Fashioning rights in the African Court on Human and Peoples' Rights: understanding the proceduralisation of substantive rights

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ABSTRACT: In the contemporary practice of international human rights adjudication, it is increasingly recognised that almost every substantive right implies a positive action of establishing effective procedures to ensure its enforcement. In intensifying their scrutiny of domestic procedures designed to ensure respect for human rights treaty provisions in the national order, regional human rights courts have developed a practice of adding a procedural obligation to national authorities to strengthen the internal protection of substantive rights. While such a practice remains unnamed in human rights law jurisprudence, scholars have described it as the 'proceduralisation' of substantive rights. In essence, the proceduralisation of substantive rights, as an offshoot of judicial activism, seeks to ensure the concretisation of rights by both widening the scope of obligations and strengthening the requirement for their protection. While this issue has been topical in scholarship relating to the European Court of Human Rights, there is no systematic analysis of how proceduralisation has so far helped the African Court on Human and Peoples' Rights to fashion the trajectory of substantive rights in widening the scope of obligations and deepening the requirement of their protection. This article intends to fill that gap.

TITRE ET RÉSUMÉ EN FRANCAIS:

Le façonnage des droits à la Cour africaine des droits de l'homme et des peuples: comprendre la procéduralisation des droits substantiels

RÉSUMÉ: Dans la pratique contemporaine du contentieux international des droits de l'homme, il est de plus en plus reconnu que presque chaque droit substantiel renferme une action positive implicite de mettre en place des procédures efficaces permettant de revendiquer au niveau national le droit en cause. Les cours régionales des droits de l'homme, en intensifiant leur contrôle des procédures internes destinées à assurer le respect des dispositions des traités des droits de l'homme dans l'ordre national, ont développé une pratique d'adjonction jurisprudentielle d'une obligation procédurale à charge des autorités nationales pour renforcer la protection interne d'un droit substantiel garanti. Bien que cette pratique prétorienne reste innommée dans la jurisprudence, la doctrine l'a décrite comme étant la «procéduralisation» des droits substantiels. En substance, la procéduralisation des droits substantiels, en tant que ramification de l'activisme judiciaire, vise à assurer la réalisation effective des droits garantis en élargissant le champ des obligations des États et en renforçant l'exigence de leur protection. Si cette question est d'actualité dans la littérature sur la Cour européenne des droits de l'homme, il n'existe aucune analyse systématique de la manière dont la procéduralisation a jusqu'à présent aidé la Cour africaine des droits de l'homme et des peuples à façonner la trajectoire des droits substantiels en élargissant la portée des obligations et en approfondissant l'exigence de leur protection. Cet article vise à combler ce vide.

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CONTENT:

1 INTRODUCTION

The term 'proceduralisation' is a neologism that merely means 'making (it more) procedural'.[1] This term has not yet been clearly associated with the African Court on Human and Peoples' Rights (African Court or Court). Neither the African Charter on Human and Peoples' Rights (Charter), nor any other relevant human rights instrument[2] from which the African Court derives its jurisdiction in light of article 3(1) of the African Charter,[3] refers to the term. The case law of the African Court is also silent on this issue.

It is well established that contemporary international human rights theory and practice recognise that almost every substantive human right implies a positive action of putting in place effective procedures capable of securing its enforcement.[4] This positive action is labelled as a procedural obligation.[5] Indeed, human rights adjudicating bodies have intensified their scrutiny of internal procedures designed to ensure respect for human rights treaty provisions in the national order.

1 E Dubout 'La procéduralisation des obligations relatives aux droits fondamentaux substantiels par la Cour européenne des droits de l'homme' (2007) 69 *Revue trimestrielle des droits de l'homme* 397; K I Panagoulias *La procéduralisation des droits substantiels garantis par la Convention européenne des droits de l'homme* (2011) 17; N Le Bonniec *La procéduralisation des droits substantiels par la Cour européenne des droits de l'homme. Réflexion sur le contrôle juridictionnel du respect des droits garantis par la Convention européenne des droits de l'homme* (2017) 23-24.

2 The African Court enjoys a distinctive contentious jurisdiction which extends to the interpretation and application of any other relevant human rights instrument ratified by the states concerned. See, A Rachovitsa 'On new "judicial animals": the curious case of an African Court with material jurisdiction of a global scope' (2019) 19 *Human Rights Law Review* 255-289; J Mumbala & E Amani 'Le système africain de protection des droits de l'homme et le droit international humanitaire' (2018) 2 *African Human Rights Yearbook* 13-14.

3 Article 3(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights reads: 'The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the states concerned'.

4 K Krešimir *Prosecuting human rights offences: rethinking the sword function of human rights law* (2017) 29; E Brems 'Procedural protection: An examination of procedural safeguards read into substantive Convention rights' in E Brems & J Gerards (eds) *Shaping rights in the ECHR* (2013) 138.

5 L Lavrysen 'The scope of rights and the scope of obligations: positive obligations' in Brems & Gerards (n 4) 162; Krešimir (n 4).

In the process, they are increasingly developing a practice of adding a procedural obligation to national authorities in order to strengthen the internal protection of a substantive right.[6] As Krešimir highlights, the procedural obligation should not be indiscriminately identified with a positive obligation in practical reasoning.[7] Instead, the latter can include two types of positive obligations: procedural and substantive obligations.[8] The positive obligation, as a specific legal concept in international human rights law, has a broader meaning and scope than the procedural obligation.[9] They do not necessarily have the same aim and models of enforcement.[10] Krešimir further observes that even though the positive obligation as a legal concept also encompasses specific substantive requirements,[11] it differs from the concept of procedural obligation, which is associated with the issue of proceduralisation of human rights.[12]

Human rights adjudicating bodies' practice of adding a procedural obligation to national authorities to strengthen the internal protection of a substantive right remains unnamed in case law. As 'law abhors a vacuum',[13] the doctrine has described it as proceduralisation of substantive rights.[14] Proceduralisation is, therefore, a purely doctrinal concept that results from judicial activism.[15]

There are two possible meanings of the concept of proceduralisation, depending on whether it relates to the law or the right. Concerning this classification, Dubout contends that proceduralisation has a broad and a narrow meaning. In its broadest sense, and from a systemic perspective, the proceduralisation of law refers to the establishment of procedures designed to enhance the quality of a legal system. In the narrower sense, and from a more contentious perspective, the proceduralisation of a right refers to the establishment of procedural mechanisms to improve the enforcement of that right.[16] It has a narrower scope and aims at enabling the realisation of a right.[17] From this second meaning, proceduralisation denotes a process intended to reinforce the protection of a substantive

6 Dubout (n 1) 398; F Sudre *Droit européen et international des droits de l'homme* (2019) 253-254.

7 Krešimir (n 4) 29.

8 V Stoyanova *Human trafficking and slavery reconsidered: conceptual limits and states' positive obligations in European law* (2017) 329.

9 See for further reading, Stoyanova (n 8) ch 8: Positive Obligations under Human Rights Law, 319-426; Lavrysen (n 5).

10 Krešimir (n 4); see further for the interplay between positive obligation and enforcement, S Rabinder 'Using positive obligations in enforcing Convention rights' (2008) 13(2) *Judicial Review* 97.

11 Stoyanova (n 8) 329.

12 Krešimir (n 4) 29.

13 B Rempel 'Scoring points: the law abhors vacuum' (1991) 16(3) *Law Now* 8-9.

14 Le Bonniec (n 1) 25; Dubout (n 1) 397; Panagoulias (n 1) 17.

15 Krešimir (n 4) 29; Dubout (n 1) 398.

16 Dubout (n 1) 398.

17 Le Bonniec (n 1) 30

right guaranteed in international human rights law.[18] It is both a positive and implied obligation that requires active conduct from national authorities to ensure the effectiveness of the protected right.[19] The failure to comply with the procedural obligation leads to a violation of a Human Right Convention regardless of whether the substance of the protected right itself has been violated.[20] As a result, a distinction is made in the same provision between a substantive aspect and a procedural aspect, thus creating a form of duplication of the guaranteed right.[21] In this regard, Krešimir observes that while the substantive and procedural aspects of human rights norms operate as distinct and autonomous duties,[22] they are not in a conceptual clash but rather interact as two conceptually distinct legal requirements.[23] In the same vein, Dubout sees the procedural and substantive protections of a right as two complementary guarantees.[24] He distinguishes between the two by highlighting the substantive protection as an obligation of result and the procedural protection as an obligation of means. As Krešimir emphasises, in practical reasoning, this distinction translates into the fact that in order to find a substantive violation of a right, it is necessary to establish a causal link between the action or inaction of the state and the infringement of the right.[25] For example, a procedural violation can be found by identifying failures in the process that have led to the absence of prevention, sanctioning and effective deterrence of a human rights offence. However, in order to make such a finding, it is not necessary to identify whether the state is directly responsible for the infringement of the substantive aspect of the right.[26]

Overall, proceduralisation in international human rights law has several aspects.[27] Linked to substantive rights, it intends to reinforce the protection of substantive rights guaranteed in international human rights law. It leads to the concretisation of rights by widening the scope of obligations and by deepening the requirement of their protection.[28]

18 Krešimir (n 4) 29; Dubout (n 1) 398.

19 Dubout (n 1) 398.

20 As above.

21 As above.

22 K Krešimir 'Substantive and procedural criminal law protection of human rights in the law of the European Convention on Human Rights' (2020) 20 *Human Rights Law Review* 75-100 at 81; Krešimir (n 4) 30; T Kleinlein 'The procedural approach of the European Court of Human rights: between subsidiarity and dynamic evolution' (2019) 68 *International and Comparative Law Quarterly* 99.

23 See further, A Bottoms & J Tankebe 'Beyond procedural justice: a dialogic approach to legitimacy in criminal justice' (2012) 102(1) *Journal of Criminal Law and Criminology* 119-170.

24 Dubout (n 1) 415.

25 Krešimir (n 22) 83.

26 As above.

27 JH Gerards & E Brems 'Procedural review in European fundamental rights cases: introduction' in JH Gerards & E Brems (eds) *Procedural review in European fundamental rights cases* (2017) 1; T Kleinlein 'The procedural approach in international human rights law and fundamental values: towards a proceduralisation of the interface of international and domestic law?' (2018) 10(4) *ESIL Conference Paper Series* 1-23; Kleinlein (n 22) 92.

28 Dubout (n 1) 404.

The proceduralisation of substantive rights is not absent from the African Court's case law. Whereas it has been a topical issue in the literature[29] relating to the European Court of Human Rights' case law, there is no systematic analysis of how it has so far helped the African Court to concretise a given right. The discussion herein will make an appraisal of this trend of proceduralisation in the African Court's case law.

2 THE GENERAL APPROACH OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS REGARDING PROCEDURALISATION OF SUBSTANTIVES RIGHTS

The Africa Court has progressively been involved in the proceduralisation of substantive rights. The trend towards proceduralisation in its judgments emerges from two patterns. On the one hand, explicit procedural requirements are found in various provisions of the African Charter. These self-contained procedural rights imply a duty of due diligence in investigation and prosecution, or a duty to enact new legislation providing individuals with judicial remedies.

These obligations now fall within the scope of the right in question, which suggests that review on the merits of the relevant right may also include a review on the procedural merits. On the other hand, the African Court has focused on domestic proceedings among the other grounds when deciding on the merits. Proceduralisation is, therefore, an integrated procedural review,[30] which implies that the quality of the internal decision-making processes influences the Court's review on the merits.

A thorough analysis of the African Court judges' reasoning and motivations reveals that the Court does not only adjudicate and solve legal disputes, but it also makes law by determining what abstract norms mean.[31] Through the interpretative practice of proceduralisation, it has clarified or modified a substantive provision's content and scope of application. By widening the scope of states' obligations and deepening the requirement of substantive rights' protection, the African Court refashions the trajectory[32] of some provisions of the African Charter.

29 Le Bonniec (n 1); Dubout (n 1); Panagoulias (n 1).

30 See further, Kleinlein (n 22) 93.

31 See further for a concise analysis of how courts make law, E Yildiz 'A Court with many faces: judicial characters and modes of norm development in the European Court of Human Rights' (2020) 31 *European Journal of International Law* 73-99.

32 Regarding the reshape or refashion of norm's trajectory, see n 31 above.

In addition, the Court seems to have acquired a taste in this practice of proceduralisation that it has managed to proceduralise substantive rights that are not enshrined in the African Charter. This practice may be the consequence of this phenomenon resulting from the judicial activism of the Court.

2.1 Applying the proceduralisation to qualified substantives rights

Cases decided thus far by the Court have concerned qualified rights. The most common paradigm of the concretisation of rights by deepening the requirement of their protection and widening the scope of obligations is the requirement of an effective investigation into the infringement of a substantive right guaranteed by article 7 of the African Charter.

In its landmark judgment issued in the case of *Nobert Zongo and Others v Burkina Faso,*[33] the African Court assessed the procedural requirements found in the substantive right to a fair trial guaranteed in article 7 of the African Charter. This case was about the murder of Norbert Zongo, an investigative journalist and editor of the Burkinabe magazine *L'Indépendant*, his younger brother Ernest Zongo and two co-workers.[34] They were all killed in Burkina Faso on 13 December 1998 in particularly suspicious circumstances. The case was brought by the families of Zongo and his colleagues and by the NGO *Mouvement Burkinabé des Droits de l'Homme et des Peuples*. The applicants alleged that the killings of Zongo and his colleagues were not the result of a random act of violence, but related to their investigations they were carrying out into various political scandals, including those taking place at the highest levels of the Burkinabe government.[35] Besides, the applicants claimed that Burkina Faso officials failed to investigate the case properly, and deliberately impeded the investigation, leaving them unable to bring to justice those responsible for the murders.[36] By its judgment rendered on 28 March 2014, the Court ruled unanimously that Burkina Faso had violated articles 1 and 7 of the African Charter.[37]

The Court's legal reasoning in this regard is of particular interest. It outlines the Court's path in shaping the trajectory of article 7 of the Charter to broaden the scope of states' obligations and strengthen the substance of the right to a fair trial. The African Court found that Burkina Faso failed to act 'with due diligence in seeking out, prosecuting and placing on trial those responsible for the murder of

33 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (merits)* (2014) 1 AfCLR 219 (*Nobert Zongo* case).

34 See comment on this case, O Windridge 'Zongo v. Burkina Faso, Judgment & Judgment on Reparations (Afr. Ct HPR)' (2017) 56 *International Legal Materials* 1091-1143.

35 *Zongo* case (n 33) paras 3-6.

36 paras 12-14.

37 para 203.

Norbert Zongo and his three companions'.[38] Therefore, the Court noted that, in that aspect, Burkina Faso 'had violated the rights of the Applicants to have their case heard by competent national courts as guaranteed under Article 7 of the Charter'.[39]

The Court's reading is entirely novel. Indeed, the procedural obligations to investigate, prosecute and bring to justice those responsible for serious crimes are not expressly set out in article 7 of the Charter. The Court's ruling essentially introduced a new 'rule' that the procedural obligation to investigate the infringement of the right to life is an essential component of the right secured by this provision.[40] In the *Nobert Zongo* case, applicants contended that 'by failing to initiate an effective inquiry to determine the circumstances surrounding the death of Nobert Zongo and ensuring that those responsible were identified, prosecuted and convicted, Burkina Faso violated Norbert Zongo's right to life as guaranteed under Articles 4 of the Charter on Human and Peoples' Rights'.[41] The Court's reasoning would perhaps draw little attention if these procedural obligations stemmed from article 4 of the African Charter.[42]

The fact that the African Court found these procedural requirements as embedded within the substantive right to a fair trial under article 7(1) of the African Charter, perfectly illustrates the extent to which the African Court is capable of fashioning the trajectory of a right.

So far, many of the cases brought before the African Commission on Human and Peoples' Rights (African Commission) have been revolving around allegations of violations of the right to a fair trial under article 7.[43] However, the African Commission had not yet discovered such procedural obligations in article 7 of the Charter. Yet, in the same vein, numerous resolutions have been adopted,[44] and declarations from

38 *Zongo* case (n 33) para 155.

39 As above.

40 African Commission on Human and Peoples' Rights, *General Comment No 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)* (PULP, 2015); R Murray *The African Charter on Human and Peoples' Rights: a commentary* (2019)108; See further, O Cahn 'Obligations positives procédurales et droit à la vie' in G Giudicelli-Delage, S Manacorda & J Tricot (eds) *Devoir de punir? Le système pénal face à la protection internationale du droit à la vie* (2013) 235.

41 *Zongo and Others v Burkina Faso (preliminary objections)* (2013) 1 AfCLR 199.

42 Article 4: 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right'.

43 NJ Udombana 'The African Commission on Human and Peoples' Rights and the development of fair trial norms in Africa' (2006) 6 *African Human Rights Law Journal* 299-332; R Murray (n 40) 206.

44 Resolution on the Right to Recourse and Fair Trial adopted by the Commission at its 11th Ordinary Session in Tunis, Tunisia, in March 1992; recalling further the resolution on the Respect and the Strengthening of the Independence of the Judiciary adopted at the 19th Ordinary Session held in Ouagadougou, Burkina Faso, in March 1996; Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa, ACHPR/Res.41(XXVI)99: Resolution on the Right to Fair Trial and Legal Aid in Africa (1996), 15 November 1999.

other workshops and conferences endorsed, including the Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa.[45] Reflecting this continued need to examine this right, the African Commission established a Working Group on Fair Trial in November 1999 with the mission to 'prepare a draft of general principles and guidelines on the right to a fair trial and legal assistance under the African Charter'.[46] As Murray highlights, the results of this Working Group's endeavours include contributions to the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa adopted in 2003.[47] Surprisingly, however, both the communications and the resolutions of the African Commission, as well as all these other instruments mentioned above do not refer to procedural requirements to investigate, prosecute and judge as intrinsic to article 7 of the Charter. For instance, the African Commission in *Mamboleo M Itundamilamba v Democratic Republic of Congo*[48] observed that states might choose to use 'means peculiar to their judicial system to meet the requirements of Article 7'.[49] However, it was noted that such discretionary power should be exercised

> in the light of the objectives of the Charter, namely taking all appropriate measures to ensure that justice is delivered by a competent, independent and impartial court or tribunal; that justice should be fair and adversarial. This is an obligation to produce a result, non-compliance with which cannot be justified by any reason whatsoever, and if the result is not achieved, the state is at fault. It is not enough for the state to prove its passivity in the occurrence of a situation which violates the provisions of article 7 of the African Charter.[50]

Interestingly, the African Court's reasoning in shaping the trajectory of this provision is quite different from the African Commission's, and is perhaps more elaborated, as illustrated in *Nobert Zongo* case. The Court did not question the state's discretion, as to how the state should comply with the procedural requirements in article 7(1) of the African Charter. Instead, it found that the procedural obligation to carry out effective investigations leading to the trial of the perpetrators is a 'measure of cessation of a violation already established'[51] and a 'legitimate measure likely to forestall the continued violation of

45 Recommendations of the Seminar on the Right to a Fair Trial in Africa held in collaboration with the African Society of International and Comparative Law and Interights, in Dakar, Senegal, from 9-11 September 1999

46 ACHPR/Res.41(XXVI)99: Resolution on the Right to Fair Trial and Legal Aid in Africa (1996), 15 November 1999

47 Murray (n 40) 205-206.

48 Communication 302/05, *Mr Mamboleo M Itundamilamba v Democratic Republic of Congo*, 18 October 2013. See further comment on this case and its aftermath, S Smis, D Inman, A Cirimwami and C Bahala 'The (un)willingness to implement the recommendations of the African Commission on Human and Peoples' Rights: revisiting the Endorois and the Mamboleo M Itundamilamba decisions' (2018) 2 *African Human Rights Yearbook* 400-426, spec 418-424.

49 Communication 302/05 (n 48) para 115.

50 As above.

51 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations)* (2015) 1 AfCLR 258, paras 103-104.

Article 7'.[52] How the state should do so was within its discretion,[53] but the Court ordered that it should 'reopen investigations with a view to seek out, prosecute and bring to justice the perpetrators of the assassination of Norbert Zongo and his three companions'.[54] It follows that the proceduralisation of article 7 of the African Charter through criminal prosecution has brought to light the transformation of the classic relationship between human rights and criminal law. Human rights are not only considered as a shield against the criminal law but also a driving force for its deployment in order to give full effect to the substantive right. The literal reading of article 7 is that it vests any person suspected or accused of a criminal offence with legal rights shielding him or her from state repression in the investigation and prosecution of crime. Thus, the function of human rights law is to neutralise the application of criminal law mechanisms against an individual.[55]

Apart from this 'shield function' of human rights law, the legal reasoning of the African Court in the *Nobert Zongo* case draws the instances where human rights law mandates the state to investigate, prosecute and, if appropriate, punish criminal attacks on human rights. Human rights law plays, in this sense, a sword function that leads to triggering the application of criminal law mechanisms rather than neutralising their effects.[56] The African Court now seems to recognise that only effective and efficient criminal proceedings can protect individuals from particularly unbearable violations of their rights granted by the Charter. The idea is, therefore, that certain violations of the fundamental rights of the person, whether caused by a state agent or by an individual, lead to a criminal response and its absence constitutes an autonomous violation by the state of its obligation to protect treaty rights. The procedural obligation of instituting criminal prosecution in the competent courts, and thus penalising the acts breaching substantive rights, is then imposed on a state as part of the criminal protection of a value deemed essential.

Another relevant case to the proceduralisation of article 7 of the African Charter is one of *Anudo v Tanzania* (*Anudo* case).[57] In this case, the African Court considered that the procedural safeguards of article 7 require Tanzania to enact new legislation providing individuals with judicial remedies in the event of a dispute over their citizenship. In this case, Anudo Ochieng Anudo's (applicant) Tanzanian nationality was withdrawn and, as a result, was deported to Kenya; which, in turn, expelled him back to Tanzania. As he could not enter Tanzania, he was stranded in no man's land at the border.

52 As above.

53 *Zongo* case (n 51) para 108.

54 *Zongo* case (n 51) para 110(x).

55 Regarding the shield and sword function of Human Rights, see Y Cartuyvels and others (eds) *Les droits de l'homme, bouclier ou* épée *du droit pénal*? (2007); F Tulkens 'The paradoxical relationship between criminal law and human rights' (2011) 9 *Journal of International Criminal Justice* 577-595; K Krešimir (n 22) 77.

56 Krešimir (n 22).

57 *Anudo v Tanzania* (merits) (2018) 2 AfCLR 248 (*Anudo* case).

The Applicant alleged, amongst other things, that his right to nationality as guaranteed under the Universal Declaration of Human Rights (UDHR) had been violated.[58] The Court held that neither the African Charter nor the ICCPR explicitly deals with the right to a nationality. However, the withdrawal of nationality by making a stateless person violates article 15 UDHR,[59] which reflects customary international law.[60] Thus, the Court ruled that the deprivation of the Applicant's nationality was arbitrary under article 15 of the UDHR. His expulsion was therefore also arbitrary and in violation of article 12 of the African Charter and article 13 of the ICCPR. Further, the applicant's right to due process protections had been violated, including the right to be heard before an impartial tribunal, under article 7 of the African Charter and article 14 of the ICCPR.[61]

As far as the right to a nationality is concerned, the African Court has adjudicated two cases only. The *Anudo* case was the first decided by the Court in 2018. In 2019, the African Court issued its ruling in the *Robert John Penessis v Tanzania* case (*Penessis* case).[62] One notable difference between the two cases is that the Court departed from its earlier Ruling in the *Anudo* case where it held that the African Charter does not deal with the right to a nationality and, for this reason, applied article 15 of the UDHR as customary international law. However, in the *Penessis* case, while acknowledging that the Charter does not directly regulate this issue of the right to nationality, the Court infers it from article 5 of the Charter guaranteeing the right to dignity.[63]

The African Commission appears to have decided over several communications relating to the violation of the right to a nationality.[64]

58 para 13.

59 Article 15, UDHR, (1) Everyone has the right to a nationality.

(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality'.

The African Court has jurisdiction to interpret any human rights obligations binding on the state, and the case thus draws not only on the African Charter, but also on the International Covenant on Civil and Political Rights (ICCPR), as well as Article 15 of the UDHR, which the Court affirmed to be customary international law. See, n 2 above.

60 *Anudo* case (n 57) para 76: 'The Court notes that neither the Charter nor the ICCPR contains an Article that deals specifically with the right to nationality. However, the Universal Declaration of Human Rights which is recognized as forming part of customary international law provides under article 15 thereof that: "1. Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality…"'; see further, N Ndeunyema 'Anudo v Tanzania: The African Court Recognises the Right to Nationality under Customary International Law' (2018) *OxHRH Blog* 19 April 2018, http://ohrh.law.ox.ac.uk/anudo-v-tanzania-the-african-court-recognises-the-right-to-nationality-under-customary-international-law (accessed 15 August 2020).

61 *Anudo* case (n 57) para 132.

62 Application 13/2015, *Robert John Penessis v Tanzania*, Judgement of 28 November 2019, https://www.african-court.org/en/index.php/56-pending-cases-details/878-app-no-013-2015-robert-john-penessis-v-united-republic-of-tanzania.

63 *Penessis* case (n 62) paras 84 and 103.

64 See Nubian Community in *Kenya v Kenya*, Communication 317/06, para 140 (30 May 2016), https://www.achpr.org/sessions/descions?id=229.

As Bronwen Manby highlights in her comment,[65] although the African Court does not mention the right to a nationality, the African Commission has accumulated a significant jurisprudence on the subject.[66] Manby also states that 'the number of cases brought to the African Commission reflects the fact that contested rights to belong to the national community have been at the basis of many of the most intractable political and military conflicts in the continent'.[67]

The most important of the Court's contribution to the current discussion on proceduralisation in the *Anudo* case was its ruling on the burden of proof that shifts to the respondent state and the enactment of legislation. Indeed, the Court held that if a person already holds official documents attesting citizenship the state must prove (to the satisfaction of an independent tribunal) that he or she is not a citizen. The Court ordered Tanzania to amend its legislation to allow for court review of administrative decisions.[68] In other words, the African Court's reasoning regarding the infringement of the right to a nationality guaranteed in article 15 of the UDHR is that, in case of withdrawal of nationality, one has the right to be heard under article 7(1)(a) of the African Charter. This implies a procedural obligation to, by all means, avail a judge for the right holder, including by creating through legislation a competent tribunal where it does not exist.

The *Nobert Zongo* case and *Anudo* cases perfectly illustrate the proceduralisation of substantive rights. Fundamentally, the obligation of an effective investigation, as a general requirement, creates further requirements such as where applicable, the obligation of instituting criminal prosecution in the competent courts and thus penalising the acts breaching substantive rights. Besides, there is an obligation to enact the legislation and to create a competent Court capable of securing the enforcement of a substantive right.

While these two cases relate to the qualified substantive right under article 7 of the African Charter, African Court has also used the technique of proceduralisation to fashion 'implied' substantive rights whose content and scope are controversial.

2.2 Proceduralising implied substantive rights

The proceduralisation did not only help the African Court to fashion the trajectory of 'statutory' substantive rights. The ruling on the effects of Rwanda's withdrawal of the Declaration under article 34(6) of the African Court Protocol delivered in the *Ingabire Umuhiza v Rwanda* (*Ingabire* case)[69] is of great interest to the issue of proceduralisation.

65 B Manby 'Anudo v Tanzania (Afr. Ct. H.P.R.)' (2019) 58(3) *International Legal Materials* 603-627.

66 Manby (n 65) 604-605.

67 As above.

68 *Anudo* case (n 57) para 113-116.

69 *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction) (2016) 1 AfCLR 562 (*Ingabire* case).

Indeed, the *Ingabire* case reveals a fascinating and troubling aspect of the proceduralisation of substantive rights. Not only did the African Court infer a procedural obligation from a substantive right that seems itself to be an underlying right, but it also used the proceduralisation to retain room for manoeuvre in future cases.

The *Ingabire* case was relating to the jurisdiction of the African Court to continue hearing a case given that Rwanda had submitted a notice of withdrawal of its declaration made under article 34(6) of the Court Protocol allowing direct access to the Court by individuals and NGOs. On 2 March 2016, the government of Rwanda notified the African Court of its decision to withdraw the right of individuals and suitably qualified NGOs to submit complaints directly to the African Court. This right was granted in 2013 when it deposited a special declaration with the Court following article 34(6) of its Protocol.[70] The notification letter further stated that '[t]he Republic of Rwanda requests that after deposition of the same, the Court suspends hearings involving the Republic of Rwanda, including the [Ingabire] case [...] until review is made to the Declaration and the Court is notified in due course'.[71]

The African Court held that in terms of article 3(1) and (2) of the Court Protocol it had jurisdiction to entertain all disputes relating to the Court Protocol, including the issue of withdrawal of article 34(6) declaration.[72] The ruling on the effects of Rwanda's withdrawal of its declaration articulates around three main issues: the validity of the withdrawal,[73] the conditions that apply to it[74] and the legal effects of the withdrawal.[75] These three issues resulted in some outstanding comments among scholars.[76]

The most relevant point to the question of proceduralisation is relating to the conditions of the withdrawal and its legal effects. The Court held that even though Rwanda was entitled to withdraw its declaration, this could not be done arbitrarily as it conferred rights on 'third parties, the enjoyment of which require legal certainty'.[77] The African Court's reasoning is that withdrawal should be preceded by a minimum of one-year prior notice: 'The provision of a notice period is essential to ensure juridical security by preventing abrupt suspension

70 *Ingabire* case (n 69) para 51.

71 para 18.

72 para 52.

73 paras 53-59

74 paras 60-99

75 paras 67-68.

76 See further, O Windridge 'Assessing Rwexit: the impact and implications of Rwanda's withdrawal of its article 34(6)-declaration before the African Court on Human and Peoples' Rights' (2018) 2 *African Human Rights Yearbook* 243; SB Traoré 'Requête no 003/2014, affaire *Ingabire Victoire Umuhoza c. République du Rwanda*' in A Soma & S Dabiré (eds) *Les grands arrêts de la Cour africaines des droits de l'homme et des peuples* (2020) (forthcoming).

77 *Ingabire* case (n 69) para 60.

of rights, which inevitably impact on third parties, in this case, individuals and groups who are rights holders'.[78]

In other words, the African Court considered that such a declaration once made creates subjective rights to the benefit of individuals and groups. Therefore, 'the suddenness of withdrawal without prior notice has the potential to weaken the protection regime provided for in the Charter'.[79] Thus, the Court imposes a procedural requirement of one year's notice to give effect to the subjective rights of individuals and groups.

Unlike the *Nobert Zongo* case and *Anudo* case whereby substantive rights are uniquely identified, the judgment on the Effects of Withdrawal in *Ingabire* case does not determine the rights that the African Court intended to safeguard. It is challenging to know to which specific right the Court refers. Also, it is not possible to specify its exact content and scope. The Court has just considered that there are subjective rights for individuals whose states have accepted its jurisdiction under article 34(6) of the Court's Protocol.

Therefore, proceduralising these rights by imposing on the Rwandan authorities the requirement of one year's notice before the withdrawal takes effect poses a methodological problem in the Court's reasoning. Perhaps the understatement is that the Court appeared to give effect to a general right to justice, including the right to remedy, for victims of human rights infringements. The African Court seems to proceduralise a right for victims whose cases are under consideration to have standing before it regardless of the withdrawal of the declaration under 34(6) of the Charter. Moreover, the African Court seems to leave the door open for potential victims who might seize it during the notice period. The Court's decision does not say that the notice period has the effect of allowing the Court to complete its consideration of the case. Instead, such a notice period intends to prevent an abrupt withdrawal from violating the individual rights arising from the state's acceptance of the Court's jurisdiction. In so doing the Court has tried to shape the trajectory of an implied substantive right. From this perspective, it is understandable why it stated that the suddenness of withdrawal without prior notice has the potential to weaken the protection regime provided for in the African Charter.

The troubling issue with the Court's approach is that it has inferred a procedural obligation from a substantive right that seems itself to be an underlying right. While article 34(6) of the Court's Protocol has hitherto been considered as the basis of the Court's jurisdiction to hear individual and NGO complaints, the Court's judgment in the *Ingabire* case demonstrates that it also contains a substantive right. Proceduralisation has thus enabled the Court to bring back to the debate the existence of this substantive right and, subsequently, to impose a procedural requirement of a notice period on Rwanda to

78 para 62; see further, F Viljoen *International human rights law in Africa* (2007) 256.

79 *Ingabire* case (n 69).

ensure that its abrupt withdrawal does not infringe it. Perhaps the complexity of proceduralisation lies at this point.

Overall, this phenomenon demonstrates that, as an interpretative tool resulting from judicial activism, the proceduralisation can serve other purposes than the effectiveness of a statutory substantive right. The Court can also use proceduralisation as a tool to maintain more flexibility for future cases. Proceduralising an implied substantive right that derives from article 34(6) of the Court's Protocol has a *prima facie* reading. It can be seen as a means by which the ACHPR intended to manage future withdrawals of the declaration enshrined in article 34(6) of its Protocol. Indeed, since the Rwandan withdrawal, three other countries have withdrawn their declarations in only six months.[80]

3 CONCLUSION

In an effort to discharge its mandate to protect human rights on the continent, the African Court has been navigating the troubled waters of the tension between the desire to safeguard the rights of individuals, to shape their content and the scope of states' obligations. The proceduralisation of substantive rights has served as a navigational compass in some of the cases handled by the Court. As we have seen, proceduralisation is an interpretive tool arising from judicial activism. It makes human rights protection more effective and reinforces procedural values. The cases discussed in this article show that through this technique, the judges of the African Court have inferred procedural requirements into substantive rights and imposed them on states to give effect to the rights guaranteed by the African Charter. The *Nobert Zongo* and *Anudo* cases have demonstrated how proceduralisation leads to the concretisation of rights by widening the scope of obligations and by deepening the requirement of their protection. The requirement of instituting criminal prosecution in the competent courts and thus penalising the acts breaching substantive rights embedded in article 7 of the African Charter is a perfect illustration of how proceduralisation widens the scope of states' obligations and deepens the requirements of their protection. Moreover, the procedural obligation to enact legislation establishing a Court to rule on the infringement of guaranteed rights in the same provision (in the *Anudo* case) contributes to strengthen the rights protection regime and broaden the states' obligations.

The prospects and success of proceduralisation will depend on the ability of African Court to be sharper in its reasoning. The *Ingabire* case shows the complexity of proceduralisation as an interpretative tool. The analysis of this case demonstrates that the procedural obligation of one-year notice period imposed on Rwanda tends to leave the Court more

80 See T Davi & E Amani 'Another one bites the dust: Côte d'Ivoire to end individual and NGO access to the African Court' (2020) Ejil:Talk! Blog of the *European Journal of International Law* 19 May 2020, https://www.ejiltalk.org/another-one-bites-the-dust-cote-divoire-to-end-individual-and-ngo-access-to-the-african-court/ (accessed 15 August 2020).

room for manoeuvre regarding future withdrawals rather than fashioning the content and scope of a particular substantive right guaranteed by the African Charter.