



Drone Strikes as a “War Crime” – The Peshawar High Court embarrasses itself

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The High Court of Peshawar has issued a decision condemning drone strikes in Pakistan as war crimes and demanding political consequences. This judgment is catastrophically flawed and shows a lack of basic understanding of international law.

Peshawar High Court, Judgment, Writ Petition No. 1551-P/2012, available at <http://www.peshawarhighcourt.gov.pk>

“Drone strikes [in Pakistan] are a blatant violation of basic human rights and are against the United Nations (UN) Charter” and thus “a war crime” – with this the High Court of Peshawar closed its much-noticed judgment on US drone strikes. It ascertained a violation of Pakistan’s sovereignty and ordered the government to “ensure that in future such drone strikes are not conducted & carried out within the sovereign territory of Pakistan”. Moreover, the government is ordered to take the matter to the UN Security Council and to request the Secretary General to constitute an independent war crime tribunal. If this plan fails, then “the Government of Pakistan shall sever all ties with the USA”. Calling the judgment “flawed” would not capture the tremendous foolishness of this judicial failure. One hardly knows where to begin to point out the errors and contradictions. Nevertheless, there is the need to clarify some aspects. Starting with the underlying facts, the court bases its reasoning on a report submitted by the political authorities of North Waziristan. According to the report, as cited by the High Court, 1.496 civilians were killed during the last five years in North and South Waziristan. These numbers do not stop the court from contradicting itself by claiming that “civilians in thousands” have fallen victim to drone strikes (p. 16). Unworthy of an independent and impartial tribunal, the judgment uses a language that is clearly biased. It finds, for example, the degree of precision shockingly low (p. 5) and nothing in writing that proves a consent of Pakistan’s authorities (p. 6). Additionally, “the US decision making troika, the president, pentagon & CIA have joined hands to carry out drone strikes” (p. 5). The court never questions facts in favor of its direction of political impact. The court, however, ridicules any opposing view. For instance, militants “allegedly belonging to ‘Alqaida Group’” are “allegedly hiding in the high mountains of FATA & Afghanistan” (p. 13). Given that Abbottabad lies within the High Court’s District, a little less cockiness would have suited the court better. With regard to substantive international law, the court blends ius ad bellum with ius in bello aspects (p. 9). It talks about a possible violation of Pakistan’s sovereignty without taking into consideration whether or not such a violation could be justified. It states that international humanitarian law protects the civilian population and allows targeting of fighters and civilians who take a direct part in hostilities without further elaborating on this issue. Furthermore, the court confuses the prohibition to cause excessive collateral damage with the principle of proportionality in regard to actions against enemy fighters. Granted, in legal scholarship the debate on proportionality is not over: Still, a court should have professionally dealt with this by weighing arguments and reaching a conclusion and not by ignoring the dispute. Overall, the High Court does not assess whether or not specific attacks were lawful. Rather, the court treats all drone strikes as one and establishes the lawfulness of all attacks in one go. If the court proceedings were an armed conflict, this would amount to a violation of Art. 51 (5) (a) Additional Protocol 1 to the Geneva Conventions. Also, the question of whether or not the US is bound by human rights law while extraterritorially conducting drone strikes is not addressed. In the end the court equals any violation of international humanitarian law with a war crime, which ignores the nature of international criminal law. If the court meant to say that the breach of Pakistan’s sovereignty is a crime, it should have used the correct terminology of “crime of aggression”. There is no doubt that drone strikes raise questions under international law that need to be answered. However, the High Court fails to address those questions in a way that takes the questions seriously and its judgment lacks depth in legal analysis. This is not a court’s judgment, it is a monstrosity born out of the wrath of a judge.

Verantwortung

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