Chapter 10

The Scope of National Jurisdiction

10.1. Introduction

Both Resolution 1373 and other substantial UN measures on terrorism highlight the importance of prosecuting and punishing terrorists in order to suppress their activities. In order to achieve these objectives it is considered crucial to create a national jurisdiction with wide enough scope to ensure that no act of terrorism remains unpunished because it falls outside the jurisdiction of any state. Within the EU, the right to free movements of people gives rise to a particular need to remove national borders as an obstacle to the prosecution of terrorists.

Criminal jurisdiction gives a state competence to subject persons (natural or legal) and things to its legal order, thereby authorising the appropriate bodies (e.g. public prosecutors and courts) to prosecute and punish alleged perpetrators of criminal acts. Moreover, criminal jurisdiction entails a right to initiate investigation, and thus to apply investigational measures such as surveillance and detention accordingly. Although the latter right may only be applied on the investigating state’s own territory, it substantially expands the practical significance of jurisdiction.

The subject of jurisdiction raises questions at both the international and national level. As regards international law, the fundamental issue is whether the state in question (in relation to other states) has a right, or even a duty, to exercise jurisdiction over an offence. At the level of national law, the main

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1737 See SC Res. 1373 Art 2 (e), cited supra 2.3.3. See also, inter alia, the preambles to the 1979 Convention on Hostage Taking, the 1997 Convention on Terrorist Bombings and the 1999 Convention on Financing Terrorism.

1738 See preamble para. 7 to the EU Framework Decision, according to which ‘jurisdictional rules should be established to ensure that the terrorist offence may be effectively prosecuted’.

issue is whether national law empowers the national authorities to exercise jurisdiction over the relevant offence.

Rooted in the principle of state sovereignty and non-interference, territoriality has long been the dominant doctrine of jurisdiction in international law. However, the complexity and politically latent nature of terrorism as a crime, as well as the transnational character of terrorist networks has necessitated a more flexible approach to the matter. In order to be able to effectively combat terrorism, extensive obligations and options to establish extraterritorial jurisdiction over terrorist offences have been stipulated, at both the international and regional level. In this regard, the pivotal question has become the extent to which other connections to the offence (than that of territoriality) justify the infringement of state sovereignty represented by the exercise of jurisdiction over crimes committed on foreign territory.

This chapter begins with an analysis of the obligations to establish territorial jurisdiction pursuant to Resolution 1373 (and the related UN conventions) and the EU Framework Decision, as well as the parallel rules in national law (10.2). This analysis includes an overview of the national regulation of the question of where an offence shall be considered to have been committed (the locus delicti), a determining factor for the actual scope of territorial jurisdiction. The obligations and options set out in the international instruments to create extraterritorial jurisdiction will then be examined, along with their national implementation (10.3). As the instruments studied here contain independent requirements to establish jurisdiction where extradition is refused, the relationship between jurisdiction and the extradition or surrender of suspected terrorists will be investigated separately (10.4). Finally, conflicts between concurrent jurisdictions that may arise as a result of the extensive establishment of extraterritorial jurisdiction and guidelines for the handling of such conflicts will be studied (10.5), before some concluding comments are made (10.6).

10.2. Territorial jurisdiction and the locus delicti

10.2.1. Resolution 1373 and related international obligations

Resolution 1373 is addressed to ‘all states’ and it is thus based on the presumption that each state will, as a minimum, fulfil its obligation with regard to terrorism within its exclusive sovereignty, i.e. on its own territory. This is expressly stated in Article 1 (a), which obliges the states, inter alia, to crimi-