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Before Dost Muhammad Khan, C.J. and Musarrat Hilali, J

FOUNDATION FOR FUNDAMENTAL RIGHTS---Petitioner

Versus

FEDERATION OF PAKISTAN and 4 others---Respondents

Writ Petition No.1551-P of 2012, decided on 9th May, 2013.

(a) Constitution of Pakistan---

----Arts. 199 & 245(1)---Geneva Conventions, 1949---Constitutional petition---Drone attacks/strikes carried out by intelligence agency of a foreign country (United States of America) in territory of Pakistan---Legality---Breach of sovereign territory/airspace of Pakistan---Breach of United Nations Charter and its Conventions---War crimes---Extra-judicial killing of civilians---Destruction of moveable and immoveable property---Compensation of victims of drone strikes---Duty of Armed Forces of Pakistan to protect sovereign territory and airspace of Pakistan---Scope---Foreign country in question (United States of America) through self-framed opinion labelled foreign militants hiding in Tribal Agencies of Pakistan as their enemy, and was carrying out drone strikes in said areas on spy information to hit and kill these elements---Forming of an opinion by the intelligence agency of foreign country that drone strikes targeted groups of men, who were militants having links with terrorist groups, was based on figment of imagination and till date no tangible, reliable and convincing proof had been furnished to such effect by the authorities and intelligence agency of foreign country---Ratio of killing of foreign elements (through drone strikes) was negligible while casualties of local civilians, non-combatants were shockingly considerable, besides damage caused to properties of the local population, their households and other moveable properties---Majority of the victims of drone attacks were women and small children including suckling babies besides, animals/cattle heads and wildlife---During drone strikes the degree of precision was hardly maintained---Killing was never the sole objective of an operation as was the case in the drone strikes being carried out in the territory of Pakistan---Drones strikes were a blatant breach of absolute right to life---Huge loss to life and property, suffered by nationals of Pakistan due to drone strikes, was strictly prohibited not only by the Charter of the United Nations but also by the Geneva Conventions of 1949--- Admittedly, neither the (United Nations) Security Council nor the United Nations in general at any point of time had permitted the authorities of foreign country particularly its intelligence agency to carry out drone attacks within the territory of Pakistan---Drone strikes were a clear and naked aggression on sovereign territory/airspace of Pakistan---Such strikes were carried out at the whims and will of intelligence agency of foreign country in question, and neither the Government of Pakistan nor its security agencies were taken into confidence before carrying out such strikes---Although authorities of foreign country claimed that a former President of Pakistan had given verbal consent to carry out drone attacks but

there was nothing in writing to that effect to lend support to such view point---Aggression made on the territory of a sovereign State (Pakistan) was in clear violation of the United Nations Charter and different Conventions approved and adopted by the United Nations Member States---Under the United Nations Charter and Conventions, the people of Pakistan had every right to ask its security forces either to prevent drone strikes by force or to shoot down the intruding drones because such right was conferred upon the Member State, aggressed upon, to defend itself, its people and territory against foreign aggression---President of Pakistan, the Parliament through unanimous resolution, the Prime Minister and his Cabinet and military leadership had openly condemned drone attacks and had lodged protests with authorities of the foreign country---Drones strikes were blatant violation of basic human rights and were a war crime cognizable by the International Court of Justice or Special Tribunal for War Crimes, constituted or to be constituted by the United Nations for such purpose---Drone strikes were absolutely illegal and blatant violation of the sovereignty of the State of Pakistan because frequent intrusion was made on its territory/airspace without its consent rather against its wishes---Government of foreign country was bound to compensate all the victims' families---High Court directed that the Government of Pakistan and its security forces shall ensure that in future drone strikes were not conducted and carried out within the sovereign territory of Pakistan; that proper warning should be administered in such regard and if that did not work, the Government of Pakistan and State institutions particularly the security forces shall have the right being under constitutional and legal obligations to shoot down the drones attacking territories of Pakistan or when they entered the airspace of Pakistan's sovereign territory; that Government of Pakistan should take the matter seriously before the United Nations Security Council and in case it did not succeed there then, an urgent meeting of the General Assembly be requisitioned through a written request to resolve the menace (of drone attacks) in an effective manner; that the Government of Pakistan should also file a proper complaint, giving complete details of the losses sustained by civilians of Pakistan both to life and properties due to drone strikes, making a request to the Secretary General of United Nations, to constitute an independent War Crime Tribunal which shall have the mandate to investigate and enquire into all the matters and to give a final verdict as to whether the same amounted to war crime or not, and in the former case to direct the authorities/government of foreign country in question to immediately stop the drone strikes and arrange for the complete and full compensation for the victims' families both for life and properties at the rate and ratio laid down under the international standards; that Ministry of Foreign Affairs should prepare a draft resolution/complaint within the minimum possible time and should ask and require the (United Nations) Security Council and the General Assembly, as the case might be, to pass a resolution condemning the drone strikes, and that in case authorities of foreign country did not comply with the said resolution, the Government of Pakistan should sever all ties with the foreign country and as a mark of protest should deny all logistic and other facilities to the foreign country within Pakistan---Constitutional petition was allowed accordingly.

Mary O Connell in "Unlawful Killing with Combat Drones" ref.

(b) Constitution of Pakistan---

----Arts. 4(2)(a), 9 & 199---Constitutional jurisdiction of High Court---Scope---Protection of life and property of citizens---Article 199 of the Constitution put the High Court under tremendous obligation to safeguard and protect the life and property of the citizens of Pakistan and any person for the time being in Pakistan.

Mirza Shahzad Akbar for Petitioner.

Iqbal Mehmand, D.A.G. and Naveed Akhtar, A.A.G. for Khyber Pakhtunkhwa.

Date of hearing: 11th April, 2013.

JUDGMENT

DOST MUHAMMAD KHAN, C. J.---This single judgment shall also decide connected W.P. No. 3133/2011 entitled "F.M. Sabir Advocate Peshawar High Court Peshawar v. Federation of Pakistan through Ministry of Defence and 5 others", W.P. No. 1550-P/2012 entitled "Malik Noor Khan v. Federation of Pakistan through Governor Khyber Pakhtunkhwa and 5 others" and W.P. No.3134/2011 entitled "Defence of Pakistan Council through its Provincial Convenient Syed Yousaf Shah and 6 others v. Federation of Pakistan through its Secretary Interior and 4 others" because in all these petitions identical questions of law and facts are involved with the following prayers:--

i. to order the respondents to immediately assert its State Sovereignty and convey forcefully to the US in clear terms that no further drone strikes will be tolerated on its sovereign territory;

ii. to order the respondents to protect the 'right to life' of its citizen and use force if need be to stop extrajudicial killings with drones;

iii to provide redress for the criminal offences committed by those involved inside and outside Pakistan in drone operations and in particularly involved in the strike on 17th March 2011 by directing the relevant authorities that criminal charges, under the relevant laws of the Islamic Republic of Pakistan be registered against those responsible;

iv. to order the respondents to immediately contact the Security Council of the United Nations for violation of Pakistan's territorial sovereignty, protected by Article 2 (4) of the UN Charter and demand the adoption of a resolution condemning drone strikes and requiring the US to stop the strikes in Pakistan;

v. to order the respondents to gather DATA of victims of drone strikes and encourage any such victims to come forth for the wrong done to them and approach the UN Human Rights Council and the Special Rapporteur on extrajudicial, summary or arbitrary executions for launching their complaint;

vi. to order the respondents to use its 'right to reparation' for the wrongful act under the customary international law and under the International Law Commission's Draft

Articles on State Responsibility and seek remedies available under Draft Articles of International Law Commission and any customary International Law.

Any other relief that this Hon'ble Court deems fit may also kindly be granted.

2. The serial killing of local civilians both of North and South Waziristan Agency, adjoining Khyber Pakhtunkhwa Province through drone strikes visibly commenced from the year 2008 which is still continuing unabated.

3. According to the report, based on physical verification, submitted by the Political Authorities of North Waziristan Agency, 896 Pakistani civilians, residents of the said Agency, were killed during the last five (5) years till December 2012 while 209 were seriously injured. In these drone attacks only 47 foreigner were killed and 6 were injured. Many houses and vehicles of different category, make and model, worth millions dollars, were destroyed during these attacks. Besides, many cattle heads of different kinds were torn into pieces and charred, belonging to the local residents.

Similarly, in South Waziristan Agency 70 drone strikes were carried out during last five (5) years till June 2012 in which 553 local civilians were killed, 126 were injured, 3 houses were destroyed and 23 vehicles were badly damaged.

4. According to the Press Reports of International and National Media, some foreign militants are hiding in the mountainous region of North and South Waziristan Agency, beyond the access of the local Administration and semi- armed forces of Pakistan.

5. The United States through self framed opinion labeled these foreign elements as their enemy. The U.S decision making troika, the President, Pentagon and CIA have joined hands to carryout drone strikes in these areas on spy information to hit and kill these elements, however, the ratio of killing of foreign elements is negligible while local civilians, non-combatants, casualties are shockingly considerable, beside damage caused to the properties of the local population, their households and other moveable properties including cattle heads, in great number, is a painful phenomena. The most shocking, gruesome and goriest side of these ruthless strikes is that the degree of precision is hardly maintained and why the figures, given above, would prove that these are carried out at random and innocent civilians casualties mostly of infant babies, pre-teen and teenage children, women and others including their properties are hundred times greater than those, killed alleged to be militants.

6. The President of Pakistan, the Parliament through unanimous resolution, the Prime Minister and his Cabinet and Military Leadership have openly condemned these attacks and have lodged soft protests with the US Authorities through its Ambassador in Pakistan. The other side of the story given by the U.S Authorities is that the then dictator, General Parvez Musharraf has given verbal consent to carryout these attacks in the tribal belt of North and South Waziristan Agency but there is nothing in writing to that effect with the Government of Pakistan or with the Government of USA to lend support to the view point of the U.S Authorities.

7. Admittedly, neither the Security Council nor the UNO in general at any point of time has permitted the U.S Authorities particularly the CIA to carryout drone attacks within the territory of Pakistan, a sovereign State, the old member of the UNO. The Pakistan Army has rendered unmatchable sacrifices while acting under the UNO / Security Council mandate to maintain peace and tranquility in different regions of the world where ethnic or other disturbances were rampant and killing of innocent civilians was going unabated. It has successfully restored peace in those regions of the world beside restoring communication, telecommunication, electricity and other civic facilities for the population of those troubled areas consisting different regions around the Globe and had earned great appreciation from the UNO and in particular from its Secretary General.

8. The provisions of Article 2 (4) of the United Nations Charter provides as under:--

"All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations".

9. The United Nations Millennium Declaration, contained in Resolution No. 55/2, adopted by the United Nations General Assembly on 18th September, 2000, reinforced / reiterated the notion of territorial integrity and sovereign equality of all states in the following words: -

"We are determined to establish a just and lasting peace all over the world in accordance with the purposes and principles of the Charter. We rededicate ourselves to support all efforts to uphold the sovereign equality of all States, respect for their territorial integrity and political independence, resolution of disputes by peaceful means and in conformity with the principles of justice and international law, the right to self-determination of peoples which remain under colonial domination and foreign occupation, non-interference in the internal affairs of States, respect for human rights and fundamental freedoms, respect for the equal rights of all without distinction as to race, sex, language or religion and international cooperation in solving international problems of an economic, social, cultural or humanitarian character."

10. Further, the U.N General Assembly through Resolution No.2625 (XXV) "Declaration of Principles of International Law Concerning Friendly Relations" specifically states:--

"Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues."

11. The huge loss to life and property, suffered by Pakistani Nations of North and South Waziristan Agency due to drone strikes, is thus, strictly prohibited not only by the Charter of the UNO but also by the Geneva Conventions of 1949. According to Article 3 and Article 52(1) and (2) of the Additional Protocol, targeted killing is only

lawful when the target is a "combatant" or "fighter" or, in the case of a civilian, only for such time as the person "directly participates in hostilities". Additionally, per Geneva Conventions Common Articles 3 and 51(5)(b) and Article 7 of the Additional Protocol-1, the killing must be militarily necessary, the use of force must be proportionate so that any anticipated military advantage is considered in light of the expected harm to civilians in the vicinity, and everything feasible must be done to prevent mistakes and minimize harm to civilians. It is never permissible for killing to be the sole objective of an operation as is the case in these U.S drone strikes.

12. Mary O Connell in "Unlawful Killing with Combat Drones" based on the case study of Pakistan SSRN, 2004--2009, has clearly pointed out that since a majority of drone strikes in Pakistan fall under "signature strikes", these would not be proportionate under the Geneva Conventions and thus, is illegal under International Law. The forming of an opinion by the CIA that these strikes target groups of men, who are militants having links with terrorist groups, is based on figment of imagination and till date no tangible, reliable and convincing proof has been furnished to that effect by the U.S. Authorities including CIA. On December 16th, 1966 multilateral treaty, adopted by the United Nations General Assembly having been given effect from March 23rd, 1976. It has been unanimously resolved with regard to civil and political rights (ICCPR) monitored by the Human Rights Committee where, Article 6 (1) states that every human being has inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Keeping in view the safeguard and protection to life, provided by the above Article, the drone strikes in Pakistan is blatant breach of absolute right to life.

13. The Convention of 9th December 1948 with regard to punishment of crime of Genocide, imposing prohibition against genocide, defined by Article 1 of the Convention include the following acts:--

(a) "Acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group;

(b) Killing members of the group;

(c) Causing serious bodily or mental harm to members of the group;

(d) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(e) Imposing measures intended to prevent births within the group;

(f) Forcibly transferring children of the group to another group".

14. The international observers' analysis unrebuttably proved that through drone strikes in Pakistan territory residential houses, vehicles, worshippers in mosques, mourners in funeral procession and even rescue personnel have been attacked with brutality. The residential houses are burnt into ashes along with vehicles and cattle heads, the worst

kind of cruelty to the animals, besides charred bodies almost fully mutilated, majority of whom consist of small children and innocent women are found, after the strikes are carried out. So far no clear images of such bodies of alleged militants have been presented before the international media or any UNO body.

15. The tribal belt (FATA) of Pakistan is 17000 kilometers away from USA. After 9 / 11 incident, happened 11 years back, not a single noticeable terror incident had taken place again any where in USA.

16. Few militants, allegedly belonging to "Alqaida Group", have neither the potential nor any source of logistic, transportation or any other means to outreach the West, carry out subversive activities and why for the last more than ten (10) years no noticeable incident took place there. The group, allegedly hiding in the high mountains of FATA and Afghanistan, has taken shelter for the safety of its lives, hence, they are more concerned with their own security by taking shelter in the caves. Keeping in view this hard fact, neither any Municipal Law nor International Law including the UNO Charter and the provision of Geneva Conventions, the resolve expressed by the General Assembly of UNO through unanimously adopted resolution, permit these drone strikes, carried out and conducted by the CIA of USA in the sovereign territory of Pakistan, which is unlawful and illegal. It is a clear and naked aggression on sovereign territory/airspace of Pakistan. These strikes are carried out at the whims and will of CIA, neither the Government of Pakistan nor its security agencies are taken into confidence before carrying out these strikes. It is another aspect highly deplorable because aggression made on the territory of a sovereign State (Pakistan) is in clear violation of the UN Charter and different Conventions approved and adopted by the UN Member States.

17. In view of the above established facts, undeniable in nature, under the U.N Charter and Conventions, the peoples of Pakistan have every right to ask the security forces either to prevent such strikes by force or to shoot down the intruding drones because this right is conferred upon the Member State, aggressed upon, to defend itself, its people and territory against foreign aggression and when the President of Pakistan, the Prime Minister and his Cabinet and the Parliament, through unanimously adopted resolution, have not only condemned the drone strikes but have shown serious concerns at different occasions and at different forums about the same, the only option left out is to give effective rejoinder to such naked aggression made on sovereign state territory/airspace.

18. Many Human Rights Organizations including International Human Rights Commission and the European Union have also criticized the same in strongest words because of the heavy losses inflicted on life and properties both moveable and immoveable of the civilians non-combatants. Majority of the victims of such attacks are women and small children including suckling babies besides, animals/cattle heads and wildlife.

19. Under the International Law and Conventions of the UNO, no State can choose and hit its enemy, hiding in another State, unless the latter State consents to it in writing

and with mutual collaboration the same is carried out but strictly under the sanction of UN Security Council which is not granted to the US Authorities including CIA.

20. Pakistan has been described by the US Authorities including its former and incumbent President as a close friend on war against terror and terrorists then, why no confidence or mistrust is shown by the CIA and Pentagon to consult the Security Forces and Government of Pakistan and get its help to carry out strikes with high degree of accuracy and precisions, so that, civilians in thousands, having been fallen victims to such strikes, could be avoided.

21. Despite financial and technical assistance provided by the USA Government to the Government of Pakistan, the Security Forces and to the people of Pakistan in the Social Development Sector, is going waste because of the unilateral policy of attacking Pakistani territory through drone strikes and consistent interference in its internal affairs.

22. Under the Constitution of Pakistan, 1973 particularly Article 199 thereof put this Court under tremendous obligation to safeguard and protect the life and property of the citizen of Pakistan and any person for the time being in Pakistan, being fundamental rights, hence, this Court is constrained to hold as follows:--

i. That the drone strikes, carried out in the tribal areas (FATA) particularly North and South Waziristan by the CIA and US Authorities, are blatant violation of Basic Human Rights and are against the UN Charter, the UN General Assembly Resolution, adopted unanimously, the provision of Geneva Conventions thus, it is held to be a War Crime, cognizable by the International Court of Justice or Special Tribunal for War Crimes, constituted or to be constituted by the UNO for this purpose.

ii. That the drone strikes carried out against a handful of alleged militants, who are not engaged in combat with the US Authorities or Forces, amounts to breach of International Law and Conventions on the subject matter, therefore, it is held that these are absolutely illegal and blatant violation of the Sovereignty of the State of Pakistan because frequent intrusion is made on its territory/airspace without its consent rather against its wishes as despite of the protests lodged by the Government of Pakistan with USA on the subject matter, these are being carried out with impunity.

iii. That the civilians casualties, as discussed above, including considerable damage to properties, livestock, wildlife and killing of infants/ suckling babies, women and preteen children, is an uncondonable crime on the part of US Authorities including CIA and it is held so.

iv. That in view of the established facts and figures with regard to civilians casualties and damage caused to the properties, livestock of the citizens of Pakistan, the US Government is bound to compensate all the victims' families at the assessed rate of compensation in kind of US dollars.

v. The Government of Pakistan and its Security Forces shall ensure that in future such drone strikes are not conducted and carried out within the sovereign territory of

Pakistan. Proper warning be administered in this regard and if that does not work, the Government of Pakistan and State Institutions particularly the Security Forces shall have the right being under constitutional and legal obligations to shutdown the drones, attacking Pakistani territories or when these enter the airspace of Pakistan Sovereign territory.

vi. The Government of Pakistan is directed to take the matter seriously before the Security Council of the UNO and in case it does not succeed there if VETTO power is unduly exercised by the US Authorities then, urgent meeting of the General Assembly be requisitioned through a written request to resolve this menace in an effective manner.

vii. The Government of Pakistan shall also file a proper complaint, giving complete details of the losses sustained by the Pakistani civilians citizens both to life and properties due to drone strikes, making a request to the UN Secretary General to constitute an independent War Crime Tribunal which shall have the mandate to investigate and enquire into all these matters and to give a final verdict as to whether the same amounts to War Crime or not and in the former case to direct the US Authorities/Government to immediately stop the drone strikes within the airspace/territory of Pakistan and to immediately arrange for the complete & full compensation for the victims' families of the civilians of Pakistan both for life and properties at the rate and ratio laid down under the international standards.

viii. The Ministry of Foreign Affairs is directed to prepare draft resolution/complaints and requisition for doing the needful within a minimum possible time in line of the above guidelines given by the Court, also asking and requiring the Security Council and the General Assembly, as the case may be, to pass a resolution condemning the drone strikes, flown by the CIA/US Authorities and violating the sovereign territory of Pakistan in violation of UN Charter and various Conventions of the UNO, referred to above.

ix. In case the US Authorities do not comply with the UNO Resolution, whether passed by the Security Council or by the General Assembly of UNO, the Government of Pakistan shall sever all ties with the USA and as a mark of protest shall deny all logistic and other facilities to the USA within Pakistan.

This and the connected writ petitions all are admitted and allowed in the above terms.

MWA/254/P Petition allowe

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