Legal issues arising from the armed conflict in Afghanistan

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Abstract. The article is an attempt to shed some light on the legal issues arising from the armed conflict that took place in Afghanistan in the aftermath of the September 11th 2001 terrorist attacks as concerns non-state actors. The first two parts consider the right of self-defence as a possible justification of the US bombings. Can attacks by non-state actors qualify as “armed attacks” under Article 51 of the United Nations Charter? Secondly the legal limits of the exercise of the right of self-defence are considered, with focus on the possible adversaries of the actions of the defending state. In the third part, the imprisonment of the captured Taliban and Al Qaeda fighters is considered. The legal status of the detainees, the possible legal bases of the detention and the relationship of the legal bases with the treatment of prisoners are discussed.

Keywords: Afghanistan, detention, non-state actors, self-defence, unlawful combatant

1. Introduction

On September 11, 2001 the World Trade Centre and parts of the Pentagon crumbled down. With them, the terrorist attacks destroyed the certainty that destruction of that scale could only be caused by hostile acts of another state. Furthermore, the citizens of New York, of the United States of America (hereafter US) and worldwide lost their faith in the ability of nation states to protect them from such violence. The traditional concept of international relations according to which armed attacks and the protection against them is a matter of interstate affairs was put into question.1 Nevertheless, the US used a most traditional and age-old method to react to the terrorist attacks. Air strikes against Afghanistan began on October 8, 2001.2 Accordingly, US officials legitimised the attacks on Afghanistan with the help of a classical and well-known justification: On October 7, the United States informed the Security Council of the United Nations that they were exercising their inherent right of self-defence by actions against Al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.3 By resorting to this argument, they opted for a justification that the Security Council had at least suggested in the preambles of its Resolutions 13684 and 1373.5 In these resolutions, the Security Council referred to the

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inherent right of self-defence according to Article 51 of the United Nations (hereafter UN) Charter even if it did not refer to Afghanistan as the possible adversary in an interstate armed conflict.

Similarly, North Atlantic Treaty Organisation (NATO) allies had qualified the 11th September attacks as “armed attacks” justifying the exercise of self-defence, as did the Organization of American States. They upheld these statements of support that preceded the air strikes after the beginning of the Operation Enduring Freedom, undertaken against Afghanistan. Even states like Russia and China displayed their support and the Arabic states uttered no direct criticism. States furnished practical support by unprecedented offers of airspace and landing rights. The *ius ad bellum* seemed uncontested.

Uneasiness appeared later concerning the methods of warfare, and the abduction of “unlawful combatants” due to possible violations of international humanitarian law, the *ius in bello*. The fact that the “Daisy-Cutter” bombs were not the best means to distinguish between the civilian population and combatants found less attention, given that no treaty illegalises their use explicitly. However, the press, Non-Governmental Organisations, other states and finally the Inter-American Court of Human Rights criticised the detention of alleged terrorists captured during the hostilities in Afghanistan. After initially having been detained in Afghanistan or in US naval vessels, the first twenty detainees arrived at the US naval base in Guantánamo Bay, Cuba on January 11th 2002. Since that date, the number of prisoners has increased to over 600. As at the time of writing, there has not been a single judicial review concerning the lawfulness of the detentions by a US court, whether military or not. The recent press coverage, reporting that the US authorities are erecting a solid prison at Guantánamo unfortunately seems to confirm the pessimistic predictions that the prisoners will generally have to face indefinite detention without charge or trial, even if a small number of prisoners have been released. As to their legal status, US officials referred and still refer to the captured as “unlawful combatants”, thus precluding the application of international humanitarian law.

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10 Stahn, Carsten, see supra note 9, p. 9.