A party's non-participation in proceedings before the African Court on Human and Peoples' Rights and other regional courts in Africa

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ABSTRACT: Across Africa, regional courts are regularly confronted with a party declining to participate in judicial proceedings, prompting questions as to how the institutions should seek to address this challenge. After identifying the prevalence of such non-participation, this article synthesises the approaches taken by the African Court on Human and Peoples' Rights, the ECOWAS Community Court of Justice, and the COMESA Court of Justice. From a comparative analysis that extends to the practice of international courts and tribunals, it becomes evident that although these regional courts' legal frameworks generally allow the adjudicators to enter a default judgment against a non-appearing party with minimal analysis, this discretion has not been used to date. Instead, regional courts in Africa are proactively striving to ensure that their judgments are sufficiently grounded in fact and law, resulting in a multitude of victories for the non-appearing party. The article concludes by questioning whether this rigorous evaluation can be sustained if the caseload of these judicial bodies continues to swell.

TITRE ET RÉSUMÉ EN FRANÇAIS:

La non-participation d'une partie aux procédures devant la Cour africaine des droits de l'homme et des peuples et d'autres juridictions régionales en Afrique

RÉSUMÉ: En Afrique, les juridictions régionales sont régulièrement confrontées au refus d'une partie de participer à la procédure devant elles, ce qui soulève des questions sur la manière dont lesdites institutions devraient tenter de relever ce défi. Après avoir identifié la prévalence de cette non-participation, cette contribution synthétise les approches adoptées par la Cour africaine des droits de l'homme et des peuples, la Cour de Justice de la Communauté économique des États de l'Afrique de l'Ouest (CEDEAO) et la Cour de Justice du Marché commun de l'Afrique orientale et australe (COMESA). Une analyse comparative montre que, bien que le cadre juridique de ces juridictions leur permette généralement de rendre un décision par défaut à l'encontre d'une partie non comparante avec un examen minimal, ce pouvoir discrétionnaire n'a pas été utilisé jusqu'à présent. Au contraire, les juridictions régionales en Afrique s'efforcent de manière plus proactive de s'assurer que leurs jugements sont suffisamment fondés en fait comme en droit, ce qui se traduit par une multitude de victoires pour la partie non comparante. L'article conclut en se demandant si cette évaluation rigoureuse peut être maintenue si la charge de travail de ces organes judiciaires continue d'augmenter.

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CONTENT:

1 INTRODUCTION

Regional courts across Africa are being asked to play an ever-increasing role in continental affairs, with the caseload of the African Court on Human and Peoples' Rights (African Court), for example, skyrocketing in recent years.[1] As the African Court works to resolve applications alleging violations of human rights and fundamental freedoms, it has found itself seeking to delineate a cohesive approach to a less substantive matter that nevertheless has the potential to determine the outcome in specific cases: how to address a party's non-participation in the proceedings.

When a party – inherently the respondent – refuses to appear, it not only withholds legal arguments in its favour, but may also be depriving the judges of evidentiary material that could facilitate their assessment of the facts. This likewise precludes the adjudicators from assessing through an adversarial process whether, and which, allegations are sufficiently well founded to merit a finding for the applicant. A party's absence is hardly extraordinary, however, and while some courts' foundational documents set out how their judges should react to non-participation, the constitutive frameworks of other judicial bodies do not account for this eventuality and instead defer the approach to the applicable rules or the discretion of judges in individual cases.

The African Court has not been immune from such non-participation, which continues to demand the Court's attention. In fact, as this article was being finalised, the African Court issued yet another judgment grappling with this issue.[2] In addition to its judicial pronouncements, the Court has placed greater emphasis on how its legal framework facilitates management of a party's absence, changing its Rules a few years ago to streamline the process for issuing a decision in default should it wish to do so.

1 See https://www.african-court.org/cpmt/statistic (accessed 1 November 2023). See also ECOWAS Community Court of Justice 'ECOWAS Court issues 2020 judicial statistics', http://www.courtecowas.org/2021/01/21/ecowas-court-issues-2020-judicial-statistics (accessed 1 November 2023).

2 *Kaunda & Others v Malawi* Application 013/2021, Judgment (5 September 2023).

Following a fulsome empirical assessment to identify all cases involving non-participation before the African Court and its regional counterparts, this article seeks to ascertain commonalities across the African continent while evaluating any differences that exist. Part 2 of the article sets out the experience of the African Court in each relevant case. Part 3, in turn, discusses non-participation in the Economic Community of West African States (ECOWAS) Community Court of Justice and the Common Market for Eastern and Southern Africa (COMESA) Court of Justice, before summarising the approaches seen among international courts and tribunals. Part 4 identifies similar ways in which regional courts in Africa have reacted to a party's non-participation. In doing so, it observes that an absent respondent has often emerged victorious notwithstanding its non-appearance, while explaining that the courts have not hewed closely to the approach foreseen by their rules and have instead frequently exercised their discretion to adopt a case-specific determination aimed at ensuring justice and safeguarding the legitimacy of the proceedings. The implications of this approach to non-participation are considered, alongside concluding remarks, in part 5.

2 NON-PARTICIPATION IN THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

At the time of writing, the African Court had disposed of 198 cases, with non-participation having featured in 19 written judgments or rulings.[3] Reflecting the diverse manner in which a party's absence can feature in a case, six judgments concerned non-participation at the merits phase,[4] 11 arose in the earlier procedural stage regarding jurisdiction and admissibility,[5] and two additional instances materialised with respect

3 https://www.african-court.org/cpmt (accessed 1 November 2023). The analysis here is limited to judgments or rulings, and includes identified instances where a party was represented by counsel but did not submit substantive arguments. It does not extend to cases where there were multiple respondents with at least one participating, or to determinations concerning requests for review, interpretation of a judgment, or third parties seeking to intervene.

4 *African Commission v Libya* Application 002/2013, *Arrêt* (3 June 2016) 1 AfCLR 153, 1 RJCA 158; *Mulindahabi v Rwanda* Application 004/2017, *Arrêt* (26 June 2020) 4 AfCLR 291, 4 RJCA 294; *Mugesera v Rwanda* Application 012/2017, *Arrêt* (27 November 2020) 4 AfCLR 834, 4 RJCA 846; *Richard v Tanzania* Application 035/2016, Judgment (2 December 2021); *Muwinda & Others v Tanzania* Application 030/2017, Judgment (24 March 2022); *Kaunda* (n 2). References are provided to the original version and any English translation where applicable.

5 *Mulindahabi v Rwanda* Application 006/2017, *Arrêt (compétence et recevabilité)* (4 July 2019) 3 AfCLR 367, 3 RJCA 384; *Mulindahabi v Rwanda* Application 007/2017, *Arrêt (compétence et recevabilité)* (4 July 2019) 3 AfCLR 378, 3 RJCA 395; *Mulindahabi v Rwanda* Application 009/2017, *Arrêt (compétence et recevabilité)* (4 July 2019) 3 AfCLR 389, 3 RJCA 407; *Mulindahabi v Rwanda* Application 005/2017, *Arrêt* (26 June 2020) 4 AfCLR 328, 4 RJCA 332; *Mulindahabi v Rwanda* Application 010/2017, *Arrêt* (26 June 2020) 4 AfCLR 350, 4 RJCA 355; *Mulindahabi v Rwanda* Application 011/2017,

to reparations.[6] With another 140 cases pending at present,[7] it seems all but certain that the African Court will have further opportunities to fine-tune the approach it has developed thus far.

The first time that the African Court confronted this issue was in *African Commission on Human and Peoples' Rights v Libya*, where the African Commission on Human and Peoples' Rights (African Comission) seized the African Court on behalf of a Libyan citizen detained in a secret location.[8] Following an order for provisional measures, which Libya ignored, the Commission sought a default judgment for violating the citizen's rights under the African Charter on Human and Peoples' Rights.[9] While default judgments were not foreseen in the Protocol establishing the African Court,[10] they are addressed in the Rules of Court, which at the time provided in Rule 55 that the African Court could react to a party's non-appearance and enter a judgment in default after the Court had 'satisfied itself' of four considerations concerning service of documents, jurisdiction, admissibility and 'that the application is … well founded in fact and in law'.[11]

Faced with Libya's non-response on the merits, the African Court first acted *proprio motu* to extend the time limit for Libya to submit its views, and when none were received, the Court notified Libya that it would be compelled to consider a default judgment absent a responsive submission.[12] In its judgment, the Court addressed the first three considerations extensively,[13] but engaged in a somewhat more cursory

Arrêt (26 June 2020) 4 AfCLR 374, 4 RJCA 379; *Said v Tanzania* Application 011/2019, Ruling (30 September 2021); *Munyandilikirwa v Rwanda* Application 023/2015, Ruling (2 December 2021); *Touray & Others v The Gambia* Application 026/2020, Ruling (24 March 2022); *Marwa v Tanzania* Application 021/2017, Ruling (22 September 2022); *Baguian v Burkina Faso* Application 014/2019, *Arrêt* (22 September 2022).

6 *Umuhoza v Rwanda* Application 003/2014, *Arrêt sur les réparations* (7 December 2018) 2 AfCLR 202, 2 RJCA 209; *Makungu v Tanzania* Application 006/2016, Judgment (Reparations) (23 June 2022).

7 https://www.african-court.org/cpmt (accessed 1 November 2023).

8 *African Commission v Libya* (n 4) paras 1, 3-6.

9 *African Commission v Libya* (n 4) paras 8-11.

10 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 9 June 1998 (entry into force 25 January 2004). See also TM Makunya 'Decisions of the African Court on Human and Peoples' Rights during 2020: trends and lessons' (2021) 21 *African Human Rights Law Journal* 1249 ('[T]he legal basis for a default judgment is not treaty-based, that is, the procedure is not contemplated under the Protocol. It is rather regulated by the Rules of Court.').

11 Rules of Court (2 June 2010), African Court on Human and Peoples' Rights, Rule 55.

12 *African Commission v Libya* (n 4) paras 29-30, 32.

13 *African Commission v Libya* (n 4) paras 41-42 (referring to the lengthy procedural history demonstrating the service of all relevant documents), 46-60 (conducting an 'exhaustive examination' of its personal, material, temporal, and territorial jurisdiction), 61-74 (explaining why the application was admissible before it).

assessment of whether the application was well founded.[14] While there was a difference of opinion among the judges as to whether they should have examined the legal issues in additional detail or solicited further information,[15] it was evident that the Court accepted the applicant's unrebutted factual allegations as true and accordingly found that the non-participating state had violated the citizen's human rights.[16]

The next string of non-participation cases before the African Court arose mainly from Rwanda's and Tanzania's withdrawal of their respective declarations accepting the Court's jurisdiction with regard to cases instituted by individuals and recognised non-governmental organisations,[17] and their consequent determination not to further participate in proceedings. As a result, the Court had to deliberate and deliver ten judgments without any submissions from Rwanda as the respondent state,[18] followed by five judgments without the participation of Tanzania.[19]

Turning first to the *Umuhoza* case,[20] it is worth noting that during the merits stage, Rwanda had responded to allegations regarding the applicant's arrest, detention and trial,[21] to which the Court made extensive reference when rendering its judgment.[22] Having concluded that the applicant's human rights were violated in certain respects,[23] the Court noted that it lacked submissions on reparations and indicated it would determine the remedy 'after having heard the parties'.[24] Although Rwanda did not participate in the remedial stage of proceedings, this did not shift the burden of proof away from the applicant, whose evidence and arguments the Court scrutinised in

14 *African Commission v Libya* (n 4) paras 75-97 (dedicating substantial portions of the merits section to recalling the alleged violations and quoting legal provisions). See also O Windridge 'In default: *African Commission on Human and Peoples' Rights v Libya*' (2018) 18 *African Human Rights Law Journal* 775 (noting that the judgment 'does not provide a substantial analysis' of the merits).

15 See *African Commission v Libya* (n 4) Separate Opinion of Fatsah Ouguergouz J paras 5-17, 20-25, 28.

16 *African Commission v Libya* (n 4) paras 78, 85-87, 90-91, 93, 96-97.

17 The African Court held that these withdrawals would take effect one year after their deposit, but that they had no legal effect on cases already pending before the Court. *Umuhoza v Rwanda* Application 003/2014, Ruling on Jurisdiction (3 June 2016) 1 AfCLR 562, paras 18, 59, 67-69; *Cheusi v Tanzania* Application 004/2015, Judgment (26 June 2020) 4 AfCLR 219, paras 2, 37-39.

18 *Umuhoza* (n 6) para 15; *Mulindahabi* 006/2017 (n 5) para 21; *Mulindahabi* 007/2017 (n 5) para 23; *Mulindahabi* 009/2017 (n 5) para 18; *Mulindahabi* 004/2017 (n 4) para 18; *Mulindahabi* 005/2017 (n 5) para 21; *Mulindahabi* 010/2017 (n 5) para 26; *Mulindahabi* 011/2017 (n 5) para 19; *Mugesera* (n 4) para 15; *Munyandilikirwa* (n 5) para 45.

19 *Said* (n 5) para 12; *Richard* (n 4) para 12; *Muwinda* (n 4) para 20; *Makungu* (n 6) para 12; *Marwa* (n 5) para 19.

20 This is also referred to as the *Ingabire* case. See *Cheusi* (n 17) paras 37-39.

21 *Umuhoza v Rwanda* Application 003/2014, *Arrêt* (24 November 2017) 2 AfCLR 165, 2 RJCA 171, paras 3, 9, 36. Following its responsive submissions, Rwanda declined to furnish additional documentation sought by the Court and opted not to appear at subsequent hearings (paras 39, 43, 46).

22 *Umuhoza* (n 21) paras 50, 52, 61-65, 81, 91-92, 97, 101, 107, 125-127, 139, 145, 152.

23 *Umuhoza* (n 21) paras 98, 163, 173.

24 *Umuhoza* (n 21) para 170.

order to adjudicate, on an item-by-item basis, whether reparations were warranted and if so to precisely what extent, before determining that some reimbursement was due.[25] Yet even absent any countervailing submissions, the Court decided not to grant other prayers for relief, such as the applicant's request to receive reimbursement for equipment that was confiscated, which was deemed unsuccessful as she had not produced evidence of its monetary value.[26]

The next three judgments featuring non-participation were at the jurisdiction and admissibility stage. In *Mulindahabi* 6/2017, 7/2017 and 9/2017 the Court actively sought to avoid the respondent's non-participation, acting *proprio motu* to offer multiple, lengthy extensions to Rwanda in the hopes of receiving its arguments.[27] When that proved unsuccessful, the Court proceeded to enter a default judgment under Rule 55,[28] and although Rwanda had not challenged either the jurisdictional or admissibility questions,[29] the Court assessed both prerequisites. While it swiftly established that it had jurisdiction, the Court engaged in a detailed consideration of admissibility, leading it to conclude that the applicant had not exhausted local remedies and had not adduced evidence to support his claim that doing so was not feasible, with the result that each application was deemed inadmissible.[30]

The following year, the Court declared inadmissible three further *Mulindahabi* applications notwithstanding Rwanda's non-appearance. A similar approach emerged in cases 5/2017, 10/2017 and 11/2017, where the Court gave numerous extensions to Rwanda, observed that the respondent 'voluntarily refrained from asserting its defence', and turned to an examination of jurisdiction and then admissibility.[31] This time the Court's in-depth analysis concluded that local remedies had in

25 *Umuhoza* (n 6) paras 15, 17, 21, 38-46, 53-72, 74.

26 *Umuhoza* (n 6) paras 31-32, 47-52, 74.

27 *Mulindahabi* 006/2017 (n 5) paras 13, 15 (three extensions of 45 days each); *Mulindahabi* 007/2017 (n 5) paras 15, 17 (same); *Mulindahabi* 009/2017 (n 5) paras 12, 14 (first extension of 45 days and a further extension of 30 days).

28 *Mulindahabi* 006/2017 (n 5) para 17; *Mulindahabi* 007/2017 (n 5) para 19; *Mulindahabi* 009/2017 (n 5) para 15.

29 *Mulindahabi* 006/2017 (n 5) paras 23 ('noting that nothing on file indicates that it does not have jurisdiction'), 28 (noting that the admissibility requirements 'are not in contention between the parties, the Respondent State having not participated in the proceedings'); *Mulindahabi* 007/2017 (n 5) paras 25, 30 (same); *Mulindahabi* 009/2017 (n 5) paras 20, 24 (similar).

30 *Mulindahabi* 006/2017 (n 5) paras 23-24, 28-36, 39; *Mulindahabi* 007/2017 (n 5) paras 25-26, 30-38, 41; *Mulindahabi* 009/2017 (n 5) paras 20-21, 24-35, 38. In separate opinions, Bensaoula Chafika J set out her view that the Court had acted contrary to the provisions of Rule 55 by issuing a default judgment notwithstanding the lack of an 'application of the other party' to do so and without any legal reasoning permitting such a default, which she noted was different than rendering a judgment in the absence of one of the parties. *Mulindahabi* 006/2017 (n 5) *Opinion individuelle jointe l'arrêt du 4 juillet 2019* paras 2-9, 11-14; *Mulindahabi* 007/2017 (n 5) *Opinion individuelle jointe l'arrêt du 4 juillet 2019* paras 2-10, pp 3-4; *Mulindahabi* 009/2017 (n 5) *Opinion individuelle jointe l'arrêt du 4 juillet 2019* paras 2-10, pp 3-4.

31 *Mulindahabi* 005/2017 (n 5) paras 14, 16, 24, 29-31; *Mulindahabi* 010/2017 (n 5) paras 19, 21, 29, 34-36; *Mulindahabi* 011/2017 (n 5) paras 13, 15, 22, 27-29.

fact been exhausted, but that the applicant did not bring his case to the Court within a reasonable amount of time, rendering these applications inadmissible even if the judgments were issued in default.[32]

Conversely, the *Mulindahabi* 4/2017 application overcame both the jurisdictional and admissibility hurdles, leading the Court to the merits for adjudication.[33] The claims themselves arose from the applicant's job dismissal and dissatisfaction with how the Rwandan judiciary handled his legal challenges.[34] For its part, the Court remained acutely aware that Rwanda's non-appearance meant it could be lacking relevant information, as evidenced by the Court's frequent indication that its conclusions were necessarily based on 'the record' before it.[35] Moreover, the Court emphasised that 'the onus is on the Applicant to prove his allegations', which 'should not be limited to general statements' even if they were unopposed,[36] thereby making clear that non-participation did not shift or otherwise alleviate the burden placed on applicants to make out their case. Nor did it abbreviate the judges' extensive assessment of the merits, with the Court finding in favour of Rwanda on every matter before it in the default judgment.[37]

Shortly after these judgments, in September 2020 the African Court sought to enhance its effectiveness by revising the Rules of Court in a number of ways,[38] one of which was to streamline the process for entering a default judgment when one party did not participate. The Rule concerning default, now Rule 63, still provides that the African Court 'may' enter a decision in default and that before doing so the African Court must satisfy itself that the non-appearing party has been duly served with all relevant documents, but it no longer contains a requirement for the Court to satisfy itself of its jurisdiction, the application's admissibility, or that the application is well founded in fact and law.[39] When Rule 63 entered in force, it applied to all cases still pending resolution,[40] and therefore was applicable when the Court

32 *Mulindahabi* 005/2017 (n 5) paras 34-48, 51; *Mulindahabi* 010/2017 (n 5) paras 39-53, 56; *Mulindahabi* 011/2017 (n 5) paras 32-46, 49.

33 *Mulindahabi* 004/2017 (n 4) paras 27-28, 32-47.

34 *Mulindahabi* 004/2017 (n 4) paras 3-7, 48.

35 *Mulindahabi* 004/2017 (n 4) paras 34, 46, 55, 72, 100.

36 *Mulindahabi* 004/2017 (n 4) para 100.

37 *Mulindahabi* 004/2017 (n 4) paras 48-107, 115.

38 African Court on Human and Peoples' Rights 'African Court on Human and Peoples' Rights adopts new Rules of Court' 28 September 2020, https://www.african-court.org/wpafc/african-court-on-human-and-peoples-rights-adopts-new-rules-of-court (accessed 1 November 2023).

39 Rules of Court, 1 September 2020 (entry into force 25 September 2020) Rule 63 titled 'Decision in Default', and providing in section one that: '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.'

40 African Court Rules (n 39) Rules 92, 93(1).

rendered a default judgment in *Mugesera* two months later.[41] While that judgment set out the text of this new Rule,[42] it was an apparent oversight to have indicated that Rule 63 still required assessments of jurisdiction, admissibility, and whether the claims were sufficiently founded, as had been necessary before the revisions.[43]

Of greater significance in *Mugesera* was that the Court elaborated a fuller approach to non-participation. In particular, the Court stated for the first time that the applicant could succeed by adducing *prima facie* evidence to make the allegations credible,[44] and that such *prima facie* evidence would shift the burden of proof to the respondent state for facts under its control,[45] with the clear implication that an absent state would not discharge this burden when it shifted.[46] This did not imply that the Court's assessment would be cursory or that the state would lose automatically, and indeed the Court examined and dismissed a number of allegations against Rwanda.[47] Yet Rwanda's non-appearance also meant that it had not responded on matters for which the Court considered the evidence to be sufficient to shift the burden, leading the Court to find that Rwanda had violated the applicant's human rights in various ways.[48] On reparations and costs, too, the Court scrutinised the evidence before it, granting some prayers for relief, dismissing others and using its inherent power to set its own compensation amounts.[49] Interestingly, when assessing the discrete factual issue of whether the applicant's daughter was in fact his daughter, the Court noted that this was not evidenced on the record and, with reference to the Rules, initiated its own research of the public domain to confirm this was the case.[50]

In the final case concerning Rwanda, *Munyandilikirwa*, the Court concluded that the conditions set out in recently revised Rule 63 were fulfilled and that it therefore 'may rule by default'.[51] While no longer a component of the legal framework for a party's non-participation, the

41 *Mugesera* (n 4) para 177.

42 *Mugesera* (n 4) paras 13-14.

43 *Mugesera* (n 4) para 18 referring to *African Commission v Libya* (n 4) paras 38-42; *Mulindahabi* 004/2017 (n 4) para 22. The two judgments relied upon had applied former Rule 55.

44 *Mugesera* (n 4) para 44 ('failure by one of the parties to appear before it does not exempt the Applicant from having to prove his case, and adduce evidence, even if *prima facie*, to render the allegations credible').

45 *Mugesera* (n 4) paras 33 ('with regard to the facts under control of the State, the burden of proof can be shifted to the Respondent State, provided that the Applicant adduces any *prima facie* evidence to support his allegation'), 84.

46 See *Mugesera* (n 4) para 34 ('on the basis of the information mentioned above … the burden of proof is shifted to the Respondent State. Thus, without any contrary evidence submitted by the Respondent State, the Court concludes that it has no reason to consider that [the facts are not as alleged by the Applicant]').

47 *Mugesera* (n 4) paras 48-75, 78-86, 108, 110-114, 177.

48 *Mugesera* (n 4) paras 76-77, 87-107, 109, 115-121, 177.

49 *Mugesera* (n 4) paras 122-177.

50 *Mugesera* (n 4) paras 147, 152 referring to African Court Rules (n 39) Rule 55(1) ('The Court may, of its own accord or at the request of a party, obtain any evidence which in its opinion may provide clarification of the facts of a case. […]').

51 *Munyandilikirwa* (n 5) para 46.

Court commenced with a jurisdiction and admissibility assessment in light of other governing provisions,[52] before potentially turning to the merits of the claim. Yet in what has become a regular occurrence, the applicant failed to establish compliance with all admissibility requirements, notwithstanding the lack of any counter-argument from the respondent state. Here, the applicant asserted that he should be excused from the need to exhaust local remedies because 'evidence suggests that they are in reality not available, effective, and sufficient in practice',[53] which he apparently supported with 'various reports of human rights organisations and bodies'.[54] Even though this allegation went unrebutted, the Court engaged in a detailed assessment of the applicable dispute resolution procedures in three languages, the provisions of Rwandan law and the holdings from multiple Rwandan proceedings in the case,[55] before concluding that there was 'nothing manifestly erroneous' in the Rwandan judiciary's assessments requiring the Court's intervention,[56] leading the majority to declare the application inadmissible.[57]

Turning to the series of rulings involving the non-participation of Tanzania, they likewise reflect the African Court's willingness to provide multiple extensions in an effort to receive responsive submissions on the matters before it. This was evidenced in both *Said* and *Marwa*, where the Court granted Tanzania a pair of extensions,[58] even though the applicants had not attempted to justify their own unreasonably late applications, rendering them inadmissible.[59]

Similarly, in *Richard* and *Muwinda*, where the applications were considered on the merits, the Court extended the time for Tanzania to respond on multiple occasions over a number of years, before concluding that it could enter a default judgment.[60] In turning to the merits in *Richard*, the Court repeatedly noted that due to Tanzania's non-response, the record was devoid of any explanation for why the applicant's criminal appeal had remained unresolved for many years, prompting the Court to find a violation of the right to be tried within a

52 *Munyandilikirwa* (n 5) paras 47-49, 56-58 referring to African Charter on Human and Peoples' Rights, 27 June 1981 (entry into force 21 October 1986) art 56; African Court Protocol (n 10) arts 3, 6(2); African Court Rules (n 39) Rules 49(1), 50(1)-(2).

53 *Munyandilikirwa* (n 5) para 65.

54 *Munyandilikirwa* (n 5) para 88.

55 *Munyandilikirwa* (n 5) paras 75-89.

56 *Munyandilikirwa* (n 5) para 90.

57 *Munyandilikirwa* (n 5) para 98. Ben Kioko J and Rafaâ Ben Achour J dissented.

58 *Said* (n 5) paras 9, 16 (90 days and 45 days); *Marwa* (n 5) paras 11-12, 19 (30 days and four months).

59 *Said* (n 5) paras 39, 44, 50 (filed eight years and three months after the exhaustion of local remedies); *Marwa* (n 5) paras 36, 41-42, 48 (submitted more than six years after local remedies were exhausted). Bensaoula Chafika J dissented in the latter case.

60 *Richard* (n 4) paras 8, 16, 18 (seven reminders between January 2017 and July 2020); *Muwinda* (n 4) paras 12-20, 29 (six extensions granted between July 2018 and March 2021).

reasonable time.[61] Interestingly, in considering reparations, the Court simply 'observe[d] that the Applicant suffered emotional distress' as a result of this violation, without reference to any supporting evidence, before granting a financial award for the resultant moral prejudice.[62] *Muwinda*, by contrast, arose after Tanzania's appellate court had finished adjudicating an employment-termination dispute, permitting the African Court to rely on these findings when considering that the applicants had not addressed, let alone overcome, the deficiencies identified by the Tanzanian judiciary.[63] Nor did the applicants meet their burden to demonstrate they were discriminated against, with their 'general allegation of discrimination' insufficient even with the respondent state declining to respond.[64]

The Court also gave Tanzania two reminders before rendering a default judgment in the *Makungu* reparations matter, from which the applicant sought reparations for violations arising out of the inability to appeal his criminal conviction and sentence for more than 22 years.[65] Notwithstanding Tanzania's non-participation at this remedial stage, the Court reiterated that the burden remained on the applicant to justify his request for relief, especially as it pertained to material damages, and found that the applicant had not established that he sold his house and land as a result of his incarceration.[66] With respect to his lost earnings as a farmer, the Court accepted that a 'flexible approach' was warranted given the applicant's inability to provide documents of his earnings from decades earlier,[67] and *proprio motu* engaged in a detailed calculation of what he would have earned in approximate terms.[68] Turning to his claims arising out of moral prejudice, the Court accepted without evidence that the violations and long prison term 'undoubtedly caused [the applicant] distress and psychological anguish' warranting compensation, but also considered the medical documentation he provided of specific ailments to be 'incomplete and unclear' as to whether they were directly caused by the violations.[69] The Court likewise demanded more than an affidavit to establish the applicant's relationship with alleged indirect victims such as his spouses, children and mother, and considered that without more these requests for reparations could not succeed, even if they had not been opposed by Tanzania.[70]

61 *Richard* (n 4) paras 37, 47-50.

62 *Richard* (n 4) para 56. Blaise Tchikaya J dissented with respect to this award of damages.

63 *Muwinda* (n 4) paras 5-7, 55-58.

64 *Muwinda* (n 4) para 66.

65 *Makungu* (n 6) paras 1, 7-8, 16, 18, 30, 45. Tanzania had participated in the earlier proceedings on the merits. See *Makungu* Application 006/2016, Judgment (7 December 2018) 2 AfCLR 550, paras 16, 26-27.

66 *Makungu* (n 6) paras 22, 37-38.

67 *Makungu* (n 6) paras 32-33.

68 *Makungu* (n 6) paras 33-36, 77.

69 *Makungu* (n 6) paras 49, 51-53.

70 *Makungu* (n 6) paras 54-63.

In 2022 two further applications were dismissed by the Court as inadmissible even without contravening arguments from the respondent states. In *Touray* the Court observed that some applicants made no submissions on the exhaustion of local remedies in The Gambia, and considered by majority that other applicants filed public interest cases that were identical to claims recently adjudicated by the ECOWAS Community Court of Justice, thereby rendering them already settled and inadmissible.[71] In *Baguain* the African Court found that local remedies had not been exhausted in Burkina Faso, since the applicant filed an appeal in 2018 that was still pending when he filed his application before the Court in 2019,[72] which the Court did not consider to be 'unduly prolonged',[73] though it also did not inquire or address whether the appeal was still pending at the time of its decision three years later.[74]

The most contemporary example of the African Court's approach to non-participation can be seen in the recent *Kaunda* judgment. While Malawi had filed a response to the initial request for provisional measures, it had not responded on the merits application, even after the Court offered a 45-day extension before closing the proceedings.[75] Referring to Rule 63, the Court considered the necessary formalities to have been complied with and decided *proprio motu*, 'for the proper administration of justice', to render the judgment by default.[76] As has now become customary, the Court commenced with a jurisdiction and admissibility assessment,[77] before turning to the merits of the claim that Malawi's Supreme Court of Appeal had violated the applicants' rights when it nullified an election due to certain irregularities.[78] For each such allegation, the Court duly noted the lack of submissions from the respondent, proceeded to the record concerning the rulings of the Malawian Supreme Court of Appeal, and found that the applicants' mere assertions did not discharge their burden to demonstrate error in those national decisions.[79]

71 *Touray* (n 5) paras 35, 39-45, 49; Joint Separate Opinion of Ben Kioko J and Stella Anukam J, para 10; Joint Dissenting Opinion of Rafâa Ben Achour J and Blaise Tchikaya J, paras 4-16.

72 *Touray* (n 5) paras 28-33.

73 *Touray* (n 5) para 31.

74 See *Touray* (n 5) paras 7-10, 31-35.

75 *Kaunda* (n 2) paras 8, 10-12, 14, 17-18.

76 *Kaunda* (n 2) paras 15-20.

77 *Kaunda* (n 2) paras 21-37.

78 *Kaunda* (n 2) paras 38-39, 44-45, 48, 56-57.

79 *Kaunda* (n 2) paras 40, 44-47, 49, 53-55, 58, 62-63, 65-67, 76.

3 NON-PARTICIPATION IN OTHER REGIONAL COURTS IN AFRICA AND BEFORE INTERNATIONAL COURTS

In order to place the approach of the African Court in context, a review of other regional courts in Africa was undertaken to identify any instances of non-participation. This was necessarily limited by the resources made available by the courts, which largely place their rulings on their websites, either directly or through published compilations of jurisprudence. Focus was maintained on judgments where no respondent participated, and thus where the adjudicators were devoid of any argumentation or challenge in opposition to the application. Cases where at least one respondent participated are, therefore, not incorporated below.

No such instance of non-participation was identified in the East African Court of Justice, while the absence of the respondent was noted in both the ECOWAS Community Court of Justice and the COMESA Court of Justice. After first examining the experiences of these two courts, this section will briefly set out the approach at the international level to a party's non-participation, before turning towards a comparative analysis in the following part.

3.1 Non-participation in the ECOWAS Community Court of Justice

Established in 1975 in order to accelerate and sustain economic development and thereby promote unity among the countries of West Africa,[80] ECOWAS still comprises 15 member states today.[81] Its Community Court of Justice effectively started functioning in 2004, when its jurisdiction was almost immediately expanded to cover alleged human rights violations in any member state and to permit both individuals and corporate bodies to bring claims before the Court.[82] Since then it has issued approximately 275 judgments,[83] 15 of which

80 Treaty of the Economic Community of West African States (ECOWAS), 28 May 1975 (entry into force 20 June 1975) Preamble. See also Revised Treaty of the Economic Community of West African States (ECOWAS), 24 July 1993 (entry into force 23 August 1995) Preamble.

81 https://ecowas.int/about-ecowas; https://ecowas.int/member-states (both accessed 1 November 2023).

82 (2004-2009) CCJELR vii-viii. See also Supplementary Protocol A/SP.1/01/05, 19 January 2005, arts 3(4), 4.

83 (2004-2009) CCJELR; (2010) CCJELR; (2011) CCJELR; (2012) CCJELR; (2013) CCJELR; (2014) CCJELR; (2015) CCJELR; (2016) CCJELR; (2017) CCJELR; http://www.courtecowas.org/decisions-3 (accessed 1 November 2023). This does not include advisory opinions or other rulings.

involved the respondent's wholesale non-participation,[84] attendance but non-submission of views,[85] or non-attendance with belated or irregular submission of a statement in defence.[86]

It is difficult to discern a single, consistent approach to non-participation among these 15 cases, nor has there been an apparent evolution towards cohesion. One commonality that has emerged, however, is that the ECOWAS Community Court of Justice may be ready to grant respondents additional time in the hope of receiving their views, but it will not accept submissions that are unduly delayed in nature. That is understandable when '[t]he attitude of [the defendant] throughout the proceedings showed total and blatant disregard for the proceeding before this Court and for the outcome of the case',[87] as in *Mba*, prompting the Court to reject a second extension of time,[88] enter a default judgment that ultimately went against the respondent,[89] and dismiss the later request to set aside that judgment.[90] Notably, in this case it appeared that the respondent had belatedly submitted its 'Statement of Defence',[91] but the Court made no mention of its contents or the views of the respondent when adjudicating the merits of the application.[92] In other cases where the

84 *Ukor v Laleye* Judgment ECW/CCJ/JUD/01/05 (27 May 2005) (2004-2009) CCJELR 19; *Oserada v ECOWAS Council of Ministers & Others* Judgment ECW/CCJ/JUD/01/08 (16 May 2008) (2004-2009) CCJELR 167; *Manneh v The Gambia* Judgment ECW/CCJ/JUD/03/08 (5 June 2008) (2004-2009) CCJELR 181; *Bah v Sierra Leone* Judgment ECW/CCJ/JUD/11/15 (4 May 2015) (2015) CCJELR 193; *Eli v Nigeria* Judgment ECW/CCJ/JUD/29/19 (11 October 2019); *Gnimagnon & Others v ECOWAS Commission* Judgment ECW/CCJ/JUD/15/2022 (28 March 2022).

85 *Heirs of Baré v Niger* Judgment ECW/CCJ/JUD/23/15 (23 October 2015) (2015) CCJELR 429; *Touré & Bangoura v Guinea* Judgment ECW/CCJ/JUD/03/16 (16 February 2016) (2016) CCJELR 29; *Santoi v Nigeria* Judgment ECW/CCJ/APP/01/19 (23 January 2019); *Faculty of Peace & Others v Nigeria* Judgment ECW/CCJ/JUD/06/22 (21 March 2022).

86 *Mba v Ghana* Judgment ECW/CCJ/JUD/10/13 (6 November 2013) (2013) CCJELR 335; *Kakali v Niger* Judgment ECW/CCJ/JUD/26/15 (1 December 2015) (2015) CCJELR 497; *Pilakiwe & Others v Togo & Togolese Tax Revenue Office* Judgment ECW/CCJ/JUD/01/16 (16 February 2016) (2016) CCJELR 1; *Vision Kam Jay Investment v President of the Commission & ECOWAS Commission* Judgment ECW/CCJ/JUD/24/16 (6 October 2016) (2016) CCJELR 595; *Sam-Sumana v Sierra Leone* Judgment ECW/CCJ/JUD/19/17 (27 November 2017) (2017) CCJELR 281.

87 *Mba v Ghana* Judgment ECW/CCJ/RUL/07/14 (13 May 2014) (2014) CCJELR 137 para 27.

88 *Mba v Ghana* Ruling ECW/CCJ/RUL/14/13 (6 November 2013) (2013) CCJELR 325 paras 21-22 (an extension of time, which reflected a 'strict notice' that non-compliance could lead to default, had already amounted to 85 days), 34 (request for further extension rejected). See also *Mba* (n 86) para 9 (the respondent did not appear at the oral hearing either).

89 See *Mba* (n 86) paras 10, 48-50, 63, 74, 103, 109.

90 *Mba* (n 87) para 37. The Court would subsequently dismiss the plaintiff's efforts to seek enforcement of the judgment as well. *Mba v Ghana & Others* Judgment ECW/CCJ/JUD/30/18 (11 December 2018) pp 12, 21.

91 *Mba* (n 88) para 4.

92 Eg *Mba* (n 86) para 109 ('considering that the Republic of Ghana did not in any way challenge the complaint filed against it').

ECOWAS Court declined to accept a late defence filing,[93] however, it referenced the statement's content in the judgment to varying extents: relying only on non-denials and admittance of a key fact in *Vision Kam Jay*,[94] setting out the respondent's position in both *Kakali* and *Pilakiwe*,[95] and not only summarising but also taking into account defence arguments in *Sam-Sumana*.[96]

A comparable flexibility can also be seen in cases where the respondent participated only by seeking an extension or appearing in court, but evidently never sought to challenge the applicant's claims through formal or informal means.[97] In *Heirs of Baré* the ECOWAS Court opted to contemplate a 'clearly perceptible line of defence' that could be seen 'from the attitude of [the respondent's] domestic courts',[98] even though no such defence position was invoked in *Touré & Bangoura*, *Santoi* or *Faculty of Peace*.[99]

Variable approaches have also arisen in cases where the respondent did not appear or participate in any manner, with *Manneh* being a particular outlier. In that case, which concerned the arrest and incommunicado detention of a journalist without trial in The Gambia, the ECOWAS Court not only adjourned its hearing to give the defendant an additional opportunity to appear, which in turn led to a second adjournment, but it then demanded that other evidence be introduced to prove the uncontested allegations in line with article 43 of its Rules.[100] As a consequence, the plaintiff called three witnesses to testify on his behalf and, even afterwards, the Court 'gave another opportunity to the defendant to attend the next session to cross-examine the witnesses, and to present their side of the story'.[101] After the defendant declined to participate for the sixth time, the Court reasoned that the uncontroverted evidence before it revealed numerous human rights violations.[102] Conversely, the responding party's total absence in other cases did not prompt *proprio motu* action by the Court, not only when the application was deemed inadmissible as in

93 *Kakali* (n 86) pp 500, 503-504; *Pilakiwe* (n 86) para 18; *Vision Kam Jay* (n 86) pp 602, 604-605; *Sam-Sumana* (n 86) pp 281, 288.

94 *Vision Kam Jay* (n 86) 605 ('The Defendants have not denied any of these allegations (even from the purported statement of defence, which the Court discountenanced, the debt [at issue in the case] was clearly admitted).').

95 *Kakali* (n 86) pp 502-503; *Pilakiwe* (n 86) paras 11-14.

96 *Sam-Sumana* (n 86) pp 288-289, 293, 296-298.

97 See *Heirs of Baré* (n 85) paras 26, 28-29; *Toure & Bangoura* (n 85) paras 2, 6, 8, 10; *Santoi* (n 85) paras 3, 5-7, 9; *Faculty of Peace* (n 85) paras 6-7.

98 *Heirs of Baré* (n 85) para 25.

99 Eg *Toure & Bangoura* (n 85) paras 11-53; *Santoi* (n 85) para 62; *Faculty of Peace* (n 85) paras 16, 35.

100 *Manneh* (n 84) paras 4-6, 41. See Rules of the Community Court of Justice of the Economic Community of West African States (ECOWAS) (effective date 2002) art 43(1) ('The Court may, either of its own motion or on application by a party, order that witnesses prove certain facts. The order of the Court shall set out the facts to be established.').

101 *Manneh* (n 84) paras 7-10.

102 *Manneh* (n 84) paras 4, 10, 20, 23, 27, 41.

Ukor and *Oserada*,[103] but equally in *Bah* when the Court relied on documentary evidence to give a total victory to the plaintiff except only on the amount of damages requested,[104] and in *Eli* and *Gnimagnon* which revealed a situation-specific determination of whether any supporting documentation was necessary or sufficient to establish an undisputed allegation.[105]

With only a few exceptions,[106] the ECOWAS Court consistently entered a default judgment or expressly indicated that it considered the situation one of default.[107] Such an outcome may not have been foreseen in the foundational documents,[108] but it is specifically contemplated by the Court's Rules,[109] with article 90(4) stating that '[b]efore giving judgment by default the Court shall, after considering the circumstances of the case consider (a) whether the application initiating proceedings is admissible; (b) whether the appropriate formalities have been complied with; and (c) whether the application appears well founded'. Yet, in numerous cases the Court did not assess admissibility, compliance with formalities, and the apparent well-founded nature of the application before entering a default judgment, with the result that the Court frequently proceeded in default only to later conclude that these prerequisites were not fulfilled.[110] Only in *Santoi* did the Court first proceed as set out in article 90(4) and, after one condition was not fulfilled, refrain from entering a default judgment.[111] Moreover, article 90(4)(c) provides for an assessment of whether the application 'appears' well founded, not whether it actually 'is' well founded, with the Court's application of the latter standard entailing a more in-depth analysis than mandated by its legal framework.[112]

103 *Ukor* (n 84) paras 32-33; *Oserada* (n 84) p 180.

104 *Bah* (n 84) pp 198, 207-213.

105 *Eli* (n 84) paras 37-38, 46-49, 53, 55, 59-61, 63, 66, 69; *Gnimagnon* (n 84) paras 139-144, 157-158, 164-165, 186, 199-203, 208-210, 215-219.

106 *Sam-Sumana* (n 86); *Santoi* (n 85); *Faculty of Peace* (n 85).

107 *Ukor* (n 84) paras 1, 31; *Oserada* (n 84) para 18, p 179; *Manneh* (n 84) para 10; *Mba* (n 86) paras 10, 49, 63, 74-75, 103; *Bah* (n 84) p 200; *Heirs of Baré* (n 85) para 32, p 451; *Kakali* (n 86) pp 504, 510; *Pilakiwe* (n 86) para 18, p 10; *Touré & Bangoura* (n 85) para 62, p 60; *Vision Kam Jay* (n 86) p 605; *Eli* (n 84) para 71; *Gnimagnon* (n 84) para 138.

108 See ECOWAS Revised Treaty (n 80) art 15; Protocol A/P.1/7/91 on the Community Court of Justice, 6 July 1991, arts 11-14.

109 ECOWAS Rules (n 100) art 90 titled 'Judgments by Default and Applications to Set Them Aside'.

110 *Ukor* (n 84) paras 31-32 (default, but application inadmissible for lack of merit); *Oserada* (n 84) pp 179-180 (default, but application inadmissible and no grounds to examine the merits); *Kakali* (n 86) pp 510-511 (default, but declaring the Court had no power to provide the requested relief, and rejecting all claims accordingly); *Pilakiwe* (n 86) pp 10-11 (default, but declaring that the case did not involve one of the respondents and that no violations could be attributed to the other respondent).

111 *Santoi* (n 85) paras 68, 78-79, 98-99, 107-108, 110, 117, 124, 127, p 23.

112 Eg *Eli* (n 84) p 13 (section heading '[o]n whether the Application is well founded', followed by 32 paragraphs evaluating the allegations); *Faculty of Peace* (n 85) para 37 ('The Court must still determine whether the Application is well founded', with 52 paragraphs dedicated to the merits assessment).

None of these approaches seems to depend on the strength of the plaintiff's case, as no pattern materialises from those where the application was entirely or mostly upheld,[113] where a smaller number of violations was established,[114] or where the application was denied notwithstanding the absent respondent.[115] Perhaps the main constant was that the ECOWAS Community Court of Justice largely proceeded on the basis that a successful applicant needed to provide a convincing evidential basis for its allegations, and a respondent's lack of challenge did not alter this burden of proof.[116]

3.2 Non-participation in the COMESA Court of Justice

COMESA, established in 1994 to advance the economic integration of its member states,[117] now encompasses 21 states including a number located in other regions of Africa.[118] Structurally, COMESA is composed of numerous organs, including the COMESA Court of Justice, whose remit is to adjudicate matters referred to it by member states, the Secretary-General and legal or natural persons in accordance with the founding treaty.[119] Although it too was established in 1994, the COMESA Court of Justice has been called upon to issue only 28 judgments or other reported rulings,[120] two of which involved a party's non-participation.[121]

In *PTA Bank v Burundi* the Eastern and Southern African Trade and Development Bank – which was also a COMESA institution[122] – had sought to lease its former headquarters in Bujumbura to another organisation, which Burundi prohibited.[123] The Bank reacted by alleging a violation of the host state agreement and seizing its sister institution, the COMESA Court of Justice, with two applications for interim relief, to which Burundi offered no response.[124] However, at

113 *Manneh* (n 84) paras 41, 44; *Mba* (n 86) paras 92, 99, 102, 109; *Bah* (n 84) pp 198, 213; *Heirs of Baré* (n 85) paras 23, 40, 69, 71-72, pp 451-452; *Vision Kam Jay* (n 86) pp 601-602, 607; *Faculty of Peace* (n 85) para 15, pp 33-34; *Gnimagnon* (n 84) paras 121, 242.

114 *Touré & Bangoura* (n 85) pp 60-61; *Sam-Sumana* (n 86) pp 286-288, 300; *Eli* (n 84) para 71.

115 *Ukor* (n 84) para 32; *Oserada* (n 84) p 180; *Kakali* (n 86) p 511; *Pilakiwe* (n 86) p 11; *Santoi* (n 85) p 23.

116 Eg *Mba* (n 86) paras 83-86; *Santoi (*n 85) paras 83-84; *Eli* (n 84) paras 35-37.

117 Treaty Establishing the Common Market for Eastern and Southern Africa, 5 November 1993 (entry into force 8 December 1994) Preamble.

118 https://www.comesa.int/members (accessed 1 November 2023).

119 COMESA Treaty (n 117) arts 7(1), 23(1), 24-30. See also https://www.comesa.int/comesa-institutions-3 (accessed 1 November 2023).

120 https://comesacourt.org/court-decisions (accessed 1 November 2023).

121 *PTA Bank v Burundi* Reference 1 of 2006, Judgment of the Court (16 August 2006); *COMESA v Dube* Appeal 1 of 2015, Judgment of the Court (26 May 2016).

122 COMESA Treaty (n 117) art 174(1)-(3).

123 *PTA Bank v Burundi* (n 121) pp 1-4.

124 *PTA Bank v Burundi* (n 121) pp 4-7.

the hearing the COMESA Court pressed the Bank's legal representative to such an extent that he was forced to 'concede' a number of points, after which the Court concluded that it lacked jurisdiction as domestic remedies had not been exhausted.[125]

The procedural posture was different in *Dube*, in which COMESA itself had appealed from a first-instance determination that the Secretary-General had unlawfully dismissed a former staff member.[126] The appeal hinged on questions concerning the interpretation of the staff rules governing summary dismissal and due process,[127] with the Appellate Division of the COMESA Court of Justice being deprived of 'the benefit of hearing submissions on behalf of the respondent' on account of his non-participation.[128] Yet, following its own detailed consideration of the applicable provisions, and recognising the need for procedural fairness even in cases of summary dismissal, the Appellate Division agreed with the first-instance determination and ruled against COMESA.[129]

At the time of these two cases, the COMESA Court of Justice's responses to non-participation do not appear to have been governed by specific legal provisions, not least because such a situation was not foreseen in the founding treaty and its Rules of Procedure came into effect following these judgments.[130] The current legal framework permits dismissal of a claim if the claimant does not attend the hearing to pursue the matter, while indicating that the case should continue to be heard if it is the respondent who is absent.[131]

3.3 Non-participation in international courts and tribunals

Like their regional counterparts, international courts and tribunals have been forced to grapple with a party's non-participation in proceedings before them. This issue has arisen in fields as diverse as interstate disputes,[132] international human rights law,[133] international

125 *PTA Bank v Burundi* (n 121) pp 7-12.

126 *Dube* (n 121) paras 1-4, 19.

127 *Dube* (n 121) paras 21-24.

128 *Dube* (n 121) paras 4, 26.

129 *Dube* (n 121) paras 27-39.

130 See COMESA Treaty (n 117) art 33; COMESA Court of Justice Rules of Procedure, 15 October 2016 (entry into force 15 October 2016).

131 COMESA Court of Justice Rules of Procedure (n 130) Rules 59, 64(2), 88.

132 Eleven judgments in the International Court of Justice (ICJ), eight instances in the Permanent Court of Arbitration (PCA) and two cases in the International Tribunal for the Law of the Sea (ITLOS). C Lentz 'The evidentiary implications of a party's non-participation in the proceedings' in G Kajtár, B Çali & M Milanovic (eds) *Secondary rules of primary importance in international law: attribution, causality, evidence, and standards of review in the practice of international courts and tribunals* (2022) 204-209.

133 Sixty examples in the Human Rights Committee (CCPR) since 2000 identified in a non-exhaustive search, with three decisions in the Committee against Torture

administrative law,[134] international trade law,[135] and international criminal law.[136] Following a holistic assessment of these bodies in how they address non-participation, both similarities and differences have become apparent.

With regard to the commonalities, it is evident that a party's absence never prompts an international adjudicator to discontinue the proceedings, shift the burden of proof or automatically enter a judgment against the non-participant. On the contrary, international decision makers frequently go to great lengths to ensure that the proceedings are beyond reproach. Indeed, an absent party occasionally emerges victorious, either in part or in whole, with 16 examples identified among approximately 100 cases.[137]

As for variances, they are seen most prominently in the extent to which an international panel will seek out and consider additional information not already on the formal record, and the extent of its analysis before making findings. In this respect, interstate dispute bodies often go beyond the strict confines of the record to identify and assess arguments that could benefit the absent party, international human rights committees largely remain focused on the material brought to their attention, and international administrative law reflects a case-by-case approach. These differences have been explained with reference to each international body's foundational texts, which often identify or suggest divergent practices for how to address non-participation.[138] Where the legal framework is unclear or silent on this matter, the international courts have tended to devise their own approach in the cases before them.[139]

4 ASSESSING THE APPROACHES TO NON-PARTICIPATION

It perhaps is no surprise that non-participation features most prominently, and frequently, in the two regional courts in Africa that permit an individual to bring a human rights claim against a state. The African Court and the ECOWAS Court have respectively faced 19 and 15 identified instances of non-participation in their judgments, whereas only two exist before the COMESA Court and none before the East African Court of Justice. Not only have the African Court and the

(CAT) and one case in the Committee on the Elimination of Discrimination Against Women (CEDAW Committee). Lentz (n 132) 209-212.

134 Sixteen judgments in the United Nations Appeals Tribunal (UNAT). Lentz (n 132) 212-215.

135 One panel report in the World Trade Organisation. Lentz (n 132) 203.

136 One case apiece before the International Military Tribunal and the Special Tribunal for Lebanon. Lentz (n 132) 203.

137 Lentz (n 132) 215.

138 Lentz (n 132) 215-218 (discussing the ICJ Statute, PCA cases based on the United Nations Convention on the Law of the Sea, and the applicable convention or protocol for the CCPR, CAT and CEDAW Committee).

139 Lentz (n 132) 217-218 (addressing ITLOS and UNAT).

ECOWAS Court issued a greater number of judgments with an absent respondent, but they also continue to face this challenge unabated, with eight such judgments rendered in the last two years.[140]

Similar approaches can be seen both among these courts as well as in comparison to international adjudicative bodies. At the most basic level, a party's non-participation does not terminate the proceedings, alleviate the applicant's burden of proof or lead to an automatic judgment entered in favour of the claimant. In this respect, it bears mention that both the African Court and the ECOWAS Court use the term 'default judgment' within the context of their specific legal framework, and not in the broader sense of entering a judgment against the non-participant.[141]

Across regional courts in Africa, respondents have regularly triumphed in spite of their non-appearance, including in 14 of 19 cases before the African Court,[142] five times out of 15 in the ECOWAS Court,[143] and both instances in the COMESA Court of Justice.[144] Even when the judges consider some allegations to be established, this does not necessitate an outright victory.[145] In fact, out of 36 cases of non-appearance, only six applicants emerged wholly victorious on the merits, if not on reparations.[146]

This nuanced reaction to non-participation is also reflected in the willingness of each institution, on occasion, to seek confirmation or clarification of necessary issues even when not disputed by the absent respondent. At its most proactive, this power was exercised by the

140 *Kaunda* (n 2) (African Court 2023); *Baguian* (n 5) (African Court 2022); *Marwa* (n 5) (African Court 2022); *Makungu* (n 6) (African Court 2022); *Gnimagnon* (n 84) (ECOWAS 2022); *Touray* (n 5) (African Court 2022); *Muwinda* (n 4) (African Court 2022); *Faculty of Peace* (n 85) (ECOWAS 2022). The last such judgment in the COMESA Court of Justice was in 2016. See *Dube* (n 121).

141 See 'default judgment' in B Garner (ed) *Black's law dictionary* (2019) 526 ('A judgment entered *against* a defendant who has failed to plead or otherwise defend against the plaintiff's claim') (my emphasis). In the African Court on Human and Peoples' Rights, Bensaoula Chafika J similarly noted that rendering a judgment in the absence of the respondent 'is in no way the legal definition of default'. *Mulindahabi* 006/2017 (n 5) separate opinion para 8; *Mulindahabi* 007/2017 (n 5) separate opinion para 9. See also *Mulindahabi* 009/2017 (n 5) separate opinion para 9; above n 30.

142 *Mulindahabi* 006/2017 (n 5) para 39; *Mulindahabi* 007/2017 (n 5) para 41; *Mulindahabi* 009/2017 (n 5) para 38; *Mulindahabi* 004/2017 (n 4) para 115; *Mulindahabi* 005/2017 (n 5) para 51; *Mulindahabi* 010/2017 (n 5) para 56; *Mulindahabi* 011/2017 (n 5) para 49; *Said* (n 5) para 50; *Munyandilikirwa* (n 5) para 98; *Muwinda* (n 4) para 74; *Touray* (n 5) para 49; *Marwa* (n 5) para 48; *Baguian* (n 5) para 39; *Kaunda* (n 2) para 76.

143 *Ukor* (n 84) para 32; *Oserada* (n 84) p 180; *Kakali* (n 86) p 511; *Pilakiwe* (n 86) p 11; *Santoi* (n 85) p 23.

144 *PTA Bank v Burundi* (n 121) p 12; *Dube* (n 121) para 39.

145 *Heirs of Baré* (n 85) pp 451-452; *Touré & Bangoura* (n 85) pp 60-61; *Sam-Sumana* (n 86) p 300; *Umuhoza* (n 6) para 74; *Eli* (n 84) para 71; *Mugesera* (n 4) para 177; *Faculty of Peace* (n 85) p 34; *Gnimagnon* (n 84) para 242; *Makungu* (n 6) para 77.

146 *Manneh* (n 84) paras 23, 28, 41, 43-44; *Mba* (n 86) paras 92, 99, 102-103, 109; *Bah* (n 84) pp 198, 213; *African Commission v Libya* (n 4) paras 85, 90-91, 96-97, p 171; *Vision Kam Jay* (n 86) pp 598-599, 607; *Richard* (n 4) paras 50-51, 64.

ECOWAS Court in a relatively early case, when it ordered the plaintiff to adduce additional evidence to support his claims, prompting him to call three witnesses to testify before the Court.[147] The African Court has contemplated but declined to use its corresponding power to solicit further evidence,[148] yet it has performed its own, open-source investigation to confirm undisputed information before it rather than accept the pleadings as sufficient.[149] Not dissimilarly, the COMESA Court's own questioning prompted the unopposed applicant to concede a multitude of jurisdictional points, even without any challenge from the respondent.[150] While used sparingly and judiciously, these actions demonstrate that regional adjudicators throughout Africa remain minded to ensure that their judgments have sufficient basis in fact and law, even absent any arguments to the contrary. This is all the more remarkable for the African Court, given that its Rules were revised to eliminate the need for the Court to satisfy itself that the application 'is … well founded in fact and in law' before entering a default judgment,[151] which has not prevented it from continuing to assess the legal and evidentiary sufficiency of the allegations in detail.[152]

This reveals another commonality among African regional courts in reacting to non-participation, namely, that this situation is not addressed in their constitutive legal documents and that they take limited direction from the other provisions of their legal framework. For the COMESA Court, this was by necessity, as its Rules of Procedure came into effect only after the relevant judgments had been rendered.[153] However, for both the African Court as well as the ECOWAS Court, they frequently appear to be guided, but not constrained, by the relevant Rules in determining how to address a party's non-participation.[154] Similar instances exist among international decision makers, and while they are generally outliers,[155] they also occur most regularly when a party's absence is not accounted for by those establishing the court or tribunal, leaving the issue to be resolved through subsequent judicial determination.[156]

The African Court and ECOWAS Court appear to share an eagerness to dispense justice in each individual case, and a willingness to take the steps they deem necessary to do so. This flexible, case-

147 *Manneh* (n 84) paras 6-10.

148 See *African Commission v Libya* (n 4) Separate Opinion of Fatsah Ouguergouz J paras 15-17, 20-25, 28.

149 *Mugesera* (n 4) para 152.

150 *PTA Bank v Burundi* (n 121) pp 7-11.

151 See nn 11 (former African Court Rule 55(2)), 39 (African Court Rule 63).

152 *Mugesera* (n 4) paras 18, 40-121, 177; *Muwinda* (n 4) paras 48-66, 74; *Kaunda* (n 2) paras 38-67, 76.

153 See nn 121, 130.

154 See nn 42-43, 110-112, 151-152.

155 See Lentz (n 132) 211-212, 217-218 (addressing three instances, out of 60 cases, where the CCPR went beyond the information made available to it by the parties, notwithstanding the indication in its constitutive document that complaints are to be considered only in light of such information).

156 See n 139.

specific approach accounts for some of the variation seen in both courts, especially considering that they have encountered non-participation at all stages of their proceedings as well as in relation to a diverse range of claims. Just like their international counterparts,[157] it is apparent that regional judges in Africa endeavour to ensure that a party's non-participation does not impact the legitimacy of the proceedings before them.

5 CONCLUSION

Regional courts in Africa have already confronted non-participation on numerous occasions, from which they have developed specific approaches to a party's absence and whether and how to utilise their legal provisions governing default judgments. The African Court and the ECOWAS Court have been most active in this regard, and both have independently sought to evaluate the applicants' claims on the merits, even when they are not otherwise contested, and despite the fact that doing so is not mandated by their applicable rules.

This heightened attention to the veracity of allegations would seem to boost the perceived legitimacy of these judges' findings, even if the result is that applicants discover their uncontested claims being rejected more often than not. It remains to be seen, however, whether the African Court and ECOWAS Court can maintain this resource-intensive approach if their caseloads continue to multiply. Perhaps, too, some potential respondents are taking note of these outcomes and contemplating whether this moderates the need for them to participate in the proceedings, at least so long as these bodies continue to go beyond what is required by the provisions for default in their legal framework and rule in favour of non-participants.

With the extensive number of pending cases, it can safely be concluded that the latest judgment by the African Court will soon be overtaken by even more recent judicial pronouncements concerning a party's absence. Indeed, regional courts in Africa seem poised to face additional instances of non-participation on a fairly regular basis, permitting them the opportunity to calibrate their approaches further.

157 Lentz (n 132) 215.