Chapter 11
The Exclusion of Actions by Military Forces, Resistance Movements and Demonstrators?

11.1. Introduction

The core of the difficulties in achieving a common definition of terrorism on the international level has concerned what has pertinently been called ‘an ideological split on the permissible uses of violence’. Whereas it is undisputed that certain acts that have all the traditional characteristics of a terrorist offence may, in exceptional circumstances, be considered legitimate pursuant to international law, e.g. when committed by lawful combatants in an armed conflict in accordance with the laws of war, such legitimacy is regularly also claimed for more controversial use of force by state agents and ‘freedom fighters’. The controversies have been no less fierce at the regional and national levels. In addition to actions in connection with armed conflict, the European debate has focused on actions by ‘resistance movements’ as well as on violent and damaging acts committed during demonstrations.

The main question in this chapter is whether actions by military forces, ‘freedom fighters’, ‘resistance movements’ and demonstrators are excluded from or covered by the global, regional and national terrorism legislation studied in this book. At the core of the question lies the general issue of when and by whom the use of violence is considered to be lawful. However, certain acts may be excluded from the concept of terrorism for other reasons than their being lawful, such as the need to be able to distinguish terrorism from other crimes. An important aim of this analysis is thus to determine the relationship of the multilevel terrorism legislation to other rules of international and national law.

The conclusions drawn with regard to these issues could potentially affect the material scope of all the offences discussed supra Chapters 5–9. More-

over, the extensive possibilities of extraterritorial application of these rules as established in the previous chapter have highlighted the need to clarify these issues. This is why such a significant topic has been left to the very end of the book.

The lack of any definition of terrorism in Resolution 1373 makes it extraordinarily difficult to establish the actual scope of the Resolution’s obligations in relation to these controversial issues. Nevertheless, we will start with an attempt to do just that, through an analysis of the Resolution in light of the general discussion at the level of international law (11.2). This analysis will also form a useful background for the discussion of the parallel questions in the interpretation of the EU Framework Decision (11.3). The point of departure in that respect is the explicit saving clause in preambular paragraph 11, which addresses various actions of armed forces that are governed by international humanitarian law or other rules of international law. Moreover, the content and legal relevance of an attached Council Statement,1944 in which the EU Member States upheld the legitimacy of acts of resistance against undemocratic regimes and detached offences committed in the exercise of the right to manifest one’s opinions from the concept of terrorism, will also be discussed. When turning to the national legislation that implements the UN and EU obligations, the discourses at the global and regional levels re-emerge in a different context, and an analysis of the national debates leading up to the adoption of the new legislation may provide valuable guidance on the interpretation of the domestic rules in question (11.4). Finally, the three levels of regulation will be seen in connection with each other and some conclusions will be drawn (11.5).

11.2. Resolution 1373

As already mentioned, the failure of Resolution 1373 to specify the scope of its obligations is a challenge for anyone trying to clarify its relationship to contested issues such as actions by various kinds of armed forces. A contextual interpretation will nevertheless be conducted in an attempt to outline possible solutions. The analysis will draw both on the relevant content of the Resolution and on what can be inferred from its lack of regard for certain issues compared with other resolutions.

Article 3 (g) of Resolution 1373 calls on the states to ensure that ‘claims of political motivation’ are no longer recognised as grounds for refusing requests