



29 September 2021

**Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Lordkipanidze from the case *The Prosecutor v. Bosco Ntaganda***

**I. Relevant Procedural History**

1. On 18 December 2020, Judge Lordkipanidze was elected as judge of the Court.<sup>1</sup>
2. On 2 February 2021, Judge Lordkipanidze resigned with immediate effect from his position as member of the Board of Directors of the Trust Fund for Victims (the ‘TFV’ and the ‘TFV Board of Directors’, respectively),<sup>2</sup> which he occupied since December 2018.
3. On 8 March 2021, Trial Chamber VI issued its Reparations Order against Mr Ntaganda (the ‘Reparations Order’),<sup>3</sup> thereby seeking the TFV’s assistance to ‘design the award for reparations’ and to ‘determin[e] the size and nature of

<sup>1</sup> Assembly of States Parties, Results of the Elections 2020, [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) (last visited on 10 September 2021).

<sup>2</sup> Trust Fund for Victims, Press Release, Newly elected Judge to the ICC, Gocha Lordkipanidze, resigns from TFV Board of Directors, 12 February 2021, [https://www.icc-cpi.int/Pages/item.aspx?name=210212-tfv-pr#:~:text=Following%20his%20election%20as%20a,Fund%20for%20Victims%20\(TFV\)](https://www.icc-cpi.int/Pages/item.aspx?name=210212-tfv-pr#:~:text=Following%20his%20election%20as%20a,Fund%20for%20Victims%20(TFV)) (last visited on 10 September 2021).

<sup>3</sup> Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Reparations Order, 8 March 2021, ICC-01/04-02/06-2659.

the reparation awards',<sup>4</sup> and ordering the preparation of a draft implementation plan for the Chamber's approval.<sup>5</sup>

4. On 10 March 2021, Judge Lordkipanidze was sworn in as judge of the Court<sup>6</sup> and was, subsequently, assigned to the Appeals Division.<sup>7</sup>
5. On 8 April 2021, the Common Legal Representatives of the Victims of the Attacks and Mr Ntaganda submitted their notices of appeal against the Reparations Order,<sup>8</sup> and, subsequently, on 7 June 2021, their respective appeal briefs (the 'Reparations Appeals').<sup>9</sup>
6. On 2 July 2021, Mr Ntaganda submitted his request for disqualification of Judge Lordkipanidze (the 'Application').<sup>10</sup>

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<sup>4</sup> Reparations Order, ICC-01/04-02/06-2659, para. 248, *referring to Appeals Chamber, The 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, 3 March 2015, ICC-01/04-01/06-3129, paras 184, 200.

<sup>5</sup> Reparations Order, ICC-01/04-02/06-2659, para. 249.

<sup>6</sup> International Criminal Court, Press Release, Six New Judges Sworn in today at the seat of the International Criminal Court, 10 March 2021, <https://www.icc-cpi.int/Pages/item.aspx?name=PR1575#:~:text=Today%2C%2010%20March%202021%2C%20six%20new%20judges%20of,the%20six%20outgoing%20ICC%20judges%20ending%20their%20terms> (last visited on 10 September 2021).

<sup>7</sup> Presidency, Decision assigning judges to divisions and recomposing Chambers, 16 March 2021, ICC-01/04-02/06-2663, p. 4.

<sup>8</sup> Common Legal Representative of the Victims of the Attacks, *The Prosecutor v. Bosco Ntaganda*, Notice of Appeal of the Common Legal Representative of the Victims of the Attacks against the Reparations Order, ICC-01/04-02/06-2668, 8 April 2021; Defence for Mr Ntaganda, *The Prosecutor v. Bosco Ntaganda*, Defence Notice of Appeal against the Reparations Order, ICC-01/04-02/06-2659, 8 April 2021, ICC-01/04-02/06-2669.

<sup>9</sup> Common Legal Representative of the Victims of the Attacks, *The Prosecutor v. Bosco Ntaganda*, 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; Defence for Mr Ntaganda, *The Prosecutor v. Bosco Ntaganda*, Defence Appellant Brief against the 8 March Reparations Order, 7 June 2021, ICC-01/04-02/06-2675.

<sup>10</sup> Defence for Mr Ntaganda, *The Prosecutor v. Bosco Ntaganda*, 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, 2 July 2021, ICC-01/04-02/06-2690.

7. On 8 July 2021, the Presidency issued an order establishing deadlines for submissions in respect of the Application.<sup>11</sup>
8. On 17 August 2021, Judge Lordkipanidze submitted his observations (the ‘Observations’) to the Presidency,<sup>12</sup> which were notified to all judges and participants on 19 August 2021 (the ‘Notification of Observations’).<sup>13</sup> The Common Legal Representatives of the Victims did not file any observations concerning the present Application.
9. On 8 September 2021, a plenary session of judges was convened in accordance with article 41(2)(c) of the Rome Statute (the ‘Statute’) and rule 4(2) of the Rules of Procedure and Evidence (the ‘Rules’) to consider the Application. The session was attended by Judges Piotr Hofmański, Luz del Carmen Ibáñez Carranza, Antoine Kesia-Mbe Mindua, Marc Perrin de Brichambaut, Péter Kovács, Chang-ho Chung, Tomoko Akane, Reine Alapini-Gansou, Kimberly Prost, Rosario Salvatore Aitala, Joanna Korner, María del Socorro Flores Liera, Sergio Gerardo Ugalde Gordínez, Miatta Maria Samba and Althea Violet Alexis-Windsor. Judges Bertram Schmitt and Solomy Balungi Bossa were not present for the plenary session.

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<sup>11</sup> Presidency, *The Prosecutor v. Bosco Ntaganda*, Order concerning the ‘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’ dated 2 July 2021 (ICC-01/04-02/06-2690), 8 July 2021, ICC-01/04-02/06-2692, p. 3.

<sup>12</sup> Judge Lordkipanidze, *The Prosecutor v. Bosco Ntaganda*, Observations of Judge Gocha Lordkipanidze on the “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” in the *Ntaganda* case, dated 2 July 2021 (ICC-01/04-02/06-2690), dated 17 August 2021, 19 August 2021, ICC-01/04-02/06-2707-AnxI, annexed to Presidency, Notification concerning the ‘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’ dated 2 July 2021 (ICC-01/04-02/06-2690), 19 August 2021, ICC-01/04-02/06-2707.

<sup>13</sup> Notification of Observations, ICC-01/04-02/06-2707.

## II. The Arguments

### A. Application

10. The Application alleges the risk of an appearance of bias in connection to Judge Lordkipanidze's prior role as member of the TFV Board of Directors. It is grounded on two principal contentions. First, that the TFV, in light of the role granted to it by the Reparations Order, could be considered akin to a party, with its mandate, scope and capacity being a live issue in the present appeal proceedings,<sup>14</sup> and, second, that Judge Lordkipanidze performed functions at the TFV which had an impact on the Reparations Order currently under appeal.<sup>15</sup>
11. As regards the first contention, the Application submits that in light of the role that the Trial Chamber assigned to the TFV<sup>16</sup> and the recent TFV's submissions related to the reparations plan,<sup>17</sup> the TFV could not be considered as an impartial and disinterested participant in the reparations proceedings, but rather assumed a role comparable to that of a party to the proceedings.<sup>18</sup> In addition, the Application submits that the TFV's mandate is a live issue in the present Reparations Appeals and the Appeals Chamber will consequently be required to rule on the mandate, scope and capacity of the TFV.<sup>19</sup>
12. As regards the second contention, the Application further submits that Judge Lordkipanidze's prior work at the TFV overlapped with the Reparations

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<sup>14</sup> Application, ICC-01/04-02/06-2690, paras 16-21.

<sup>15</sup> Application, ICC-01/04-02/06-2690, paras 22-27.

<sup>16</sup> Application, ICC-01/04-02/06-2690, para. 17.

<sup>17</sup> Application, ICC-01/04-02/06-2690, para. 19.

<sup>18</sup> Application, ICC-01/04-02/06-2690, para. 20.

<sup>19</sup> Application, ICC-01/04-02/06-2690, para. 21.

Appeals in the case.<sup>20</sup> He argues that the TFV submitted filings on several occasions between October 2019 and December 2020<sup>21</sup> and referred to Judge Lordkipanidze's active involvement in the respective preparations.<sup>22</sup> In addition, Mr Ntaganda points out that Judge Lordkipanidze was involved in the renewed assistance mandate in Ituri in July 2020.<sup>23</sup> He further submits that Judge Lordkipanidze formed part of the TFV Board of Directors while the TFV was ordered to decide on victim eligibility in the *Lubanga* case,<sup>24</sup> which he considers of specific relevance to the Reparations Appeals, since the Trial Chamber had determined that 933 beneficiaries for the reparations in the *Lubanga* case are also eligible for reparations in the *Ntaganda* case.<sup>25</sup>

## B. Observations

13. Judge Lordkipanidze considers that, after careful consideration, there is no need to recuse himself from the *Ntaganda* case, since he is able to retain an

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<sup>20</sup> Application, ICC-01/04-02/06-2690, paras 22-27.

<sup>21</sup> Application, ICC-01/04-02/06-2690, para. 23; referring to TFV, *The Prosecutor v. Bosco Ntaganda*, 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; TFV, *The Prosecutor v. Bosco Ntaganda*, Trust Fund for Victims' observations relevant to reparations, 28 February 2020, ICC-01/04-02/06-2476; TFV, *The Prosecutor v. Bosco Ntaganda*, Public Redacted Version of the "Trust Fund for Victims' Final Observations on the reparations proceedings", 21 December 2020, ICC-01/04-02/06-2635-Red.

<sup>22</sup> Application, ICC-01/04-02/06-2690, para. 23, referring to Judge Lordkipanidze's *curriculum vitae*, submitted to the ASP for the election in December 2020, stating: 'In this capacity, involved, inter alia, in working on filings with the Court prepared by the TFV Secretariat.'; see *Curriculum Vitae* of Gocha Lordkipanidze (Georgia), [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) (last visited on 10 September 2021).

<sup>23</sup> Application, ICC-01/04-02/06-2690, para. 24.

<sup>24</sup> Application, ICC-01/04-02/06-2690, para. 25.

<sup>25</sup> Application, ICC-01/04-02/06-2690, para. 26, referring to Reparations Order, ICC-01/04-02/06-2659, para. 246; *The Prosecutor v. Thomas Lubanga Dyilo*, 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, 5 March 2021, ICC-01/04-01/06-3495-Red-Corr, para. 106. The confidential version of this document was filed on 14 December 2020.

open mind and adjudicate the matters before him impartially without favouring any party or participant.<sup>26</sup> He further notes that the States Parties elected him as Judge with full knowledge of his activities as member of the TFV Board of Directors and that his previous position had rather furnished him with expertise in the field.<sup>27</sup> He additionally submits that article 41 of the Statute does not contemplate that every level of previous involvement in a case automatically disqualifies a judge from sitting in the same case,<sup>28</sup> referring also to previous practice of the Court in this regard.<sup>29</sup>

14. As to the Defence's argument that the role of the TFV is a live issue in the Reparations Appeals, Judge Lordkipanidze submits that at the time of the issuance of the Reparations Order, he was no longer part of the TFV Board of Directors, having already resigned.<sup>30</sup> He emphasises that his previous involvement in the TFV does not prevent him from addressing arguments with an open mind, but that his experience and expertise could be of value when addressing the questions raised in the Reparations Appeals.<sup>31</sup>
15. In respect of the allegations concerning specific functions performed during his time at the TFV, Judge Lordkipanidze submits that the overlap between the victims in the *Lubanga* and *Ntaganda* cases does not lead to the conclusion that he was automatically involved in determining the eligibility of victims

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<sup>26</sup> Observations, ICC-01/04-02/06-2707-AnxI, para. 11.

<sup>27</sup> Observations, ICC-01/04-02/06-2707-AnxI, para. 12.

<sup>28</sup> Observations, ICC-01/04-02/06-2707-AnxI, para. 14.

<sup>29</sup> Observations, ICC-01/04-02/06-2707-AnxI, para. 17, *referring to* Decision of the Plenary of Judges on the Application of the Legal Representative for Victims for the disqualification of Judge Christine Van den Wyngaert from the case of *The Prosecutor v. Germain Katanga*, 22 July 2014, ICC-01/04-01/07-3504-Anx, para. 51 (the '*Katanga* Disqualification Decision 22 July 2014'); Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Silvia Fernández de Gurmendi from the case of *The Prosecutor v. Thomas Lubanga Dyilo*, 3 August 2015, ICC-01/04-01/06-3154-AnxI, para. 36 (the '*Lubanga* Disqualification Decision 3 August 2015').

<sup>30</sup> Observations, ICC-01/04-02/06-2707-AnxI, para. 20.

<sup>31</sup> Observations, ICC-01/04-02/06-2707-AnxI, para. 20.

in the present case.<sup>32</sup> He points out that no victim eligibility assessments for the *Ntaganda* case were undertaken by the TFV while he was a member of the TFV Board of Directors.<sup>33</sup> He further explains that in respect of eligibility assessments conducted while he worked for the TFV, he was mainly responsible for matters related to the *Al Mahdi* case.<sup>34</sup> Additionally, he points out that neither the assessment of eligibility of victims undertaken by the TFV in the *Lubanga* case, nor the TFV's involvement in an assistance mandate in Ituri, was directly challenged in the Reparations Appeals.<sup>35</sup>

16. Judge Lordkipanidze further submits that the TFV's submissions before the Trial Chamber on three occasions, in the context of reparations proceedings in the present case, during his tenure on the TFV Board of Directors, do not undermine his capacity to participate objectively in the present Reparations Appeals, especially considering the lack of overlap between the content of the TFV's submissions and the issues currently under adjudication in the Reparations Appeals.<sup>36</sup> He finally submits that his previous TFV capacity was administrative in nature, a role he considers to be incomparable with his judicial duties in the Appeals Chamber.<sup>37</sup>

### III. Relevant law

17. Article 41 (2) of the Statute provides:

- (a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court or in a related criminal

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<sup>32</sup> Observations, ICC-01/04-02/06-2707-AnxI, para. 22.

<sup>33</sup> Observations, ICC-01/04-02/06-2707-AnxI, para. 22.

<sup>34</sup> Observations, ICC-01/04-02/06-2707-AnxI, para. 21.

<sup>35</sup> Observations, ICC-01/04-02/06-2707-AnxI, para. 22.

<sup>36</sup> Observations, ICC-01/04-02/06-2707-AnxI, para. 23.

<sup>37</sup> Observations, ICC-01/04-02/06-2707-AnxI, para. 24.

case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.

- (b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.
- (c) Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

18. Rule 34(1) of the Rules provides in relevant parts:

In addition to the grounds set out in article 41, paragraph 2, and article 42, paragraph 7, the grounds for disqualification of a judge, the Prosecutor or a Deputy Prosecutor shall include, *inter alia* the following:

- (a) Personal interest in the case, including a spousal, parental or other close family, personal or professional relationship, or a subordinate relationship, with any of the parties;  
[...]
- (c) Performance 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.

#### IV. Determination of the plenary

##### A. Applicable legal standards

19. The plenary of judges notes its previous assessment that the disqualification of a judge is not a step to be undertaken lightly and that a high threshold must be satisfied in order to rebut the presumption of impartiality which

attaches to judicial office.<sup>38</sup> Unless rebutted, it is presumed that the judges of the Court are professional judges capable of deciding on issues before them while relying solely and exclusively on the evidence submitted in a case.<sup>39</sup> It is presumed that judges can disabuse themselves of any irrelevant personal beliefs or predispositions.<sup>40</sup>

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<sup>38</sup> Decision of the plenary of judges on the “Defence Request for the Disqualification of a Judge” of 2 April 2012, 5 June 2012, ICC-02/05-03/09-344-Anx, para. 14 (the ‘Banda & Jerbo Disqualification Decision 5 June 2012’); 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, para. 37 (the ‘Lubanga Disqualification Decision 11 June 2013’); 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 (the ‘Bemba et al Disqualification Decision 20 June 2014’); *Lubanga Disqualification Decision 3 August 2015*, ICC-01/04-01/06-3154-AnxI, para. 29; 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 (the ‘Ntaganda Disqualification Decision 20 June 2019’); 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 (the ‘Lubanga Disqualification Decision 28 June 2019’); 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. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, 8 July 2019, ICC-01/12-01/18-398-AnxI, para. 19 (the ‘Al Hassan Disqualification Decision 8 July 2019’); Public redacted version of the 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-AnxI-Red, para. 23 (the ‘Al Hassan Disqualification Decision 12 September 2019’).

<sup>39</sup> *Banda & Jerbo Disqualification Decision 5 June 2012*, ICC-02/05-03/09-344-Anx, para. 14, referring to, Decision on the request of Judge Sanji Mmasenono Monageng of 25 February 2010 to be excused from reconsidering whether a warrant of arrest for the crime of genocide should be issued in the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, pursuant to article 41(1) of the Statute and rules 33 and 35 of the Rules of Procedure and Evidence, 19 March 2010, ICC-02/05-01/09-76-Anx2, page 7; *Lubanga Disqualification Decision 11 June 2013*, ICC-01/04-01/06-3040-Anx, para. 10; *Bemba et al Disqualification Decision 20 June 2014*, ICC-01/05-01/13-511-Anx, para. 18; *Katanga Disqualification Decision 22 July 2014*, ICC-01/04-01/07-3504-Anx, para. 45; *Lubanga Disqualification Decision 3 August 2015*, ICC-01/04-01/06-3154-AnxI, para. 29; *Lubanga Disqualification Decision 28 June 2019*, ICC-01/04-01/06-3459-Anx, para. 26; *Al Hassan Disqualification Decision 8 July 2019*, ICC-01/12-01/18-398-AnxI, para. 19; *Al Hassan Disqualification Request 12 September 2019*, ICC-01/12-01/18-458-AnxI-Red, para. 23.

<sup>40</sup> *Lubanga Disqualification Decision 11 June 2013*, ICC-01/04-01/06-3040-Anx, para. 36, citing *President of the Republic of South Africa v. South Africa Rugby Football Union 1999 (7) BCLR 725 (CC)* at 753. See also *Al Hassan Disqualification Decision 8 July 2019*, ICC-01/12-01/18-398-AnxI, para. 19. *Al Hassan Disqualification Decision 12 September 2019*, ICC-01/12-01/18-458-AnxI-Red, para. 23.

20. The plenary of judges understands the Application to effectively concern the apprehension of bias on the part of Judge Lordkipanidze.<sup>41</sup> Consequently, it is not necessary for an applicant seeking to disqualify a judge to show actual bias on behalf of the judge; rather, the appearance of grounds to doubt her or his impartiality is sufficient.<sup>42</sup> The plenary of judges recalls that justice must not only be done, but must additionally be seen to be done.<sup>43</sup>
21. The plenary of judges has consistently considered that the question of impartiality should be viewed from the objective perspective of whether a fair-minded and informed observer, having considered all the facts and circumstances, would reasonably apprehend bias in the judge.<sup>44</sup> It has regularly been emphasised that such fair-minded person is an objective observer, not to be confused with the applicant,<sup>45</sup> whose consideration of

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<sup>41</sup> Application, ICC-01/04-02/06-2690, paras 3, 4, 37.

<sup>42</sup> *Banda & Jerbo* Disqualification Decision 5 June 2012, ICC-02/05-03/09-344-Anx, para. 11; *Lubanga* Disqualification Decision 11 June 2013, ICC-01/04-01/06-3040-Anx, para. 9; *Bemba et al* Disqualification Decision 20 June 2014, ICC-01/05-01/13-511-Anx, para. 16; *Katanga* Disqualification Decision 22 July 2014, ICC-01/04-01/07-3504-Anx, para. 38; *Lubanga* Disqualification Decision 3 August 2015, ICC-01/04-01/06-3154-AnxI, para. 28; *Ntaganda* Disqualification Decision 20 June 2019, ICC-01/04-02/06-2355-AnxI-Red, para. 32; *Lubanga* Disqualification Decision 28 June 2019, ICC-01/04-01/06-3459-Anx, para. 27; *Al Hassan* Disqualification Decision 8 July 2019, ICC-01/12-01/18-398-AnxI, para. 20; *Al Hassan* Disqualification Decision 12 September 2019, ICC-01/12-01/18-458-AnxI-Red, para. 24.

<sup>43</sup> *Lubanga* Disqualification Decision 11 June 2013, ICC-01/04-01/06-3040-Anx, para. 67, referring to United Kingdom, King's Bench Division, *The King v. Sussex Justices, Ex parte McCarthy*, 9 November 1923 [1924] 1 K.B. 256, p. 259; See also *Lubanga* Disqualification Decision 28 June 2019, ICC-01/04-01/06-3459-Anx, para. 27; *Al Hassan* Disqualification Decision 12 September 2019, ICC-01/12-01/18-458-AnxI-Red, para. 24.

<sup>44</sup> *Lubanga* Disqualification Decision 11 June 2013, ICC-01/04-01/06-3040-Anx, para. 34; *Bemba et al* Disqualification Decision 20 June 2014, ICC-01/05-01/13-511-Anx, para. 44; *Ntaganda* Disqualification Decision 20 June 2019, ICC-01/04-02/06-2355-AnxI-Red, para. 32; *Lubanga* Disqualification Decision, ICC-01/04-01/06-3459-Anx, para. 27; *Al Hassan* Disqualification Decision 8 July 2019, ICC-01/12-01/18-398-AnxI, para. 20; *Al Hassan* Disqualification Decision 12 September 2019, ICC-01/12-01/18-458-AnxI-Red, para. 25.

<sup>45</sup> *Lubanga* Disqualification Decision 11 June 2013, ICC-01/04-01/06-3040-Anx, para. 35, referring to *Helow v. Secretary of State for the Home Department and another (Scotland)* [2008] UKHL 62, para. 2. See also *Ntaganda* Disqualification Request 20 June 2019, ICC-01/04-02/06-2355-AnxI-Red, para. 32; *Lubanga* Disqualification Request 28 June 2019, ICC-01/04-01/06-3459-Anx, para. 27; *Al Hassan* Disqualification Request 8 July 2019, ICC-01/12-01/18-398-AnxI, para. 20; *Al Hassan* Disqualification Decision, 12 September 2019, ICC-01/12-01/18-458-AnxI-Red; para. 25.

facts and circumstances includes an understanding of the nature of a judge's profession.<sup>46</sup> The plenary of judges specifies that, in forming a view regarding the appearance of bias, the fair-minded observer should take into account the entire context of the case.<sup>47</sup> The plenary of judges explicitly recalls that it is for the party requesting the disqualification to demonstrate the appearance of bias.<sup>48</sup>

## B. Preliminary Issue

22. The plenary of judges considers that the requirement in article 41(2)(c) of the Statute, namely that any question as to the disqualification of a judge shall be decided by an *absolute majority of the judges*, constitutes an evident *lex specialis* in the context of the ordinary rule applicable to plenary decision-making,<sup>49</sup> thereby requiring that decisions under article 41(2)(c) of the Statute be taken by an absolute majority of all the judges of the Court. Accordingly, this would require the concordance of at least 10 judges of the Court.

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<sup>46</sup> *Lubanga* Disqualification Decision 11 June 2013, ICC-91/04-01/06-3040-Anx, para. 36; *Ntaganda* Disqualification Decision 20 June 2019, ICC-01/04-02/06-2355-AnxI-Red, para. 32; *Lubanga* Disqualification Decision 28 June 2019, ICC-01/04-01/06-3459-Anx, para. 27; *Al Hassan* Disqualification Decision 8 July 2019, ICC-01/12-01/18-398-AnxI, para. 20; *Al Hassan* Disqualification Request 12 September 2019, ICC-01/12-01/18-458-AnxI-Red, para. 25.

<sup>47</sup> *Lubanga* Disqualification Decision 11 June 2013, ICC-01/04-01/06-3040-Anx, para. 38; *Lubanga* Disqualification Decision 28 June 2019, ICC-01/04-01/06-3459-Anx, para. 27; *Al Hassan* Disqualification Decision 8 July 2019, ICC-01/12-01/18-398-AnxI, para. 20; *Al Hassan* Disqualification Decision 12 September 2019, ICC-01/12-01/18-458-AnxI-Red, para. 25.

<sup>48</sup> *Ntaganda* Disqualification 20 June 2019, ICC-01/04-02/06-2355-AnxI-Red, para. 33; *Lubanga* Disqualification Decision 28 June 2019, ICC-01/04-01/06-3459-Anx, para. 27; *Al Hassan* Disqualification Decision 8 July 2019, ICC-01/12-01/18-398-AnxI, para. 20; *Al Hassan* Disqualification Decision 12 September 2019, ICC-01/12-01/18-458-AnxI-Red, para. 25.

<sup>49</sup> Rule 4(4) of the Rules.

### C. Merits

23. Having considered all relevant information before it, an absolute majority of twelve judges (the ‘Majority’), consisting of Judges Piotr Hofmański, Luz Ibáñez Carranza, Antoine Kesia-Mbe Mindua, Marc Perrin de Brichambaut, Péter Kovács, Chang-ho Chung, Tomoko Akane, Reine Alapini-Gansou, Rosario Salvatore Aitala, María del Socorro Flores Liera, Sergio Gerardo Ugalde Gordínez and Miatta Maria Samba deny the Application. A minority of three judges (the ‘Minority’), consisting of Judges Kimberly Prost, Joanna Korner and Althea Violet Alexis-Windsor, is unable to reach the same conclusion.

#### 1. *Opinion of the Majority*

24. The Majority emphasises, in particular, the Court’s previous determinations that the disqualification of a judge is not a step to be undertaken lightly and that a high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office.<sup>50</sup> Such high threshold is itself fully acknowledged in the Application.<sup>51</sup> The Majority considers that the Application fails to properly substantiate its claim of an appearance of bias in the eyes of the fair-minded and well-informed objective observer. In this regard, the Majority emphasises that it was convinced neither by the Application’s arguments concerning the role of the TFV in the Reparations

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<sup>50</sup> *Banda & Jerbo* Disqualification Decision 5 June 2012, ICC-02/05-03/09-344-Anx, para. 14; *Lubanga* Disqualification Decision 11 June 2013, ICC-01/04-01/06-3040-Anx, para. 37; *Bemba et al* Disqualification Decision 20 June 2014, ICC-01/05-01/13-511-Anx, para. 18; *Katanga* Disqualification Decision 22 July 2014, ICC-01/04-01/07-3504-Anx, para. 45; *Lubanga* Disqualification Decision 3 August 2015, ICC-01/04-01/06-3154-AnxI, para. 29; *Ntaganda* Disqualification Decision 20 June 2019, ICC-01/04-02/06-2355-AnxI-Red, para. 31; *Lubanga* Disqualification Decision 28 June 2019, ICC-01/04-01/06-34590Anx, para. 26 ; *Al Hassan* Disqualification Request 8 July 2019, ICC-01/12-01/18-398-AnxI, para. 19; *Al Hassan* Disqualification Decision, ICC-01/12-01/18-458-AnxI-Red, para. 23.

<sup>51</sup> Application, ICC-01/04-02/06-2690, para. 28.

Appeals,<sup>52</sup> nor by the allegations of direct overlap between the prior work of the Judge and the Reparations Appeals.<sup>53</sup>

25. The Majority emphasises, for clarity, that Judge Lordkipanidze resigned from the TFV on 2 February 2021, well before the Reparations Order of 8 March 2021 was issued and that, accordingly, he has played no role whatsoever in connection with any TFV's participation in subsequent reparations proceedings before Trial Chamber II, nor, most evidently, in the TFV's participation in the Reparations Appeals.

26. In respect of the contention that the TFV's role in the reparations proceedings is akin to that of a party, the Majority emphasises that the Application, in this regard, refers largely to the role granted to the TFV at the trial level,<sup>54</sup> which the Majority considers does not require close examination given that it is in no way determinative of its role in the appeals proceedings. In respect of the role granted to the TFV in the Reparations Appeals, the Majority notes that the procedural filings referred to in the Application<sup>55</sup> show that the role of the TFV at the appeals level is being determined in accordance with rule 103 of the Rules, which itself demonstrates that the TFV is *not* being considered as a party. The Majority, therefore, cannot accept as substantiated the Application's contention that the TFV has a role akin to a party in the Reparations Appeals.

27. In respect of the general contention that the mandate of the TFV is a live issue in the Reparations Appeals, the Majority considers it obvious that the mere

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<sup>52</sup> Application, ICC-01/04-02/06-2690, paras 16-21.

<sup>53</sup> Application, ICC-01/04-02/06-2690, paras 22-27.

<sup>54</sup> Application, ICC-01/04-02/06-2690, para. 19.

<sup>55</sup> Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, 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; Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, 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.

fact of Judge Lordkipanidze's previous role on the TFV Board of Directors is insufficient to rebut the presumption of judicial impartiality. The Majority notes that many judges of the Court have had prior roles of relevance to the Court's work, including within bodies and organs which form part of the Rome Statute system. Indeed, judges have often been elected on the basis of their expertise in such context. The Majority considers that such prior professional expertise does not, without more, substantiate the very specific risk set out in rule 34(1)(c) of the Rules that a judge may have *formed an opinion on the case in question*.

28. In respect of the Application's contention of direct overlap between Judge Lordkipanidze's prior TFV work and the Reparations Appeals, the Majority considers that the bulk of the allegations in this regard are so general as to be entirely unsubstantiated, demonstrating no role having been played by Judge Lordkipanidze on matters pertinent to the Reparations Appeals.<sup>56</sup> The Majority notes also the administrative nature of the Judge's prior functions in this regard. In relation to the specific allegation that Judge Lordkipanidze was a member of the TFV Board of Directors when it determined victim eligibility in the *Lubanga* case, the Majority is convinced of the pertinence of the information in the Observations that pursuant to the internal division of work at the TFV, Judge Lordkipanidze's main responsibility at the TFV was related to matters concerning the *Al Mahdi* case,<sup>57</sup> as well as by his contention that the matter of eligibility assessments undertaken by the TFV in *Lubanga* is not directly challenged in the Reparations Appeals.<sup>58</sup>

29. In making all of the above assessments, the Majority emphasises not only the high threshold which must be satisfied to rebut the presumption of judicial

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<sup>56</sup> Application, ICC-01/04-02/06-2690, paras 23,24.

<sup>57</sup> Observations, ICC-01/04-02/06-2707-AnxI, para. 21.

<sup>58</sup> Observations, ICC-01/04-02/06-2707-AnxI, para. 22.

impartiality, but also the Court's consistent approach that allegations of a lack of impartiality are not sufficiently made out by *any* form of prior connection to a matter. The Majority considers it necessary to demonstrate the existence of actual legal and/or factual congruence between alleged previous involvements and the legal proceedings of the subject of a disqualification request.<sup>59</sup> The Majority considers such congruence to be unsubstantiated in the Application.

30. In light of the above, the Majority considers that a reasonable well-informed and fair-minded observer, taking into consideration all relevant information, would not conclude that Judge Lordkipanidze's previous role as a member of the TFV Board of Directors undermines his appearance of impartiality in the Reparations Appeals. Put otherwise, the Majority does not consider that any information has been presented which would rebut the ordinary presumption of judicial impartiality.

## *2. Opinion of the Minority*

31. The Minority fully concurs that disqualification is not to be undertaken lightly and that the presumption of judicial impartiality is not readily rebutted. The Minority emphasises that no actual bias on the part of Judge Lordkipanidze is in any way suggested and it remains entirely convinced as to the Judge's actual capacity to perform his functions with full impartiality. Nonetheless, the Minority remains concerned that a number of factors in the present circumstances may give rise to a potential appearance of bias in the eyes of the reasonable observer.

32. First, the Minority notes that the mandate, scope and capacity of the TFV is at issue in the Reparations Appeals, a matter on which there is full

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<sup>59</sup> *Lubanga* Disqualification Decision 3 August 2015, ICC-01/04-01/06-3154-AnxI, para. 31; *Al Hassan* Disqualification Decision 12 September 2019, ICC-01/12-01/18-458-AnxI-Red, para. 26.

agreement.<sup>60</sup> The Minority considers that a fair-minded and well-informed observer may reasonably give pause as to whether it is consistent with the appearance of judicial impartiality for a judge to adjudicate on the mandate, scope and capacity of an organisation in which he has been a member of the TFV Board of Directors. This arises not merely because the TFV is involved in some way in the Reparations Appeals but because the very function, nature and role of the TFV itself forms part of the subject matter of the Reparations Appeals. The Minority considers that, notwithstanding whether the TFV is formally a party to the Reparations Appeals, there is a genuine risk that Judge Lordkipanidze could appear to have a personal interest in appellate issues in view of his former leadership role in the TFV, with the perception of such interest being inconsistent with the spirit of rule 34(1)(a) and (c) of the Rules, noting further that such rule is in no way exhaustive.

33. Even more significantly, the Minority emphasises that, in the context of reparations proceedings in *Ntaganda*, the TFV made submissions before Trial Chamber VI while Judge Lordkipanidze was a member of the TFV Board of Directors (i.e. prior to 2 February 2021).<sup>61</sup> Those submissions necessarily form part of the adjudicative process which led to the issuance of the Reparations Order of 8 March 2021 which is itself now the impugned decision in the context of the Reparations Appeals. The Minority notes that submissions of the TFV in reparations proceedings are made in the name of its Board of Directors and that the individual members of the latter, in the eyes of a reasonable observer, must be understood to assume a certain level of

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<sup>60</sup> Observations, ICC-01/04-02/06-2707-AnxI, para. 20.

<sup>61</sup> TFV, *The Prosecutor v. Bosco Ntaganda*, 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; TFV, *The Prosecutor v. Bosco Ntaganda*, Trust Fund for Victims' observations relevant to reparations, 28 February 2020, ICC-01/04-02/06-2476; TFV, *The Prosecutor v. Bosco Ntaganda*, Public Redacted Version of the "Trust Fund for Victims' Final Observations on the reparations proceedings", 18 December 2020, ICC-01/04-02/06-2635-Red.

responsibility for them, regardless of their actual personal involvement, given that what is currently under assessment is an appearance of bias, rather than its actuality. Regardless of the content of the TFV submissions in the reparations proceedings, their impact on the Reparations Order of 8 March 2021 or their connection to specific issues in the Reparations Appeals, the Minority is particularly concerned by the appearance that Judge Lordkipanidze, in his capacity as a member of the TFV Board of Directors, played a role in the reparations proceedings leading to the Reparations Order of 8 March 2021 and, therefore, leading to the Reparations Appeals. The Minority is concerned that, at a level of appearance, a fair-minded and informed observer may struggle to readily understand such apparent duality of role.

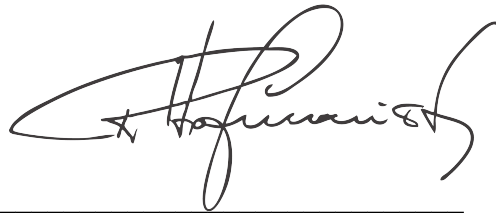
34. The Minority further considers that the apparent administrative nature of Judge Lordkipanidze's role on the TFV Board of Directors is of minimal relevance, considering rule 34 of the Rules to clearly encompass a broad range of non-exhaustive means by which certain functions, roles, views and personal or professional interests may give rise to an appearance of a lack of impartiality. A prior function being administrative in nature does not preclude the possibility of an appearance of bias arising.
35. Although being entirely convinced as to the actual impartiality of Judge Lordkipanidze in the Reparations Appeals, the Minority considers that the Judge's close relationship with the TFV, the nature and role of which forms part of the subject-matter in the appeals proceedings, combined with the fact of submissions having been made in the name of the TFV Board of Directors, while the Judge was a member thereof, and which form part of the adjudicative proceedings resulting in the Reparations Appeals, cannot help but enliven potential confusion in the eyes of even a well-informed and fair-minded observer. The Minority considers, with full respect for the strength

of the presumption of judicial impartiality, that the present situation constitutes one of those exceptionally limited circumstances in which it would have been preferable for the Judge to have sought recusal, as suggested in the Application.

36. Accordingly, the Minority would have granted the Application.

## **V. Disposition**

37. The plenary of judges, acting by absolute majority of twelve judges in accordance with article 41(2)(c) of the Statute, with three judges dissenting, decides to deny the Application.

A handwritten signature in black ink, appearing to read 'Hofmański', with a large, stylized initial 'P' and a long horizontal stroke extending to the right.

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**Judge Piotr Hofmański**  
**President**