



International Criminal Court

Communication to the Office of the Prosecutor

Respectfully submitted by **Reprive**, London, **The Foundation for Fundamental Rights**, Islamabad and **Leigh Day**, London

The Situation in Afghanistan: The Use of Drone Strikes in Pakistan

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1. EXECUTIVE SUMMARY

1. Between 2004 and 2013, drone strikes in Pakistan killed an estimated 2,537 - 3,646 people and injured 1,128 - 1,557 civilians. Many of those killed were children.
2. These drone strikes were, and are, being carried out by the United States with the assistance of their allies including the United Kingdom, Germany, Australia, and other NATO partners. They are part of a covert war which lacks both transparency in its targeting process and accountability for the deaths it causes.
3. The pattern of drone strikes which has occurred in Pakistan raises very serious issues of potential liability under international criminal law, in particular as regards the killing of civilians and those not directly participating in hostilities.¹
4. Issues under international law in respect of drone strikes are not limited to international criminal law and, as such, the submissions in this communication are without prejudice to the question of whether drone strikes give rise to other violations of International Law. The Complainants note that International Human Rights Law continues to apply, alongside the rules of International Humanitarian Law and this has now been affirmed on numerous occasions by international courts and tribunals (See e.g. Case Concerning Armed Activities on the Territory of the Congo (D.R.C. v. Uganda, ICJ Rep. (2005), 168; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Rep. (2004), 136).
5. There is a significant body of evidence from official sources, non-governmental organisations and investigative journalists, providing a reasonable case for the Prosecutor to investigate whether the United States and/or any of its allies are guilty of crimes within the Court's jurisdiction.
6. The drone attacks, which have disproportionately affected civilians, therefore, constitute offences under the following provisions of the law of armed conflict:
 - a. Article 8 (2) (a) (i): Wilful killing
 - b. Article 8 (2) (a) (iii): Wilfully causing great suffering, or serious injury to body or health;
 - c. Article 8 (2) (b) (i) (General): Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

1 As regards the applicability of international humanitarian law to the subject-matter of the present complaint, the United States has repeatedly asserted that it is involved in an armed conflict. While there is debate as to whether such an armed conflict does exist and, if so, its scope, for the purposes of this submission, the Complainants rely on the position adopted by the US authorities.

- d. Article 8 (2) (b) (i) (Attacks on Rescuers): Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - e. Article 8 (2) (b) (iv): Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
 - f. Article 8 (2) (b) (v): Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives; and/or
 - g. Article 8 (2) (b) (ix): Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.
7. Alternatively, they constitute offences under the following provisions the law of non-international armed conflict:
 - a. Article 8 (2) (e) (i): Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; and/or
 - b. Article 8 (2) (e) (iv): Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.
8. The Rome Statute obliges the Prosecutor to investigate and, if appropriate, to prosecute claims arising from the drone attacks. Although Pakistan is not a State Party to the Rome Statute, the drone attacks are launched from Afghanistan, which is a State Party, and there are reasonable grounds to believe that nationals of States Parties have participated in the drone strikes.
9. Additionally, the conduct concerned is of sufficient gravity to warrant the attention of the Court. The number of civilian casualties, both as an absolute number and relative to the number of alleged militants killed in the attacks, provides prima facie evidence that grave offences within the jurisdiction of the Court have been committed.
10. There are strong grounds for asserting that the Court is the only available means of redress for the victims and the victims' families. There are no national investigative or prosecutorial authorities willing or able to investigate or prosecute the drone attacks. Afghanistan is precluded from doing so by virtue of its bilateral agreement with the

United States. In Pakistan, where a court order for the authorities to investigate the atrocities has gone unheeded for the best part of a year, there is no realistic prospect of the authorities carrying out an investigation.

11. Given the wealth of prima facie evidence, the gravity of the crimes committed, and the unavailability of other remedies, the interests of justice cry out for investigation and, if appropriate, prosecution by the Court.
12. The Complainants request that the Prosecutor take the following steps:
 - a. provide the Complainants with the opportunity to make submissions, in particular with respect to jurisdiction of the Court to entertain their claims;
 - b. allow the Complainants to give written and/or oral testimony to the Prosecutor at the seat of the Court, in accordance with Article 15 (2);
 - c. seek additional information from the United States, United Kingdom, Afghanistan, Pakistan, NATO and intergovernmental and non-governmental organisations and other reliable sources in accordance with Article 15 (2);
 - d. before determining the question of territorial jurisdiction, request a ruling from the Court on this question in accordance with Article 19 (3); and
 - e. initiate an investigation into the facts surrounding this communication in accordance with Article 51 (1), in this case by including the issues the subject of this communication in the preliminary investigation of the situation arising from the conflict in Afghanistan.
13. We strongly urge the Prosecutor to include the subject-matter of the present complaint in her preliminary examination of the situation in Afghanistan and formally to initiate an investigation of the circumstances underlying this communication as expeditiously as possible.

2. INTRODUCTION

Overview

1. Since at least 2002, the United States has used Unmanned Aerial Vehicles (“drones” or “UAVs”), in pursuit of its war against the Afghan Taliban and Al Qaeda. In weaponized form, these remotely controlled aircraft fire missiles at targets on the ground. They also hover for days on end above communities, which is causing collective psychological harm.
2. Since 2004, drones have been particularly pervasive in the areas of Pakistan that border Afghanistan, principally in North and South Waziristan, known as the Federally Administered Tribal Areas (FATA).²

The Numbers

3. The first drone strike in FATA took place in 2004.³ Since then, there have been an estimated 381 drone strikes in Pakistan. Of these, 330 have occurred since 2009 under the Obama Administration.⁴
4. It is impossible to give precise numbers of either strikes or casualties. This is as a result of the covert nature of the programme, the complete lack of transparency of the targeting process, the failure on behalf of the US to account for numbers or identities of those killed and the remote area where strikes take place. According to a study by Stanford and New York Universities, the most robust numbers come from the Bureau of Investigative Journalism (“TBIJ”), an independent not-for-profit journalism organisation that not only aggregates media reports on strikes, but also conducts on the ground investigations.⁵ Two other independent organisations – The New America Foundation and The Long War Journal – track media reports, but do not conduct on the ground investigations. The study also found that TBIJ more frequently updated its data and was also more transparent as to the sources from which it drew its data.⁶

2 See generally Jane Mayer, *The New Yorker*, *The Predator War* (26 October 2009), http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer. [Vol II, Tab C, 1-4].

3 The Bureau of Investigative Journalism, ‘Get the data: Drone Wars - The Bush Years: Pakistan strikes 2004-2009’, 10 August 2011 <http://www.thebureauinvestigates.com/2011/08/10/the-bush-years-2004-2009/> [Vol II, Tab C, 15-55].

4 The Bureau of Investigative Journalism, *Get the Data: Drone Wars* (last accessed 5 February 2014), <http://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/> [Vol I, Annex II].

5 See Stanford Law School and New York University, *Living Under Drones: Death, Injury, and Trauma to Civilians From US Drone Practices in Pakistan*, pp. 29-55 (September 2012), www.livingunderdrones.org [Vol II, Tab B, 71-96].

6 *Ibid.*

5. According to TBIJ, there have been 381 drone strikes in Pakistan since 2004. These strikes have killed as many 3,646 people and injured 1,557 more. The Bureau estimates that as many as 951 of those killed were civilians and that as many as 200 of those killed were children.
6. In early 2014, TBIJ published a secret report from the Pakistan Government which reportedly provides details of 330 drone strikes in FATA between 2006 and September 2013. The report identified civilian casualties only until 2008, at which time it began separating those killed into two categories: local and non-local. Overall, it records 2,217 deaths during the period covered.⁷
7. The report was obtained by one TBIJ's investigators and verified by several others. The information in the report is based on information filed by local Political Agents – senior officials in the field – to the FATA Secretariat each evening. The agents gather the information from networks of informants in FATA.
8. While the document provides specific details of strikes, it also has glaring omissions. It fails to report a single strike in 2007, despite TBIJ identifying five in that year. At least one of the strikes identified by TBIJ, dated 22 May 2007, was subsequently confirmed in a leaked CIA document.⁸
9. One of the main obstacles to identifying the impact of the US covert drone programme in Pakistan is that the US Government refuses to release official numbers of either strikes or casualties. The only US public official to have spoken publicly about numbers killed is US Senator Lindsey Graham, a member of the Senate Armed Services Committee. During a community talk in 2013 about Pakistan and drones, he told an audience the US had killed 4,700 individuals.⁹

7 Alice K Ross, Bureau of Investigative Journalism, Leaked Official Document Records 330 Drone Strikes in Pakistan, (29 January 2014) <http://www.thebureauinvestigates.com/2014/01/29/leaked-official-document-records-330-drone-strikes-in-pakistan/> [Vol II, Tab C, 102-106]

8 Landay, Jonathan S. 'Obama's drone war kills 'others,' not just al Qaida leaders', 9 April 2013 <http://www.mcclatchydc.com/2013/04/09/188062/obamas-drone-war-kills-others.html> [Vol II, Tab C, 90-95]

9 In 2013, Senator Lindsey Graham, a member of the Senate Armed Services Committee, during a discussion on drone strikes on the Pakistan/Afghanistan border, said: "We've killed 4,700. Sometimes you hit innocent people, and I hate that, but we're at war, and we've taken out some very senior members of Al-Qaeda." Jason Evans, Easley Patch, Sen. Graham: I Support Drone Strikes (21 February 2013), <http://easley.patch.com/groups/politics-and-elections/p/sen-graham-i-support-drone-strikes>. Senator Graham subsequently denied revealing classified information and refused to reveal the source of his numbers. [Vol II, Tab C, 88-89]
See Mike Mount, CNN, Graham: No Secret Drone Data Revealed (20 February 2013), <http://security.blogs.cnn.com/2013/02/20/graham-insists-he-did-not-reveal-classified-drone-info/>. [Vol II, Tab C, 86-87]

The Types of Targets

10. From 2004-2008, the US launched only around 51 drone strikes in FATA. During this time, the programme is believed to have been limited to “personality” strikes that targeted specific, known individuals who were high value targets.¹⁰
11. Under President Obama, however, the programme was expanded to include “signature” strikes. Also termed “crowd killing”¹¹ or “terrorist attack disruption strikes”,¹² signature strikes were used to target individuals based upon patterns of behaviour, rather than known identities. While the standard or criteria for signature strikes has never been disclosed, there have been repeated reports that various elements of the US Government were concerned the standard was too lax. An unnamed US official told the New York Times in 2012: “The joke was that when the C.I.A. sees ‘three guys doing jumping jacks,’ the agency thinks it is a terrorist training camp.”¹³
12. Further rare glimpses into the US’ secretive targeting methods fail to allay concerns. In May 2012, the New York Times reported that the US considered all men of military age within a strike zone to be combatants, unless they were able to *posthumously* prove otherwise:

“It is also because Mr. Obama embraced a disputed method for counting civilian casualties that did little to box him in. It in effect counts all military-age males in a strike zone as combatants, according to several administration officials, unless there is explicit intelligence posthumously proving them innocent.”¹⁴

The Stance of the Pakistan Government

13. It appears that between 2004 and 2007 Pakistan may have permitted, at least tacitly, some drone strikes by US forces in its territory. In a 2013 interview, President Musharaff confirmed that he had authorised a number of the strikes while he was in power from 2001-2008.¹⁵ Documents released by Wikileaks indicate that Prime

10 Micah Zenko, Council on Foreign Relations, Reforming US Drone Strike Policies (January 2013), <http://www.cfr.org/wars-and-warfare/reforming-us-drone-strike-policies/p29736> [Vol I, Annex V, 9-11]

11 Daniel Klaidman, Newsweek, Drones: The Silent Killers (28 May 2012), <http://www.newsweek.com/drones-silent-killers-64909> [Vol II, Tab C, 79-85]

12 Jo Becker & Scott Shane, NY Times, Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will (29 May 2012), <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all> [Vol II, Tab C, 79-85]

13 Ibid.

14 Ibid.

15 Nic Robertson and Greg Botelho, CNN, ‘Ex-Pakistani President Musharraf admits secret deal with U.S. on drone strikes’, 1 (12 April 2013) <http://edition.cnn.com/2013/04/11/world/asia/pakistan-musharraf-drones/>

Minister Yousef Gilani, who succeeded Musharaff, continued this practice through August 2008.¹⁶

14. According to The Washington Post, leaked CIA documents also indicate that the CIA's Counterterrorism Unit regularly shared pre- and post-strike pictures with the Pakistan Government between 2008 and 2011.¹⁷ The leaked document also suggested that at least some Pakistani officials, such as Pakistan's Ambassador to the US, Husain Haqqani, received regular briefings from the CIA on the drone programme and that Pakistan may have been involved in at least some of the target selections. The Pakistani government, however, refused to confirm the story.
15. The Pakistani government, however, refused to comment on the Washington Post story and during this time, there were repeated statements by both government officials and the Pakistani parliament condemning the attacks as a violation of Pakistani sovereignty. On May 14, 2011, the Pakistani Parliament unanimously passed a resolution asserting, in part:¹⁸

‘that unilateral actions, such as those conducted by the US forces in Abbot-
tabad, as well as the continued drone attacks on the territory of Pakistan,
are not only unacceptable but also constitute violation of the principles of the
Charter of the United Nations, international law and humanitarian norms and
such drone attacks must be stopped forthwith, failing which the Government
will be constrained to consider taking necessary steps including withdrawal
of transit facility allowed to NATO/ISAF forces’

16. From the end of 2011 onwards it is clear that the Pakistan Government made regular and increasingly vocal statements opposing the strikes and that it did not consent to the use of force in its territory by US forces through drone strikes.¹⁹ For example:
 - In December 2011, the Pakistan Government announced a policy change, warning that US drones would be shot down if they entered Pakistani airspace.²⁰

16 Tim Lister, CNN, ‘WikiLeaks: Pakistan quietly approved drone attacks, U.S. special units’ (2 December 2010) <http://edition.cnn.com/2010/US/12/01/wikileaks.pakistan.drones/>.

17 Greg Miller and Bob Woodward, Washington Post, Secret memos reveal explicit nature of U.S. Pakistan agreement on drones (23 October 2013), http://www.washingtonpost.com/world/national-security/top-pakistani-leaders-secretly-backed-cia-drone-campaign-secret-documents-show/2013/10/23/15e6b0d8-3beb-11e3-b6a9-da62c264f40e_story.html.

18 (PID: Parliament resolution) PR No. 116 PRESS RELEASE Resolution adopted by the Joint Session of Parliament on 14 May, 2011 Islamabad: May 14, 2011, <http://pid.gov.pk/press14-05-2011.htm>.

19 Stanford Law School and New York University, ‘Legal Analysis’ in Living Under Drones: Death Injury and Trauma to Civilians From US Drone Practices in Pakistan (September 2012) http://www.livingunderdrones.org/report-legality/#_ftn9 [Vol II, Tab B, 147].

20 NBC News, Pakistan says U.S. drones in its air space will be shot down (10 December 2011), <http://worldnews.nbcnews.com/news/2011/12/10/9352886-pakistan-says-us-drones-in-its->

- In April 2012, the Parliament passed an almost unanimous resolution demanding an end to drone strikes. The resolution states that “no overt or covert operations inside Pakistan shall be permitted.” It also states that Parliament was the only body in the country with the authority to authorize drone strikes and that any existing agreements with the respect to the drone strikes “shall cease to have effect forthwith.”²¹
- On 8 June 2013, following a drone strike that killed nine people on the proceeding day, Pakistan lodged a complaint of strong protest with the US.²² The US Charge d’Affaires, Ambassador Richard Hoagland was handed a demarche, conveying the fact that Pakistan condemns the drone strike as a violation of Pakistan’s sovereignty and territorial integrity. It emphasised the need to bring an immediate end to drone strikes. It stated that the Pakistan Government has consistently maintained that drone strikes are counterproductive, entail a loss of innocent civilian lives and have human rights and humanitarian implications.²³
- On 26 October 2013, the Pakistan Government told the United Nations General Assembly’s Third (Social, Humanitarian and Cultural) Committee that they do not approve of drone strikes on its territory and, instead, that drone strikes which result in civilian casualties violate international law. The notion that Pakistan has given consent to carry out drone strikes was explicitly rejected, stating that the Pakistan Government has never given explicit or implicit consent, approval or acquiescence for drone strikes on its territory.²⁴

Drone Strikes Launched from Kandahar Air Base in Afghanistan

17. Until 2011, the drones carrying out the strikes in FATA were launched from both Afghanistan (Jalalabad Airfield and Kandahar Air Base) and Pakistan (Shamsi Air Base).²⁵ In August 2009, the New York Times reported: “Officials said the CIA now conducted most of its Predator missile and bomb strikes on targets in the

[air-space-will-be-shot-down](#) [Vol I, Annex IV, 1-3].

- 21 Salman Masood and Declan Walsh, New York Times, Pakistan Gives U.S. a set of Demands, Including an End to C.I.A. Drone Strikes (12 April 2012) <http://www.nytimes.com/2012/04/13/world/asia/pakistan-demands-an-end-to-cia-drone-strikes.html> [Vol I, Annex IV, 4-6]
- 22 The Washington Examiner, Pakistan summons US envoy over drone strike, (8 June 2013) http://washingtonexaminer.com/pakistan-summons-us-envoy-over-drone-strike/article/feed/2105018?custom_click=rss [Vol I, Annex IV, 8-9]
- 23 Michael Lewis, ‘Guest Post: Pakistan’s official withdrawal of consent for drone strikes’, (October 2013) <http://opiniojuris.org/2013/06/10/guest-post-pakistans-official-withdrawal-of-consent-for-drone-strikes/> [Vol I, Annex IV, 7].
- 24 Dawn News, ‘Never approved drone strikes, Pakistan tells UN’, (26 October 2013) <http://www.dawn.com/news/1052001/never-approved-drone-strikes-pakistan-tells-un> [Vol I, Annex IV, 10-12].
- 25 Micah Zenko and Emma Welch, ‘Where the Drones Are’, (29 May 2012; updated 6 February 2013), http://www.foreignpolicy.com/articles/2012/05/29/where_the_drones_are.

Afghanistan-Pakistan border region from the Jalalabad base, with drones landing or taking off almost hourly.”²⁶

18. Air Force and CIA personnel on the ground in both of these locations would handle the launch and recovery phase of the drones’ flight path, while pilots based at Creech Air Force Base in Nevada, US, would take over control of the weapon once it was airborne.²⁷ In December 2011, the Pakistan Government ordered the CIA to vacate Shamsi Air Base.²⁸ The US complied and, since then, the drones have been launched exclusively from Afghan soil.²⁹

Evidence of Locational Intelligence Sharing by the UK, Germany and other NATO Countries for Use in Drone Strikes

a. United Kingdom

19. There have been a number of reports in newspapers and other media outlets to the effect that the UK’s Government Communications Headquarters (“GCHQ”), the UK’s main intelligence and communication organisation, has been passing information to individuals or agencies acting on behalf of the US Government for the purpose of assisting drones attacks in Pakistan.³⁰ In particular, it has been reported that the

26 ‘CIA said to use outsiders to put bombs on drones’ (20 August 2009), http://www.nytimes.com/2009/08/21/us/21intel.html?_r=0.

27 Noah Schachtman, Wired, US Military Joins CIA’s Drone War in Pakistan (10 December 2009) <http://www.wired.com/dangerroom/2009/12/us-military-joins-cias-drone-war-in-pakistan/> [Vol I, Annex V, 4-6]

28 Salman Masood, New York Times, CIA Leaves Pakistan Base Used for Drone Strikes (11 December 2011) http://www.nytimes.com/2011/12/12/world/asia/cia-leaves-pakistan-base-used-for-drone-strikes.html?_r=2& [Vol I, Annex V, 7-8]

29 Micah Zenko, The Atlantic, What Happens if Afghanistan Shuts Down the U.S. Drone Program There? (9 April 2012) <http://www.theatlantic.com/international/archive/2012/04/what-happens-if-afghanistan-shuts-down-the-us-drone-program-there/255602/> [Vol I, Annex V, 9-11]

30 See, e.g., Top U.K. Spy Agency Aids in Controversial U.S. ‘Targeted Killings’, (Fox News, 25 July 2010), <http://www.foxnews.com/world/2010/07/25/uk-spy-agency-aids-controversial-targeted-killings/> [Vol I, Annex VI, 3-4]; David Leppard., GCHQ finds Al-Qaeda for American Strikes, (The Times, 25 July 2010) [Vol I, Annex VI, 1-2]; Gardham, D., Terror plot against Britain thwarted by drone strike, (The Telegraph, 28 September 2010), <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/8031570/Terror-plot-against-Britain-thwarted-by-drone-strike.html> [Vol I, Annex VI, 5-7]; Richard Norton-Taylor and Owen Bowcott, Mumbai-style raids on UK and France foiled by drone attacks: Germany was also target of militants in Pakistan Western intelligence agencies confirm plot fears, (The Guardian, 29 September 2010), <http://www.guardian.co.uk/world/2010/sep/29/terror-attack-plot-europe-foiled> [Vol I, Annex VI, 8-9]; Kathy Gannon, Pakistan: Dozens of Europeans in terror training, (Washington Post, 3 October 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/03/AR2010100302119.html> [Vol I, Annex VI, 10-11]; Press Trust of India, GCHQ identifies voice of Pak-based terrorists plotting attack, (The Deccan Herald, 3 October 2010), <http://www.deccanherald.com/content/101655/gchq-identifies-voice-pak-based.html> [Vol I, Annex VI,

UK uses telephone or other electronic interception to provide the US with “locational intelligence” about individuals of interest to the US; and that this intelligence is then used to direct drone attacks in Pakistan.

20. On 25 July 2010 *The Sunday Times* reported that:

“GCHQ, the top-secret communications agency, has used telephone intercepts to provide the Americans with ‘locational intelligence’ on leading militants in Afghanistan and Pakistan, an official briefed on its operations said. Insiders say GCHQ can provide more extensive and precise technical coverage in the region than its American sister organisation, the National Security Agency, because Britain has a better network of intercept stations in Asia. (...) GCHQ uses satellites and planes to collect and analyse the location of telephones used by militants. The Sunday Times have agreed not to disclose further details of these operations at the request of the agency. (...) Cheltenham-based GCHQ said it was proud of the work it did with America, which it said was in “strict accordance” with the law.”³¹

21. On the same date *Fox News* reported that:

“A top British spy agency uses its technology to pinpoint the hiding places of Al-Qaeda and Taliban chiefs for controversial ‘target killings’ by US drones. GCHQ, the top secret UK communications agency, has used telephone intercepts to provide the Americans with ‘locational intelligence’ on leading militants in Afghanistan and Pakistan, an official briefed on its operations said. Insiders says GCHQ can provide more extensive and precise technical coverage in the region than its sister American organisation, the National Security Agency, because Britain has a better network of intercept stations in Asia.(...) This weekend, GCHQ said it was proud of the work it did with America, which it said was in “strict accordance” with the law (...).”³²

22. On 3 October 2010 the *Deccan Herald*, an English-language daily newspaper

12]; GCHQ team helps foil Mumbai-style terror attack on London, (This is Gloucestershire, 4 October 2010), <http://www.thisisgloucestershire.co.uk/news/GCHQ-team-helps-foil-Mumbai-style-terror-attack-London/article-2716460-detail/article.html> [Vol I, Annex VI, 13-14]; Richard Norton-Taylor and Simon Tisdall, Briton killed by US drone ‘had wanted to attack UK’, (The Guardian, 7 October 2010), <http://www.guardian.co.uk/world/2010/oct/06/abdul-jabbar-terror-attack-plans> [Vol I, Annex VI, 15-16]; Mir, A., British Islamic Army hit hard by drones, (The News, 20 December 2010), <http://www.thenews.com.pk/TodaysPrintDetail.aspx?ID=21242&Cat=2>.

31 David Leppard, GCHQ finds Al-Qaeda for American Strikes, (The Sunday Times, 25 July 2010) [Vol I, Annex VI, 1-2].

32 Top U.K. Spy Agency Aids in Controversial U.S. ‘Targeted Killings’, (Fox News, 25 July 2010), available at <http://www.foxnews.com/world/2010/07/25/uk-spy-agency-aids-controversial-targeted-killings/>; [Vol I, Annex VI, 3-4].

published in India, reported that:

“UK’s top communication and intelligence agency has identified some of the Pakistan-based terrorists who were plotting a Mumbai-style attack on London by matching their voices against a secret database... ‘GCHQ is doing a lot of significant work in spotting these guys and helping the Americans deliver the drone kills’ said a source with knowledge of the agency’s work. An important aspect of this work is the analysis of voice prints, a technique that can identify a voice speaking on a telephone in Afghanistan or Pakistan by matching it against a databank of suspects held by GCHQ.”³³

23. More recently, in June 2013, leaks from Edward Snowden showed that GCHQ, through a programme called Tempora, was giving the US National Security Agency largely unrestricted access to its intelligence.³⁴ Four months later, in October 2013, another leak, again by Edward Snowden, revealed that the NSA was intimately involved in the CIA’s targeted killing programme in Pakistan.³⁵

b. Germany

24. There are several pending cases and investigations in Germany that revolve around Germans killed and/or injured in US drone strikes in Pakistan. All of these cases involve potential German intelligence sharing. Most prominent among these is a US drone strike on 4 October 2010 that killed several German citizens. German links to the strike forced the Government to announce in May 2011 that it would limit the type of information it shared with the US.³⁶
25. Despite this, reports about German intelligence sharing for strikes continue to emerge. In a report released in October 2013, Amnesty International accused the German Government of continuing to provide intelligence to the US for use in drone strikes in Pakistan. According to information provided to the organisation by retired Pakistani

33 Press Trust of India, GCHQ identifies voice of Pak-based terrorists plotting attack, (The Deccan Herald, 3 October 2010), available at <http://www.deccanherald.com/content/101655/gchq-identifies-voice-pak-based.html> [Vol I, Annex VI, 12];

34 Ewen MacAskill et al, The Guardian, The legal loopholes that allow GCHQ to spy on the world (21 June 2013), <http://www.theguardian.com/uk/2013/jun/21/legal-loopholes-gchq-spy-world> [Vol I, Annex VI, 22-25].

35 Greg Miller, Julie Tate and Barton Gellman, Washington Post, Documents reveal NSA’s extensive involvement in targeted killing program (17 October 2013), http://www.washingtonpost.com/world/national-security/documents-reveal-nasas-extensive-involvement-in-targeted-killing-program/2013/10/16/29775278-3674-11e3-8a0e-4e2cf80831fc_story.html [Vol I, Annex VI, 28-31].

36 Holger Stark, Der Spiegel, Drone Killing Debate: Germany Limits Information Exchange with US Intelligence (17 May 2011), <http://www.spiegel.de/international/germany/drone-killing-debate-germany-limits-information-exchange-with-us-intelligence-a-762873.html> [Vol I, Annex VI, 17-19].

intelligence officials, relating to 2012 and 2013, “secret services in Germany and in other European states have worked together with the USA and its drone program in Pakistan”.³⁷ This assistance included a variety of data, including the mobile phone numbers of victims.

26. In June 2013, reports also emerged that the US was using German military bases to conduct attacks and targeted killings and that the United States Africa Command (AFRICOM), based in Stuttgart, and the US Air Force base Ramstein, “play a substantial role[...] in the drone war.”³⁸

c. Australia

27. In July 2013, it was revealed that the Australian base Pine Gap plays a key role in US drone strikes in Pakistan. An operator explained Pine Gap’s role as one of providing locational intelligence to the US:³⁹

“The [Taliban] know we’re listening, but they still have to use radios and phones to conduct their operations, they can’t avoid that. We track them, we combine the signals intelligence with imagery, and once we’ve passed the geolocation intell[igence] on, our job is done. When drones do their job we don’t need to track that target any more.”

28. Another official told the newspaper:

“The US will never fight another war in the eastern hemisphere without the direct involvement of Pine Gap,”.

Evidence of Psychological Harm

29. Drones are not only being used to target individuals, they are also being used for constant and persistent surveillance of FATA. The constant surveillance – and resulting buzzing noise reported by people in the area – coupled with the intermittent firing of missiles, is causing psychological harm to entire communities. Communities living beneath the drones can hear their constant buzzing and see them in the air. Because they do not know who is being targeted and why, the drones audible (and sometimes visible) omnipresence has a devastating impact on communities.

37 The Local, Germany helped US with ‘illegal’ drone attacks (22 October 2013), <http://www.thelocal.de/20131022/52515> [Vol I, Annex VI, 32-33].

38 Markus Lutticke, Deutsche Welle, Germany shies away from comment on possible role in US drone war (1 June 2013) <http://www.dw.de/germany-shies-away-from-comment-on-possible-role-in-us-drone-war/a-16852606> [Vol I, Annex VI, 20-21].

39 Philip Dorling, Sydney Morning Herald, Pine Gap drives US drone kills (21 July 2013) <http://www.smh.com.au/national/pine-gap-drives-us-drone-kills-20130720-2qbsa.html> [Vol I, Annex VI, 26-27].

30. A recent report by Stanford and New York Universities reported that the constant threat of death hovering overhead was causing widespread post-traumatic stress disorder, as well as 'anticipatory anxiety', where another attack is believed always to be imminent, thus creating a collective fear that never leaves.⁴⁰
31. The report found the drones were having a devastating impact on social relations within communities, as people feared gathering in large groups would attract the hovering drones. Individuals interviewed for the study reported being afraid to go outside of their homes and that children had stopped going to school, for fear the school would be attacked.
32. Agence France-Presse reported similar findings of terror caused by the buzzing noise of patrolling drones. As well as harrowing flashbacks and nightmares, an AFP study found high levels of depression and anxiety. The estimate of a local doctor is that mental illness has tripled in the recent years with instances of psychosis, paranoia and delusions commonly presenting.⁴¹
33. Similar findings have been reported in Yemen. In February 2013, clinical psychologist, Dr. Peter Schaapveld, reported findings from his study in Yemen to an all-party parliamentary committee.⁴² He described 'hollowed-out shells of children' and the example of nightmares and daily vomiting suffered by an eight-year-old girl.
34. A former White House counterterrorism official told the New Yorker that the C.I.A. has so many drones flying over Pakistan, scouting for targets, that arguments have erupted over which remote operators can claim which targets, provoking "command-and-control issues."⁴³

40 Stanford Law School and New York University, Living Under Drones: Death Injury and Trauma to Civilians From US Drone Practices in Pakistan (September 2012) 80-87 www.livingunderdrones.org [Vol II, Tab B, 122-129]

41 The Express Tribune, Depression, anxiety and war take toll in Pakistan's tribal belt (7 April 2013) <http://tribune.com.pk/story/532330/depression-anxiety-and-war-take-toll-in-pakistans-tribal-belt/> [Vol I, Annex VII, 4]

42 Channel 4 News, Drone attacks 'traumatising a generation of children' (5 March 2013) <http://www.channel4.com/news/drone-attacks-traumatising-a-generation-of-children> [Vol I, Annex VII, 1-3]

43 See generally Jane Mayer, The New Yorker, The Predator War (26 October 2009), http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer. [Vol II, Tab C, 1-4].

3. LEGAL SUBMISSIONS

Introduction

1. As the evidence set out in the present communication illustrates, the use of force in Pakistan by United States forces launching drones from bases in Afghanistan raises serious issues of potential criminality under the Rome Statute, requiring investigation by the Office of the Prosecutor. It is estimated that in the period between 2004 and 2013, between 2,537 and 3,646 people have been killed in Pakistan by drone strikes.⁴⁴ Between 1, 128 and 1,557 civilians have been injured. Many of those killed have been children. Indeed, in a single incident on 30 October 2006, some 81 people were killed in a drone strike in a village at Chinagi, Tehsil Mamund, confirmed by the Pakistan Government as including 80 children and one adult male, all civilians not participating in hostilities **[Vol I, Annex III, 1]**, on the Pakistan Government's own assessment.
2. There is, therefore, a significant body of evidence, from official sources, NGOs and investigative journalists, taken together with primary evidence from victims and witnesses (as indicated illustratively in these submissions) demonstrating that there is a reasonable basis for concluding that crimes of the utmost gravity within the jurisdiction of the Court may have been committed.
3. The obligation on the Prosecutor to initiate an investigation having "evaluated the information made available to him or her" is mandatory, "unless he or she determines that there is no reasonable basis to proceed under this Statute", under Article 53 (1) of the Statute, having regard to material jurisdiction, admissibility, gravity and the interests of justice. In the circumstances outlined herein, given the evidence before the Prosecutor, Article 53 requires that an investigation be initiated. In this regard, as further explained below, the Complainants note with concern the approach of OTP's 2013 Report on Preliminary Examination Activities ("the 2013 Report"), where the Prosecutor concludes that there will be no formal investigation into civilian deaths caused by air-strikes launched by pro-government forces, on the basis that the "information available" does not provide a reasonable basis for concluding that a crime under Article 8(2)(e)(i) had been committed. The Complaints submit that this approach in assessing the need for an investigation is in error. The Prosecutor's reliance on "the information available" in reaching conclusions, as set out in paragraph 48 of the OTP's 2013 Report, is a matter of great concern in the present context. The availability of information alone should not be a reason for refusing further investigation. Allowance can and should be made for the real prospect of further information becoming available through proper investigation, particularly in circumstances where it is difficult, if not impossible, for those submitting information

⁴⁴ See Bureau of Investigative Journalism, Casualty Estimates [Vol 1, Annex II] Government of Pakistan, List of Casualties in Pakistan [Vol 1, Annex III].

to the Prosecutor to obtain such evidence from the relevant authorities, whose cooperation has not been forthcoming.

For the avoidance of doubt, it is submitted that the Prosecutor should consider this complaint in the context of the preliminary assessment already being carried out in relation to the situation in Afghanistan. The Complainants are firmly of the view that a failure to include examination of the issues pertaining to drones in the preliminary assessment as to whether a formal investigation needs to be opened into the situation in Afghanistan would be a grave error on the part of the Prosecutor. As set out below, the ICC has jurisdiction over drone strikes and there are significant grounds for believing that drone strikes in Pakistan, launched from Afghanistan, may have involved commission of some of the gravest crimes within the Court's jurisdiction. Substantial evidence for this is set out in this communication. Failure to investigate these allegations and evidence would, in the circumstances, risk compromising the efficacy and fairness of the Afghan overall investigation.

Summary of Submissions

4. In particular, the Complainants submit that:

- (i) first, the Court has jurisdiction in respect of the subject matter of the present complaint under Article 12 (2) of the Rome Statute on the grounds that:
 - i. the "State on the territory of which the conduct occurred" is a State Party to the Rome Statute (in particular, the fact that a significant number of the drone strikes were launched from Afghanistan gives rise to subjective territorial jurisdiction under the Statute); and/or
 - ii. perpetrators of crimes resulting from conduct subject of the present complaint are, or may be, nationals of State Parties to the Rome Statute (including perpetrators by means of secondary participation in accordance with Article 25 (3) of the Statute. This includes nationals of Afghanistan as well as certain NATO Member States, which provide material assistance in the conduct of drone strikes);
- (ii) second, Pakistan does not consent to the use of force within its territory by means of drone strikes, as indicated not least by the public pronouncements of its officials, public servants and representatives both domestically and before international fora. Pakistan has on many occasions described such military action as a violation of its sovereignty. In these circumstances, the use of force by UAVs in its territory, including the killing and injury of persons and the damage of property, can, on one view, be assessed by the laws of international

armed conflict;

- (iii) third and, alternatively, on another view, even if Pakistan has, or may have, consented at some or all times material to the use of force in its territory by UAV's launched from Afghanistan, such use of force is, in any event, to be judged by the laws of non-international armed conflict. The evidence indicates that many of the drone strikes have killed and injured those who were not, on any view, directly participating in hostilities, or on targets which were not military objectives. Thus, in the words of Article 53, that is a "reasonable basis to conclude" that these incidents amounted to crimes within the jurisdiction of the Court; and
- (iv) fourth, evidence submitted with this application including statistical evidence regarding the number of Drone strikes which have killed exclusively or disproportionately those "not directly participating in hostilities", together with case studies relating to those killed or injured in illustrative individual attacks, provides a reasonable basis to believe that drone strikes may have involved the commission of crimes within the jurisdiction of the Court placing the Prosecutor under an obligation to investigate such crimes under Article 53 of the Statute; and

5. In short, there is reasonable basis for concluding that:

- (i) the Court has jurisdiction over the subject matter of this complaint;
- (ii) the complaints are admissible;
- (iii) the deaths, injury and damage caused by drone strikes are of such gravity as to justify investigation by the Prosecutor; and
- (iv) it is firmly in the interests of justice that, if crimes have, or may have, been committed, they be prosecuted. In these circumstances the OTP must ensure that these crimes are investigated in accordance with Article 53 of the Statute.

Summary of Steps Sought by OTP

6. The Complainants request that the OTP takes the following steps:

- (i) Prior to making any final decision in respect of their application, the Prosecutor ensure that the Complainants have the opportunity to provide submissions, in particular on the question of jurisdiction, in the same manner as that afforded in respect of the preliminary examination of the situation in the Occupied Palestinian Territories.
- (ii) Further, the victims of drone strikes request opportunity to provide written

and/or oral testimony to the Prosecutor at the seat of the Court, in accordance with Article 15 (2) of the Statute, to ensure the requirements of natural justice are satisfied in dealing with their communication and in view of the fact that they have had no opportunity to give such evidence before any other legal or judicial fora, national or international.

- (iii) In analysing the seriousness of the information received, it is respectfully requested that the Prosecutor seek additional information from the United States, United Kingdom, Afghanistan, Pakistan, NATO and intergovernmental and non-governmental organisations and other reliable sources in accordance with Article 15 (2) of the Statute.
- (iv) Before determining the question of territorial jurisdiction (a matter of great importance to the overall jurisdiction of the Court) the Prosecutor request a ruling from the Court on this question in accordance with Article 19 (3), of the Statute.
- (v) Initiate an investigation of the facts surrounding this communication in accordance with Article 51 (1) of the Statute.

Each of these steps is of great importance to the Complainants, who have all suffered great personal loss, including serious injury and disfigurement, the loss of close family members and deep psychological trauma. They have not had the opportunity to challenge the conduct complained of in any legal fora, domestic or international. The opportunity to be heard is of critical importance to them, the value of which cannot be underestimated.

JURISDICTION ON GROUNDS OF NATIONALITY AND TERRITORIALITY

- 7. The Court's jurisdiction over the crimes committed as a result of drone strikes in Pakistan arises in two ways. The first is (subjective) territorial jurisdiction on grounds that the attacks were launched from a State Party (e.g. Afghanistan), while the second is nationality (on grounds that there is a reasonable basis for concluding that the nationals of States Parties to the Rome Statute may have participated in crimes under the Statute.

A. Territoriality

- 8. Although Pakistan is not a State Party to the Rome Statute, the Court has jurisdiction in respect of the drone strikes in Pakistan under Article 12 (2) (a) of the Statute, where attacks are launched from the territory of a State Party.
- 9. Publicly available and uncontested information demonstrates that drone strikes in Pakistan are now launched exclusively from either Jalalabad Air Base and/or Kandahar Airbase in Afghanistan, which has been a State Party to the Rome Statute since 10 February 2003 . Until 2011, the drones carrying out the strikes in Pakistan were launched from both Jalalabad Air Base in Afghanistan and Shamsi Air Base

in Pakistan. US Air Force and Central Intelligence Agency (CIA) personnel on the ground in both of these locations would handle the launch and recovery phase of the drone's flight path, while pilots based at Creech Air Force Base in Nevada would take over control of the weapon once it was airborne.⁴⁵ In December 2011, the Pakistan Government ordered the CIA to vacate Shamsi Air Base.⁴⁶ The US complied and since then, the drones have been launched exclusively from Afghan soil.⁴⁷ Many of the attacks occurring prior to December 2011 were therefore launched from the territory of a State Party to the Statute and all attacks subsequent to this date have been launched from such territory. Owing to the lack of an effective investigation to date, the Complainants are unable to establish with certainty, at the present time, whether all of the incidents believed to amount to a crime within the jurisdiction of the Court identified herein were launched from Afghan territory. However, the extensive use made of Jalalabad Airbase in such attacks gives rise to a reasonable basis for believing that the conduct prior to December 2011 falls within the jurisdiction of the Court. Since 2011, there can be no doubt that all attacks fall within the territorial jurisdiction of the Court.

10. On the question of territorial jurisdiction, according to Article 12 (2) (a) of the Rome Statute, the Court may exercise jurisdiction under the Statute where “[t]he State on the territory of which the conduct in question occurred” is a State Party to the Statute. This confers territorial jurisdiction upon the Court. It goes almost without saying that the question of the nationality of a perpetrator is irrelevant to the territorial jurisdiction of the Court. States are entitled to prosecute foreign nationals who commit crimes within their territory.⁴⁸ The fact that some of those involved in organizing or conducting drone strikes, are not nationals of a State Party to the Rome Statute does not, in any way, preclude the Court from exercising jurisdiction.⁴⁹
11. Second, it is also long established that territorial jurisdiction does not (and could not sensibly) apply only to crimes occurring wholly within the State in relation to which territorial jurisdiction is said to arise. This point is obvious. For instance, jurisdiction

45 Noah Schachtman, ‘US Military Joins CIA’s Drone War in Pakistan’, *Wired* (10 December 2009) <http://www.wired.com/dangerroom/2009/12/us-military-joins-cias-drone-war-in-pakistan/> [Vol I Annex V, 4-6]

46 Salman Masood, *New York Times*, C.I.A. Leaves Base in Pakistan Used for Drone Strikes (11 December 2011), http://www.nytimes.com/2011/12/12/world/asia/cia-leaves-pakistan-base-used-for-drone-strikes.html?_r=2& [Vol I Annex V, 7-8]

47 Micah Zenko, *The Atlantic*, What Happens if Afghanistan Shuts Down the U.S. Drone Program there? (9 April 2012) <http://www.theatlantic.com/international/archive/2012/04/what-happens-if-afghanistan-shuts-down-the-us-drone-program-there/255602/> [Vol I Annex V, 9-11]

48 *Holmes v. Bangladeshi Binani Corporation* [1989] 1 AC 1112, 113; 87 ILR pp. 365, 380-381; *Ex parte Pinochet* (No. 3), [2000] 1 AC 147, 188; 119 ILR, p. 139, per Lords Griffiths and Browne-Wilkinson.

49 The question of the enforcement of the Court’s jurisdiction against nationals of non-state parties, does not arise at the present time and is not specifically addressed in these submissions.

to prosecute crimes involving secondary participation is not lost where one element of the crime occurs outside the territory of a State in which the effects of the crime occur (for instance, aiding and abetting a crime by supplying arms to perpetrators outside the territory of the State where they know a crime will be committed). The principle of subjective territorial jurisdiction entitles a State on whose territory an attack amounting to a crime was launched to exercise jurisdiction over that crime.⁵⁰ This is a long established and uncontroversial aspect of criminal territorial jurisdiction.

12. Further, the terms of the Statute itself support this interpretation of the territorial jurisdiction conferred upon the Court. Under Article 12 (2) (a) of the Rome Statute provides that the Court may exercise jurisdiction where “[t]he State on the territory of which the conduct in question occurred” is a State Party to the Statute. According to Article 31 of the Vienna Convention on the Law of Treaties “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. As regards the text of Article 12 (2) (a), there is no stipulation that all of the conduct must occur within the State Party to the Statute.
13. The context is also instructive. As part of the “context” of Article 12 (2) (a), the other provisions of the Statute must be taken into account. Article 25 sets out the circumstances in which individuals can incur criminal responsibility under the Statute, expressly recognizing different forms of secondary liability for crimes under international law including aiding and abetting a crime, ordering, soliciting or inducing a crime and joint criminal enterprise. There is, of course, no basis under the Statute to interpret Article 12(2)(a) as requiring that each and every element of the conduct comprising the crime must be committed within the territory of a State Party. Many crimes will involve conduct occurring partly in the territory of a State Party and partly outside it. Were liability to be precluded by reason of this perpetrators of many crimes would readily avoid the jurisdiction of the Court. Such an interpretation would fatally undermine the entire concept of individual criminal responsibility set out in Article 25 of the Statute and is therefore unsustainable.
14. Thus, given that drone strikes are launched from the territory of a State Party to the International Criminal Court (Afghanistan), killing and injuring citizens in Pakistan, the Court has territorial jurisdiction over any crimes committed in the course of such military action.

B. Nationality

15. There is a reasonable basis to believe that nationals of State Parties to the Rome

⁵⁰ The S.S Lotus Case (France v. Turkey), PCIJ, Series A, No. 10, 1927, pp. 23, 30; 4 AD, pp. 153-159; DPP v. Doot [1973] AC 807, 817; 57 ILR, pp. 117-119; Strassheim v. Daley 221 US 280 (1911); US v. Colombia-Colella 604 F. 2d 356 and US v. Perez-Herrera 610 F.2d 289.

Statute may have participated in drone strikes in Pakistan amounting to crimes within the jurisdiction of the Court. There have been reports in newspapers and other media outlets to the effect that personnel in the United Kingdom's GCHQ has been passing information to individuals or agencies acting on behalf of the US Government for the purpose of assisting drones attacks in Pakistan.⁵¹ In particular, it has been reported, on the basis of information from "an official briefed on [GCHQ's] operations", that the UK uses telephone or other electronic interception to provide the US with "locational intelligence" about individuals of interest to the US; and that this intelligence is then used to direct drone attacks in Pakistan. Other reports in the media confirm that GCHQ is passing intelligence to US forces to assist in targeted killings through drone strikes, in outlets including UK national newspapers *The Sunday Times*⁵² and *The Guardian*⁵³ and the US's *The Washington Post*.⁵⁴

16. Whilst it is accepted that the killing of militants does not necessarily amount to a

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- 51 See, e.g., Top U.K. Spy Agency Aids in Controversial U.S. 'Targeted Killings', (Fox News, 25 July 2010), <http://www.foxnews.com/world/2010/07/25/uk-spy-agency-aids-controversial-targeted-killings/>; [Vol I, Annex VI, 3-4] David Leppard, GCHQ finds Al-Qaeda for American Strikes, (The Times, 25 July 2010); [Vol I, Annex VI, 1-2] Gardham, D., Terror plot against Britain thwarted by drone strike, (The Telegraph, 28 September 2010), <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/8031570/Terror-plot-against-Britain-thwarted-by-drone-strike.html> [Vol I, Annex VI, 5-7]; North-Taylor, R. and Bowcott, O., Mumbai-style raids on UK and France foiled by drone attacks: Germany was also target of militants in Pakistan Western intelligence agencies confirm plot fears, (The Guardian, 29 September 2010), <http://www.guardian.co.uk/world/2010/sep/29/terror-attack-plot-europe-foiled> [Vol I, Annex VI, 8-9]; Gannon, K., Pakistan: Dozens of Europeans in terror training, (Washington Post, 3 October 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/03/AR2010100302119.html> [Vol I, Annex VI, 10-11] ; Press Trust of India, GCHQ identifies voice of Pak-based terrorists plotting attack, (The Deccan Herald, 3 October 2010), <http://www.deccanherald.com/content/101655/gchq-identifies-voice-pak-based.html> [Vol I, Annex VI, 12] ; GCHQ team helps foil Mumbai-style terror attack on London, (This is Gloucestershire, 4 October 2010), <http://www.thisisgloucestershire.co.uk/news/GCHQ-team-helps-foil-Mumbai-style-terror-attack-London/article-2716460-detail/article.html> [Vol I, Annex VI, 13-14]; Norton-Taylor, R. and Tisdall, S., Briton killed by US drone 'had wanted to attack UK', (The Guardian, 7 October 2010), <http://www.guardian.co.uk/world/2010/oct/06/abdul-jabbar-terror-attack-plans> [Vol I, Annex VI, 15-16] ; Mir, A., British Islamic Army hit hard by drones, (The News, 20 December 2010), <http://www.thenews.com.pk/TodaysPrintDetail.aspx?ID=21242&Cat=2>.
- 52 David Leppard, GCHQ finds Al-Qaeda for American Strikes, (The Sunday Times, 25 July 2010), [Vol I, Annex VI, 1-2].
- 53 Ewen MacAskill et al, The Guardian, The legal loopholes that allow GCHQ to spy on the world (21 June 2013), <http://www.theguardian.com/uk/2013/jun/21/legal-loopholes-gchq-spy-world>, [Vol I, Annex VI, 22-25] .
- 54 Greg Miller, Julie Tate and Barton Gellman, Washington Post, Documents reveal NSA's extensive involvement in targeted killing program (17 October 2013), http://www.washingtonpost.com/world/national-security/documents-reveal-nsas-extensive-involvement-in-targeted-killing-program/2013/10/16/29775278-3674-11e3-8a0e-4e2cf80831fc_story.html, [Vol I, Annex VI, 28-31].

crime within the jurisdiction of the Court, the killing of such persons will amount to a crime within the jurisdiction of the Court where they are not “actively participating in hostilities”. As set out elsewhere in these submissions, there is almost no indication that those killed in drone strikes were actively participating in hostilities at the time of their deaths. Many of the killings took place with air strikes on homes, when families were going about routine activities (preparing meals, washing or sitting together). Furthermore, even in those instances in which militants may have been killed, a number of well publicized practices appear to have been employed regularly, which would amount to crimes within the jurisdiction of the Court, namely (i) secondary attacks in which rescuers have been killed; and (ii) very high numbers of civilian casualties indicative of disproportionate killing of civilians in such attacks. These practices have been the subject of considerable publicity, providing reasonable grounds for concluding that persons supplying intelligence must have known that the information they supply may be used in furtherance of crimes within the jurisdiction of the Court in the ordinary course of events, such as to establish the requisite mens rea.⁵⁵

C. Admissibility: Gravity, Complementarity and Interests of Justice

(I) Gravity

17. On any view, the nature, scale and impact of crimes in which there are reasonable grounds to believe drone strikes involved (stretching back over almost a decade) leaves no doubt that the conduct in question is of sufficient gravity to fall within the Court’s jurisdiction as a matter of principle. The Pakistan Government’s own assessment of the impact of drone strikes indicates that in many instances they appear to have killed exclusively civilians and that, where militants have been killed, numerous civilians have also often been killed and civilian property destroyed. In the period between 2004 and 2013, an estimated 2,537 and 3,646 people have been killed in Pakistan by drone strikes,⁵⁶ and between 1,128 and 1,557 civilians have

55 By way of a few examples see: Tara McKelvey, BBC News, ‘Drones Kill Rescuers in Double Tap Say Activists’ (22 October 2013) <http://www.bbc.co.uk/news/world-us-canada-24557333> [Vol II, Tab C, 96-97]; Jerome Taylor, The Independent, ‘Outrage at CIA’s Deadly double tap drone strike’ (25 September 2012) <http://www.independent.co.uk/news/world/asia/outrage-at-cias-deadly-double-tap-drone-attacks-8168232.html> [Vol II, Tab C, 71-73]; Leon Watson, ‘America’s deadly double tap drone attacks are ‘killing 49 people for every known terrorist in Pakistan’ (25 September 2012) <http://www.dailymail.co.uk/news/article-2208307/Americas-deadly-double-tap-drone-attacks-killing-49-people-known-terrorist-Pakistan.html> [Vol II, Tab C, 74-78]; Salman Masood and Declan Walsh, New York Times, Pakistan Gives U.S. a set of Demands, Including an End to C.I.A. Drone Strikes (12 April 2012) <http://www.nytimes.com/2013/10/22/world/asia/civilian-deaths-in-drone-strikes-cited-in-report.html> [Vol I, Annex IV, 4-6]

56 See Bureau of Investigative Journalism, Casualty Estimates [Vol I, Annex II, 1]; Government of Pakistan, List of Casualties in Pakistan [Vol I, Annex III];

been injured. Many of those killed have been children. Indeed, in a single incident on 30 October 2006, some 81 people were killed in a drone strike in a village at Chinagi, Tehsil Mamund, confirmed by the Pakistan Government as including 80 children and one adult male, all civilians not participating in hostilities **[Vol I, Annex III, 1]**. It is beyond question that the nature and scale of this conduct is sufficiently grave and disproportionate to pass the gravity threshold.

(II) **Complementarity**

18. There are no national investigative or prosecutorial authorities willing or able to investigate or prosecute the conduct forming the subject-matter of the present complaint. As regards an investigation by the Afghan authorities, they are expressly precluded from exercising jurisdiction over any criminal conduct in respect of US forces by the US-Afghanistan Agreement regarding the status of United States military and civilian personnel of the U.S. Department of Defense present in Afghanistan in connection with cooperative efforts in response to terrorism, humanitarian and civic assistance, military training and exercises and other activities.⁵⁷ As regards the possibility of an investigation in Pakistan of US personnel, Pakistani authorities have consistently made clear that the United States has been unwilling to cooperate with any efforts it has sought to make to obtain more information regarding the circumstances of drone strikes.
19. On 11 April 2013, the Peshawar High Court issued a mandatory order to Pakistani authorities requiring a series of steps to be taken to stop the drone strikes, including formally taking the matter before the General Assembly of the UN, ensuring the US compensate victims and to seek UN support for the establishment of an independent war crimes tribunal to consider the matter. None of these steps have been taken to date and contempt proceedings have been initiated in Pakistan to seek to require the Pakistani authorities to implement the order of the Court.
20. As matters presently stand, there is no prospect of any national authority investigating, much less prosecuting, crimes associated with drone strikes. The Afghan authorities cannot lawfully do so because of the Status of Forces Agreement with the United States. Pakistan has shown itself unable to obtain cooperation from the United States to investigate drone strikes and, in any event, unwilling to do so or even to implement, in whole or part, the decision of its own High Court. The only institution therefore capable of investigating these drone strikes, which have killed and injured thousands of Pakistani citizens over the last ten years, is the Court. The Court is the

⁵⁷ Treaties and other International Acts Series (T.I.A.S.) Agreement effected by exchange of notes at Kabul September 26 and December 12, 2002 and May 28, 2003, and entered into force May 28, 2003. See also International Criminal Court: Article 98 Agreement between the United States and Afghanistan, signed at Washington September 20, Entered into Force August 23, 2003 <http://www.state.gov/documents/organization/183325.pdf>. [Vol II, Tab A, 1-7]

last court or institution to which the families of those civilians killed and injured by such strikes can turn.

(III) **Interests of Justice**

21. Where crimes of sufficient gravity that fall within the jurisdiction of the Court have occurred and where national authorities are unwilling or unable to investigate such crimes, it will only be in exceptional circumstances that the interests of justice would militate against investigation of such crimes. No such circumstances exist in the present case. Those killed or injured in incidents forming the subject matter of the present complaint have suffered enormous physical and psychological trauma from which, in many cases, they will never fully heal. Where such harm may be a consequence of violation of fundamental norms of international criminal law, the case for investigation is overwhelming. Furthermore, the frequency and intensity of strikes suggest that the significance of the subject matter of the complaint is neither historical nor of decreasing significance. Drones are being purchased by and deployed in a wide range of countries, including those where there is no declared war. Those deploying drones actively rely on the perceived legal ambiguities surrounding the use of drones in Pakistan. If the status quo is maintained the lives and wellbeing of thousands of civilians, in Pakistan (and elsewhere) is placed at risk. The interests of justice therefore strongly favour investigation and, if appropriate, prosecution.

Crimes within the jurisdiction of the court

22. There exists significant evidence that drone strikes in Pakistan involve conduct amounting to crimes within the jurisdiction of the Court. The Complainants have compiled evidence including witness statements from victims and eye-witnesses demonstrating that very often many of the drone strikes have killed persons who could not, on any view, be said to be actively participating in hostilities at the time of their death. Many strikes have killed overwhelmingly (or even exclusively) civilians engaged in everyday activities, such as travelling to a market, attending a community meeting or attending school, providing grounds to believe that such strikes have resulted in the disproportionate loss of civilian life contrary to Article 8 (2) (b) (iv) of the Statute (on the assumption that the rules of international armed conflict are applicable). There is also evidence that drone strikes have been directed against establishments dedicated to education and religion. Finally, a great deal of evidence exists as to the psychological impact of drone strikes in Pakistani territory and the suffering this has caused to the civilian population. Given the information publicly available in respect of drone strikes and information set out in this application, there is therefore a reasonable basis for believing that drone strikes may involve the commission of crimes within the jurisdiction of the Court.

The Rules of Armed Conflict Applicable to Drone Strikes

23. There is no question, given the nature, scale and number of drone strikes in

Pakistan, that such strikes occur as part of an “armed conflict” such as to trigger the material jurisdiction of the Court. This conclusion is all the more obvious given the clear nexus between the drone strikes in Pakistan and the ongoing conflict in Afghanistan. As the Trial Chamber observed in its judgment in *Prosecutor v. Lubanga* [at 533]:

An armed conflict exists whenever there is a resort to armed force between States or protracted violence between governmental authorities and organized armed groups or between such groups within a State.

24. Drone strikes within Pakistan have resulted in the deaths, on any account, of several thousand persons over the last decade. They have injured thousands more. A great deal of property has been destroyed. These attacks have been mounted on an almost weekly basis for a protracted period of years. There exists therefore no room for doubt that the intensity, nature and pattern of force involved in the campaign of drone strikes, as part of the wider Afghanistan situation, falls within the material jurisdiction of the Court.
25. The next question is whether the rules of international armed conflict (and crimes under the Statute operative therein) or the rules of non-international armed conflict apply to drone strikes. Two views of this are possible.
26. The US drone strikes, launched from Afghanistan into Pakistani territory, could be assessed by the rules of international armed conflict given the lack of consent for such conduct by the Pakistani authorities. However, even if drone strikes are to be assessed by the rules of non-international armed conflict, evidence submitted with this application demonstrates a reasonable basis to believe that grave crimes have been committed.
27. As regards an international armed conflict, the definition of an international armed conflict in customary international law is reflected and set out in Common Article 2 of the Four Geneva Conventions of 1949, which states:

The present Convention shall apply to all cases of declared war or of any other **armed conflict which may arise between two or more of the High Contracting Parties**, even if the state of war is not recognized by one of them.

28. As the International Committee of the Red Cross’s authoritative Commentary to the First Geneva Convention, makes clear, the scope of Article 2 is broad:

A State can always pretend, when it commits a hostile act against another State, that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence. The expression “armed conflict” makes such arguments less easy. **Any difference arising between two States**

and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims⁵⁸ (emphasis added).

29. The fact that Pakistan has not militarily resisted drone strikes is therefore irrelevant to the application of the laws of international armed conflict to the use of force which such military action involves. The central question as regards the applicability of the laws of international armed conflict concerns whether the armed action in question is with the consent of Pakistan.
30. Certainly from the end of 2011, it is clear that Pakistan has not consented to drone strikes within its territory. There is significant evidence for this. In December 2011, the Pakistan Government warned that US drones would be shot down if they entered Pakistani airspace.⁵⁹ In April 2012, the Parliament passed an almost unanimous resolution demanding an end to drone strikes. The resolution stated “no overt or covert operations inside Pakistan shall be permitted.” It also stated that the Parliament was the only body in the country with the authority to authorize drone strikes and that any existing agreements with respect to the drone strikes “shall cease to have effect forthwith.”⁶⁰
31. On 8 June 2013, following a drone strike that killed nine people the preceding day, Pakistan lodged a complaint of strong protest with the U.S.⁶¹ The US Chargé d’Affaires, Ambassador Richard Hoagland was handed a démarche, conveying the fact that that Pakistan condemns drone strikes as a violation of Pakistan’s sovereignty and territorial integrity. It emphasised the need to bring an immediate end to drone strikes. It stated that the Pakistan Government has consistently maintained that drone strikes are counterproductive, entail a loss of innocent civilian lives and have human rights and humanitarian implications.⁶² On 26 October 2013,

58 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, International Committee of the Red Cross, 1952, p.32 [Vol II, Tab B, 10].

59 NBC News, Pakistan says U.S. drones in its air space will be shot down (10 December 2011), <http://worldnews.nbcnews.com/news/2011/12/10/9352886-pakistan-says-us-drones-in-its-air-space-will-be-shot-down> [Vol I, Annex IV, 1-3].

60 Salman Masood and Declan Walsh, New York Times, Pakistan Gives U.S. a set of Demands, Including an End to C.I.A. Drone Strikes (12 April 2012) <http://www.nytimes.com/2012/04/13/world/asia/pakistan-demands-an-end-to-cia-drone-strikes.html> [Vol I, Annex IV, 4-6].

61 The Washington Examiner, Pakistan summons US envoy over drone strike, (8 June 2013) http://washingtonexaminer.com/pakistan-summons-us-envoy-over-drone-strike/article/feed/2105018?custom_click=rss [Vol I, Annex IV, 8-9].

62 Lewis, M, ‘Guest Post: Pakistan’s official withdrawal of consent for drone strikes’, (October 2013) <http://opiniojuris.org/2013/06/10/guest-post-pakistans-official-withdrawal-of-consent->

- the Pakistan Government told the United Nations General Assembly's Third (Social, Humanitarian and Cultural) Committee that it does not approve of drone strikes on its territory and, instead, that drone strikes which result in civilian casualties violate international law. The notion that Pakistan has given consent to carry out drone strikes was explicitly rejected, stating that the Government of Pakistan has never given explicit or implicit consent, approval or acquiescence for drone strikes on its territory.⁶³
32. In view of these facts, the repeated military intervention on Pakistani territory through drone strike, which includes attacks almost on a weekly basis, without the consent of the Pakistani authorities and in face of their opposition, must unquestionably fall to be assessed against the laws of international armed conflict and the rules of criminal liability applicable therein.
33. Even if, however, the Prosecutor takes the view that the drone strikes are not to be assessed by the rules of international armed conflict, the use of force implied by the campaign of drone strikes, with the many thousands of casualties inflicted, meets the threshold requirements for an armed conflict under international law rendering, at the very least, the law of non-international armed conflict applicable. As set out below, there is a reasonable basis for believing that the drone strikes have involved, in a significant number of instances, crimes under the law applicable in non-international armed conflict set out in Article 8 (2) of the Rome Statute.

Crimes within the Jurisdiction of the Court

34. The following summary sets out some of the central evidence of crimes within the jurisdiction of the Court in the possession of the Complainants. It does not purport to provide an exhaustive summary of all the evidence available in respect of each crime nor is it intended to set out exhaustively all those crimes under the Statute which may have arisen through drone strikes. It does, however, identify and summarize a substantial body of evidence which indicates a reasonable basis (indeed, in some instances, a very strong basis) for concluding, at this stage, that drone strikes have involved crimes within the jurisdiction of the Court.

A. Article 8 (2) (a) –(b): Crimes under the Law of International Armed Conflict

Article 8 (2) (b) (iv): Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall

[for-drone-strikes/](#) [Vol I, Annex IV, 7].

63 Dawn News, 'Never approved drone strikes, Pakistan tells UN', (26 June 2013) <http://www.dawn.com/news/1052001/never-approved-drone-strikes-pakistan-tells-un> [Vol I, Annex IV, 10-12]

military advantage anticipated;

35. There is a great deal of evidence that drone strikes have inflicted disproportionate death and injury upon civilians in Northern Pakistan. It is estimated that between 2,537 and 3,646 people have been killed in drone strikes between 2004 and 2014, including between 416 and 951 civilians,⁶⁴ indicating that, on even the most conservative estimate, between a fifth and a quarter of those killed in drone strikes are civilians. Moreover, substantial witness and documentary evidence indicates that, in a significant number of incidents, drone strikes have resulted in overwhelming civilian casualties, including a number of mass casualty strikes which have killed scores of people.
36. These propositions are supported by both official, internal Pakistan Government statistics on drone strikes, together with eye witness evidence. The Pakistan Government's statistics on drone strikes run from January 2006 through to September 2013. Many of the strikes recorded killed largely or exclusively civilians, including, for instance: 13 January 2006, recorded as killing 16, all civilians, including five children, five women and six men); 30 October 2006, recorded as killing 81 people, 80 of whom were children; 8 October 2009, recorded as killing 23, people including eight women, five children and seven men, all civilians.
37. There have also been a number of mass casualty drone strikes which have killed scores of civilians, in circumstances where the object of the attack (a seminary and a public gathering) was such that mass scale and disproportionate casualties were the inevitable result of a missile strike. As noted earlier, on 30 October 2006, an attack on a seminary killed 81 individuals, including 80 children, in Chingai village. These figures and the civilian status of all of those killed have been affirmed by the internal statistics prepared by the Pakistani officials. The scale of harm has also been affirmed by eye witnesses. A missile strike in these circumstances, with this number of casualties, raises a prima facie case, at the very least, of a crime under Article 8 (2) (b) (iv) and calls out for investigation.
38. Similarly, on 17 March 2011, there was a drone strike on a jirga (a tribal assembly of elders). The Pakistan Government records this strike as having killed 41 and notes that "it is feared that all [those] killed were local tribesmen". The scale of this strike and the number of casualties are confirmed by witness evidence gathered by the Complainants. The tribal meeting had been called to deal with an ongoing dispute over a local chromite mine. Those present were from a large number of local tribes as well as "khasadars" who are employed by the Pakistan Government to act as

64 Figures compiled by the Bureau of Investigative Journalism, available here: <http://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/> [Vol I, Annex II, 1, 8-11] with methodology set out here: <http://www.thebureauinvestigates.com/2011/08/10/pakistan-drone-strikes-the-methodology2/> [Vol I, Annex II, 2-7]

- local police. This was plainly a meeting at which very large numbers of civilians were present. Indeed, there is no evidence of any militant being present, much less being actively engaged in hostilities at the meeting. The missile strike left few survivors owing to the power of the blast [See Case Study 10, Vol I, Annex I]. Again, the circumstances of this missile strike, on a well attended civilian meeting, with no obvious military target, resulting in scores of fatalities (indeed, few survivors), calls out for investigation, since it raises prima facie evidence of a crime under Article 8 (2) (b) (iv).
39. In sum, there is substantial evidence, even at this stage, indicating that many drone strikes have resulted in disproportionate loss of civilian life. Indeed, a significant number of attacks appear to have been directed to civilian targets and killed exclusively civilians, even on the internal estimation of the Pakistan Government. All of this provides a reasonable basis for believing that a crime under Article 8 (2) (b) (iv) has been committed.

Article 8 (2) (b) (i) (General) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

40. The evidence before the Prosecutor raises serious concerns that drone strikes are being directed against civilians “not taking a direct part in hostilities”. As set out further below, many drones strikes have been directed against persons engaged in everyday activities (such as participating in a family gathering, travelling to a local market or school, or attending a community meeting). It is crucial to note that even if (which is not accepted) any person subject to a drone strike set out in one of the thirteen case studies submitted with this communication, assisted a militant group, he or she could not lawfully be subject to attack unless directly engaged in hostilities at the time of his or her killing. Given this crucial point and given the everyday activities in which those subjected to “targeted killings” by drone strikes were engaged at the time of their death, it is clear that a strong case exists that such strikes have, on a significant number of occasions, been directed at those not “taking a direct part in hostilities”.
41. According to the ICRC in its authoritative Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law⁶⁵ “[t]he notion of direct participation in hostilities refers to **specific acts** carried out by individuals as part of the conduct of hostilities between parties to an armed conflict”.⁶⁶ Further clarifying this, the ICRC notes that: “the notion of direct participation in hostilities **does not refer to a person’s status, function, or affiliation, but to his or her**

65 Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, (Geneva: ICRC; 2009) available at: <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> [Vol II, Tab B, 16-28]

66 Ibid. p. 41. [Vol II, Tab B, 21]

engagement in specific hostile acts” (emphasis added).⁶⁷ The Guidance also states:

It may be tempting to regard not only each hostile act as direct participation in hostilities, but even their continued intent to carry out unspecified hostile acts in the future. However, any extension of the concept of direct participation in hostilities beyond specific acts would blur the distinction made in IHL between temporary, activity-based loss of protection (due to direct participation in hostilities), and continuous, status or function based loss of protection (due to combatant status or continuous combat function).⁶⁸

42. The suggestion that individuals “directly participate in hostilities” simply by virtue of an affiliation with an armed group or because of occasional or sporadic support for such a group is therefore rejected. Indeed, it would clearly render the requirement of “direct” participation a dead letter. To become a legitimate military target, an individual must therefore engage in “specific hostile acts”.
43. In view of these requirements there is substantial evidence that many of those targeted and killed in drone strikes were not, on any view, “directly participating in hostilities” giving rise to a reasonable basis indicating that their killing amounted to a crime under Article 8 (2) (b) (i). For instance many of those killed in the specific instances summarized in the present submission, **were killed when at home with their families:** e.g. the attack on 9 October 2008, on a dwelling in Mirali, killing four and injuring one; 23 January 2009, seven family members were killed in an attack on a dwelling in Zairaki; 7 September 2009, four family members were killed when celebrating an Iftar (an opening of the fast during Ramadan) at their family home; 20 November 2009, attack on a dwelling killing three; 10 June 2010, attack on dwelling killing four; and the killing of 40-45 during the jirga on 17 March 2011.
44. As regards whether they have been “intentionally” attacked, Article 30(2) of the Rome Statute states that “a person has intent where: (a) [i]n relation to conduct, that person means to engage in the conduct; (b) [i]n relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events”. There is nothing to indicate that any of those killed on these occasions were involved in “specific hostile acts” as would be required in order to justify a military attack upon them. In these circumstances, there is a strong prima facie case that they were attacked, intentionally, in circumstances where it was known that there were not engaged in hostile acts at the time of their death.

67 Ibid. p. 44. [Vol II, Tab B, 24]

68 Ibid. p. 45. [Vol II, Tab B, 25]

45. Furthermore, the Complainants note with great concern paragraph 48 of the OTP's 2013 Report on Preliminary Examination Activities ("the 2013 Report"), where the Prosecutor states: "[t]he information available does not indicate that civilian deaths or injuries caused by air strikes launched by pro-government forces, as well as escalation-of-force incidents and "night raids", resulted from the intentional directing of attacks against the civilian population. Accordingly, the information available does not provide a reasonable basis to believe that the war crime of intentionally directing attacks against the civilian population as such or against individual civilians not taking part in hostilities pursuant to article 8(2)(e)(i) has been committed by pro-government forces"⁶⁹ (Emphasis added).
46. The Complaints submit that this approach in assessing the need for an investigation is in error. The Prosecutor's repeated reference to (and reliance on) "the information available" in reaching conclusions, as set out in paragraph 48 of the OTP's 2013 Report, is a matter of great concern. By its nature, information such as that contained in the accompanying documentation is not provided by guilty parties. It does not become available without painstaking investigations conducted in difficult and often dangerous circumstances. This alone should not therefore be a reason for refusing further investigation. Allowance can and should be made for the real prospect of further information **becoming available** through proper investigation.
47. The Complainants provide this fresh information in the expectation that the Prosecutor will continue to discharge her responsibility to seek information to determine whether there is a reasonable basis to believe that any violations of the Rome Statute may have been committed. They submit that the Prosecutor is obligated to conduct a full examination of the role of drones in targeting and killing individuals and groups of civilians not taking part in hostilities and in intentionally inflicting widespread and systematic psychological harm on the civilian population of large areas of Pakistan in violation of articles 8(2)(e)(i) and 8(2)(e)(iv).

Article 8 (2) (b) (i) (Attacks on Rescuers): Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

48. There is probative evidence that, on a number of occasions, an initial drone strike was followed by further strikes on the same location when a rescue operation was underway, thereby killing those seeking to provide medical assistance and relief to those killed or injured in the air strike. TBIJ, in conjunction with the Sunday Times, a national UK publication, conducted research into this phenomenon. With the aid of a Pakistani journalist in Peshawar, TBIJ spent four months working with independent researchers in Waziristan seeking to validate the reports. Villagers,

⁶⁹ The Office of the Prosecutor, "Report on Preliminary Examination Activities 2013" (November 2013) at paragraph 48 [Vol II, Tab B, 218]

militants and local officials have been questioned, and attempts made to identify those killed in the strikes.⁷⁰

49. The following table sets out, independently verified instances, where those rescuing persons injured and killed in drone strikes have themselves been subjected to attack.

Strike Date	Location	Bureau's Summary Findings
16/5/09	Khesoor North Waziristan	Attack confirmed. Nine civilian rescuers reported killed – six named as Sabir, Ikram, Mohib, Zahid, Mashal and Syed Noor , all from the Utmanzai Wazir tribe. Four Taliban rescuers also died.
18/6/09	Wana, South Waziristan	Attack confirmed. Four civilian rescuers reported killed, named as Jehanzeb, Liaqat, Daraz and Sabil . Three Taliban rescuers also died.
23/6/09	Miram Shah, North Waziristan	Attack confirmed. Between 18 and 45 civilians reported killed among up to 83 fatalities in strike on funeral.
17/12/09	Degan, North Waziristan	Attack confirmed. Six civilian rescuers reported killed, five named as Bashirullah, Amir Khan, Shairullah, Abidullah and Fazle Rabbi , all of the Dawar tribe.

⁷⁰ Further information on this investigation is available here: Chris Woods 'Drone Warfare - Get the data: Obama's terror drones' The Bureau of Investigative Journalism, 4 February 2012, <http://www.thebureauinvestigates.com/2012/02/04/get-the-data-obamas-terror-drones/> [Vol II, Tab C, 50-55]

18/12/09	Degan, North Waziristan	Attack confirmed. Five civilian funeral prayer-goers reported killed, four named as Syed Noor, Shakirullah, Banaras and Fayyaz .
6/1/10	Datta Khel North Waziristan	Attack confirmed. Five civilian rescuers reported killed, four named as Khalid, Matiullah, Kashif, Zaman and Waqar , all of the Utmanzai Wazir tribe. No Taliban rescuers were reported killed.
2/2/10	Pai Khel North Waziristan	Attack confirmed. Five civilian rescuers killed, named as Noor Janan, Farhad, Samad, Salam and Baseer . Four Taliban rescuers also died.
10/3/10	Datta Khel	Attack confirmed. Four civilian rescuers killed, named as Gulzar, Shamim, Majan and Sarwar . Two Taliban rescuers reported to have died.
16/4/10	Toor Khel North Waziristan	No confirmation. According to researchers no rescuers were killed.
15/9/10	Danda Darpakhel, North Waziristan	Attack confirmed. Five civilian rescuers of the Dawar tribe reported killed, named as Yahya, Samin, Niamatullah, Shahzad and Ilyas . Three Taliban rescuers also reported killed.
20/9/10	Darazinda North Waziristan	No confirmation – researchers could find no evidence of rescuers killed.

22/9/10	Azam Warsak, South Waziristan	Unconfirmed.
13/10/10	Datta Khel	Attack confirmed. Three civilian rescuers killed – named as Bashir, Wajid and Laiq – along with five Taliban rescuers.
28/12/10	Ghulam Khan, North Waziristan	Attack confirmed. Two civilian rescuers reported killed, named as Jamil and Mustafa . No Taliban rescuers were reported among the dead.
28/12/10	Ghulam Khan	Not an attack on rescuers or civilians, according to researchers. Only militants died.
1/1/11	Mandi Khel North Waziristan	No rescuers killed, according to researchers.
11/3/11	Khesoor	Attack confirmed. Five civilian rescuers reported killed, named as Noor Gul, Jaffar, Faraz, Musa and Kamal . Five Taliban rescuers also reported killed.
20/6/11	Khardand, Kurram Agency	Although all of those killed were reportedly civilians, no rescuers were targeted in the attack.
12/7/11	Dray Nashtar, North Waziristan	Although not reported at the time by media, researchers claim that four civilian rescuers – named as Shabbir, Kalam, Waqas and Bashir died in the attack.

50. Concerns about the policy of these so-called “double-tap” drone strikes have been

raised in the media on many occasions.⁷¹ The number and scale of these instances (together with the fact that the practice appears to have stopped in around July 2011, according to TBIJ's findings), gives rise to the inference that these attacks on rescuers may have been intentional, perhaps to ensure that those targets injured in the attacks in question did not survive. These circumstances call out for an investigation.

Article 8 (2) (a) (3): Wilfully causing great suffering, or serious injury to body or health;

51. These reports of the psychological impact of drones have been widely publicized. Those responsible for controlling and operating the drone programme are well aware of the impact it has had on the local population. In accordance with Article 30 (2) of the Statute those most responsible for the drones programme are aware that in the "ordinary course of events" drones will produce these kind of deleterious effects on the psychology of the local population, including children and, as such, there is a reasonable basis for concluding that the mens rea of the crime under Article 8 (2) (a) (3) has been established. A prima facie case therefore exists that the drone strikes may amount to a crime under Article 8 (2) (a) (3) of the Statute, a situation which calls out for investigation.

Article 8 (2) (b) (v): Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

52. Many of the drone strikes have involved attacks on ostensibly civilian objects including in particular family dwellings: e.g. the attack on 9 October 2008, on a dwelling in Mirali, killing four and injuring one; 23 January 2009, seven family members killed in an attack on a dwelling in Zairaki; 7 September 2009, four family members were killed when celebrating an Iftar (an opening of the fast during Ramadan) at their family home; 20 November 2009, attack on a dwelling killing three; 10 June 2010, attack on dwelling killing four.

53. The Pakistan Government's internal statistics on drone strikes confirms that these were civilian targets. There is no question that any of these sites was "defended" in any way, with weaponry or otherwise. Those in the dwellings at the time of the missile strikes were engaged in everyday activities such as sharing tea with

71 Tara McKelvey, BBC, Drones kill rescuers in 'double tap', say activists (22 October 2013) <http://www.bbc.co.uk/news/world-us-canada-24557333> [Vol II, Tab C, 96-97]; Jerome Taylor, The Independent, Outrage at CIA's deadly 'double tap' drone attacks (25 September 2012), <http://www.independent.co.uk/news/world/asia/outrage-at-cias-deadly-double-tap-drone-attacks-8168232.html> [Vol II, Tab C, 71-73]; Leon Watson, Daily Mail, America's deadly double tap drone attacks are 'killing 49 people for every known terrorist in Pakistan' (25 September 2012) <http://www.dailymail.co.uk/news/article-2208307/Americas-deadly-double-tap-drone-attacks-killing-49-people-known-terrorist-Pakistan.html> [Vol II, Tab C, 74-78].

other family members, having dinner or participating in a family gathering. These circumstances provide reasonable basis requiring an investigation as to whether a crime under Article 8 (2) (b) (v) has been committed.

Article 8 (2) (b) (9): Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

54. On a number of occasions drone strikes have targeted educational and religious buildings. These are self-evidently civilian buildings and can only be rendered subject to attack where they become military objectives. A number of these attacks, in particular the air strike on 30 October 2006, have resulted in very substantial loss of civilian life. As already noted, in this attack in the Chingai village, a seminary was destroyed killing 80 children and one adult, all civilians. With such a large number of children and young people in attendance these premises would clearly have been civilian buildings, on any view. There is no indication that these premises had or served any role other than education. As well as giving rise to clear issues regarding the legality of this attack on other grounds, on the basis of the evidence available, this attack plainly also requires investigation under Article 8 (2) (b) (9) of the Statute.

B. Article 8 (2), (c) – (f): Crimes under Law of Non-International Armed Conflict

Article 8 (2) (e) (i): Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

55. For the same reasons as set out above in relation to the crime under Article 8 (2) (b) (i), applicable in an international armed conflict, on the basis of the evidence before the Prosecutor, a prima facie case exists that those targeted in numerous drone strikes were not, on any view, actively participating in hostilities and could not lawfully therefore be subject to attack. It is submitted that the circumstances of these killings requires investigation by the Office of the Prosecutor.

56. In addition, the Complainants also submit that there is a reasonable basis to believe that, as set out above, the attacks on rescuers, in and of themselves, amount to violations of Article 8 (2) (e) (i).

Article 8 (2) (e) (4): Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

57. For the same reasons as those set out above in respect of Article 8 (2) (b) (9), an investigation is also require under Article 8 (2) (b) (4), if the drone strikes in Pakistan are treated as a non-international armed conflict.

CONCLUSION

58. Even on the basis of the evidence and information available at this preliminary stage, very serious concerns arise that drone strikes may have involved the commission of grave crimes falling within the jurisdiction of the Court. The available evidence provides a compelling case for an investigation in accordance with the Prosecutor's obligation under Article 53 of the Statute. These missile attacks have resulted in thousands of fatalities over the last decade. Many people who are, on any view, civilians going about their ordinary lives have been killed and injured by these missile strikes. Those who are not directly affected often suffer from the fear and terror caused by the constantly circling drones. Substantial evidence of the psychological trauma this causes to ordinary people, especially children, is available, and a matter of great concern. No court or judicial fora, domestic or international, has shown any willingness or ability to investigate these matters or even to properly hear those who suffer the effects of the drone strikes. The Court is now the only judicial institution to which these victims can turn. Without an investigation by the Prosecutor there can be no doubt that the result will be absolute and unquestionable impunity for those involved in what may constitute grave crimes within the jurisdiction of the Court.

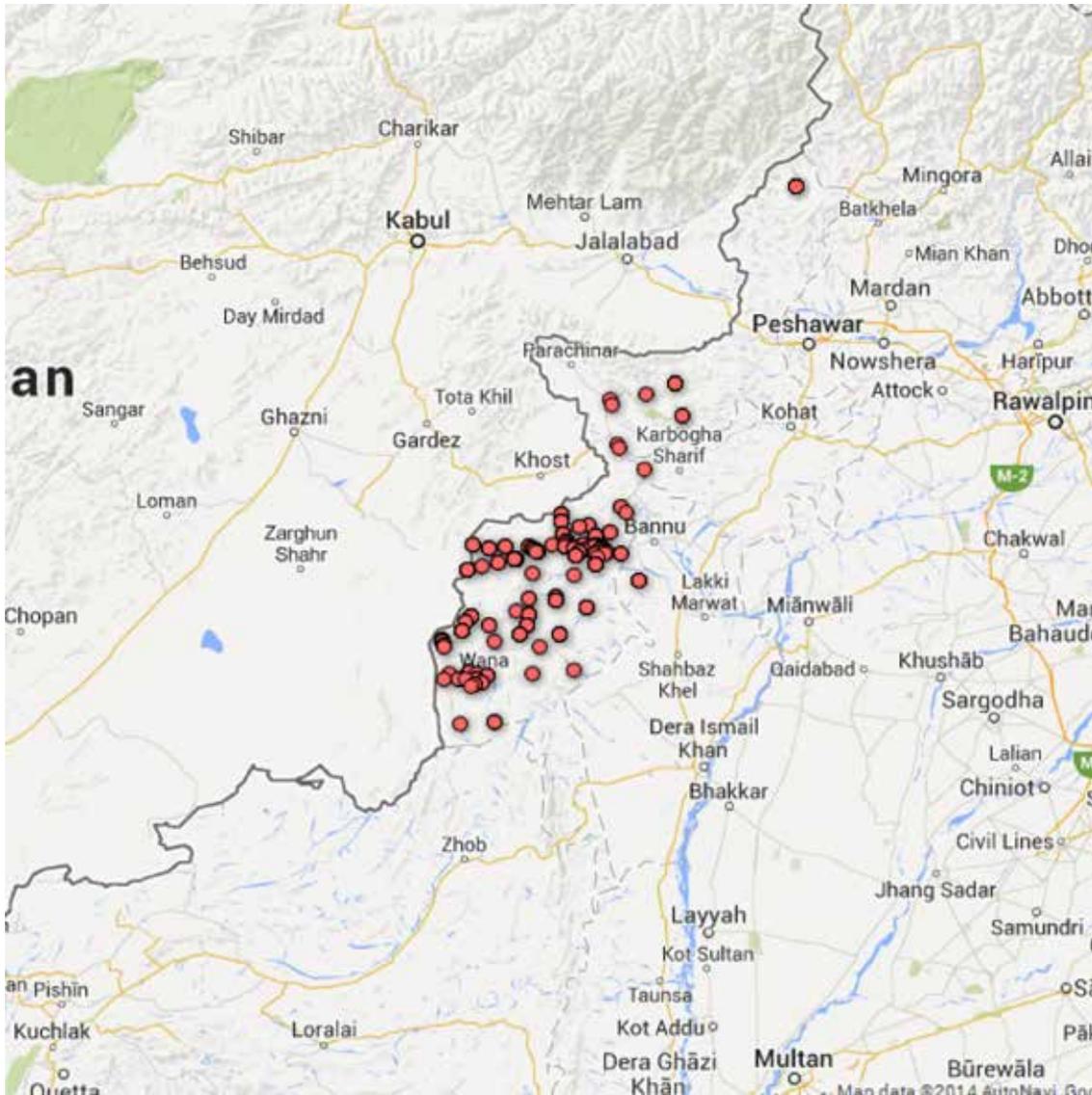
4. CASE STUDIES

The following is a dossier of case studies relating to 13 drone strikes conducted in Pakistan between 2006 and 2012. The case studies are organized in chronological order.

Methodology

1. Reprieve, along with our Pakistani-based partner, the Foundation for Fundamental Rights (FFR), has been collecting evidence of drone strikes in North Waziristan since 2010. In addition to FFR, which is based in Islamabad, we also work with three independent investigators in the affected region in order to corroborate and cross-check stories.
2. Evidence is obtained both through firsthand interviews, as well as through investigators on the ground. In each case profiled, victims of the strikes met with either an FFR lawyer, Reprieve lawyer or both. Because access to North Waziristan is restricted, these interviews took place just outside of the tribal areas, either in Peshawar, Bannu or in some cases, Islamabad.
3. Physical evidence, such as government employment records, missile pieces, and medical records, are obtained either directly from the victims and/or their families, or through secondary sources, such as medical professionals or government offices.
4. In certain instances, such as in the case of the strike on a grandmother on 24 October 2012, pictures of the damaged building and the field where the strike occurred were taken by our investigators.
5. Reported civilian deaths are cross-checked by our investigators with other members of the community. Reprieve and FFR also cross-check the stories with Pakistan Government documents, such as the reports of political agents in the region, and media reports.
6. In order to verify the identity of both the person making the claim and the person reportedly killed, we hold on file a copy of the person's National Identity Card.
7. For each strike, Reprieve and/or our partner FFR are in direct communications with either the person injured in the strike or the family member of someone killed. Should further information and/or direct testimony be necessary for the ICC's investigation, Reprieve can arrange for this to happen.

Map of Strike Zone



Case Study 1: Attack Involving Children and a School

8. Date: 30th October 2006
9. Location: Chingai village near town of Khar, Bajaur district, FATA
10. Number of victims:
 - (i) Killed: 82
 - (ii) Injured: None known
11. Description:

At approximately 5 AM on 30th October 2006 an attack took place on a madrassah (seminary) in Chingai village. It was later revealed that not only was a US drone responsible, but none of the victims were terrorists or militants.¹

The vast majority of victims were under the age of 20. Out of the 82 fatal victims, “one of the deceased was only seven-year old, three were eight, three nine, one was 10, four were 11, four were 12, eight were 13, six were 14, nine were 15, 19 were 16, 12 were 17, three were 18, three were 19”.²

Victims include Sohail aged 7; Talha, Noor Mohammed and Shoaib aged 8; Asadullah, Khalillullah and Saifullah aged 9; Hizbullah aged 10; Alam Nabi, Wilayat Khan, Shehzad Gul, Mohammad Salim aged 11; Luqman, Ismail, Kitab Gul aged 12; Ilyas, Ziaur Rahman, Jannatullah, Darvesh, Baacha Rahman and Najibullah aged 13; Qari Alamzeb, Bakht Muneer, Numair, Jamshed Khan, Rahmatullah, Shaukat and Nimatullah aged 14.

Other victims include Maulvi Khaleefa, Mashooq Jan, Noor Mohammad, Shahbuddin, Shahjehan, Gul Sher Khan, Ameer Said, Inayatullah, Shabir aged 15; Mohammad Tahir, Fazal Wahab, Ziauddin, Mohammad Yunus, Razi Mohammad, Sultanat Khan, Mohammad Yaas Khan, Inayatur Rahman, Yahya Khan, Mashooq Khan, Ihsanullah, Zaheeruddin, Siraj, Abdul Waris, Salman, Zabihullah, Shafiullah and Shakirullah aged 16; Nawab, Ziaur Rahman, Ikramullah, Rahatullah, Abdus Samad, Saeedullah, Inayatur Rahman, Wali-ur-Rahman, Iftikhar, Naeemullah and Qari Sharifullah aged 17; Abdullah, Taseel Khan and FaWahab aged 18; Fazal Hakim, Qari Ishaq, and Qari Abdul Karim aged 19.³

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- 1 Christina Lamb, “US Carried out Madrasah Bombing”, The Times, 26 November 2006, available at: <http://www.informationclearinghouse.info/article15737.htm>; Gareth Porter, “Why Pakistani Military Demands a Veto on Drone Strikes”, Inter Press Service, 16 August 2011, available at: <http://www.ipsnews.net/2011/08/why-pakistani-military-demands-a-veto-on-drone-strikes/> [Vol I, Annex VIII, 3-4]
 - 2 Yousaf Ali, “Most Bajaur victims were under 20”, The News, 02 November 2006, available at: <http://www.thenews.com.pk/TodaysPrintDetail.aspx?ID=4043&Cat=13&dt=11/5/2006> [Vol I, Annex VIII, 1-2]
 - 3 Yousaf Ali, “Most Bajaur victims were under 20”

Case Study 2: All Civilians, Including One Child

12. Date: 09th October 2008
13. Location: Mirali, North Waziristan Agency, FATA
14. Number of victims:
 - (i) Killed: 4
 - (ii) Injured: 1
15. Description:

On 9th October 2008, Bakhtoor Gul, his father Sultan Jan, Sultan Jan's nephew Muhammad Yusuf, Aman Ullah Jan and Aman Ullah's 14 year old son, Zaad Imran Khan, were present at Sultan Jan's house in Ghandi Kala for a family gathering. At approximately 10 PM a missile was fired from a drone which had been flying around the area for some time.

As narrated by Muhammad Yusuf, the missile struck part of the house and reduced it to a "bunk of debris". Bakhtoor Gul, Sultan Jan, Aman Ullah Jan and 14 year old Zaad Imran Khan were all killed. None of the victims had any affiliations with terrorists or militants.

Case Study 3: Civilians Killed; Child Injured

16. Date: 23rd January 2009
17. Location: Zairaki, North Wazir Ali, North Waziristan, FATA
18. Number of victims:
- (i) Killed: 7
 - (ii) Injured: 1
19. Description:

On 23rd January 2009, 13 year old Fahim Qureshi and seven of his relatives were having a family gathering in his father's house in Zeraiki village. All the male members of his family were gathered in the 'hujra', the portion of the house reserved for males. They were sharing tea and having a discussion.

At approximately 5 PM a missile fired by a drone struck the hujra. Everyone apart from Fahim was killed. Among the dead were

- Muhammad Khalil, a retired school teacher and Fahim's father;
- Mansoor ur Rehman, a government teacher in the Zairaki village and Fahim's uncle;
- 21 year old Aizaz ur Rehman, Fahim's cousin who, days before his death, was getting ready to leave for the United Arab Emirates for work; and
- Khushdil Khan, Fahim's uncle who ran a hardware store in the neighbouring Mirali village.⁴

Everyone but Fahim was killed in the strike. Fahim was severely injured. He suffered a fractured skull, lost sight in his left eye and he needs laser surgery for his right eye in order to be able to see properly.⁵ As "a result of shrapnel from the drone entering his stomach he had to have a massive operation."⁶ The "entire left side of [his] body was operated on" and he spent 24 days in a hospital in Peshawar, 200 kms from his hometown. Due to complications from his injuries, Fahim had to spend the next 6 months in the Combined Military Hospital in Rawalpindi, 400kms from his hometown. Fahim also sustained injuries to his head and ear drums.

Upon hearing the blast, Fahim's cousin Ejaz Ahmed, rushed from the neighboring village

4 Affidavit of Ejaz Ahmed; Declaration of Fahim Qureshi

5 Declaration of Fahim Qureshi

6 Affidavit of Ejaz Ahmed

to the site of the attack. Once there he witnessed “a scene of complete destruction”.⁷ The attack utterly annihilated the hujra which the family has not been able to rebuild since.⁸

Fahim distinctly remembers the “terrorizing sound of the missile as it launched”.⁹

According to Fahim and Ejaz, no one in the house was involved in terrorism.

A picture of Fahim, a picture of Fahim’s uncle and pictures of the structure damaged in the strike are below.



Fahim Qureshi



Khushdil Khan, Fahim’s uncle



7 Ibid.

8 Declaration of Fahim Qureshi

9 Ibid.

Case Study 4: Civilians Killed; Child Injured who Subsequently Died

20. Date: 07th September 2009

21. Location: Machi Khel, Mir Ali, North Waziristan Agency, FATA

22. Number of victims:

(i) Killed: 4

(ii) Injured: 1 (A second person, Sadaullah Khan, was originally injured and lost both of his legs. He died in October 2013, three years after the strike, from poor health that resulted from the injuries.)

23. Description:

On 7th September 2009, 14 year old Sadaullah was overjoyed that an “iftar” (an opening of the fast during Ramadan) feast was planned at his house. Many of his relatives were attending as well. After breaking their fast, the guests proceeded to the courtyard to offer prayer. Sadaullah was the last one to join the prayers as he was busy serving everyone. After completing their prayer, everyone returned to the hujra to have the main course of their meal. Sadaullah and his elder cousin Ajmanullah were the last ones to complete their prayers.

As Sadaullah and Ajmanullah were entering, a missile struck the hujra. Sadaullah’s grandfather’s brother Sabruddin, Sabruddin’s son Qanatullah and his grandfather’s sister’s son Mataullah Jan were all killed in the strike. Sadaullah and Ajmanullah were injured in the strike. Sadaullah fell unconscious “right at the spot of the drone strike”.

When he regained consciousness, Sadaullah was in a hospital in Peshawar. Sadaullah learned he would never be able to “play cricket, football or other sports” as both his legs were amputated. Shrapnel from the missile caused him to lose sight in his left eye and a patch was placed on his right eye. He would frequently suffer from severe headaches around his right eye. He also sustained injuries to his right arm.

No one in the house was involved in terrorist activities.

Sadaullah passed away in October 2012 as a result of the severe burden his injuries placed on his daily life.



Injury to Sadaullah’s legs and eyes



Injury to Sadaullah’s right arm

Case Study 5: Child Killed

24. Date: 20th November 2009
25. Location: Aziz Khel, Miranshah, North Waziristan, FATA
26. Number of victims:
- (i) Killed: 3
 - (ii) Injured: None
27. Description:

On 20th November 2009, teenage minor Sakinullah, a student in 10th grade, travelled from his home village of Machi Khel to neighbouring Aziz Khel. He was accompanied by his friend Razm Khan and went to Aziz Khel to visit Razm Khan's maternal uncle, Gul Rehman.¹⁰

At 8.30 AM a missile struck the hujra of Gul Rehman's home. Razm Khan, Sakinullah and Shafiq, Gul Rehman's friend, were all killed in the blast. The hujra and two cars were completely destroyed.¹¹ None of the victims nor anyone from Gul Rehman's family had or have any affiliation with terrorist or militant groups.

Below is the National ID card for Razm Khan.



10 Samiullah affidavit; Gul Rehman affidavit

11 Ibid.

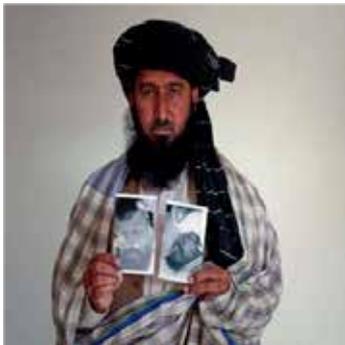
Case Study 6: Civilian Casualties

28. Date: 31st December 2009
29. Location: Machi Khel, North Waziristan, FATA
30. Number of victims:
- (i) Killed: 3
 - (ii) Injured: None known
31. Description:

On 31st December 2009, three men were chatting and sipping ‘kehwa’ (a form of green tea) after dinner in the ‘hujra’ of Karim Khan’s house, a local journalist working for Al-Quds, Al-Jazeera and Al-Arabiya. Karim Khan was away on business in Islamabad but present in the hujra were Asif Iqbal, Karim’s brother; Zainullah, Karim’s 18 year old son and Khaliq Daq who was working on the construction of the village mosque and was staying in Karim’s hujra.

Zainullah was an employee of the Education department and worked at a girls’ school in Mirali Tehsil in North Waziristan Agency as helping staff. Asif Iqbal, Karim’s brother was working in the Education department and was English language teacher in a Government secondary school of Dattakhel, another town North Waziristan Agency. Asif Iqbal held a Masters in English Literature from National University of Modern Languages in Islamabad.

At approximately 9 PM, 3 Hellfire missiles struck the hujra, killing all three men inside. As soon as he was told of the strike, Karim rushed back to his home only to find “two coffins containing the bodies of [his] son and brother.”¹² Asif is survived by a wife and a young boy, who was a toddler at the time of his father’s killing.



Karim Khan holding pictures of his deceased son and brother



Ruins of Karim Khan’s hujra

12 Statement of Karim Khan

Case Study 7: Civilians Killed

32. Date: 8th January 2010
33. Location: Tappi, Miranshah, North Waziristan
34. Number of victims
- (i) Killed: 4
 - (ii) Injured: None
35. Description:

On 8th January 2010, Mir Kalam was travelling to Tappi on a dinner invitation.¹³ While on the way he stopped at a shop in the marketplace and started a conversation with some acquaintances, namely Akbar Zaman, Syed Wali Khan and Fiaz. Akbar Zaman was a school teacher in Spalghah and was in the marketplace running errands.

While Mir Kalam and others were chatting, a missile fired from a drone struck killing all four of them. Mir Kalam had only been married for one year prior to his killing. He leaves behind a young daughter and widow who have no one to support them.¹⁴ None of the victims had any affiliation with terrorist or militant groups.

13 Affidavit Janatullah

14 Affidavit Janatullah

Case Study 8: Civilians Killed

36. Date: 10th June 2010

37. Location: Tappi, Miranshah, North Waziristan Agency

38. Number of victims:

(i) Killed: 4

(ii) Injured: 1

39. Description:

On 10th June 2010, Mohsin, his brother Syed Kamal, and his neighbours Syed Amanullah, Shahab Rehman and Sakhi Rehman were gathered in the hujra of Mohsin's home in Marsi Khel.

At approximately 7 PM a missile fired by a drone struck the hujra, destroying part of the building and a nearby parked vehicle. Mohsin's brother and all his neighbours were killed. Neither Mohsin nor any of the victims had any affiliation with terrorist or militant groups.

Media reports initially indicated that Al Qaeda's Sheikh Ihsanullah, Abu Ibrahim, and Harun, a Turkish fighter, were killed.¹⁵ Neither Mohsin nor any of the victims knew these individuals; nor were they present in the hujra.

15 Flashpoint Partners, Turkish Speaking Jihadists Report on Al-Qaida Casualties in Latest Waziristan Drone Strike (11 June 2010), https://flashpoint-intel.com/inteldocument/flashpoint_aqcasualtieswaziristan.pdf [Vol I, Annex VIII, 13]

Case Study 9: Civilians Killed

40. Date: 26th November 2010
41. Location: Mirali, North Waziristan Agency
42. Number of victims
- (i) Killed: 4
 - (ii) Injured: None known
43. Description:

On 26th November 2010, 19 year old Sanaullah was driving his friend home after school along the Miranshah-Mir Ali highway. At approximately 3 PM a missile fired by a drone struck Sanaullah's car, killing him and his friend.¹⁶

Sanaullah was an engineering student at the Government Degree College in Mir Ali.¹⁷ On the day Sanaullah was killed, villagers told his family that "all that was left of Sanaullah was his school ID card."¹⁸ He "was well liked by everyone and he never caused any trouble or harm."¹⁹

Since Sanaullah's death, his elder brother, Khairullah, has lost all interest in studies. He feels "there's no point to an education because [he] too may be wrongfully targeted by a drone and killed in an attack."²⁰ Sanaullah's father, once the bread winner of the family, refuses to leave his room. As a result, Khairullah has difficulties funding his studies. Two of his brothers have stopped studying and taken up work as taxi drivers to support the family. Neither Sanaullah nor any member of his family was affiliated to terrorist or militant groups.

Sanaullah's ID card that was on him at the time of the strike.



- 16 Khairullah Jan declaration
17 Khairullah Jan affidavit
18 Khairullah Jan declaration
19 Ibid.
20 Ibid.



Khairullah Jan

Case Study 10: Massive Civilian Casualties; Tribal Elders

44. Date: 17th March 2011

45. Location: Datta Khel, North Waziristan Agency, FATA

46. Number of victims:

(i) Killed: 40-45

(ii) Injured: 5-7

47. Description:

On 16th March 2011 a “Jirga” (gathering of tribal elders) was held to resolve an ongoing dispute over a chromite mine. The dispute was between two parties over the ownership of a chromite mine in the mountains of North Waziristan Agency. A large number of people were present include tribal leaders from over 40 tribes and sub-tribes as well “khasadars” who are employed by the Pakistan Government and act as local police. All in all, an estimated 50 people were present at the Jirga. On that day, the elders agreed to reconvene the Jirga for the next day.²¹

On 17th March 2011, at approximately 11 AM a missile fired by a drone struck the Jirga killing over 40 people and leaving close to no survivors. Witnesses reported that “only pieces of the victims remained” for burial. Fatal victims include Malik Daud Khan, one of the most senior tribal elders and father to Noor Khan²² ; 25 year old driver Din Mohammad; 40 year old Khanay Khan who was the sole bread winner for his family; Gul Muhammad killed alongside his son and Muhammad Ismail killed alongside his father.

Those who survived suffered debilitating injuries. Mohammed Noor, a 27 year old day labourer, is the nephew of Gul Mohammed. Because of the strike Mohammed’s “legs are covered in scars” and he “underwent surgery to fit metal rods in [his] legs to act as bones.”²³ Another survivor, Ahmed Jan, has “lost the full use of one of [his] feet”. He has had to forego employment as a driver and to this day it is extremely painful for him to walk. He also suffers from a hearing problem because of the sound the missile made upon impact.



Photographs of Ahmed Jan’s leg injuries

21 Noor Khan declaration

22 Noor Khan is pursuing legal recourse in the United Kingdom and Pakistan to seek justice for the death of his father and others present

23 Mohammed Noor declaration



Case Study 11: Rescuers Killed

48. Date: 4th June 2012

49. Location: Hasukhel, Mirali, North Waziristan Agency, FATA

50. Number of victims:

First attack

(i) Killed: 5

(ii) Injured: 4

Second Attack

(iii) Killed: 10

(iv) Injured: 6

51. Description:

Five people were killed and four more injured in the first attack which also damaged a car and two motorbikes parked inside a house compound. Twelve people arrived to start rescue work about 10 minutes later. There were foreigners (a phrase which can be used to describe Al Qaeda) and local tribesmen among the first responders. Twenty minutes later a drone fired two more missiles killing 10 more people and injuring at least 6.

The US said they were targeting Abu Yahya Al-Libi who appears to have been observing the rescue operation when he was killed, together with his bodyguard and driver.

At least 6 of the dead had no connection to militant activity²⁴.

24 Amnesty International, "Will I be Next" US Drone Strikes in Afghanistan (2013) <http://amnesty.org/en/library/asset/ASA33/013/2013/en/041c08cb-fb54-47b3-b3fe-a72c9169e487/asa330132013en.pdf> [Vol I, Annex VIII, 25-100]

Case Study 12: Child Killed

52. Date: 31st October 2011
53. Location: Mirali, North Waziristan Agency, FATA
54. Number of victims:
- (i) Killed: 2
 - (ii) Injured: None known
55. Description:

On 31st October 2011, 16 year old Tariq Aziz and his cousin Waheed-ur-Rehman were on the way to pick up their aunt and bring her home to the village of Norak. Both were killed when a missile fired by a drone hit their car.

Three days before their indiscriminate killing Tariq participated in a Jirga held in Islamabad that was organized by a Pakistani legal charity named FFR and its British partner organization, Reprieve (UK). The purpose of the Jirga was for victims from Waziristan to share their experiences and lives of loved ones lost as a result of the illegal drone attacks with international jurists, human rights activists and journalists. Tariq travelled for eight hours by bus “to discuss the covert use of drones by the CIA, bringing with him his cousin’s ID card, retrieved from rubble after he was killed by a Hellfire missile fired by a drone near his home.”²⁵

Tariq Aziz was among hundreds of Pakistanis, mainly from Waziristan, who gathered to condemn the rampant violence in their areas and to ask for accountability from the US. During his brief time in Islamabad, several of the international participants got a chance to meet Tariq. His vibrancy and desire to speak out against the injustices taking place daily in his community struck a chord with many of them. Tariq Aziz and Waheed Rehman’s murder highlighted the random selection of targets by the US for killing by drones in Tribal area. Neither Tariq Aziz nor Waheed-ur- Rehman were part of any terrorist activities.



16 year old Tariq Aziz at the Jirga held in Islamabad on 28th October 2011

Tariq’s coffin being carried by villagers

25 Jemima Khan, “The boy, 16, sitting with me in these photos was protesting against deadly US drone strikes... Three days later he was killed – by a U.S. drone”, Mail Online, 21 April 2012, available at: <http://www.dailymail.co.uk/news/article-2133282/The-boy-sitting-photos-protesting-deadly-US-drone-strikes--Three-days-later-killed--US-drone-says-Jemima-Khan.html> [Vol I, Annex VIII, 16-24]

Case Study 13: Woman and Pensioner Killed

56. Date: 24th October 2012
57. Location: Tappi, Miranshah, North Waziristan Agency
58. Number of victims:
- (i) Killed: 1
 - (ii) Injured: 8
59. Description:

On 24th October 2012, Momina Bibi, a 67 year old grandmother, was working in the vegetable fields. Some of her grand-children were helping her in the field. Some of her grand-children were playing in the field. There were a total of nine children in the field aged 3 to 17. At approximately 2:45 PM a missile launched by a drone killed Momina Bibi and injured the children.

Some of the children still have shrapnel in their body. Kaleem-ur-Rehman, a 17 year old boy “has some pieces of shrapnel in his leg and would need laser surgery to get it out.”²⁶ For Rafiq-ur-Rehman, Momina’s son and a primary school teacher, his mother’s killing has “been a big emotional setback for his family. He is scared for the future safety of his children who have already been injured in the strike.”²⁷

Rafiq’s 13 year old son Zubair recalls that when “the drone fired the first time, the whole ground shook and black smoke rose up.”²⁸ Several minutes later the drone fired once more. Zubair spent a night of agony in the hospital before being operated upon the next morning.



Rafiq-ur-Rehman (far right) and his children holding casings of the Hellfire missiles used to kill Momina Bibi

26 Rafiq ur Rehman statement
27 Ibid.
28 Zubair statement before US Congress

Case Study 14: Rescuers Killed

60. Date: 6th July 2012
61. Location: Datta Khel, North Waziristan Agency
62. Number of Victims:
- First Strike
- (i) Killed: 9
 - (ii) Injured: not known
- Subsequent Strikes:
- (iii) Killed: 12 -15
 - (iv) Injured: at least 5
63. Description:

The initial strike killed a group of men eating dinner at about 7.40pm. “It was our gathering place; usually at the end of the day after work the villagers sit together and talk to each other about our daily business,” said Ahsan, a chromite miner and resident who was praying in a local mosque at the time.²⁹ A group of men saying evening prayers nearby were not targeted.

After 30 minutes men went to search for survivors. A follow-up strike hit 20 men after the rescuers began their work. Twelve more people, including two Arabs, four Wazir tribesmen and six Dawar tribesmen were killed. Five others sustained serious injuries – a senior doctor managing the casualty department in Miranshah said the wounded suffered multiple burn injuries and required specialised treatment and plastic surgery. “The people tried to collect their bodies, some were carrying stretchers, blankets and water,” a local resident explained.

Some reports indicate there were two follow up strikes but this is not clear. The identity of all those killed is also not known but may include Salay Khan; Mir Jahan Gul; Allah Mir Khan; Noor Bhadshah Khan; Mir Gull Jan; Batkai Jan; Gallop Haji Jan; and Gull Saeed Khan – none of whom were known to be militants.

²⁹ Amnesty International, “Will I be Next” US Drone Strikes in Afghanistan (2013) <http://amnesty.org/en/library/asset/ASA33/013/2013/en/041c08cb-fb54-47b3-b3fe-a72c9169e487/asa330132013en.pdf> [Vol I, Annex VIII, 25-100]

Case Study 15: Killed At Funeral

64. Date: 23rd June 2009
65. Location: Makeen, South Waziristan
66. Number of Victims:
- (i) Killed: 60
 - (ii) Injured: 27
67. Description:

A funeral was held for Niaz Wali Mehsud, an alleged TTP commander, who had also been killed earlier the same day by a drone strike. At least 5000 people attended.

As people dispersed, up to three missiles were fired at suspected militant targets. The missiles killed at least 60 people, including between 18-50 people who were not known to be militants. The dead were buried in a mass grave.³⁰

Among the villagers who died in the drone attack on the funeral, 10 were children aged five to 10 together with four local tribal elders. The sources at the ill-equipped Agency Headquarters Hospital in Miramshah said 58 people had been taken to the hospital, most of them in critical condition. Appeals were made through loudspeakers, asking the people to donate blood for the injured people at the hospital.³¹

Pakistan later condemned the attack, with Prime Minister Gilani raising the issue with the visiting US National Security Adviser, and a Foreign Ministry spokesman stating: 'We have conveyed our serious concerns over the continued drone attacks to the United States. These are not acceptable and must be stopped.'

30 Dawn.com, Missile kills key trainer of Taliban suicide bombers (25 June 2009), <http://www.dawn.com/news/964449/missile-kills-key-trainer-of-taliban-suicide-bombers>; Pir Zubair Shah and Salman Masood, New York Times, U.S. Drone Strike Said to Kill 60 in Pakistan (23 June 2009) <http://www.nytimes.com/2009/06/24/world/asia/24pstan.html?ref=global-home> [Vol I, Annex VIII, 7] (Dawn.com) [Vol I, Annex VIII, 5-6] (Pir Zubair Shah)

31 Mushtaq Yusufzai, Irfan Burki and Malik Mumtaz, The News, No prominent militant killed in drone attack (25 June 2009) <http://www.thenews.com.pk/TodaysPrintDetail.aspx?ID=22926&Cat=13&dt=6/25/2009> [Vol I, Annex VIII, 8-12]

[**REPRIEVE**]