PARTLY DISSENTING OPINION OF JUDGE RAFAÂ BEN ACHOUR

1. I agree with almost all the reasoning and the operative part of the *Léon Mugesera v. Republic of Rwanda* Judgment above-mentioned. I am, however, dissenting on the Court's reasoning in paragraphs 73 and 74 and on sub-paragraph (iii) of the operative part[1]. It is indeed my opinion that the Court should have declared that the Respondent State violated the Applicant's right to be heard by an independent and impartial court or tribunal, as provided for under Articles 7(1)(d)[2] and 26[3] of the African Charter on Human and Peoples' Rights.

2. On this issue, the Applicant alleges that the Respondent State violated his right to be heard by an independent and impartial tribunal insofar as the Rwandan judiciary is neither independent nor impartial, given that "the Honourable Judge Athanase Bakuzakundi was replaced on 15 September 2014 by a new judge, two years after the beginning of the trial, that is, on 12 September 2012, when most of the prosecution witnesses and oral submissions had been heard".

3. In support of his allegation, the Applicant tendered a number of documents emanating from international, governmental and non-governmental organizations, and from an English court. This evidence, in my opinion, has unquestionable probative value. Unfortunately, the Court did not accord it attention.

4. It is appropriate in this regard to first cite the concluding Observations of the Human Rights Committee on the Fourth Periodic Report of Rwanda in which "The Committee is concerned at reports about the unlawful interference of government officials in the judiciary and notes that the procedure for appointing judges of the Supreme Court and the presidents of the main courts could expose them to political pressure"[4]. As can be seen from the last sentence, the system for appointing judges in the various jurisdictions leaves reasonable doubt as to their independence. Moreover, the Committee recommended to the State Party to:

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[1] "Declare that the Respondent State has not violated the Applicant's right to be heard by an independent and impartial tribunal as provided under Articles 7(1)(d) and 26 of the Charter"
[2] "Every individual shall have the right to have his cause heard. This right comprises: [...] d) the right to be tried within a reasonable time by an impartial court or tribunal."
[3] "States parties to the present Charter shall have the duty to guarantee the independence of the Courts...".
[4] Human Rights Committee, Observations of the Human Rights Committee on the Fourth Periodic Report of Rwanda, 2 May 2016, Document No. CCPR/C/RWA/4, § 33.

"take the necessary legislative and other measures to ensure that:

(a) Judges are not subjected to any form of political influence in their decision-making and that the process of judicial administration respects at all times the principles of presumption of innocence and equality of arms;
(b) Judicial appointments are made according to the objective criteria of competence and independence and that the High Council of the Judiciary participates effectively in such decisions"

5. It is then noteworthy that the Applicant cites the Brown case, in which "the High Court of England refused to expel Vincent (formerly Vincent Bajinya) at the request of his government[5], the Court having held that "the expulsion could lead to a denial of justice, due to the lack of independence and impartiality of Rwandan Courts". In the case referenced above, Vincent Brown was arrested by the British police along with three other Rwandan citizens following a request to this effect from the Rwandan government. The arrest warrant accused Mr. Bajinya of murder and of organizing or inciting the genocide of Tutsis between 1 January 1994 and 12 December 1994. He was remanded in preventive custody and then arraigned before the Court of Westminster on 26 January 2007, with a view to extradite him to Kigali. He denied all the charges levelled against him. On 6 June 2008, the trial court upheld the request for extradition of the four men to Rwanda. The High Court overturned that decision on appeal on 8 April 2009, on the grounds that the guarantees of fair trial in Rwanda were not provided (risk of denial of justice and intimidation of defense witnesses). The Court ordered their release. On 30 May 2013, after a fresh request for extradition from Rwanda, the British police again arrested Vincent Bajinya and the other compatriots. On 21 December 2015, the British courts once again rejected the extradition request filed by the Rwandan government. The decision in this regard indicated that the guarantees of fair trial and respect for fundamental rights had not been provided in respect of the five detainees despite the evolving developments in Rwandan legislation. The extradition hearings before the High Court opened 28 November 2016, again resulting in the denial of the request to extradite.

6. In light of these two pieces of evidence, and without needing to invoke the NGO[6] reports, it is my opinion that the Court should have found that the fact that the

[5] *Vincent Brown, alias Vincent Bajinya and Others v. Government of Rwanda and the State Secretary of Interior* [2009] EWHC 770 (Admin), § 121.
[6] In the Report of the Office of the High Commissioner for Human Rights in accordance with § 15 (c) of the Annex to Human Rights Council resolution 5/1 containing the summary of eight stakeholder submissions to the Working Group on the Universal Periodic Review during the Universal Periodic Review of Rwanda

Honourable Judge Athanase Bakuzakundi was replaced with a new judge, two years after the start of the trial, when most of the prosecution witnesses and oral submissions have been heard, is dubious and raises questions as to the real motives behind the replacement.

7. Indeed, the Court in its reasoning rightly notes that "the change of a judge may be a form of interference if it is determined or done to satisfy another organ or one of the parties, in violation of the principles of the proper administration of justice". We refer in this regard to an affirmation of the African Commission on Human and Peoples' Rights in the Communication *Jean-Marie Atangara Mebara c. Cameroon: "*the question of impartiality may arise from internal and external elements connected both to the judge himself and also to other authorities having competence in the organization of the judicial system."[7]

8. In its *APDH v. Côte d'Ivoire Judgment* of 18 November 2016[8], the Court endorsed the position expressed by the European Court as to the impartiality of a jurisdiction. For the European Court "[t]o establish whether a tribunal can be considered as "independent", regard must be had, inter alia, to the manner of appointment and term of office of its members, the existence of guarantees against outside pressures and the question whether the body presents the appearance of independence."[9] The Court further held that in order to maintain confidence in the independence and impartiality of a tribunal, appearances may be of importance."[10] However, in the present case, the Court did not seek to know whether the replacement of a judge, precisely, leaves a taste of such "appearance" of partiality and interference of the political authorities in the trial instituted against the Applicant.

9. Unfortunately, the Court does not draw the necessary conclusion since it asserts that "in this case, the Applicant is simply referring to a change of judge, without indicating to what extent this constitutes bias or how the independence of the High Court Chamber for International Crimes would be affected. The Court also finds that the allegations on the lack of independence of the Respondent State's

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Human Rights Council (Tenth session, Geneva, 24 January - 4 February 2011), it is reported that: "the Commonwealth Human Rights Initiative (CHRI) indicated it has found political interference with the judiciary, particularly in trials of political interest and in cases where there were accusations of 'divisionism'. In addition, the Government unconstitutionally intervened with judicial appointments". Cf. Document A/HRC/WG.6/10/RWA/3, §11.

[7] Communication 416/12 - *Jean-Marie Atangana Mebara v. Republic of Cameroon*, adopted at the 18th Extraordinary Session of the African Commission on Human and Peoples' Rights, held from 29 July to 8 August 2015 in Nairobi, Kenya.

[8] *APDH v. Côte d'Ivoire* (Judgment of 16 November 2016), 1 AfCLR 668

[9] *Findlay v. United Kingdom* (Application No. 22107/93), Judgment of 25 February 1995, § 73.

[10] Idem, § 76.

judiciary, including international reports, the decision of the High Court of England to refuse the extradition of a Rwandan citizen to his country of origin and the declaration of the former Rwandan Minister of Justice, are general allegations that do not demonstrate how they are connected to his case". How can one consider that "the international reports, the decision of the High Court of England [...] and the declaration of the former Rwandan Minister of Justice, are general allegations". Do the report of the Human Rights Committee and the decisions of the British courts not constitute concrete evidence?

10. As it stated in *Woyome v. Ghana:* "to ensure impartiality, any Court must offer sufficient guarantees to exclude any legitimate doubt"[11]. In this case, there is indeed a legitimate doubt corroborated by highly crucial judicial and quasi-judicial evidence.

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11. For all these reasons, it is my opinion that the Court should have examined these pieces of evidence in-depth, apply its previous case law and not consider them peremptorily as mere " general allegations" even though the issue is that of highly concrete and concordant clues which generate reasonable doubt.

Arusha, 27 November 2020

Judge Rafaâ Ben Achour

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
The Registrar
LE GREFFIER
ARUSHA TANZANIA
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

[11] *Alfred Woyome v. Republic of Ghana*, ACtHPR 28 June 2019.