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Oasis or Mirage? Extraterritorial positive obligations

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Oasis or Mirage?

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Into the Desert

Paradoxically, the longest chapter in Vladislava Stoyanova's book on positive obligations is devoted to the desert: the grim and arid lands *extra muros*. Where States operate beyond their borders, few standards survive. How could one even hope to find positive obligations there? Yet, with close to 100 pages, Chapter 8 ("Extraterritorial positive obligations") covers about one third of Stoyanova's book. That seems quite rich for an analysis of the situation in which States tend to have limited means at their disposal to comply with any positive obligations that might exist. More often than not, the State's regulatory framework will not apply beyond its territory; more often than not, its capacity to enforce compliance with the law – or, more generally, to promote, protect and fulfill human rights – will be limited; more often than not, the context in which the State acts beyond its borders is characterised by violence and armed conflict. Clashes with the sovereign territorial rights of the host State are inherent in any undertaking that takes place in the territory of another State. Not exactly the environment where positive obligations prosper.

25 Years of Confusion

The Strasbourg case-law relating to extraterritorial situations is a notorious source of confusion, and the Court's references to positive obligations in this domain are no exception to this. Take the very first case in which the Court referred to extraterritorial positive obligations: [*Banković a.o. v. Belgium and 16 Other Contracting States*](#).

The facts of the case are simple. On 23 April 1999, a building of *Radio Televizije Srvije (RTS)* was hit by a missile launched by NATO forces. The attack occurred in the context of a military campaign against what then was the Federal Republic of Yugoslavia. Sixteen people were killed and another sixteen were seriously injured in the bombing of the RTS building. Five relatives of the deceased and a survivor of the bombing brought a complaint before the Strasbourg Court against the NATO member States, in so far as they were bound by the ECHR. The applicants had a straightforward claim: the television station had not been not a legitimate target. They alleged breaches of notably Article 2 (the right to life) and Article 10 ECHR (the freedom to impart information).

The respondent States raised a number of preliminary objections. First and foremost they argued that the victims had never been "within the jurisdiction" of the respondent States; consequently, under Article 1 ECHR, there was no obligation to secure the applicants' rights and freedoms. In order to counter that claim, which was based on a particular – mostly territorial – understanding of the word "jurisdiction", the applicants proposed another interpretation that would allow for the applicability

of Convention standards outside the respondent State's territory. To this end they argued that the very act of bombing the RTS building had brought the victims "within the jurisdiction" of the respondent States. Of course it would not be reasonable, in these specific circumstances, to expect the respondent States to secure *all* rights and freedoms included in the ECHR. In an effort to develop a realistic model, the applicants proposed a 'gradual' and context-related approach. The idea was basically that the extent to which a Contracting Party controls the situation in which an individual finds itself, is commensurate with the extent to which it must secure the rights and freedoms of that particular individual. This principle is widely accepted when it concerns situations within the territory of a State (compare the duty of care for individuals in State custody with the duty to prevent domestic violence); it is not any different if a State acts outside its borders. In *Banković* control had been very limited, but at the very least one could expect the States to refrain from acts that predictably posed a direct and immediate threat to the victims' lives. All this seemed to be perfectly reasonable – but the Court said no:

[...] the Court is of the view that the wording of Article 1 does not provide any support for the applicants' suggestion that *the positive obligation* in Article 1 to secure "the rights and freedoms defined in Section I of this Convention" can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question ([ibid](#), para. 75).

What is striking for present purposes, is the Court's reference to the bombing as *a matter of positive obligations*. If there is *any* State action that amounts to an interference, then it is the act by which it ends life. Depending on whether this exercise of State power can be justified, it may or may not entail a violation of its obligations under the Convention. But that does not change the fact that killing is very much a matter of *negative* obligations. So, why then did the Court in *Banković* suggest, repeatedly, that the applicants sought to rely on a "positive obligation to protect" them ([ibid](#), paras. 46 and 76)? Not one single applicant had expected to be "protected" by any of the respondent States. All they had hoped for was to be left alone by them.

Why would the Court bring in the notion of positive obligations – and effectively inflate the applicants' claim – only to reject it? Could it be that positive obligations were used as a *deterrent*? It appears that the Court wanted to warn for what it believed were the huge and unpredictable consequences of the applicants' claim. What at the face of it was a complaint about a deliberate air strike that took 16 lives, the Court cautioned, was in reality "tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention" ([ibid](#), para. 75). That was not what the applicants had claimed but, more importantly, that was clearly not what the Court wanted. The Court preferred the desert over the jungle.

Extraterritorial Positive Obligations as a Mirage: Echoes of *Banković*

Why recount this story of a quarter of a century ago? Didn't the case-law move on since then? True. As Court watchers know, the *Banković* decision looked firm and

unforgiving (“not any support”), but this did not prevent a U-turn: 10 years later, in [Al Skeini a. o. v. the U.K.](#), the Court quietly embraced the “divide and tailor” approach (paras. 113-114).

Yet, the spirit of *Bankovi#* still echoes in the Court’s deliberation room (see for instance: [M.N. a.o. v. Belgium](#), paras. 112-113; [H.F. v. France](#), para. 200). The reluctance of an overburdened Court, which does not want to get involved in potentially numerous ‘remote’ and politically sensitive conflicts, is palpable. This became apparent again in April of this year, when the Court decided the three climate change cases. Here we are clearly in positive obligations territory. As the Court sets out in great detail, notably in the leading case, [Verein KlimaSeniorinnen Schweiz a. o. v. Switzerland](#), it derives from Article 8 ECHR a positive obligation to implement sufficient measures to combat climate change. This includes the “primary duty to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change” ([ibid.](#), para 545).

Seen from the perspective of extraterritoriality, the most interesting of the three climate change cases was that of [Duarte Agostinho a.o. v. Portugal a.o.](#). As in *Bankovi#*, the applicants brought an action ‘from abroad’ against a set of States. But their claim was more far-reaching: it did not ‘merely’ concern an instantaneous act that took the lives of 16 well-defined individuals. *Duarte Agostinho* is based on the claim that the respondent States had breached their obligations under the Convention by failing to regulate and limit the greenhouse gas emissions from public and private sources in a manner that was consistent with internationally agreed targets. Yet this claim met with the same response as in *Bankovi#*:

The Court does not find it possible to consider that the proposed positive obligations of States in the field of climate change could be a sufficient ground for holding that the State has jurisdiction over individuals outside its territory or otherwise outside its authority and control. [...] jurisdiction cannot be established merely on the basis of the argument that the State is capable of taking a decision or action impacting the applicant’s situation abroad ([ibid.](#), paras. 198-199).

As in *Bankovi#*, the case was unanimously rejected by the Grand Chamber. So the average Court watcher might be forgiven to believe that extraterritorial positive obligations are like a mirage in the desert: a fantastic prospect that retreats as soon as one comes closer.

... Or an Oasis after All?

But Vladislava Stoyanova is not your average Court watcher. In her new book she explores the extraterritorial positive obligations, undeterred by the considerable size of the Court’s case-law and the abundant literature on the topic. And she does have her own voice to add. Unlike most authors Stoyanova is not exclusively or even primarily interested in considerations of feasibility or the State’s actual capacity to fulfil when discussing the content and scope of positive obligations. Rather she takes her inspiration from “normative preconditions”, such as the role of the State in society

and the democratic legitimacy of decisions taken within that society. This enables her to go through the Court's case-law with a fresh look – and the result is a true oasis in the desert.

Stoyanova is not the first one to go through all the well-known cases. But she does so with an interesting perspective and a great sense of nuance and detail. She does not share the approach of the applicants in *Bankovi#*, arguing that the “relativization of the jurisdictional threshold” ([Stoyanova](#), p. 262) will lead to an unstable and unpredictable case-law. Fair enough, although the discussion makes one realise how an academic analysis is often based (and cannot avoid being based) on positions *as summarised by the Court* (see the discussion on pp. 266 et seq. of Stoyanova's [book](#)). It would have been interesting to see how a case like *Bankovi#* would have been argued if the applicants had had the benefit of Stoyanova's analysis – and how that would have influenced the outcome the case.

Stoyanova's overall conclusion is that the Court is certainly sensitive to the normative preconditions that she has identified. However, there is still a lack of clarity and consistency: “Rather, the judgments, and the models of jurisdiction endorsed therein, meander between a facticist approach and a normative approach” ([Stoyanova](#), pp. 263-264). One might say that this is the typical criticism of the academic who seeks to identify patterns in the practice of the Court, whereas the judges that make up the Court – with all their different ideas and perspectives – seek to identify solutions that allow them to agree how justice can be done to the facts of the particular case. But Stoyanova is certainly right if she observes that the Court's jurisprudence meanders. New cases will be decided – such as the climate change cases – and they will lead to new turns in the river. Which is actually good news for any desert.

Endnote: The author was part of the team that represented the applicants in Bankovi#, and drafted their argument on “jurisdiction”. For a more detailed account see: R.A. Lawson, “Life after Bankovi# – On the Extraterritorial Reach of the ECHR”, in F. Coomans & M. Kamminga (eds.), Extraterritorial Application of Human Rights Treaties (2004), pp. 83-123.

