

# The judicial function of the African Court on Human and Peoples' Rights in default judgments: the developments set forth in the *Léon Mugesera* case

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**ABSTRACT:** This case discussion focuses on the judicial function of the African Court on Human and Peoples' Rights (Court) in default judgments. The discussion brings to the foreground the changes introduced by the Court in its recently revised Rules of Procedure and how these changes are put in practice in its case law. The revised provision on default judgments includes the extended power of the Court to decide on its own motion on whether to issue a default judgment and the introduction of a legal innovation in international dispute settlement, namely, a remedy for the defaulting party to set aside a default judgment. The recent default judgment in *Léon Mugesera v Rwanda* serves as a focal point in the analysis since it is the first instance that the revised Rules of Procedure were put into practice and since the *Mugesera* case illustrates the difficulties encountered by the Court in cases of non-appearance of the respondent state. The Court's Rules of Procedure and case law are also placed within the corpus of international (human rights) law and the jurisprudence of its two regional counterparts on matters pertaining to default judgments so as to shed light on different approaches. The analysis makes two main arguments. The first concerns the procedural requirements for rendering a judgment in default. Until the *Mugesera* decision, the Court was not consistent in meeting these requirements, and had been known to decide in default on its own motion without having a textual basis in the Protocol or the Rules of Procedure to do so. The recently revised Rule of Procedure grants the Court the power to decide on its own motion. Second, the analysis argues that the *Mugesera* decision cements an alarming trend in the case law, whereby in cases of non-appearance the Court does not satisfy itself that the applicant's submissions are well-founded.

## TITRE ET RÉSUMÉ EN FRANCAIS:

### La fonction juridictionnelle de la Cour africaine des droits de l'homme et des peuples en matière d'arrêt par défaut: évaluation des développements découlant de l'affaire *Léon Mugesera*

**RÉSUMÉ:** Cette contribution porte sur la fonction judiciaire de la Cour africaine des droits de l'homme et des peuples (Cour africaine ou Cour) en matière d'arrêt par défaut. La discussion met en évidence les changements introduits par la Cour dans son règlement intérieur récemment révisé et la manière dont ces changements sont mis en œuvre dans la jurisprudence. La disposition relative aux arrêts par défaut telle que révisée comprend le pouvoir étendu de la Cour de décider d'office de rendre un arrêt par défaut et l'introduction d'une innovation juridique dans le règlement des différends internationaux, à savoir un recours en annulation d'un arrêt rendu par défaut mu par la partie défaillante. Cette contribution analyse en particulier le récent arrêt rendu par défaut dans l'affaire *Léon Mugesera c. Rwanda* qui illustre pour la première fois la mise en œuvre du règlement intérieur de la Cour en matière d'arrêt

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par défaut depuis sa révision. L'affaire *Léon Mugesera* illustre globalement les difficultés rencontrées par la Cour africaine en cas de non-comparution de l'État défendeur. Le règlement intérieur et la jurisprudence de la Cour sont contextualisés partant du droit international (droits de l'homme) et de la jurisprudence de deux autres juridictions régionales en matière d'arrêt par défaut, afin de mettre en relief les différentes approches qu'elles adoptent. L'analyse s'articule sur deux arguments principaux. Le premier concerne les exigences procédurales pour rendre un arrêt par défaut. Avant l'affaire *Léon Mugesera*, la Cour n'était pas cohérente dans le respect de ces exigences, et était connue pour rendre des arrêts par défaut de sa propre initiative sans avoir de base textuelle dans le Protocole ou le Règlement intérieur. Le Règlement intérieur récemment révisé accorde à la Cour le pouvoir de statuer d'office. Par ailleurs, l'article soutient que l'affaire *Léon Mugesera* cristallise une tendance alarmante de la jurisprudence, selon laquelle, en cas de non-comparution, la Cour africaine ne s'assure pas que les arguments du requérant sont fondés en fait.

**KEY WORDS:** default judgment, non-appearance, African Court on Human and Peoples' Rights, *Léon Mugesera v Rwanda*, burden of proof, standard of evidence, prima facie evidence, well-founded claims

**CONTENT:**

1	Introduction.....	344
2	Background and facts of the <i>Léon Mugesera</i> case .....	345
3	The Court's judgment .....	346
3.1	Personal jurisdiction.....	346
3.2	Merits of the case.....	346
4	The African Court's judicial function in default judgments .....	349
4.1	Applying the requirements for default judgments: The African Court's practice until <i>Léon Mugesera</i> .....	351
4.2	The 2020 revision of the requirements to give a default judgment and its application in <i>Léon Mugesera</i> .....	353
4.3	Were Mugesera's claims well-founded in fact? The problematic assessment of evidence .....	355
5	Conclusion .....	359

## 1 INTRODUCTION

This article focuses on the judicial function of the African Court on Human and Peoples' Rights (African Court or Court) in default judgments.<sup>1</sup> The discussion brings to the foreground the changes introduced by the Court in its recently revised Rules of Procedure and how said changes are put in motion in the case law. The revised provision on default judgments includes the extended power of the Court to decide on its own motion on whether to issue a default judgment and the introduction of a legal innovation in international dispute settlement, namely a remedy for the defaulting party to set aside a default judgment. The recent default judgment in *Léon Mugesera v Rwanda*<sup>2</sup> serves as a focal point in the analysis since this is the first instance that the revised Rules of Procedure were put into practice and since *Léon Mugesera* overall illustrates the difficulties encountered by the African Court in cases of non-appearance of the respondent state. The Court's Rules of Procedure and case law are also placed within the corpus of international (human rights) law and the

1 *Léon Mugesera v Rwanda* (Merits and Reparations) Appl 12/2017, paras 9, 13–18 (*Léon Mugesera* case).

2 *Léon Mugesera* (n 1); See also *Prof Léon Mugesera v Rwanda* (order for provisional measures) Appl 12/2017.

jurisprudence of its two regional counterparts on matters pertaining to default judgments so as to shed light on different approaches.

The article makes two main arguments. The first concerns the procedural requirements for rendering a judgment in default. Until *Léon Mugesera*, the African Court was not consistent in meeting these requirements, and had been known to decide in default on its own motion without having a textual basis in the Protocol nor the Rules of Procedure to do so. The recently revised Rule of Procedure grants the Court the power to decide on its own motion and, therefore, brings to an end this problematic position. Second, the analysis argues that *Léon Mugesera* cements an alarming trend in the case law, whereby in cases of non-appearance the African Court does not satisfy itself that the applicant's submissions are well-founded in fact. Although the Court allocates the standard of evidence and burden of proof soundly, it seems that it endorses applicants' claims as proven without duly assessing the evidence before it.

The discussion is structured as follows. The second section summarises the facts of the *Léon Mugesera* case and the third section explains the main points of the Court's judgment pertaining to the jurisdiction and merits of the application. Next, the analysis turns to assess the requirements for the Court to render a default judgment, according to its Rules of Procedure – both before and after the 2020 revision – and how the Court applied them in practice. The final section concludes.

## 2 BACKGROUND AND FACTS OF THE *LÉON MUGESERA* CASE

Léon Mugesera gave what came to be known as the 'Mugesera speech', an inflammatory anti-Tutsi speech broadcast on public radio in November 1993, a few months before the outbreak of the genocide in Rwanda.<sup>3</sup> In 2012, having fought deportation for sixteen years, he was deported from Canada to Kigali to face charges of inciting genocide and crimes against humanity.<sup>4</sup> In 2016, he was convicted by the High Court Chamber for International Crimes of incitement to genocide and sentenced to life in prison. A few months before the African Court rendered its judgment, the Supreme Court of Rwanda found the applicant guilty of inciting ethnic hatred and persecution as a crime against humanity, among other crimes, and upheld the life sentence imposed on him.<sup>5</sup>

Mugesera resorted to the African Court alleging violations of a series of rights under the African Charter on Human and Peoples' Rights (African Charter).<sup>6</sup> He claimed that during the judicial proceedings between 2012 and 2016 the High Court Chamber for

3 P Gourevitch *We wish to inform you that tomorrow we will be killed with our families* (2000).

4 Supreme Court of Canada, *Mugesera v Canada (Minister of Citizenship and Immigration)* 2005 SCC 39 (CanLII) [2005] 2 SCR 91.

International Crimes and the Supreme Court of Rwanda had committed several irregularities. He further submitted that his conditions of detention were in violation of the African Charter.<sup>7</sup> Mugesera alleged violations of the right to a fair trial, the right not to be subjected to cruel, inhuman or degrading treatment, the right to his physical and mental integrity and the right to family under the Court.

### 3 THE COURT'S JUDGMENT

#### 3.1 Personal jurisdiction

On the matter of jurisdiction, the African Court had to ascertain whether it enjoyed personal jurisdiction with regard to the respondent state. In 2016, Rwanda withdrew its declaration under article 34(6) of the Protocol to the African Charter<sup>8</sup> accepting the African Court's jurisdiction to receive applications from individuals and non-governmental organisations (NGOs).<sup>9</sup> In line with *Ingabire Victoire Umuhoza v Republic of Rwanda*,<sup>10</sup> the African Court confirmed that the declaration would remain in effect until one year after the withdrawal. In this instance, the application was filed one day before this period expired and, therefore, the African Court proceeded with deciding the case.<sup>11</sup> In light of Rwanda's non-appearance, the African Court decided to render a judgment in default.<sup>12</sup>

#### 3.2 Merits of the case

As far as the right to a fair trial is concerned, Mugesera claimed violations of the right to defence, the right to legal aid and the right to be heard by an independent and impartial court. The African Court dismissed most of these claims. The applicant complained that he had

5 The High Court Chamber for International Crimes is a specialised chamber set up to try international crimes. The Supreme Court of Rwanda acts as the appeal court to the judgments rendered by the High Court Chamber for International Crimes. See <https://www.gov.rw/government/judiciary> and <https://www.justiceinfo.net/en/24222-160212-rwandajustice-rwanda-creates-special-chamber-for-international-crimes.html> (accessed 30 October 2022).

6 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) CAB/LEG/67 3 Rev 5(1982) 21 ILM 58.

7 *Léon Mugesera* (n 1) para 3.

8 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) OAU/LEG/EXP/AFCHPRIPROT(III) (Protocol to the African Charter).

9 Republic of Rwanda, Ministry of Foreign Affairs and Cooperation, 24 February 2016, <https://www.african-court.org/wpafc/wp-content/uploads/2020/10/Withdrawal-Rwanda.pdf> (accessed 30 July 2022).

10 *Ingabire Victoire Umuhoza v Rwanda* (Merits) Appl 3/2014, paras 13, 25, 36, 39–47 (*Ingabire Victoire Umuhoza* case).

11 *Léon Mugesera* (n 1) para 22.

12 *Léon Mugesera* (n 1) paras 9, 13–18.

not been allowed to stand trial in a language of his choice, in violation of his right to defence under article 7(1)(a) of the African Charter. He argued that, although French is one of Rwanda's three official languages, the trial was held in Kinyarwanda, a language that his counsel did not speak. His complaint was dismissed since he had not demonstrated that an interpreter had been requested and a member of his team of counsels was a Rwandan national.<sup>13</sup> With respect to Mugesera's submission that his right to legal aid had been breached, the African Court held that the interests of justice did not require free legal representation in this instance. Mugesera may have been accused of a serious crime (genocide) which is punishable by life imprisonment, but he did not prove that he could not afford a lawyer of his choice. The Court noted that, in addition to one lawyer from Rwanda, the applicant was represented by two lawyers of foreign origin.<sup>14</sup>

Nonetheless, the African Court found that certain allegations pertaining to the right to a fair trial were substantiated. The applicant submitted that he was not fully informed of the charges brought against him. The public prosecutor had declined to provide him with the information necessary to prepare his defence and the High Court Chamber for International Crimes had refused to hear his arguments and witnesses. The African Court found that these allegations were proven by the applicant's letter addressed to the Attorney General, in which he highlighted the difficulties he faced in preparing his defence. A breach of article 7(1)(a) of the African Charter was declared, even though it is not entirely clear from the African Court's reasoning how this letter proved said allegations.<sup>15</sup>

Mugesera also raised a complaint concerning the right to be heard by an independent and impartial court. He alleged that the High Court Chamber for International Crimes was neither independent nor impartial, as per the requirements of articles 7(1)(d) & 26 of the African Charter. Two years after the beginning of the trial, when most of the evidence had already been presented, one of the members sitting in the High Court Chamber was replaced by a new judge. The applicant argued that this replacement was driven by political interference. In support of his claims, he invoked a statement by the former Minister of Justice that the applicant would not enjoy a fair trial and he cited reports by intergovernmental and non-governmental organisations raising concerns about the independence and impartiality of the Rwandan judiciary.<sup>16</sup> The African Court found that the submissions lacked substantiation; the replacement of a judge did not in itself constitute a violation of the independence or impartiality of a court.<sup>17</sup> Moreover, the reports that Mugesera submitted made general assessments about Rwandan courts without establishing evidence for the circumstances of his own trial.<sup>18</sup> However, Judge Ben Achour, in his

13 *Léon Mugesera* (n 1) para 44.

14 *Léon Mugesera* (n 1) paras 58-59.

15 *Léon Mugesera* (n 1) paras 41, 45-46.

16 *Léon Mugesera* (n 1) paras 62-66.

17 *Léon Mugesera* (n 1) paras 70-73.

dissenting opinion attached to the majority's judgment, expressed the view that the majority had not sufficiently examined the *appearance* of partiality in the Rwandan courts as a possible violation of the right to a fair trial.<sup>19</sup> The safeguard of the impartiality of courts concerns the perception of bias generated in the eyes not only of the party concerned but also of any reasonable observer.<sup>20</sup> Judge Ben Achour also submitted that the majority had not placed appropriate weight on the evidentiary value of international reports and views by inter-governmental and non-governmental organisations.<sup>21</sup>

The remainder of Mugesera's claims concerned his conditions of detention. The complaints pertained to the prohibition of torture, cruel, inhuman and degrading treatment (article 5 of the African Charter), the right to physical and mental integrity (article 4 of the African Charter) and the right to family (article 18(1) of the African Charter). The African Court held that Rwanda had violated article 5 of the African Charter concerning human dignity on account of death threats made by prison officials, limited access to a doctor and medication, no provision of an orthopaedic pillow, deprivation of adequate food (Mugesera's fruit-based and cholesterol-free diet was not respected) and obstacles to contact his family and lawyers. Other claims were dismissed as unfounded (for example, the prison's repeated broadcasting of his 1992 speech or the inclusion of his name on the list of persons to be executed).<sup>22</sup>

The Court also found that these detention conditions were not in line with Rwanda's obligations under article 4 of the African Charter concerning the right to physical and mental integrity. Unlike other human rights treaties, the African Charter establishes an explicit link between the right to life and the integrity of a human being. The right to life under article 4 is understood in its physical sense and as a right to a decent existence.<sup>23</sup> The Court's view was that Mugesera's detention circumstances had violated both its literal right to life, since they were likely to cause his death, and his right to a dignified life as a prisoner, especially given his vulnerable status (being elderly and ill).<sup>24</sup>

18 *Léon Mugesera* (n 1) paras 70, 72.

19 Similar concerns were raised in the *Alfred Agbesi Woyome v Republic of Ghana* (merits and reparations) Appl 1/2017; see Dissenting Opinion of Judge Gerard Niyungeko, para 7 and Dissenting Opinion of Judge Rfaaa Ben Achour paras 7-16 (in French).

20 United Nations Office on Drugs and Crime, 'Commentary on the Bangalore Principles of Judicial Conduct', 2007, para 56.

21 Partial dissenting opinion of Judge Ben Achour in *Léon Mugesera* (n 1) (in French); *Léon Mugesera* (n 1) para 72.

22 *Léon Mugesera* (n 1) paras 77, 90.

23 R Murray, *The African Charter on Human and Peoples' Rights – A commentary* (2019) 101-132. Cf the development of the concept of *dignified life* in the case law of the Inter-American Court of Human Rights. See JM Pasqualucci 'The right to a dignified life (*vida digna*): the integration of economic and social rights with civil and political rights in the Inter-American human rights system' (2008) 31 *Hastings International & Comparative Law Review* 1.

24 *Léon Mugesera* (n 1) paras 100-101, 104.

Finally, the African Court declared a breach of the right to family under article 18(1) of the African Charter on account of the failure of the prison authorities to provide the applicant with the statutory means to communicate with his family. The Court noted that it was not apparent from the record why the maximum duration of communications between the applicant and his family was set at ten minutes.<sup>25</sup>

The violation of articles 4, 5 and 18(1) of the African Charter was substantiated on the basis of medical reports submitted by Mugesera and a series of letters that he had sent to state authorities.<sup>26</sup> The question of whether this evidence was sufficient to satisfy the Court that the allegations were well-founded will be discussed below.

#### 4 THE AFRICAN COURT'S JUDICIAL FUNCTION IN DEFAULT JUDGMENTS

Although non-appearance is a phenomenon known in interstate dispute settlement,<sup>27</sup> it is not common before international human rights courts. There are no instances of non-appearing states at the European Court of Human Rights (ECtHR) thus far. The Inter-American Court of Human Rights (IACtHR) has issued a few default judgments.<sup>28</sup> Compared to its two regional counterparts, the African Court has a high(er) rate of default judgments, including the *African Commission on Human and Peoples' Rights v Libya* case,<sup>29</sup> multiple cases concerning Rwanda<sup>30</sup> and, as of recent, the *Yusuph Said v United Republic of Tanzania* judgment.<sup>31</sup>

In *Léon Mugesera*, Rwanda's choice not to participate in the proceedings before the African Court did not come as a surprise. Rwanda stopped appearing before the African Court in 2016, when it withdrew its declaration accepting the Court's jurisdiction to receive applications from individuals and NGOs. Although Tanzania, Benin

25 *Léon Mugesera* (n 1) para 121.

26 *Léon Mugesera* (n 1) paras 84-89, 94-107, 119-120.

27 China did not appear *In the Matter of the South China Sea Arbitration (The Republic of the Philippines v The Peoples' Republic of China)* Permanent Court of Arbitration (12 July 2016); Venezuela did not appear before the ICJ in *Arbitral Award of 3 October 1899 (Guyana v Venezuela)* ICJ (18 December 2020) (2020) ICJ Reports 455 (*Arbitral Award* case); and Russia abstained from appearing at the Permanent Court of Arbitration *In the Matter of the Arctic Sunrise Arbitration (The Kingdom of the Netherlands v The Russian Federation)* Permanent Court of Arbitration (14 August 2015). For commentary see M Goldmann 'International courts and tribunals, non-Appearance' (2006) *Max Planck Encyclopedia of Public International Law*, para 6; H von Mangoldt & A Zimmermann 'Article 53' in A Zimmermann and others (eds) *The statute of the International Court of Justice: a commentary* (2019) at 146.

28 See sources referred to in n 35-38.

29 *African Commission on Human and Peoples' Rights v Libya* (Merits) Appl 2/2013 (*African Commission on Human and Peoples' Rights* case).

30 Eg, *Léon Mugesera* (n 1); *Ingabire Victoire Umuhoya* (n 10) and further sources referred to in (n 49) 51, 54.

31 *Yusuph Said v Tanzania* (jurisdiction and admissibility) Appl 11/2019.

and Côte d'Ivoire followed Rwanda in withdrawing their optional declarations,<sup>32</sup> they continued appearing and making submissions before the Court.<sup>33</sup> Rwanda is not the only state that has failed to appear before the Court. Libya did not appear before the Court in the *African Commission on Human and Peoples'* case and neither did Tanzania in *Yusuph Said*. Yet, Rwanda is the only state that, following its withdrawal, effectively 'disappeared'.<sup>34</sup> With that being said, this 'disappearing act' is not unprecedented in international human rights law. The IACtHR rendered two judgments in default following Trinidad and Tobago's 1998 denunciation of the IACHR,<sup>35</sup> which did not have an immediate effect releasing it from its obligations under the IACHR.<sup>36</sup> Similarly, the IACtHR rendered two judgments in default in connection to Peru.<sup>37</sup> In 1999 Peru announced it was withdrawing its acceptance of the IACtHR's jurisdiction but this decision was reversed in 2001. Even if the IACtHR held that Peru's withdrawal of recognition of its contentious jurisdiction was only a partial withdrawal and hence did not take effect,<sup>38</sup> Peru did not participate in two cases.<sup>39</sup>

The ensuing discussion examines the African Court's judicial function when rendering default judgments by placing its function within the corpus of international human rights jurisprudence. The discussion makes the following points. First, until Léon Mugesera, the

- 32 For discussion see L Burgorgue-Larsen, *Les 3 cours régionales des droits de l'homme in context* (2020) 107-115; N de Silva & M Plagis, 'A court in crisis: African states' increasing resistance to Africa's human rights court' *Opinio Juris*, 19 May 2020, <http://opiniojuris.org/2020/05/19/a-court-in-crisis-african-states-increasing-resistance-to-africas-human-rights-court/> (accessed 30 July 2022). But recently the Republic of Guinea Bissau and the Republic of Niger deposited respective declarations under art 34(6) of the Protocol allowing direct access to the African Court; see African Court, Press Release, 3 November 2021, <https://www.african-court.org/wpafc/the-republic-of-guinea-bissau-becomes-the-eighth-country-to-deposit-a-declaration-under-article-346-of-the-protocol-establishing-the-court/> (accessed 30 July 2022).
- 33 TM Makunya 'Decisions of the African Court on Human and Peoples' Rights during 2020: trends and lessons' (2021) 21 *African Human Rights Law Journal* 1230 at 1249.
- 34 For discussion on the motivations and implication of non-appearance cf Separate Opinion of Judge Antonio A Cançado Trindade in *Caesar v Trinidad and Tobago* (Merits, Reparations and Costs) IACtHR (11 March 2005) Series C No 123, paras 69-84 (*Caesar* case) and S Yee 'Knowledge and strategy in international litigation: a review essay on Hugh Thirlway's *The International Court of Justice, with some reference to non-appearance*' (2020) 19 *Chinese Journal of International Law* 509.
- 35 *Caesar* case (n 34); *Hilaire, Constantine and Benjamin and Others v Trinidad and Tobago* (Merits, Reparations and Costs) IACtHR (21 June 2002) Series C No 94 (*Hilaire, Constantine and Benjamin and Others* case).
- 36 The IACtHR held in *Hilaire, Constantine and Benjamin and Others v Trinidad and Tobago* (Preliminary Objections) IACtHR (1 September 2001) Series C No 123 that the denunciation would become effective one year later.
- 37 *The Constitutional Court v Peru* (Merits, Reparations and Costs) IACtHR (31 January 2001) Series C No 71 (*Constitutional Court* case); *Ivcher-Bronstein v Peru* (Interpretation of the Judgment of the Merits) IACtHR (6 February 2001) Series C No 84.
- 38 *Ivcher-Bronstein v Peru* (Merits, Reparations and Costs) IACtHR (24 September 1999) Series C No 74, paras 51-55.
- 39 Since then, Peru appears regularly before the IACtHR.

African Court was not consistent in meeting the requirements for issuing a judgment in default, as prescribed by its Rules of Procedure. The Court had at times decided in default on its own motion without formally enjoying such discretion. The recently revised rule, which was put into practice for the first time in *Léon Mugesera*, grants the Court the power to decide on its own motion. The revised rule also introduces a legal innovation in dispute settlement, namely the remedy for the defaulting party to set aside a default judgment. Second, the analysis argues that in *Léon Mugesera* the African Court did not satisfy itself that the applicant's submissions were well-founded in fact, casting doubt on whether the Court duly fulfils its judicial function in cases of non-appearance. The Court's case law reveals a strong trend towards accepting applicants' claims as proven without properly assessing the evidence.<sup>40</sup>

#### 4.1 Applying the requirements for default judgments: The African Court's practice until *Léon Mugesera*

In September 2020 the African Court revised its Rules of Procedure,<sup>41</sup> including the provision concerning the default process (rule 63).<sup>42</sup> However, the rule applicable to cases decided prior to *Léon Mugesera* was former rule 55. This subsection focuses on the requirements of former rule 55 so as to arrive at a critical assessment of the Court's practice until *Léon Mugesera* and thus shed light on the revised rule applied in this case in subsections 4.2 and 4.3.

According to former rule 55: 'Whenever a party does not appear before the Court, or fails to defend its case, the Court may, on the application of the other party, pass judgment in default'. Moreover, the Court 'shall satisfy itself that it has jurisdiction in the case, and that the application is admissible and well-founded in fact and in law'.<sup>43</sup> Consequently, the African Court could not decide on its own motion whether to render a judgment in default; the other party to the dispute

40 It is worthwhile mentioning that the Rules of Procedure of the African Commission on Human and Peoples' Rights do not raise similar issues. In the scenario of a non-appearing party '... the Commission shall proceed to adopt a decision by default based on the information before it'. This rule is applicable with regard to decisions on admissibility and on merits both in inter-state complaints and in other communications brought by natural or legal persons. See Rules 111(2), 114(2), 118(2) and 120(2), Rules of Procedure of the African Commission on Human and Peoples' Rights, 2020, [https://www.African Charter.org/public/Document/file/English/Rules%20of%20Procedure%202020\\_ENG.pdf](https://www.African Charter.org/public/Document/file/English/Rules%20of%20Procedure%202020_ENG.pdf) (accessed 30 October 2022).

41 Rules of the Court, updated 25 September 2020, <https://www.african-court.org/wpafc/wp-content/uploads/2021/04/Rules-Final-Revised-adopted-Rules-eng-April-2021.pdf> (accessed 30 July 2022). The new Rules of Procedure came into effect in September 2020.

42 For discussion see Makunya (n 33) 1248-1250.

43 Rules of the African Court, 2 June 2010, [http://www.african-court.org/en/images/Basic%20Documents/Final\\_Rules\\_of\\_Court\\_for\\_Publication\\_after\\_Harmonization\\_-\\_Final\\_\\_English\\_7\\_sept\\_1\\_.pdf](http://www.african-court.org/en/images/Basic%20Documents/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final__English_7_sept_1_.pdf) (accessed 30 July 2022).

had to request it. It is interesting to note that this rule departed from equivalent provisions in the Rules of Procedure of the other two international human rights courts, the ECtHR and the IACtHR. In particular, the ECtHR and IACtHR can decide to render a judgment in default on their own motion, without a request from the other party.<sup>44</sup>

Rwanda's first instance of non-appearance was in *Ingabire Victoire Umuhoza*. In this case, Rwanda had already informed the Court of its response to the application before notifying it of its withdrawal from the African Court's jurisdiction. Following the notification, Rwanda submitted a preliminary objection arguing that its withdrawal was effective immediately and so the Court had no jurisdiction to decide the case. The Court held that the withdrawal could not be applied to the application retroactively and that therefore it had jurisdiction.<sup>45</sup> From this point on, Rwanda stopped participating in the proceedings of this case (and all subsequent cases).<sup>46</sup> Yet, the Court neither held that it would render a judgment in default nor applied former rule 55 as a basis to this effect.<sup>47</sup> Instead, it decided the case on its merits by relying, in many parts of its judgment, upon Rwanda's initial response to the application.<sup>48</sup>

In a series of subsequent rulings concerning Rwanda in 2019-2020, the African Court applied former rule 55 and gave judgments in default. However, in doing so, the Court disregarded the stipulation that it may pass judgment in default only upon the request of the other party. Instead, it followed the default procedure, despite the fact that the applicant had not made any such request.<sup>49</sup> Judge Bensaoula Chafika criticised the majority for ignoring the conditions of former rule 55 without any justification.<sup>50</sup> In subsequent cases, the Court acknowledged that 'it should, in principle, have given a judgment in default only at the request of the Applicant' but considered that 'in view of the proper administration of justice, the decision to rule by default falls within its judicial discretion'.<sup>51</sup> There was no explanation, however, of why the judgments served the interests of justice or how it

44 Art 29(1), Rules of Procedure of the Inter-American Court of Human Rights, approved by the Court during its LXXXV regular session, 16–28 November 2009, <https://www.corteidh.or.cr/reglamento.cfm?lang=en> (accessed 30 July 2022); Rule 65C, Rules of the European Court of Human Rights, updated 2 June 2021, [https://www.echr.coe.int/Documents/Rules\\_Court\\_ENG.pdf](https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf) (accessed 30 July 2022).

45 *Ingabire Victoire Umuhoza* (n 10) paras 41, 45.

46 *Ingabire Victoire Umuhoza* (n 10) paras 43, 46.

47 *Ingabire Victoire Umuhoza* (n 10) paras 57–58.

48 *Ingabire Victoire Umuhoza* (n 10) paras 50, 97.

49 *Mulindahabi Fidèle v Republic of Rwanda* (jurisdiction and admissibility) Appl 6/2017, paras 16–17; *Mulindahabi Fidèle v Republic of Rwanda* (admissibility) Appl 7/2017, paras 16–17; *Mulindahabi Fidèle v Republic of Rwanda* (admissibility) Appl 9/2017, para 15.

50 Separate opinion by Judge Bensaoula Chafika in *Mulindahabi Fidèle* Appl 6/2017 (n 49) paras 6, 7, 9.

51 *Mulindahabi Fidèle v Republic of Rwanda* Appl 4/2017, para 22; *Mulindahabi Fidèle v Republic of Rwanda* (Admissibility) Appl 5/2017, para 25; *Mulindahabi Fidèle v Republic of Rwanda* (Admissibility) Appl 10/2017, para 30; *Mulindahabi Fidèle v Republic of Rwanda* (Admissibility) Appl 11/2017, para 23.

was possible for the Court to exercise judicial discretion on a matter that it did not in fact enjoy unless the applicant had requested a default judgment.<sup>52</sup>

#### 4.2 The 2020 revision of the requirements to give a default judgment and its application in *Léon Mugesera*

Against this background, in 2020 the Court revised former rule 55 by making three changes.<sup>53</sup> First, the now-revised rule 63 prescribes that the Court may enter a decision in default on its own motion. This amendment entails that an applicant's request to that effect is no longer a requirement aligning the African Court's Rules of Procedure with the respective rules of the ECtHR and IACtHR. The *Léon Mugesera* case was the first opportunity for the Court to apply new rule 63. The applicant had not requested a judgment in default but the revised rule granted the Court the power to decide on its own motion. The Court proceeded with deciding the case after confirming that the defaulting party (Rwanda) had been duly notified.<sup>54</sup>

Second, curiously, the Court decided to delete paragraph 2 of former rule 55, which provided the obligation to 'satisfy itself that it has jurisdiction in the case, and that the application is admissible and well-founded in fact and in law'. The rationale for purposefully omitting this provision from the text of revised rule 63 is unclear and raises the question of whether the Court is still under this obligation. It is argued that irrespective of whether this obligation is expressly incorporated in the statute or Rules of Procedure of an international court, it is still incumbent upon that court, pursuant to its judicial function, to determine whether claims are well-founded in fact and in law.<sup>55</sup> The obligation to ascertain whether a claim is well-founded in law, independently of the parties' submissions, stems from the principle *jura novit curia*. An international court is not solely dependent on the

52 Separate Opinion by Judge Bensaoula Chafika (n 50) para 13.

53 Rule 63 reads: '1. Whenever a party does not appear before the Court, or fails to defend its case within the period prescribed by the Court, the Court may, on the Application of the other party, or on its own motion, enter a decision in default after it has satisfied itself that the defaulting party has been duly served with the Application and all other documents pertinent to the proceedings. 2. The Court may, upon an Application from the defaulting party showing good cause, and within a period not exceeding one year from the date of notification of the decision, set aside a decision entered in default in accordance with sub-rule 1 of this Rule. 3. Prior to considering the Application for setting aside the said decision, the Court shall notify the Application to the other party giving the latter thirty (30) days within which to submit written observations'.

54 *Léon Mugesera* (n 1) para 16. See also the subsequent case *Laurent Munyandikirwa v Republic of Rwanda* (jurisdiction and admissibility) Appl 23/2015, paras 40-46.

55 Separate opinion of Judge Fatsah Ouguergouz in *African Commission on Human and Peoples' Rights* case (n 29) para 26; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ (27 June 1986) (1986) ICJ Reports 14, paras 29-30 (*Nicaragua* case).

arguments of the parties before it with respect to the applicable law.<sup>56</sup> As to the facts of a case, in principle, an international court is not bound to confine its consideration to the material formally submitted to it by the parties (although it may not be possible for a court to examine the accuracy of the facts in all of their detail).

The norms governing the functioning of international courts and/or their respective judicial practice strengthen this argument. Article 53 of the statute of the International Court of Justice (ICJ) reads that it 'must ... satisfy itself, not only that it has jurisdiction ... but also that the claim is well-founded in fact and law'.<sup>57</sup> In contrast, international human rights courts have less concrete requirements on paper for rendering a judgment in default: as far as the ECtHR is concerned, the default procedure needs to be 'consistent with the proper administration of justice',<sup>58</sup> while the IACtHR needs to 'take the measures necessary to conduct the proceedings to their completion'.<sup>59</sup> Despite the unclarity of these provisions, the IACtHR specifically affirms in its case law that it must satisfy itself that claims are well-founded in fact and law.<sup>60</sup> Therefore, even if the African Court has removed the obligation from its Rules of Procedure, it is still under the obligation to ascertain whether the applicant's claims are well-founded. This was also confirmed in *Léon Mugesera*, when the Court restated that it needed to determine 'whether the Applicant's claims are founded in fact and in law'.<sup>61</sup>

The third change to the provision on default judgments was the introduction of a remedy for the defaulting party, which may now apply to set aside a decision entered in default. This is a novel provision in international dispute settlement.<sup>62</sup> It may be that it is an attempt by the Court to counterbalance its extended power to render a judgment in default on its own motion by providing a remedy to the defaulting party.<sup>63</sup> The defaulting party needs to 'show good reason' in its application for setting the judgment aside, although there are no criteria for what qualifies as good reason.<sup>64</sup> The application needs to be submitted within one year from the judgment notification date and the Court must notify the other party, giving it thirty days to submit written

56 Separate opinion of Judge Fatsah Ouguergouz (n 55) paras 5–6; *Nicaragua* case (n 55) para 29.

57 Art 53, Statute of the International Court of Justice (adopted 18 April 1946) 33 UNTS 993.

58 Rule 65C, Rules of the ECtHR (n 44).

59 Art 29(1), Rules of Procedure of the IACtHR (n 44).

60 *Caesar* (n 34) para 38; *Constitutional Court* (n 37) paras 58–62.

61 *Léon Mugesera* (n 1) para 18.

62 Rule 63(2) reads: 'The Court may, upon an application from the defaulting party showing good cause, and within a period not exceeding one year from the date of notification of the decision, set aside a decision entered in default in accordance with sub-rule 1 of this Rule.' For general discussion see CF Amerasinghe *Evidence in international litigation* (2005) 252–253.

63 Amerasinghe (n 62); Separate opinion by Judge Bensaoula Chafika (n 50) paras 6, 7, 9.

64 Cf rule 78 of the African Court's Rules of Procedure, which sets out specific criteria regarding a request for a review of a judgment.

observations. It remains to be seen whether non-appearing parties will use this remedy in the future.

### 4.3 Were Mugesera's claims well-founded in fact? The problematic assessment of evidence

The non-appearance of a party has an adverse impact on the sound administration of justice and creates challenges for an international court in fulfilling its judicial function.<sup>65</sup> Such challenges manifest themselves prominently when establishing disputed facts, since the non-appearing party forfeits the opportunity to submit evidence and arguments in support of its own case.<sup>66</sup>

Difficulties concerning evidence and the establishment of facts were also present in *Léon Mugesera*. The African Court declared a violation of articles 4, 5, 7 and 18(1) of the African Charter on the basis of medical reports concerning the applicant's health and a series of letters that he had sent to state authorities complaining of the circumstances of his trial and detention.<sup>67</sup> This is arguably circumstantial evidence raising the issue of whether it should have been deemed sufficient to satisfy the Court that the allegations were well-founded in fact.<sup>68</sup> This is for two reasons. First, it is doubtful whether the material submitted by the applicant constituted convincing *prima facie* evidence meeting the standard of proof. Second, the evidentiary weight placed upon certain inferences appears to be misguided. It is also to be regretted that the Court missed the opportunity to explore, on its own motion, the possibility of gaining evidence by other means.

One should start by clarifying how the African Court allocated the standard of proof and burden of evidence. The African Court's (revised) Rules of Procedure remain silent on whether a different standard of proof is to be applied in cases of non-appearance. In the absence of prescribing a different standard, the regular standard of proof applies. In contrast, the ECtHR and the IACtHR enjoy discretion to apply a lower standard of proof by introducing a presumption against the non-appearing party.<sup>69</sup> The ECtHR 'may draw such inferences as it deems appropriate',<sup>70</sup> and the IACtHR 'may consider those facts that have not been expressly denied and those claims that have not been expressly controverted [by the state] as accepted'.<sup>71</sup> Given the absence of a specific provision in the African Court's (revised) Rules of Procedure on

65 Separate opinion of Judge Fatsah Ouguerouz (n 55) para 26; *Nicaragua* (n 55) paras 27, 31; *Arbitral Award* (n 27) para 25.

66 *Arbitral Award* (n 27) para 25; Amerasinghe (n 62) 144.

67 *Léon Mugesera* (n 1) paras 41, 45–46, 84–89, 94–107, 119–120.

68 Evidence may be distinguished into direct (eg, objective testimonial or documentary evidence) and circumstantial (eg, indicia, presumptions). Circumstantial evidence may be considered as long as it leads to conclusions consistent with the facts. See Amerasinghe (n 62) 223.

69 *Constitutional Court* (n 37) para 60; *Caesar* (n 34) para 37.

70 Rule 44C(1), Rules of the ECtHR (n 44).

71 Art 41(3), Rules of Procedure of the IACtHR (n 44).

whether a different standard of proof is to be applied in cases of non-appearance, it is reasonable to conclude that the regular standard of proof applies. Consequently, the African Court, pursuant to its Rules of Procedure, does not enjoy the discretion that the IACtHR or the ECtHR enjoy. Moreover, the fact that this point was not included in the recent revision of the rule on default judgments strongly suggests that the Court did not find it necessary to set out a deviating from the regular standard of proof position in a way similar to the rules of procedures of the ECtHR and IACtHR. Yet one may ask whether the Court may elucidate such a deviating position in its case law. In the view of the present author, the answer to this question is in the negative. Even if it were the Court's intention in *Mugesera* to do so, there is nothing in the Court's reasoning to suggest this. Turning to the burden of proof, that still fell to the applicant. However, given the fact that Mugesera remained under state control (in prison), the African Court correctly held that the applicant needed to provide *prima facie* evidence in support of his allegations and, if he did so, the burden of evidence would shift to the respondent state.<sup>72</sup> The *prima facie* evidence rule has the effect of shifting the burden of evidence from the proponent of the burden of proof to the other party.<sup>73</sup> This is an evidentiary practice followed regularly in international jurisprudence.<sup>74</sup>

Notwithstanding that the Court allocated the standard of proof and burden of evidence soundly, the assessment and weighing of evidence present shortcomings. Admittedly, international courts enjoy considerable freedom on how to apply rules of evidence. The practice is that judges determine the weight to be accorded to the evidence submitted.<sup>75</sup> The weighing of said evidence many times depends on the special circumstances of a case and the nature of allegation made. With that being said, it is expected of international courts to satisfy themselves that a claim is well argued and proven and to respectively explain so in their judicial reasoning. Turning now to the African Court, it considered that letters and medical reports submitted by the applicant successfully provided *prima facie* evidence in support of his allegations and that 'in the absence of contrary information ... these allegations ... [we]re well-founded'.<sup>76</sup> Although international courts often find that claims are proven if *prima facie* evidence remains un rebutted, certain conditions need to be met to this effect.<sup>77</sup> The Court failed to address these conditions. First, it did not examine whether the evidence did constitute cogent *prima facie* evidence. Mere allegations or unconvincing evidence are not considered *prima facie* evidence.<sup>78</sup> In this case, the only evidence that the Court relied upon was the

72 *Léon Mugesera* (n 1) paras 84–88.

73 For the difference between standard of proof and standard of evidence, see Amerasinghe (n 62) 251–254.

74 Amerasinghe (n 62) 247; JM Pasqualucci *The practice and procedure of the Inter-American Court of Human Rights* (2013) 167.

75 Eg, see Pasqualucci (n 74) 150.

76 *Léon Mugesera* (n 1) para 89.

77 Amerasinghe (n 62) 251.

78 Amerasinghe (n 62) 250–251, 254.

applicant's letters sent to state authorities setting out his allegations. Second, the Court did not assess whether said evidence was sufficient to discharge the burden of proof.<sup>79</sup> Unrebutted prima facie evidence does not automatically lead to proven claims. The African Court did not provide solid reasoning explaining why and how, in the absence of contrary information, these allegations were well-founded. Since there was no other evidence but the applicant's allegations and letters, the consistency and credibility of their content could not be verified. Consequently, the absence of contrary information could not justify the application of a *de facto* presumption against the non-appearing party. Even the IACtHR, which enjoys the discretion to apply such a presumption (as mentioned earlier, the African Court does not, as per its Rules of Procedure), still needs to ensure that the evidence is consistent with the facts on which the non-appearing state remains silent.<sup>80</sup> To give an example, the Court found a violation of the right to a defence under article 7(1)(a) of the African Charter on account of the applicant's allegations that the High Court Chamber for International Crimes refused to hear his arguments, experts and witnesses as well as the Public Prosecutor's refusal to provide the applicant with the information necessary to prepare his defence.<sup>81</sup> However, the Court in its judgment makes no reference to the actual judgment by the High Court Chamber and whether there was evidence of the applicant's claims therein. There is no reference either to the applicant's trial. Both the judgment and the trial are matters of public record and the Court could very easily have had access to them. If it did, there is nothing in its reasoning to affirm that. Finally, besides the applicant's letter addressed to the Public Prosecutor there is no mention to whether the latter responded or not to said letter. Consequently, it remains unclear on what basis the Court found the applicant's claims to be proven.

Another example comes from the Court's reasoning when it held that Rwanda violated the applicant's right to be free from cruel, inhuman or degrading treatment and the right to physical and mental integrity (articles 5 and 4 of the African Charter respectively) due to the fact, among others, that the applicant was deprived of adequate food, access to an orthopedic pillow or access to a psychiatrist so as the applicant addresses certain trauma.<sup>82</sup> Besides the reference to the applicant's medical certificates and letters from his own doctors there was no effort by the Court to verify the applicant's medical conditions and, more importantly, the consequences of the applicant not having access to specific food or services. A medical expert appointed by the Court could have given an independent opinion on these matters. This would have enabled the Court to verify certain of the applicant's claims and have a more robust reasoning as to the facts demonstrated,

79 Amerasinghe (n 62) 254.

80 See *Caesar* (n 34) para 37; *Hilaire, Constantine and Benjamin and Others* (n 35) para 67. See A Paúl 'An overview of the Inter-American court's evaluation of evidence' in Y Haec and others (eds) *The Inter-American Court of Human Rights: theory and practice, present and future* (2015) 25 at 41-42.

81 *Léon Mugesera* (n 1) paras 45-47.

82 *Léon Mugesera* (n 1) paras 77, 83, 87-90, 93, 95-97.

especially in an instance of non-appearance of the respondent state. Crucially, the Court had no justification either on how the applicant's claims (assuming that they were found proven) amounted to the threshold of degrading treatment under article 5 of the African Charter. The Court also noted that the state 'took no appropriate measures to correct the abuses against the applicant'<sup>83</sup> but there is no explanation on whether this was actually possible to verify or not. Mugesera's vulnerable status (being elderly and ill) was treated in the Court's reasoning as an inference in his favour, supporting the finding that his detention conditions had violated article 4 of the African Charter.<sup>84</sup> International courts admittedly enjoy a certain latitude in assessing facts and evidence, but circumstantial evidence, including inferences, may only be considered insofar as it results in conclusions consistent with the facts.<sup>85</sup> Mugesera's vulnerable status was undoubtedly an inference that supports his claims but the Court was not diligent in noting that this circumstantial evidence concerned a series of facts that were unclear, as explained earlier.

Overall, the Court's reasoning leaves much to be desired as to whether the evidence was sufficient to find the applicant's claims proven; how the Court discusses and analyses the evidence; and how transparent the Court is in explaining the evidentiary difficulties at hand. An instance of the Court's cryptic reasoning is that it cited certain documentary evidence, including a report of the Council/Nurse (dated 28 December 2016)<sup>86</sup> and a letter from the Council (dated February 2017)<sup>87</sup> without explaining in the text of the judgment what documents were and how they supported the applicant's claims. One may note that the Court's approach manifests the same shortcomings in *African Commission of Human and Peoples' Rights v Libya* (also a judgment in default), where the Court merely endorsed the applicant's claims in a telegraphically reasoned judgment, as Judge Fatsouh Ouguerouz pointed out in his Separate Opinion.<sup>88</sup> One may, therefore, discern that the Court has a strong inclination in default judgments to accept applicants' allegations without sufficiently examining whether they are well-founded.

In addition to this, in neither case did the African Court exercise its power under rule 55 of the Rules of Procedure to request certain measures on its own accord so as to obtain evidence which may provide clarification of the facts of a case. Such measures include the option to hear from a witness or expert, request an opinion or report or conduct an inquiry and on-site visit.<sup>89</sup> Moreover, the Court on its own motion may invite an individual or organisation to act as *amicus curiae* in a

83 *Léon Mugesera* (n 1) para 93.

84 *Léon Mugesera* (n 1) paras 100-101, 104.

85 *Amerasinghe* (n 62) 208-209, 223. For the ICJ see von Mangoldt & Zimmermann (n 27) 1491. For the ECtHR see W Schabas *The European convention on human rights: a commentary* (2015) 810-811. For the IACtHR see Pasqualucci (n 74) 167.

86 *Léon Mugesera* (n 1) footnotes 47, 58-60.

87 *Léon Mugesera* (n 1) footnote 58.

88 Separate opinion of Judge Fatsah Ouguerouz (n 55) paras 16, 29.

89 Separate opinion of Judge Fatsah Ouguerouz (n 55) paras 17, 20.

particular matter pending before it.<sup>90</sup> When international courts render judgments in default, they must explore other ways to gain access to evidence in an attempt to partially compensate for the absence of the party to the dispute.<sup>91</sup> Admittedly, an on-site visit would not have been feasible in practice, since there was little chance, if any, that Rwanda — the non-appearing party — would have cooperated. Yet, the Court could have sought direct evidence (testimonial or documentary including an opinion or a written report), for example, from experts or NGOs or a national or regional body regarding the circumstances of Mugesera's trial, status of his health and/or his conditions of detention. In similar instances, the regional counterparts of the African Court have adopted, on their own motion, various investigative measures which were capable of clarifying the facts of the case, and have obtained further evidence concerning matters considered by it to be relevant to the case. For example, in the *Hilaire, Constantine and Benjamin and Others* case, experts testified before the IACtHR as to the prison conditions in Trinidad and Tobago.<sup>92</sup> In *Husayn (Abu Zubaydah) v Poland*, the ECtHR invited the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism to take part in the hearing and also decided, of its own motion, to hear evidence from experts.<sup>93</sup>

## 5 CONCLUSION

*Léon Mugesera*, the first judgment in which the Court applied its revised Rule of Procedure on default judgments, illustrates the difficulties encountered by the Court (and all international courts for that matter) when a party to the dispute chooses not to appear and participate in the proceedings. In the past, judges in their separate opinions have criticised the majority for either ignoring the conditions set forth in the Court's Rules of Procedure<sup>94</sup> or not properly reasoning how the evidence brought before the Court substantiated the applicants' claims.<sup>95</sup>

Certain of the recent changes of the provision on default judgments came to address specific concerns. In this way, the revised Rule of Procedure (rule 63(1)) resolves the problems pertaining to the Court's practice of ignoring the procedural requirements for rendering a judgment in default. The African Court now enjoys the power to give a judgment in default on its own motion. Furthermore, although the

90 See point 45, Practice Directions to Guide Potential Applicants, <https://www.african-court.org/wpafc/wp-content/uploads/2020/06/Practice-Directions-to-Guide-Potential-Litigants-En.pdf> (accessed 30 October 2022).

91 Von Mangoldt & Zimmermann (n 27) 1491; Goldmann (n 27) paras 17–18.

92 (n 35) para 76. See art 58(a) and (c), Rules of Procedure of the IACtHR (n 44).

93 *Husayn (Abu Zubaydah) v Poland* (Merits and Just Satisfaction) ECtHR (24 July 2014) App no 7511/13, para 8. See Rule A1(1) and (2), Annex to the Rules of the ECtHR (n 44) concerning investigative measures.

94 See Separate opinion by Judge Bensaoula Chafika (n 50) paras 6, 7, 9.

95 See Separate opinion of Judge Fatsah Ouguergouz (n 55) paras 16, 29.

reason that the Court purposefully omitted the reference to its obligation to satisfy itself that the applicant's submissions are well-founded in fact and in law from the text of revised rule 63 remains unclear, both international jurisprudence and the African Court in *Léon Mugesera* confirm that this obligation is inherent in its judicial function. Interestingly, the introduction of a unique provision concerning the remedy available to the defaulting party to apply to set aside a default judgment (rule 63(2)) remains to be put to the test in the future.

Judge Fatsah Ouguerouz in connection to the *African Commission on Human and Peoples' Rights* and the present analysis with regard to *Léon Mugesera* raised the question of whether the African Court sufficiently examined and reasoned in its default judgments that the claims of the applicants were well-founded in fact. In *Léon Mugesera* the standard of proof and burden of evidence were allocated in a sound manner but the Court did not appear to thoroughly examine whether Mugesera's claims were well-founded in fact. The evidence brought before the Court neither was sufficient to qualify as *prima facie* evidence nor could discharge the burden of proof. Under rule 55 of the Rules of Procedure, the Court could have exercised its power to request certain measures on its own accord so as to obtain evidence and hence mitigate the ramifications of Rwanda's absence, but it did not use this power. It would be advisable that the Court exercises its power in future non-appearing cases without necessarily expecting of course that this measure in itself may compensate for the respondent state's absence from the proceedings.

To conclude, a comparative overview of the procedural rule on default judgments across the three regional human rights courts shows that the rule of the African Court presents certain differences compared with the respective provisions for the ECtHR and the IACtHR. The African Court recently aligned its provision with one of its counterparts so that it is now able to decide on giving a default judgment on its own motion (without a request from the other party). However, the provisions concerning the standard of proof and the burden of evidence in cases of non-appearance remain different with the African Court not enjoying discretion on applying a different standard of proof in such cases.