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No.: **ICC-01/04-02/06**

Date: **2 July 2021**

**THE PRESIDENCY**

**Before:** Judge Piotr Hofmański, President  
Judge Luz del Carmen Ibáñez Carranza, First Vice-President  
Judge Antoine Kesia-Mbe Mindua, Second Vice-President

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**IN THE CASE OF  
*THE PROSECUTOR V. BOSCO NTAGANDA***

**Public**

**Request seeking Judge Lordkipanidze to recuse himself or be disqualified to  
adjudicate the appeals against the Reparations Order issued by  
Trial Chamber VI on 8 March 2021**

**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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Further to the Decision assigning judges to divisions and recomposing Chambers (“Decision Assigning Judges”),<sup>1</sup> the issuance of the Reparations Order by Trial Chamber VI on 8 March 2021 (“8 March Reparations Order”)<sup>2</sup> and the appeals lodged by the Legal Representative of Victims of the attacks (“LRV2”)<sup>3</sup> and by the Defence on 8 April 2021 (“LRV2 Appeal” or “Defence Appeal”, together “Reparations Appeals”), Counsel for Mr Ntaganda (“Mr Ntaganda” or “Defence”),<sup>4</sup> hereby submit this:

**Request seeking Judge Lordkipanidze to recuse himself or be disqualified to  
adjudicate the appeals against the Reparations Order issued by  
Trial Chamber VI on 8 March 2021**

**(“Request for Disqualification”)**

## INTRODUCTION

1. The Trust Fund for Victims (“TFV”) is at the centre of the reparations process in the *Ntaganda* case. In a marked departure from the Court’s prior practice, the *Ntaganda* Trial Chamber has entrusted the TFV with a mandate that far exceeds that envisaged in other cases. Not only is the TFV now responsible for performing the central task of identifying the victims potentially entitled to receive reparations and to determine their eligibility<sup>5</sup> it is also required to design the *Ntaganda* reparations implementation plan, with no regime of judicial supervision, monitoring, or oversight in place.<sup>6</sup>

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<sup>1</sup> Decision assigning judges to divisions and recomposing Chambers, 16 March 2021, [ICC-01/11-01/17-21](#), p.4.

<sup>2</sup> Reparations Order, 8 March 2021, [ICC-01/04-02/06-2659](#) (“8 March Reparations Order”).

<sup>3</sup> Appeal Brief of the Common Legal Representative of the Victims of the Attacks against the Reparations Order, 7 June 2021, [ICC-01/04-02/06-2674](#) (“LRV2 Appeal”).

<sup>4</sup> Defence Appellant Brief against the 8 March Reparations Order, 7 June 2021, [ICC-01/04-02/06-2675](#) (“Defence Appeal”).

<sup>5</sup> [8 March Reparations Order](#), para.105.

<sup>6</sup> [8 March Reparations Order](#), para.212.

2. Unsurprisingly, therefore, this expanded role of the TFV is at the heart of the Defence Appeal. The Defence has argued, *inter alia*, that the Trial Chamber “erred in delegating its (judicial) functions to the TFV, without due consideration of its limitations, and without any appreciable oversight or monitoring”.<sup>7</sup> The Defence has also raised issues of the TFV’s capacity and ability to fulfil the tasks assigned to it, relying on the report of Independent Experts who recently conducted a review of ICC operations.<sup>8</sup> The TFV itself has recognised that “a number of grounds of appeal raise fundamental questions that concern the role of the Trust Fund during the implementation phase”.<sup>9</sup>

3. Until 2 February 2021, His Honour Judge Lordkipanidze’s was a member of the TFV Board of Directors (“TFV Board”). For the reasons set out below, this prior position creates a reasonable apprehension of bias, which requires him to recuse himself from the Reparations Appeals. Judge Lordkipanidze has not done so. As such, it falls to the Defence to request that Judge Lordkipanidze be disqualified from adjudicating the Reparations Appeals as a member of the Appeals Chamber, pursuant to Article 41(2)(b) of the Rome Statute (“Statute”) and Rule 34(1)(c) of the Rules of Procedure and Evidence (“RPE”).

4. Relevantly, the question is not whether Judge Lordkipanidze harbours actual bias as a result of his prior membership of the TFV Board, but whether the circumstances would lead a well-informed reasonable observer to apprehend bias on his part, in this case. The issues raised in the Reparations Appeals, and Judge Lordkipanidze’s responsibilities, involvement, and specific actions taken as a member of the TFV Board between December 2018 and February 2021 – a period which overlaps with the *Ntaganda* reparations phase that began on 25 July 2019<sup>10</sup> –

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<sup>7</sup> [Defence Appeal](#), para.225.

<sup>8</sup> [Defence Appeal](#), para.223.

<sup>9</sup> Observations on the Defence Request for Suspensive Effect and Request under rule 103 of the Rules of Procedure and Evidence, 22 June 2021, [ICC-01/04-02/06-2679](#), para.32.

<sup>10</sup> Order for preliminary information on reparations, 25 July 2019, [ICC-01/04-02/06-2366](#).

would lead a well-informed reasonable observer to apprehend bias on his part, adversely affecting the required impartiality of members of the Appeals Chamber.

## PROCEDURAL BACKGROUND

5. In December 2018, Judge Lordkipanidze was appointed as a member of the Board of Directors from Eastern Europe for the Trust Fund for Victims.<sup>11</sup> During his mandate, Judge Lordkipanidze worked alongside the current Executive Director Mr Pieter de Baan.

6. On 18 December 2020, Judge Lordkipanidze was elected as a Judge of the Court.<sup>12</sup> On 2 February 2021, Judge Lordkipanidze submitted, with immediate effect, his letter of resignation as a member of the TFV Board.

7. On 8 March 2021, Trial Chamber VI issued the 8 March Reparations Order.

8. On 10 March 2021, Judge Lordkipanidze was sworn in as a judge of the Court.

9. On 16 March 2021, the Presidency issued its Decision Assigning Judges and assigned Judge Lordkipanidze to the Appeals Division.<sup>13</sup>

10. On 8 April 2021, the LRV2<sup>14</sup> and the Defence<sup>15</sup> filed their respective notices of appeal against the 8 March Reparations Order. On 7 June 2021, the LRV2<sup>16</sup> and the Defence<sup>17</sup> filed their respective appeals brief against the 8 March Reparations Order.

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<sup>11</sup> [Curriculum Vitae of Judge Gocha Lordkipanidze](#).

<sup>12</sup> [https://asp.icc-cpi.int/EN\\_Menus/asp/elections/judges/2020/pages/results.aspx](https://asp.icc-cpi.int/EN_Menus/asp/elections/judges/2020/pages/results.aspx)

<sup>13</sup> Decision assigning judges to divisions and recomposing Chambers, 16 March 2021, [ICC-01/11-01/17-21](#), p.4.

<sup>14</sup> Notice of Appeal of the Common Legal Representative of the Victims of the Attacks against the Reparations Order, 8 April 2021, [ICC-01/04-02/06-2668](#).

<sup>15</sup> Defence Notice of Appeal against the Reparations Order, ICC-01/04-02/06-2659, 8 April 2021, [ICC-01/04-02/06-2669](#).

<sup>16</sup> [LRV2 Appeal](#).

<sup>17</sup> [Defence Appeal](#).

## APPLICABLE LAW

11. Article 41(2)(b) of the Statute gives the Defence the right to ask for the disqualification of Judge Lordkipanidze. Article 41(2)(a) of the Statute provides that “[a] judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground.”

12. The ICC Code of Judicial Ethics provides in Article 4(1) that “Judges shall be impartial and ensure the appearance of impartiality in the discharge of their judicial functions” and in sub-section (2) that “Judges shall avoid any conflict of interest, or being placed in a situation which might reasonably be perceived as giving rise to a conflict of interest.”

13. Pursuant to Rule 34 of the RPE, the grounds for disqualification of a judge include “professional relationship, or a subordinate relationship, with any of the parties”<sup>18</sup> or “[p]erformance of functions, prior to taking office, during which he or she could be expected to have formed an opinion on the case in question, on the parties or on their legal representatives that, objectively, could adversely affect the required impartiality of the person concerned.”<sup>19</sup>

14. Rule 35 of the RPE provides that:

[w]here a judge [...] has reason to believe that a ground for disqualification exists in relation to him or her, he or she shall make a request to be excused and shall not wait for a request disqualification to be made.

15. Re-affirming the standard developed at the ICTR<sup>20</sup> and ICTY<sup>21</sup>, the ICC has established that the relevant assessment is whether the circumstances would lead a

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<sup>18</sup> Article 34(1)(a) of the RPE.

<sup>19</sup> Article 34(1)(c) of the RPE.

<sup>20</sup> *Prosecutor v. Karemera et al.*, [ICTR-98-44-T](#), Decision on Joseph Nzirorera’s Motion for Disqualification of Judges Bryon, Kam, and Joensen, 7 March 2008, para.4; *Prosecutor v. Niyiramasuhuko et al.*, [ICTR-98-42-A](#), Judgement, 14 December 2015, para.2843.

reasonable observer properly informed, to reasonably apprehend bias on the part of the judge,<sup>22</sup> and whether any such apprehension was objectively reasonable.<sup>23</sup>

## SUBMISSIONS

### I. The Role of the TFV is a live issue in the Reparations Appeals

16. The TFV was established to **implement** and **distribute** reparations awards designed by the ICC trial chambers, following the conviction of accused persons. It is an administrative body, comprised of unelected officials and staff. On its website, the TFV describes its reparations mandate as follows:

The TFV's reparations mandate serves to **implement** Court-ordered reparation awards directed against a convicted person. For that purpose, the TFV either **distributes** the funds from the convicted person and/or uses its voluntary contributions upon the Board of Director's decision to complement a reparations award.<sup>24</sup>

17. The 8 March Reparations Order in the present case was issued extremely quickly. The Trial Chamber was open about the fact that the timing of the Order was to accommodate the end of the mandate of two of its members, including the mandate of the Judge who presided over the trial.<sup>25</sup> Rather than extending the mandate of these two Judges, to allow the Trial Chamber to determine eligible victims, and design a reparations plan, these central aspects of the reparations

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<sup>21</sup> ICTY, *Prosecutor v. Milošević*, Decision on Interlocutory Appeal of Kosta Bulatovic Contempt Proceedings, 29 August 2005, [IT-01-54-T](#), para.17; ICTY, *Prosecutor v. Furundžija*, Judgement, 21 July 2000, [IT-95-17/1-A](#), para.189.

<sup>22</sup> Decision of the plenary of the judges on the "Defence Request for the Disqualification of a Judge of 2 April 2012", [ICC-02/05-03/09-344-Anx](#), 5 June 2012, para.11 ("Banda-Jerbo Decision").

<sup>23</sup> [Banda-Jerbo Decision](#), para.13. *Prosecutor v. Lubanga*, Decision of the plenary of judges on the Defence Application of 20 February 2013 for the disqualification of Judge Sang-Hyun Song from the case of The Prosecutor v. Thomas Lubanga Dyilo, 11 June 2013, [ICC-01/04-01/06-3040-Anx](#), paras.9-10 ("Lubanga Decision June 2013"); *Prosecutor v. Al Hassan*, Public Redacted Version of Annex I to the Notification of the Decision of the Plenary of Judges on the 'Urgent Request for Disqualification of Pre-Trial Chamber I' dated 11 July 2019, 12 September 2019, [ICC-01/12-01/18-458-AnxI-Red](#), paras.34,37,41.

<sup>24</sup> Trust Fund for Victims, *Our Mandates*, <https://www.trustfundforvictims.org/en/about/two-mandates-tfv> (Consulted on 28 June 2021).

<sup>25</sup> [8 March Reparations Order](#), para.5.

proceedings were instead delegated to the TFV. Rather than simply “implementing” or “distributing” reparations, in the *Ntaganda* case, the TFV is running the process. By way of a summary, the Trial Chamber has ordered the TFV to:

- Identify eligible victims;<sup>26</sup>
- Draft a detailed proposal as to the way in which the TFV expects to conduct the administrative eligibility assessment;<sup>27</sup>
- Design the reparations award,<sup>28</sup> including with recommendations as to modalities, with explanations as to why any established modalities are not considered appropriate;<sup>29</sup>
- Distribute collective reparations;<sup>30</sup>
- Make recommendations as to compensation, including the amount of compensation;<sup>31</sup>
- Explore symbolic measures to be included in the reparations award, in consultation with victims;<sup>32</sup>
- Complement the reparations award as between eligible victims in both the *Ntaganda* and *Lubanga* cases;<sup>33</sup> and
- Submit, within six months, an explanation of the objectives, outcomes and activities identified as necessary to give effect to the 8 March Reparations Order, clearly indicating the methods of implementation, steps to be taken, direct and indirect costs, and expected timelines necessary for the projects’ development and implementation.<sup>34</sup>

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<sup>26</sup> [8 March Reparations Order](#), para.105.

<sup>27</sup> [8 March Reparations Order](#), para.253.

<sup>28</sup> [8 March Reparations Order](#), para.129.

<sup>29</sup> [8 March Reparations Order](#), para.212.

<sup>30</sup> [8 March Reparations Order](#), para.104.

<sup>31</sup> [8 March Reparations Order](#), para.202.

<sup>32</sup> [8 March Reparations Order](#), para.108.

<sup>33</sup> [8 March Reparations Order](#), para.212.

<sup>34</sup> [8 March Reparations Order](#), para.249.



18. Significantly, shortly after these orders were issued, the TFV advertised for a “Reparations Expert”<sup>35</sup> to work on the *Ntaganda* case, which is indicative of the state of its in-house expertise to perform functions previously carried out by a trial chamber.

19. In this context, it is unsurprising that the TFV is an active litigant in the *Ntaganda* Reparations process. Having submitted a ‘Report on TFV Preparation for Draft Implementation Plan’<sup>36</sup> and an ‘Initial Draft Implementation Plan with a focus on Priority Victims’,<sup>37</sup> on 11 June 2021, Trial Chamber II invited the TFV to submit observations on the Defence request for suspensive effect,<sup>38</sup> and on 22 June 2021, the TFV itself requested leave to submit observations on the Defence Appellant Brief.<sup>39</sup> Two days later, on 24 June 2021, the TFV (via electronic correspondence addressed to Trial Chamber II)<sup>40</sup>, sought leave to reply to the responses and observations filed by the LRVs, Defence and the VPRS in respect of the initial draft implementation plan, which it then did.<sup>41</sup>

20. As such, it cannot reasonably be argued that the TFV is an impartial and disinterested participant in the reparations proceedings, providing neutral information to the Trial Chamber as requested. Rather, in the *Ntaganda* reparations process, the TFV has assumed a role akin to a party to the proceedings, intervening on all issues and seeking leave to file submissions when none have been sought.

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<sup>35</sup> UNJobnet, *Reparations Experts*, 4 June 2021, <https://www.unjobnet.org/jobs/detail/27442593> (Consulted on 5 June 2021).

<sup>36</sup> Report on Trust Fund’s Preparation for Draft Implementation Plan, 8 June 2021, [ICC-01/04-02/06-2676-Conf](https://www.unhcr.org/refugees/2021/06/2676-Conf).

<sup>37</sup> Corrigendum to Annex A to the Initial Draft Implementation Plan with Focus on Priority Victims (“Initial Implementation Plan” or “IIP”), 14 June 2021, [ICC-01/04-02/06-2676-Conf-AnxA-Corr](https://www.unhcr.org/refugees/2021/06/2676-Conf-AnxA-Corr).

<sup>38</sup> Order setting a time limit for responses to the request for suspensive effect and invitation to the Trust Fund for Victims to submit observations on that request, 11 June 2021, [ICC-01/04-02/06-2678](https://www.unhcr.org/refugees/2021/06/2678).

<sup>39</sup> Observations on the Defence Request for Suspensive Effect and Request under rule 103 of the Rules of Procedure and Evidence, 22 June 2021, [ICC-01/04-02/06-2679](https://www.unhcr.org/refugees/2021/06/2679).

<sup>40</sup> Email correspondence from the TFV to Trial Chamber II, parties and participants, 24 June 2021, at 13:36.

<sup>41</sup> Observations on the responses and observations submitted on the Initial Draft Implementation Plan, 28 June 2021, [ICC-01/04-02/06-2687-Conf](https://www.unhcr.org/refugees/2021/06/2687-Conf).

21. Perhaps more significantly, the legality and propriety of the TFV's mandate being extended by Trial Chamber VI, is a live issue in the Reparations Appeals. Whether Trial Chamber VI was entitled to abdicate its judicial functions to the extent contemplated in the 8 March Reparations Order has been raised by the LRV2,<sup>42</sup> and forms a significant part of the Defence Appeal.<sup>43</sup> As does the Trial Chamber's failure to put in place a monitoring system allowing it to exercise oversight over the administrative decisions of the TFV.<sup>44</sup> Judges hearing the Reparations Appeals will necessarily be required to rule on the proper mandate, scope and capacity of the TFV, and whether Trial Chamber VI's near-wholesale reliance on this administrative body was an impermissible designation of its judicial functions.

## II. A direct overlap exists between Judge Lordkipanidze's prior TFV work and the Ntaganda Reparations Appeals

22. Judge Lordkipanidze was an active member of the TFV, during the *Ntaganda* reparations phase, and on matters that directly impact the issues in dispute in the Reparations Appeals.

23. Mr Ntaganda was convicted, giving rise to a reparations phase, on 8 July 2019. In convicting him, the Trial Chamber noted that it would "request submissions from the parties and participants, and hold separate hearings, on matters related to sentencing and reparations."<sup>45</sup> The first order in relation to reparations followed on 25 July 2019.<sup>46</sup> The TFV submitted observations to the Trial Chamber in the *Ntaganda* reparations proceedings in October 2019,<sup>47</sup> February 2020,<sup>48</sup> and December

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<sup>42</sup> [LRV2 Appeal](#) paras.129-135.

<sup>43</sup> [Defence Appeal](#), paras.201-225.

<sup>44</sup> [Defence Appeal](#), paras.216-226.

<sup>45</sup> Judgment, 8 July 2019, [ICC-01/04-02/06-2359](#), p.539.

<sup>46</sup> Order for preliminary information on reparations, 25 July 2019, [ICC-01/04-02/06-2366](#).

<sup>47</sup> Trust Fund for Victims' response to the Registry's Preliminary Observations pursuant to the Order for Preliminary Information on Reparations, 3 October 2019, [ICC-01/04-02/06-2428](#).

<sup>48</sup> Trust Fund for Victims' observations relevant to reparations, 28 February 2020, [ICC-01/04-02/06-2476](#).

2020.<sup>49</sup> At that time, Judge Lordkipanidze was still a member of the TFV, and as he himself mentioned in his resume in support of his candidacy as a Judge, he worked “on filings with the Court prepared by the TFV Secretariat.”<sup>50</sup>

24. During this period, Judge Lordkipanidze was involved in the renewed assistance mandate in Ituri in July 2020. The TFV website describes that:

[i]n July 2020, the TFV launched the second phase of the DRC Assistance Mandate Programme with ten new projects in collaboration with both international and national service providers working in the DRC. The programmes expect to reach over 20,000 direct beneficiaries.<sup>51</sup>

25. Perhaps most significantly, Judge Lordkipanidze formed part of the TFV Board, ordered to decide victim eligibility in the *Lubanga* case. Referring to the TFV Board administrative decision-making on victim eligibility, the TFV website states that “[t]he Secretariat is grateful for the continued engagement Mama Koité Doumbia and Gocha Lordkipanidze, on behalf of the Board, in relation to the review and approval of the Fund’s administrative eligibility decisions in these cases [the *Lubanga* and *Al Mahdi*].”<sup>52</sup> Specifically, within the timeframe Judge Lordkipanidze was a member of the TFV Board, four submissions were filed on its behalf in *Lubanga* deciding on new applicants for reparations.<sup>53</sup>

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<sup>49</sup> Trust Fund for Victims’ Final Observations on the reparations proceedings, 18 December 2020, [ICC-01/04-02/06-2635-Conf](https://www.trustfundforvictims.org/sites/default/files/observations/ICC-01/04-02/06-2635-Conf.pdf).

<sup>50</sup> ICC, *Curriculum Vitae: LORDKIPANIDZE, Gocha (Georgia)*, p.2 [https://asp.icc-cpi.int/iccdocs/asp\\_docs/Elections/EJ2020/ICC-ASP-EJ2020-GEO-CV-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/Elections/EJ2020/ICC-ASP-EJ2020-GEO-CV-ENG.pdf) (Consulted on 28 June 2021).

<sup>51</sup> Trust Fund for Victims, *Democratic Republic of the Congo*, <https://www.trustfundforvictims.org/en/locations/democratic-republic-congo> (Consulted on 28 June 2021).

<sup>52</sup> Trust Fund for Victims, *TFV Management Brief October*, December 2020, p.9 <https://www.trustfundforvictims.org/sites/default/files/reports/TFV%20Management%20Brief%20-%20October%20to%20December%202020.pdf> (Consulted on 28 June 2021).

<sup>53</sup> *Prosecutor v. Lubanga*, Decision concerning the First and Second Transmissions of Administrative Decisions on New Applications for Reparations Taken by the Trust Fund for Victims, 20 May 2020, [ICC-01/04-01/06-3476-tENG](https://www.trustfundforvictims.org/sites/default/files/decisions/ICC-01/04-01/06-3476-tENG.pdf), paras.5-6; Troisième décision sur les décisions administratives du Fonds au profit des victimes portant sur de nouvelles demandes en réparation ainsi que les demandes a/30314/19, a/30077/20 et a/30103/20, 1 December 2020, [ICC-01/04-01/06-3494](https://www.trustfundforvictims.org/sites/default/files/decisions/ICC-01/04-01/06-3494.pdf), para.11; Quatrième décision sur les décisions administratives du Fonds au profit des victimes portant sur de nouvelles

26. The relevance, of course, is that victims in the *Lubanga* case, for whom Judge Lordkipanidze is named as having been personally involved in eligibility assessments,<sup>54</sup> have also been recognised as being eligible for reparations in the *Ntaganda* proceedings. In the 8 March Reparations Order, the Trial Chamber was explicit that “[a]s of December 2020, Trial Chamber II has recognised 933 beneficiaries for reparations in the *Lubanga* case, all eligible for reparations in the *Ntaganda* case.”<sup>55</sup>

27. As such, as a former member of the TFV Board, Judge Lordkipanidze is now called upon to adjudicate the Reparations Appeals, in which the scope and propriety of the TFV’s involvement is being challenged, in relation to a reparations award directed towards victims whose eligibility he was directly involved in adjudicating, in an associated case. For the reasons set out below, this warrants his disqualification.

### III. A well-informed reasonable observer would apprehend bias on the part of Judge Lordkipanidze, warranting his disqualification

28. A strong presumption of impartiality exists in favour of sitting Judges<sup>56</sup> and a heavy burden<sup>57</sup> rests on the party requesting their disqualification. Against this

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demandes en réparation ainsi que la demande a/30213/20, 3 February 2021, [ICC-01/04-01/06-3499](#), para.10.

<sup>54</sup> Trust Fund for Victims, *TFV Management Brief October*, December 2020, <https://www.trustfundforvictims.org/sites/default/files/reports/TFV%20Management%20Brief%20-%20October%20to%20December%202020.pdf> (Consulted on 28 June 2021).

<sup>55</sup> [8 March Reparations Order](#), para.246, referring to *Prosecutor v. Lubanga*, Rectificatif de la Version publique expurgée de la Décision faisant droit à la requête du Fonds au profit des victimes du 21 septembre 2020 et approuvant la mise en œuvre des réparations collectives prenant la forme de prestations de services, [ICC-01/04-01/06-3495-Red-Corr](#), para.106.

<sup>56</sup> *Prosecutor v. Bemba et al.*, Annex - Decision of the Plenary of Judges on the Defence Applications for the Disqualification of Judge Cuno Tarfusser from the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, 20 June 2014, [ICC-01/05-01/13-511-Anx](#), para.18 (“Bemba et al. Decision”); Annex - Decision of the Plenary of Judges on the Defence Request for the Disqualification of Judge Kuniko Ozaki from the case of *The Prosecutor v. Bosco Ntaganda*, 20 June 2019, [ICC-01/04-02/06-2355-AnxI-Red](#), para.31 (“Ntaganda Decision”); *Prosecutor v. Al Hassan*, Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Marc Perrin de Brichambaut from the case *The Prosecutor*

backdrop, the Defence has not taken the process of requesting the disqualification of a Judge lightly.<sup>58</sup>

29. However, the presumption of impartiality enjoyed by Judges is rebuttable. Rule 34 states that the grounds for disqualification of a judge shall include “personal or professional relationship” and/or “[p]erformance of functions, prior to taking office, during which he or she could be expected to have formed an opinion on the case in question, on the parties or on their legal representatives that, objectively, could adversely affect the required impartiality of the person concerned”.

30. That said, it is not necessary to demonstrate actual bias on the part of Judge Lordkipanidze in order for disqualification to be warranted; the appearance of grounds to doubt the Judge’s impartiality will suffice.<sup>59</sup>

31. Moreover, the jurisprudence of the international courts and tribunals has developed the reasonable observer standard. An ICC Chamber found in its first decision on an application for disqualification of a judge that the “relevant standard of assessment was whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.”<sup>60</sup> This standard is concerned not only with whether a reasonable observer could apprehend bias, but whether any

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*v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, 8 July 2019, [ICC-01/12-01/18-398-AnxI](#), para.21 (“Al Hassan Decision July 2019”).

<sup>57</sup> [Banda-Jerbo Decision](#), para.14; *Prosecutor v. Lubanga*, Annex - Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Marc Perrin de Brichambaut from the case *The Prosecutor v. Thomas Lubanga Dyilo*, 28 June 2019, [ICC-01/04-01/06-3459-Anx](#), para.26 (“Lubanga Decision June 2019”); *Prosecutor v. Al Hassan*, Annex - Decision of the Plenary of Judges on the Defence Application for the Disqualification of judges of Pre-Trial Chamber I from the case *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, 12 September 2019, [ICC-01/12-01/18-458](#), para.23 (“Al Hassan Decision September 2019”).

<sup>58</sup> [Banda-Jerbo Decision](#), para.14.

<sup>59</sup> [Lubanga Decision June 2013](#), para.9; [Bemba et al. Decision](#), para.27; [Lubanga Decision June 2019](#), para.27; [Al Hassan Decision July 2019](#), para.20; [Al Hassan Decision September 2019](#), para.24.

<sup>60</sup> [Banda-Jerbo Decision](#), para.11.

such apprehension is objectively reasonable.<sup>61</sup> As held by the ICTR in *Ngirabatware*<sup>62</sup> and the ICTY in *Furundžija*: “[a]lthough the standpoint of the accused is a relevant consideration, the decisive question is whether a perception of lack of impartiality is objectively justified.”<sup>63</sup>

32. On the facts as set out above, Judge Lordkipanidze should have recused himself from the Reparations Appeals, and should now be disqualified.

33. Could a well-informed reasonable observer think that Judge Lordkipanidze is free to decide that the *Ntaganda* Trial Chamber erred in delegating the assessments of victims’ eligibility to the TFV, when Judge Lordkipanidze himself carried out victims’ eligibility assessments as a member of the TFV Board in *Lubanga*? Would a well-informed reasonable observer accept that Judge Lordkipanidze can consider with an open mind the Defence’s reliance on Her Honour Judge Ibáñez Carranza statement that, “making a determination as to the liability of the convicted person for reparations as well as the eligibility of victims is the responsibility of judges”,<sup>64</sup> when his former duties as a member of the TFV Board show otherwise? Would a well-informed reasonable observer think that Judge Lordkipanidze could impartially adjudicate arguments based on an assessment by the Independent Expert Review that the TFV was “unable to effectively and meaningfully carry out its reparations and assistance mandates”,<sup>65</sup> at a time when Judge Lordkipanidze was himself sitting on the TFV Board carrying out these mandates? Would a well-informed reasonable observer consider that Judge Lordkipanidze could impartially consider whether the

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<sup>61</sup> [Lubanga Decision June 2013](#), para.10; [Bemba et al. Decision](#), para.17; [Ntaganda Decision](#), para.32; [Lubanga Decision June 2019](#), para.27; [Al Hassan Decision July 2019](#), para.20; [Al Hassan Decision September 2019](#), para.25.

<sup>62</sup> ICTR, *Prosecutor v. Ngirabatware*, Decision on the defence motion for the disqualification of the judges of the trial chamber rule 15 (b) of the rules of procedure and evidence, 25 January 2011, [ICTR-99-54-T](#), para.11.

<sup>63</sup> ICTY, *Prosecutor v. Furundžija*, Judgement, 21 July 2000, [IT-95-17/1-A](#), para.182.

<sup>64</sup> [Defence Appeal](#), para.202 referring to *Prosecutor v. Thomas Lubanga Dyilo*, SEPARATE OPINION OF JUDGE LUZ DEL CARMEN IBÁÑEZ CARRANZA, 16 September 2019, [ICC-01/04-01/06-3466-AnxII](#), para.27.

<sup>65</sup> [Defence Appeal](#), para.223.

*Ntaganda* Trial Chamber was wrong in finding that it “sees no need to rule on the merits of individual applications for reparations, pursuant to rule 94 of the Rules”,<sup>66</sup> when in doing so it designated this task directly to his former colleagues? Would a well-informed reasonable observer consider that Judge Lordkipanidze is in a position to meaningfully assess a reparations award directed towards victims whose very eligibility he himself decided, in an associated case? If the answer to even one of these questions is in the negative, then Judge Lordkipanidze cannot be considered as enjoying the presumption of impartiality afforded to sitting Judges. It is respectfully submitted that the answers to each of these questions, is no.

34. This is not a situation where the Judge in question was associated with, or previously a member of an NGO or organisation and his/her prior involvement in causes correlating in some way to the subject-matter of the case was questioned,<sup>67</sup> or urged the Court to give priority to certain issues.<sup>68</sup> Similar to this case is the *Pinochet* case where the Judge was disqualified on the basis that he was involved, prior to his mandate, with a human rights NGO intervening in the case while he was part of the bench. Those facts were suggesting an even lesser apparent bias than in the case at hand.<sup>69</sup> Judge Lordkipanidze was a sitting member of the TFV Board at the time it made submissions as an active litigant in the present proceedings, and has performed the very tasks that are being challenged in the present appeal.

35. As for the requirement that “[...] a request for disqualification shall be made in writing as soon as there is knowledge of the grounds on which it is based”, in Rule 34(2) of the RPE, this must be balanced against the right of the parties to a considered response to indications of impartiality. Moreover, the timing of the present request

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<sup>66</sup> [8 March Reparations Order](#), para.196.

<sup>67</sup> ICTY, *Prosecutor v. Furundžija*, Judgement, 21 July 2000, [IT-95-17/1-A](#), paras.201-202; SCSL, *Prosecutor v. Norman*, [SCSL-2004-14-PT](#), Decision on the Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, 28 May 2004, para.2; [Lubanga Decision June 2013](#), para.44.

<sup>68</sup> ICTY, *Prosecutor v. Furundžija*, Judgement, 21 July 2000, [IT-95-17/1-A](#), para.166.

<sup>69</sup> United Kingdom, *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 2)* [1999] [1 All ER 577](#).



stems from the Defence's genuine belief that given how squarely the circumstances of the present case fell within Article 41(2)(b) of the Statute and Rule 34(1)(c) of the RPE, His Honour Judge Lordkipanidze would undoubtedly recuse himself, and a desire not to pre-empt this more direct path. When a recusal was not forthcoming, the latest substantive steps in the case, being the TFV's Observations on the Defence Request for Suspensive Effect and Request to submit observations on the Reparations Appeals;<sup>70</sup> the TFV Request to Reply to observations of Registry, Defence and LRVs observations on the Initial Draft Implementation Plan;<sup>71</sup> and the TFV Reply to Registry, LRVs and Defence observations on the Initial Draft Implementation Plan,<sup>72</sup> taken together, are a clear indication that the TFV's involvement as an active litigant in these proceedings means that a well-informed reasonable observer would apprehend bias on the part of the Judge. It was at this point, that the Defence brought the present request.

## CONCLUSION

36. It is undisputed that "the assessment of reparation pursuant to Article 75 of the Statute is a judicial process",<sup>73</sup> which implies full respect for due process rights.<sup>74</sup>

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<sup>70</sup> Observations on the Defence Request for Suspensive Effect and Request under rule 103 of the Rules of Procedure and Evidence, 22 June 2021, [ICC-01/04-02/06-2679](#).

<sup>71</sup> Email correspondence from the TFV to Trial Chamber II, parties and participants, 24 June 2021, at 13:36.

<sup>72</sup> Public redacted version of "Observations on the responses and observations submitted on the Initial Draft Implementation Plan", submitted on 28 June 2021, 28 June 2021, [ICC-01/04-02/06-2687-Red](#).

<sup>73</sup> [8 March Reparations Order](#), para.24; *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, [ICC-01/04-01/06-3129](#), para.34; *Prosecutor v. Germain Katanga*, Order for Reparations pursuant to Article 75 of the Statute, 24 March 2017, [ICC-01/04-01/07-3728-t-ENG](#), para.18; *Prosecutor v. Thomas Lubanga Dyilo*, Separate Opinion of Judge Eboe-Osuji, 18 July 2019, [ICC-01/04-01/06-3466-AnxI](#), para.10; *Prosecutor v. Thomas Lubanga Dyilo*, SEPARATE OPINION OF JUDGE LUZ DEL CARMEN IBÁÑEZ CARRANZA, 16 September 2019, [ICC-01/04-01/06-3466-AnxII](#), para.89.

<sup>74</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable', 18 July 2019, [ICC-01/04-01/06-3466-Red](#), para.248.



The independence of Judges is thus as important during the reparations phase as during all other aspects of the Court's judicial proceedings.

37. Applying the reasonable observer standard to the facts of this case leads to the inevitable conclusion that Judge Lordkipanidze should not form part of the Appeals Chamber seized with adjudicating the Reparations Appeals. Regardless whether Judge Lordkipanidze harbours actual bias as a result of his prior membership of the TFV Board, the circumstances would lead a well-informed reasonable observer to apprehend bias on his part. The issues raised in the Reparations Appeals, and Judge Lordkipanidze's responsibilities, involvement, and specific actions taken as a member of the TFV Board between December 2018 and February 2021 would lead a well-informed reasonable observer to apprehend bias on his part, adversely affecting the required impartiality of members of the Appeals Chamber.

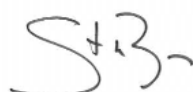
#### **RELIEF SOUGHT**

38. On the basis of the above arguments, the Defence respectfully:

**INVITES** Judge Lordkipanidze to recuse himself from the Reparations Appeals, or in the alternative

**SEIZES** the Presidency with a request for his disqualification, pursuant to Article 41(2)(b) of the Statute and Rule 34(1)(c) of the RPE.

**RESPECTFULLY SUBMITTED ON THIS 2<sup>nd</sup> DAY OF JULY 2021**



Me Stéphane Bourgon *Ad.E.*, Counsel for Bosco Ntaganda

The Hague, The Netherlands