6. Challenges facing the European Court of Human Rights: Fragmentation of the international order, division in Europe and the right to individual petition

Lucian Bojin

Besides mere criticism, it is certain that the European Court of Human Rights ('ECtHR' or 'the Court') currently faces real challenges. Rather than focusing on the criticism, this chapter addresses three of the pressing and fundamental challenges facing the Court: I) the fragmentation and defragmentation of the international order; II) the differences between Eastern and Western Europe; and III) the costs and benefits of the individual right to petition.

I. FRAGMENTATION AND DEFRAGMENTATION OF THE INTERNATIONAL ORDER

Two cases are often referred to as illustrations of the extraterritorial effects of the ECtHR's jurisdiction: *MSS v. Belgium and Greece*¹ and *Othman v. The United Kingdom*.² In these cases, the Court conferred extraterritoriality to Articles 3 and 6 of the European Convention on Human Rights ('ECHR' or 'the Convention'),³ when determining the responsibility of the respondent States in relation to events that occurred

¹ *MSS v. Belgium and Greece* App no 30696/09 (ECHR Grand Chamber 21 January 2011).

² *Othman (Abu Qatada) v. The United Kingdom* App no 8139/09 (ECHR 17 January 2012).

³ Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950, Europ.T.S. No. 5; 213 UNTS 221).

– or could occur – outside their territory. This extraterritoriality⁴ is not new in extradition or expulsion cases before the Court. While more than two decades have passed since the seminal decision in *Soering*,⁵ the concept appears to have proliferated recently at the ECtHR.

In *Othman v. The United Kingdom* the Court extended the extraterritorial effect of Article 3 ECHR – which was, in a sense, already common – to Article 6 ECHR for the first time. This should come as no surprise as once the principle was deemed applicable to and indeed appropriate in extradition or expulsion cases, its extension from Article 3 to other Convention norms was only a matter of time. Article 6 is not the only candidate,⁶ but Articles 4,⁷ 5⁸ and 7 ECHR could also be declared as entailing extraterritorial effect. Articles 2⁸ and 8⁹ ECHR have already been deemed virtually applicable in cases involving extradition or expulsion.

This proliferation raises some interesting issues regarding the relationship between different legal orders at the international level. The so-called extraterritorial effect is not a proper or strictly intended one, as

⁴ Extraterritorial effect in human rights treaties is usually recognised following a tendency to broadly interpret such treaties. See Theodor Meron, 'Extraterritoriality of Human Rights Treaties' (1995) 89 AJIL 78, 79. However, there are positions, such as the one expressed by the US Supreme Court in *Sale v. Haitian Center Councils Inc* 113 S.Ct. 2549 (1993), that embrace the classical assumption according to which, unless explicitly provided for by the treaty, extraterritoriality is not to be supposed.

⁵ *Soering v. The United Kingdom* (1989) 11 EHRR 439.

⁶ As early as *Soering* the Court stated that it 'does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country'. *Soering v. The United Kingdom* *ibid*, para. 113.

⁷ See *Othman (Abu Qatada)* *supra* n 2, para 233.

⁸ In its decision in *D v. The United Kingdom* App no 30240/96 (ECHR 2 May 1997) para 59, the Court mentioned 'the risk to the applicant's life expectancy created by his removal' but decided 'to deal globally with this allegation when examining his related complaints under Article 3'.

⁹ The decision in *Bensaid v. The United Kingdom* App no 44599/98 (ECHR 6 February 2001) para 49 stated: 'the Court's case-law does not exclude that treatment which does not reach the severity of Article 3 treatment may nonetheless breach Article 8 in its private-life aspect where there are sufficiently adverse effects on physical and moral integrity'. The Court also spoke about 'the risk of damage to the applicant's health from return to his country of origin', even though, in the circumstances of the case, such a risk was considered inadequately substantiated (para 51).

what is implicated in that doctrine is not an act of the relevant ECHR member State outside its jurisdiction, but the omission of that State (inside its jurisdiction) to properly assess conditions in the state where the person is to be sent. Such situations can be defended as being subject to the rules of international responsibility norms, at least in theory, under the classic doctrine of international law.¹⁰ The problem arises as the Court appears to require that member States have a level of involvement that exceeds the mere assessment of conditions in the receiving state and implicates the member State in the home affairs of the receiving state.

Such a situation is illustrated by the *Othman* case. Aware of the potential for its responsibility to be engaged under the prohibition of torture in Article 3 ECHR, the UK commenced negotiations with Jordan to reach a Memorandum of Understanding (MOU) before deciding to deport the applicant and other persons to Jordan. The MOU was to provide the UK with reliable assurances that Jordan would comply with the standards of the prohibition of torture and inhuman and degrading treatment.¹¹ These negotiations lasted two and a half years. The MOU included a monitoring body jointly nominated by both Governments, as well as an individual right to petition this body for the persons sent to Jordan under the MOU.¹² The agreement appeared, as such, to be a sophisticated one that could prove the exercise of due diligence on the part of the UK before deporting the applicant to Jordan.

Nevertheless, questions arose regarding the means to measure the reliability of the assurances provided by Jordan. Establishing the standard of reliability of the assurances provided by the receiving state meant establishing the standard of diligent assessment on the part of the sending state. Before the House of Lords, Lord Phillips, basing his reasoning on the conclusions of the UK Special Immigration Appeal Commission (SIAC), set the standard of rationality of such conclusions according to which assurances could be relied upon.¹³ The standard set does not mention a certain degree of probability, nor does it require an assessment of particular elements, but instead favours a general assessment of the reliability of the assurance. By contrast, the ECtHR elaborated a complex

¹⁰ See e.g. International Law Commission, *Report of the 63rd Session* (2011) A/66/10, para 250: draft article II ‘The responsibility of States in cases of unlawful expulsion’.

¹¹ *Othman (Abu Qatada)* supra n 2, paras 21–24.

¹² Ibid, para 24.

¹³ Lord Phillips’s in *Othman* stated: ‘the only basis to interfere with the view of SIAC was if its conclusions that the assurance could be relied upon were irrational’. See *Othman (Abu Qatada)* supra n 2, para 57.

standard that combined no less than 11 particular elements¹⁴ to assess the quality of the assurances. By enunciating such a detailed checklist, the Court encourages member States to actively interfere in the receiving state's sphere. The sending member State must not only obtain general proof of the good faith and intentions of the receiving state, but it must also obtain assurances concerning detailed procedures as well as the means to implement such procedures.

In *Othman* these requirements meant two things: firstly that the UK was invited to transfer to Jordan the European standards concerning the rights to a fair trial and prohibition of torture and inhuman and degrading treatment; and secondly that the UK was asked to ensure the implementation of such standards in Jordan's jurisdiction. This is inconsistent with the way in which classic international relations and classic international law are conceived. In fact, the Court seems to transform a typical inter-governmental relationship, characterised by the mutual exclusion of control and responsibility between the two states, into a quasi-coordinated order in which states operate in overlapping fields of jurisdiction. State A must not only apply and obey the Convention and assess if State B does the same, but in addition, it must intervene in some manner to ensure that State B also applies the Convention. Such a hypothesis would be quite unusual under classic international law.

However, it is important to draw a distinction between two differing situations. In the case of *MSS*, both Belgium and Greece are ECHR States Parties. Knowing this, the Court's decision can be construed as reflecting an evolution towards a new kind of legal order within the boundaries of the ECtHR's jurisdiction. The Court can be seen as signalling the abandonment of the classic conception of the inter-state legal order and embracing an integrated concept, resembling that of the European Community or the European Union ('EU'). States should not only agree on similar standards but they must actively cooperate in order to implement them. One can be favourable or critical of such a hypothetical approach by the Court, however, independent of one's belief, such an approach could have consistency. After all, in its first years, the European Court of the Communities acted in quite a similar manner.

The second case of *Othman* is quite different from *MSS*. In *Othman*, the state with which the UK was supposed to 'actively cooperate' was Jordan, a non-ECHR State Party. It seems clear that the reasoning used for a State Party cannot apply to a situation in which only one of the

¹⁴ Ibid, para 189.

States involved in the extradition is a party to the Convention. Firstly, the State Party cannot invoke towards the receiving State a kind of 'exceptionality'¹⁵ of a legal order to which they are parties that would entitle it to request certain assurances concerning the treatment of the person to be extradited or deported. In other words, it might be legitimate to say that Belgium must respond 'because of' Greece (as in *MSS*), as both are member States to the ECHR legal order (and to the EU) and, as such, they are in a kind of relationship of 'solidarity' that would have entitled Belgium to be actively involved in the way Greece complies with its international obligations concerning asylum seekers. However, the same is not true for the relationship between the UK and Jordan.

Secondly, such a requirement from the ECtHR could create problems in the relationship with the receiving State and could entail, at least in theory, the responsibility of the member State due to the Court's requirements. Imagine a case in which two states – only one of which is party to the ECHR – have a prior extradition agreement and the state has the right to refuse extradition only in limited circumstances. If the ECtHR imposes additional conditions on that state, it is in a lose/lose situation. If it accepts the extradition request it violates the Convention and if it denies the extradition request it violates the agreement with the other state. In both cases, it would be internationally responsible. The only difference is that if it decides to apply the Convention, it is responsible not for its own act but for being loyal to the Convention.

This situation is typical in a fragmented legal order, such as the international one. From this perspective, the Court could take greater consideration of the specific nature of the international legal order in which states operate. While building a supra-national legal order may be a legitimate ideal, it must not be done at the expense of the states exposed to international liability simply due to their loyalty to this emerging order. This is especially so, as the legal order that may be built around the ECHR lacks the autonomous position and the external recognition in international relations that the EU enjoys.

¹⁵ Reference is made here only to what exceeds, in the ECHR standards, what already exists in general international law standards.

II. THE DIFFERENCES AND DIVISIONS BETWEEN EASTERN AND WESTERN EUROPE

In his chapter in this volume, President Bossuyt discussed the transformation caused by the Court of some classical ‘civil rights’ (such as the prohibition on inhuman and degrading treatment and the right to property) into ‘social rights’.¹⁶ In this respect, President Bossuyt noted that, in doing so, the Court inevitably generates – or maybe only casts light on – a certain distance between Western European member States and Eastern ones. No single standard seems to be conceivable in the field of social rights.¹⁷ Could this be a step on the path towards a two-speed ‘European community of human rights’, that would divulge the obsolescence of one of the objectives set out in the Preamble of the ECHR: greater unity between member States?

President Bossuyt’s remark in this regard is very astute, and also for a reason that he does not explicitly mention. Indeed, human rights phenomenology is different in Eastern and Western Europe not only due to the scarcer resources in Eastern European State budgets. The truth is that many of the Eastern European societies still wrestle to establish a ‘civil rights’ supremacy over the authoritarian reflexes of the government and administration. While a simple thing like the protection of property in the field of taxation through the predictability of law is unlikely to constitute a human rights topic in a Western European country, it is yet to be achieved in some parts of Eastern Europe. This means that there is still much for the Court to do in the field of ‘civil rights’ consolidation in Eastern Europe.

A shift towards the ‘next level’ of ‘social rights’ in the East, without first consolidating ‘civil rights’, would only create imbalances in these societies. The emphasis put on the State’s strength by the advocates of ‘social rights’ would undermine the opposing strength of ‘civil rights’ in these societies. As such, it is likely that Eastern European member States could not comply with the Western standards of ‘social rights’. A secondary effect of the promotion of such standards would be that it is likely to also affect the strength of the ‘civil rights’. Put simply, some

¹⁶ Marc Bossuyt, ‘Is the European Court of Human Rights on a slippery slope?’, chapter 4.

¹⁷ Marc Bossuyt, *ibid* at 35: ‘... it leads to the development of a purely regional human rights standard, untenable by many countries ... Indeed, as the realisation of those rights depends on the availability of resources in the State concerned, there is no common standard, not even among ECHR member States ranging from Albania to Sweden or from Monaco to Moldova.’

steps must be taken in a certain order even if ‘social rights’ standards are to be promoted. The efficient promotion of ‘social rights’ cannot take place before first consolidating the status of ‘civil rights’. Potentially, the impatience of some actors in Western European States may jeopardise the consolidation of the classic ‘civil rights’ in Eastern European States.

It is useful to try to openly identify which sources of criticism of the ECtHR – politicians, national judges, academia, NGOs, groups of applicants, etc. – are ideologically motivated.¹⁸ Identifying ideological critiques helps to divide the arguments between those that are purely ideological and those that are more technical (of a legal or administrative nature), and assists lawyers to avoid the first category and leave them to the political arena. There is, however, a category of arguments that, even though ideologically motivated, is still worth discussing from an ideologically neutral perspective. The above discussion is an example. Even if extending human rights protection from ‘civil rights’ to ‘social rights’ is an ideologically motivated proposal, non-ideological arguments (e.g. arguments that do not sustain that the proposal is bad *per se*) can still be made. Such is the argument concerning the necessity of strengthening the ‘civil rights’ in Eastern Europe before opening a ‘social rights’ campaign.

III. THE COSTS AND BENEFITS OF THE INDIVIDUAL RIGHT TO PETITION THE ECtHR

The individual right to petition is often considered to be the main cause for the increasing workload of the Court and the current backlog of pending cases. Still, the right to individual petition is an essential feature of the ECHR legal and institutional system and, for this reason, must be maintained.¹⁹ The filtering procedure for selecting cases with merit to be

¹⁸ ‘Ideology’ includes not only political partisan ideologies about the role and weight of government (that could be categorised as the right wing vs. left wing spectrum), but also the conflicting beliefs about the role and *modus operandi* of the judiciary in general, and of international judges in particular. Such ‘ideological’ dichotomies include: judicial activism vs. judicial self-restraint; and international judicial activism vs. subsidiarity principle.

¹⁹ The importance of the right of individual application for the ECHR system was reaffirmed by the Brighton Declaration, which states that ‘The States Parties also reaffirm their attachment to the right of individual application to the European Court of Human Rights (‘the Court’) as a cornerstone of the system for protecting the rights and freedoms set forth in the Convention’. European Court of Human Rights, *High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration* (20 April 2012) paras 2 and 13.

heard by the Court also attracted a lot of criticism due to its lack of transparency. The four functions that the Court performs as outlined by President Bossuyt should be recalled: that of appellate judge; cassation judge; international judge; and judge of summary proceedings.²⁰ ‘Constitutional judge’ could be seen as part of the international judge function, however, it would not be wrong to use the words ‘Constitutional Court’. It is contended that this is what the Court was meant to be in the field of human rights – a kind of Constitutional Court for Europe – and that is why the institutional design of the Court allowed for private individuals to appeal to it, against all principles of international law generally accepted in 1950.

The presumption is that the design of the individual petition was inspired by the already proven efficiency of constitutional review by the different national courts. This model can be contrasted to the model of the inter-governmental committee, advocated by Lord Hoffmann in his famous lecture in 2009.²¹ It is true that this characteristic of the Court raises difficulties such as those mentioned above: the case overload and the lack of transparency of the filtering procedure. Still, this feature confers on the Court the exceptional position of being in direct contact with the legal environment of the Convention’s member States. If an institutional perspective is adopted when analysing the Court’s functions, it is obvious that the best way to gather information for an institution (in this case, for a court) is directly from the field involved in the activity – from the individual litigants. In this sense, it can be said that the Court not only serves the citizens, but that the citizens also serve the Court.

It is characteristic for courts that they do not set their own agendas.²² As such, they must be seized by someone else. For a court like the ECtHR there are two main options: either individual applications or claims made by member States. There are several reasons why individual

²⁰ Marc Bossuyt *supra* n 16. One might notice a further (and recently established) function – that of providing guidance to States in cases of ‘structural deficiencies’ through the mechanism of pilot judgments. See *Atanasiu and Others v. Romania* App nos 30767/05 and 33800/06 (ECHR 12 October 2010) paras 229–242.

²¹ Lord Hoffmann, *The Universality of Human Rights* (Judicial Studies Board Annual Lecture, 19 March 2009) para 44, <<http://www.judiciary.gov.uk/media/speeches/2009/speech-lord-hoffmann-19032009>> accessed on 23 October 2012.

²² Kermit L. Hall, ‘Judicial Independence and the Majoritarian Difficulty’, in Kermit L. Hall, Kevin T. McGuire (eds), *The Judicial Branch* (Oxford University Press 2005) 61.

applications should be preferred. Firstly, the Convention's primary purpose, through human rights promotion, is to defend individuals *against* member States or, more precisely, against the political and governmental elite. So how can protection against member States be entrusted to the States themselves (or even States other than the ones accused of the violation)?

The second argument is a more analytical one. Sunstein noted that courts have an inherent advantage when dealing with important and delicate conflicts of principles (and many human rights conflicts fit into this category), as they have to settle particular cases.²³ This allows them to reach agreements between the members of the Court that are 'incompletely theorized' in the sense that 'the relevant participants are clear on the result without agreeing on the most general theory that accounts for it'.²⁴ Sunstein's argument draws on the concept of 'reflective equilibrium' established by Rawls, according to which ethical, political and legal problems are better addressed not by applying a general theory but by 'comparing apparently plausible general theories with apparently plausible outcomes in particular cases'.²⁵

Individuals that apply to a court, including to the ECtHR, need to present arguments of the 'reflective equilibrium' type, in the sense that they have to invoke their private particular interest but also the general principle that favours their interest in that specific case. In terms of dimension, the principle invoked is the high-profile issue, while the particular interest of the individual is the low-profile one. On the other hand, States (political and governmental elites) have much more difficulty achieving a 'reflective equilibrium' as their interests, of bigger dimensions, rival the weight of the principles involved in a particular case. Put differently, the particular factual issue in the State application (serious enough to be brought before the Court) already constitutes a high-profile issue that might obscure the high profile of the principle involved.

It is undeniable that the individual petition system creates the filtering issue along with all the inconveniences on account of transparency. This too is unavoidable given the dimensions of the continent for which the ECtHR is supposed to standardise human rights. The drafters of the Explanatory Report of Protocol No. 14 ECHR explained that during the reflection stage prior to drafting the Protocol, a proposal to give the

²³ Cass R. Sunstein, *Legal Reasoning and Political Conflict* (Oxford University Press 1996) 4–5.

²⁴ *Ibid.*, page 5.

²⁵ *Ibid.*, page 17.

Court discretion when deciding whether or not to take a case (following the US Supreme Court procedure of *certiorari*) was rejected as it would have 'restricted the right of individual application'.²⁶ It is difficult to see a restriction to the right of individual application in such a proposal, but rather a departure from the principle of motivating every judicial decision (including the ones dismissing a claim as inadmissible). However, this has already been accomplished by the current system applying the admissibility criteria in Article 35 by a single judge on the basis of Article 27 ECHR. Decisions declaring a claim inadmissible are completely opaque regarding the reasons of such a qualification (except for in the case of non-exhaustion of local remedies or exceeding the time limit). It is proposed that the real problem has been that granting the Court discretion would have meant also accepting the Court's political role and weight not backed by democratic accountability. But this is the problem of every court dealing with constitutional issues²⁷ and, as stated earlier, the European Court of Human Rights is such a court.

At this point, it is possible to say that the utility of the Court resides in the very essence of the judicial method, which implies treating particular detailed cases on the basis of and in relation to broader, more general rules. It is not only the statistical, repeated violations that are revealed by the great number of similar applications that contribute to the utility of the Court's organisation, although they have their importance (and also important disadvantages). But the Court's action in such a field is necessarily retrospective and, as such, belated. The massive violations had already occurred by the time the Court was flooded with individual applications. On the other hand, the individual right to petition allows the Court, based on intuition that should be a quality of the great judges, to discern forms of violations that are as yet incipient but could develop over time and the Court could effectively intervene to block further developments in that direction.

It is certain that the European Court of Human Rights currently faces, besides mere criticism, real challenges. When reflecting upon reform projects or simply criticising the Court, it is important to remember the

²⁶ Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention. Explanatory Report, para 34 <<http://conventions.coe.int/Treaty/en/Reports/Html/194.htm>> accessed on 23 October 2012.

²⁷ Richard Posner, 'The Supreme Court 2004 Term. Foreword – A Political Court' (2005) 119 *Harvard Law Review* 34, 34: 'Viewed realistically, the Supreme Court, at least most of the time, when it is deciding constitutional cases, is a political organ'.

Court's numerous achievements and to understand the particular features in its institutional design and/or its fundamental philosophy that led to those achievements, and to try to maintain and defend such features.