the "[Accused's] trial when such violations have been committed, would cause irreparable damage to the integrity of the judicial process" and when it is the only effective remedy for the cumulative breaches of the

[87] ICC-01/04-02/06-1636-Conf, para.32.

Accused's rights.[88] Ordering a stay with prejudice may also very well deter the commission of such serious violations in the future.

94. This Defence Request focused on showing that a fair trial has become impossible due to the violations of Mr Ntaganda's fundamental rights, which justifies ordering a stay of proceedings. More is required, however, in light of the cumulative violations of Mr Ntaganda's rights, and the Prosecution's blatant disregard for due process over a long period of time. Ordering a new trial would cause irreparable damage to the integrity of the international criminal justice system as it would entail constituting a new Prosecution team, composing a new trial chamber, and convening a new trial, all of which require significant time whereas Mr Ntaganda has already been in the custody of the Court for four years.

CONCLUSION

95. The Prosecutor's failure to segregate the Conversations obtained as a result of her *ex parte* Article 70 investigation from the trial team in this case, the Prosecution's wilful *ex parte* and unfiltered access to detailed confidential Defence information, the Prosecution's presentation of its case while being in the possession of such critical Defence information, as well as the Prosecution's contamination of the Chamber through endless submissions of Conversations in support of written pleadings, amount to an abuse of the Court's process which has severely violated the fundamental rights of Mr Ntaganda causing irreparable prejudice.

96. In these circumstances, ensuring a fair trial for Mr Ntaganda has become impossible. Ordering a stay of proceedings with prejudice to the Prosecutor is the only available remedy.

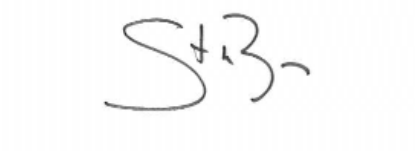
RELIEF SOUGHT

In light of the above submissions, the Defence respectfully requests the Chamber to:

[88] Barayagwiza Decision, para. 108.

ORDER the stay of the proceedings against Mr Ntaganda with prejudice to the Prosecutor.

RESPECTFULLY SUBMITTED ON THIS 21TH DAY OF MARCH 2017



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