

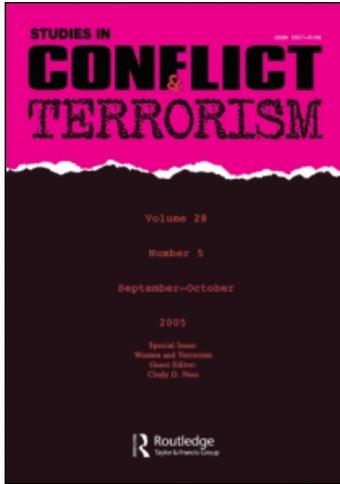
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## Studies in Conflict & Terrorism

Publication details, including instructions for authors and subscription information:

<http://www.informaworld.com/smpp/title~content=t713742821>

## War Crimes in the Armed Conflict in Pakistan

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Online publication date: 09 March 2010

To cite this Article Shah, Niaz A.(2010) 'War Crimes in the Armed Conflict in Pakistan', Studies in Conflict & Terrorism, 33: 4, 283 – 306

To link to this Article: DOI: 10.1080/10576100903582535

URL: <http://dx.doi.org/10.1080/10576100903582535>

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## War Crimes in the Armed Conflict in Pakistan

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*This article argues that an internal armed conflict exists in Pakistan and the law of armed conflict together with human rights law applies to it. It is further argued that both the security forces of Pakistan and the Pakistani Taliban have and will continue to violate these laws and to expose the Taliban's violations alone is only a half-truth. To conclude, the reasonable prospects, or lack thereof, of the war crimes committed in this conflict to be prosecuted are discussed.*

Pakistan is an important battlefield in the War on Terror (Bush 2008). The United States has included direct drone attacks in the tribal areas of Pakistan in the new strategy in the fight against the Taliban in Afghanistan (Mullen 2008; Iqbal 2008) and is sending more troops to Afghanistan as reinforcement (Gordon and Shanker 2008). The U.S. forces are increasingly using in Pakistan and Afghanistan the Iraqi counterinsurgency tactics: gathering actionable intelligence and taking out the target (*Dawn* 2008a). The Afghan government wants to go after militants inside Pakistan (Karzai 2008). The Pakistani government said it would not accept from militants anything less than to lay down their arms and accept the writ of government (Gilani 2008c). The Pakistani government made it clear that it wants to expel foreign militants from its tribal areas but would not allow direct military engagement against militants by another country (Kayani 2008a, 2008b). The government of Pakistan thinks itself “capable of taking an effective action within the boundaries” (Gilani 2008b). The Prime Minister of Pakistan has warned the United States to stop violating the Pakistani border as it is not only against the Charter of the United Nations but is also counterproductive in Pakistan’s war against militants (Giliani 2008a). The United States says it has a right to cross the Pakistani border to pursue militants (Gates 2008) but in April 2009 it came to light that both governments have a tacit understanding on the issue of drone attacks inside Pakistan (*The Washington Post* 2009). In June 2009, the United States resumed surveillance flights over Pakistan (Schmitt and Mazzetti 2009). In May 2009, the government of Pakistan changed its conciliatory stance toward militants: armed groups shall be fought until they are defeated (Zardari 2009a, 2009b) as they have become a threat to the survival of Pakistan

Received 4 March 2009; accepted 8 July 2009.

The author is grateful to Tony Rogers, Tony Ward, Kim Van der Borgh, Robert Barnidge, and the anonymous reviewers for their comments, which certainly were very helpful. The errors, however, are all mine. This article is part of a monograph: *Islamic Law and the Law of Armed Conflict: The Conflict in Pakistan* (London: Routledge-Cavendish, forthcoming in 2010). A shorter version of this article was published in the University College London’s *UCL Human Rights Review*, Vol. II October 2009.

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**Figure 1.** Bajaur Agency students' bodies. *Source: BBC Urdu (2006).*

(Gilani 2009a, 200b). The Pakistani security forces started Operation Rah-i-Rast to “clear” Swat of militants (Inter Services Public Relations (hereinafter, ISPR) 2009b). Operation Rah-i-Nijat was launched to “clear” regions of Waziristan of militants (Khan 2009). Most of the world media, human rights organizations, and experts focus less on the conduct of conflict by the security forces of Pakistan. The focus tends to be more on the conduct of conflict by the Tehrik-i-Taliban Pakistan (TTP) and its affiliated armed groups. As a result of this tendency one sees only partial exposure and analysis. Full exposure and analysis of how this conflict is conducted by both parties is needed. The purpose of this article is to investigate two aspects of the conflict: (a) whether war crimes have been committed by the security forces of Pakistan and the TTP's fighters and (b) if war crimes have been committed, have the war criminals been prosecuted or is there a real prospect of their prosecution?

### **Status of the Tribal Areas**

We need to identify the parties to the conflict and the legal status of the tribal zone in order to determine the nature of the conflict and appropriate applicable laws. There is a great deal of confusion about the legal status of the tribal areas, which is why it is important for this discussion to shed light on the point. The conflict zone in Pakistan is the tribal areas bordering Afghanistan. These areas consist of regions governed by the central and provincial governments. The Federally Administered Tribal Areas (FATA) are part and parcel of Pakistani territory under Article 1 of the 1973 constitution of Pakistan. The people of FATA are represented in the National Assembly (Art. 51) and the Senate (Art. 59) but administratively it remains under the direct executive authority of the president (Art. 247). Laws framed by the parliament do not apply to FATA unless so ordered by the president. Most of civil, and criminal, laws related to terrorism are extended to FATA (Hussain 2005).



**Figure 2.** Red Mosque casualties. *Source: BBC Urdu (2007).*

The president is also empowered to issue regulations for the peace and good governance of the tribal areas (Art. 247). The president has the power to cancel the current status of these areas after consultation with the tribal people through their council of elders (*Jirga*). Today, FATA is governed primarily through the Frontier Crimes Regulation 1901 (FCR). The Governor of the North West Frontier Province (hereinafter, NWFP) administers FATA in his capacity as an agent to the president of Pakistan, under the overall supervision of the Ministry of States and Frontier Regions in Islamabad, the capital of Pakistan. FATA is divided into two administrative categories: “protected” and “non-protected.” Protected areas are regions under the direct control of the government, while non-protected areas are administered indirectly through a council of elders of the local tribes. North Waziristan, South Waziristan, Kurram, Orakzai, Khyber, Mohmand, and Bajaur are seven tribal agencies. There is another set of areas in NWFP that are governed by the provincial government. They are known as Provincially Administered Tribal Areas (PATA). In common parlance, however, both FATA and PATA are referred to as tribal areas. Several Frontier Regions of the NWFP and some regions of Baluchistan are also recognized as tribal areas by the constitution (Art. 246). The main conflict is in the seven agencies and Swat, an adjacent region of the tribal areas. In contrast to what is generally asserted (Yusufzai 2003; McCain 2008), these regions are neither independent nor lawless. They are under the direct supervision of the president or his agents and the provincial governments (Hussain 2005, 57). The constitution of Pakistan together with other laws applies to the tribal areas (Supreme Court of Pakistan 1999). The question of which law applies to the tribal areas has lost relevance because violence has spread to the entire country and the whole country is a crime scene. Violence may emanate from the tribal areas but it is certainly no longer confined to tribal areas.

## **Parties to the Conflict**

The two main parties to the conflict are the security forces of Pakistan and the TTP.

### ***The Security Forces***

The security forces include the armed forces, the Frontier Corps, the police, and in some cases the levies (government forces also known as Khasadars) of different tribal regions. Most of the operations, apart from sporadic skirmishes, are conducted under the overall

supervision of the army. The local tribal *lashkars* (a group of village fighters), supported by the security forces, also fight the TTP in Dir and Buner areas (see later). The TTP, which is discussed later, has affiliated armed groups that carry out suicide bombing and take part in fighting against the security forces. These groups include Lashkar-i-Jhangvi, Sipah-i-Sahaba Pakistan, and Jaysh-e-Muhammad. They have a different origin and history than the TTP and are often described as the Punjabi Taliban (Abbas 2009). These organizations operated under state patronage rather than challenging the writ of the state and were, until very recently, focused on the struggle in Kashmir. In 2002, former President Musharraf banned these organizations but despite that they remained active and some joined the Taliban in Afghanistan and Pakistan. Other sectarian Shi'a and Sunni groups and criminal gangs, such as the Mangal Bagh Laskar-e-Islam of Dara Adam Khel, also commit violence but their activities are not discussed. The main armed group and party to the conflict is the TTP, which warrants detailed discussion.

### ***Tehrik-i-Taliban Pakistan***

During the U.S.-led war against the Taliban, prominent Taliban and Al Qaeda figures found shelter in the tribal areas of Pakistan. Pakistan, as an ally of the United States, provided extended support to the U.S.-led coalition. Al Qaeda branded former President Musharraf of Pakistan as a "traitor" and called on Pakistanis to rebel against him (Bin Laden 2007; Siddique 2007). The Pakistani forces started military operations to flush militants out of the tribal areas but some tribal figures resisted the Pakistani effort. This initiated a direct conflict between those who now constitute the TTP's leadership and the Pakistani security forces. At the start of the Afghan conflict in 2001, allies and sympathizers of the Taliban in Pakistan were not identified as "Taliban" themselves. The transition from being Taliban supporters and sympathizers to becoming a mainstream Taliban force in the tribal areas of NWFP initiated when many small militant groups operating independently in the area started networking with one another. Soon, many other local groups started joining the Taliban ranks in the tribal areas: some as followers while others as partners. During this process, the Pakistani Taliban never really merged into the organizational structure of the Afghan Taliban under the leadership of Mullah Omar. They, instead, developed a distinct identity. These independent militant groups, now banded together, created a space for themselves in Pakistan by engaging in military attacks on the one hand and cutting deals with the Pakistani government to establish their autonomy in the tribal area, on the other hand (Abbas 2008).

A *Shura* (Council) of forty senior Pakistani tribal leaders established the TTP as an umbrella organization (Perlez and Shah 2008b). Baitullah Mehsud was appointed as its Amir (Chief) (Yusufzai 2007a) and Maulana Faqir Muhammad of Bajaur Agency as the Deputy Chief (H. Khan 2008e). Faqir Muhammad is also the chief of the Bajaur group of the Taliban. Maulana Hafiz Gul Bahadur is the head of the North Waziristan Taliban while Mullah Nazir is controlling the Taliban group of South Waziristan (Wazir 2008a). Maulana Fazlullah is the head of the Swat chapter of Taliban. Maulvi Omer is the spokesperson and is seen as the public face of the TTP (H. Khan 2008e). The *Shura* not only has representation from all tribal agencies, but also from the settled districts of the NWFP such as Swat, Bannu, Tank, Lakki Marwat, Dera Ismail Khan, Kohistan, Buner, Mardan, and Malakand. The purpose of the formation of the TTP is to "unite the Taliban against [foreign] forces in Afghanistan and to wage a 'defensive jihad' against Pakistani forces" (Dawn 2007a). The TTP does not want to fight the Pakistani army as they regard it as a "national institution." Baitullah Mehsud said: the war is not against Pakistan as it is not beneficial for us and

Islam (Rashid 2006b). The TTP will fight the Pakistani forces when the TTP fighters are attacked. The TTP's strategy seems to be to focus on Afghanistan rather than opening a new front in Pakistan.

Baitullah Mehsud is thirty-four years old, slightly short with a black beard; a warrior belonging to the South Waziristan Agency. He hails from the Mehsud tribe. He shuns media and does not want to be photographed but in May 2008 he invited media to his stronghold in South Waziristan (BBC 2008). He came to prominence in 2005 when he signed a deal with the Pakistani government. As part of the deal, he had pledged not to provide any assistance to Al Qaeda and other militants and not to launch operations against government forces (Rashid 2005). The deal was short lived, and since 2006, he has virtually established an independent zone in parts of South Waziristan Agency. Mehsud commands a force of around two thousand militants (BBC 2007) and has moved aggressively against Pakistan's army in recent months, especially when he captured around three hundred army soldiers in August 2007 (BBC 2007). The soldiers were returned only when the government released twenty-five militants associated with Mehsud (Wazir 2007b). Of the fifty-six suicide bombings in Pakistan in 2007, thirty-six were against military-related targets, including two against the Inter Service Intelligence (ISI); two against the army headquarters in Rawalpindi; one aimed at the air force in Sargodha; and one directed at the facility of the Special Services Group (SSG) in Tarbela. For many of these attacks, the government blamed Baitullah Mehsud and his associates (Abbas 2008). This reveals the TTP's potential that it has additional resources and geographic reach. The then pro-Musharraf government has charged Mehsud with the assassination of Benazir Bhutto (Malik 2008) but Mehsud denies any involvement (Orakzai 2007). The new government of the late Bhutto's party has warned that it is premature to accuse Mehsud (*Dawn* 2008e). Baitullah Mehsud was killed on 5 August 2009 and Hakimullah took over as the new leader of the TTP (*Dawn* 2009a). The government of Pakistan banned the TTP on 25 August 2008 under the Anti-Terrorism Act, 1997 but the TTP spokesperson termed the move as ineffective (*Dawn* 2008c).

To sum up the position of the TTP, it is a newly founded organization of Pakistani origin based in the tribal areas at the border between Pakistan and Afghanistan. They have the effective control of most of the tribal areas (Perlez and Shah 2008d). They have established Islamic courts in Mohmand, Khyber, Orakzai, Bajaur, and South and North Waziristan agencies (*Dawn* 2008f; Kakar 2008b). Any security posts vacated by the Pakistani forces are occupied by the TTP fighters (Orakzai 2008d). The TTP's influence is also emerging in other provinces such as Punjab (Sulman 2008) and Sindh (Sabir 2008). The TTP has its own command structure and a clear mission: to fight and expel foreign forces from Afghanistan (Fazlullah 2008). The TTP does not want to fight Pakistani forces but if fighters of the TTP are attacked or prevented from *Jihad* in Afghanistan, they will fight back in self-defense. The government of Pakistan recognizes the TTP as a force and has signed several peace agreements with the TTP (Orakzai 2006). These, agreements, however, do not affect the TTP's mission in Afghanistan (Kakar 2008c; Hamdani 2008).

## Existence of the Conflict

The law of armed conflict applies in armed conflict of international or non-international character. The question of establishing international conflict is not difficult. The 1949 four Geneva Conventions (GC-I, Art. 2; GC-II, Art. 2; GC-III, Art. 2; GC-IV, Art. 2) define international armed conflict that occurs between two or more state parties to the conventions. Article 1(4) of the 1977 Additional Protocol I to the four Geneva Conventions extends this definition to "armed conflicts in which peoples are fighting against colonial

domination and alien occupation and against racist regimes in the exercise of their right of self-determination.” In contrast to this, it is more difficult to establish whether an internal armed conflict exists within a state. International law has defined internal conflict in two places.

The 1977 Additional Protocol II (Art. 1) to the four Geneva Conventions states that an internal conflict is a conflict between the “armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” Additional Protocol II applies to state parties and Pakistan is not party to it. Common article 3 of the four 1949 Geneva Conventions applies to “armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties” but it does not define internal armed conflict. The traditional understanding is that common article 3 applies to armed conflicts in which hostilities may occur between governmental armed forces and nongovernmental armed groups or between such groups only (ICRC 2008c, 3). Additional Protocol II definition is narrower than the notion of an internal armed conflict under common article 3 in two aspects. First, it introduces a requirement of territorial control, by providing that nongovernmental parties must exercise such territorial control “as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” Second, Additional Protocol II expressly applies only to armed conflicts between State armed forces and dissident armed forces or other organized armed groups. Contrary to common article 3, the Protocol does not apply to armed conflicts occurring only between non-State armed groups (ICRC 2008c, 3). Pakistan is party to the Geneva Conventions and common article 3 applies to internal armed conflict. Common article 3 would apply as customary law as well.

The 1998 Statute of the International Criminal Court (Art. 8(2)(f)), for the purpose of its own application, has defined internal armed conflict as a conflict “that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.” This definition is wider and is in line with common article 3 but it does not cover “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature” (ICC Statute, Art. 8(2)(f)). Pakistan is not a party to the ICC Statute but the aforementioned definition is reflective of customary law and would apply to the conflict in Pakistan.

The International Criminal Tribunal for the former Yugoslavia (ICTY 1995, paragraph 70) said that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” This interpretation is more in line with common article 3 and the ICC Statute. Three basic elements of armed conflict can be gathered from the aforementioned. First, there should be “protracted armed violence.” Second, the conflict/violence should be between government forces and armed groups or between armed groups. Third, the conflict/violence must take place within the territory of a state. These three elements must be present to establish whether an internal armed conflict exists. It is worth noting that some conflicts might have the elements of both international and non-international armed conflict (see ICTY 1999, paragraph 84).

The existence of armed conflict is a question of fact. Therefore, in order to establish the existence of an armed conflict in Pakistan, factual conditions are examined. The factual conditions on the ground indicate that armed conflict exists inside Pakistan. First, there is protracted violence in Pakistan since 2002. The TTP and its affiliated armed groups are inflicting heavy losses on the security forces of Pakistan. The Pakistani forces are using tanks, jets, and gunship helicopters to suppress the TTP’s fighters in Swat, Buner,

Dir, Kurram Agency, and North and South Waziristan. Thousands of people have left their homes and taken refuge in the neighboring areas of Afghanistan and some settled districts of the NWFP (UNHCR 2008, 2009). The ICRC (2008a, 2009) has declared Dir as a war zone and consistently refers to the situation as an armed conflict. Second, the armed conflict is between the TTP and the security forces of Pakistan. Third, the conflict is taking place with the territory of Pakistan (United Nations Security Council 2008; ICTY 2008, paragraphs 49 and 99). The conflict in Pakistan possesses the three basic elements of an internal armed conflict. The conflict even meets the more stringent requirements of an internal conflict contained in Article 1 of the Additional Protocol II as the TTP controls different regions and carry out concerted attacks on the Pakistani forces and other targets.

### Applicable International Law

In general, the law of armed conflict, customary law, human rights law (Abresch 2005; Hays 2008), international criminal law (Cassese 2008; Zahar and Sluiter 2006), and municipal laws (Rogers 2004, 216) apply to an internal armed conflict. As stated earlier, Pakistan is not party to 1977 Additional Protocol II but has signed the 1949 four Geneva Conventions; therefore, common article 3 applies. Pakistan is not a party to the ICC Statute, but article 8 (2(c–f)) might apply as it is reflective of custom. Pakistan has not ratified or acceded to many human rights conventions but has signed the 1966 International Covenant on Civil and Political Rights on 17 April 2008. Pakistan has also signed the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 17 April 2008. The fact that Pakistan has not ratified these human rights instruments is irrelevant as most of the principles contained therein have acquired the status of customary international law or *jus cogens* binding all states. In no circumstances can these norms be violated (OHCHR Fact Sheet No. 32 2008; Borelli 2005). In addition, as shown later, most of these human rights principles are recognized by the 1973 constitution of Pakistan in the form of fundamental rights.

For the present discussion, common article 3 of the four Geneva Conventions is the most important one. It is described as a “convention in miniature” (Pictet 1952, 48) or as a “convention within the convention” (Kalshoven and Zegveld 2001, 69) dealing specifically with armed conflict not of an international character. It outlines certain basic humanitarian provisions that each party to the conflict must adhere to. “The obligation is absolute for each of the Parties and independent of the obligation on the other Party” (Pictet 1952, 51). Common article 3 obligates each party to the conflict to treat humanely “in all circumstances” and without distinction those who are taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause. Common article 3 not only protects civilians but also those who had laid down their arms for whatever reason. Distinction on the basis of religion, color, race, or “other similar criteria” (e.g., nationality) is prohibited (Pictet 1952, 55). Common article 3 prohibits “at any time and in any place whatsoever” (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; and (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees. It is obligatory to collect and care for the wounded and sick. Three broad categories of people may benefit from the provisions of Common article 3: civilian, those who are *hors de combat*, and the wounded and sick. Common article 3, however, does not preclude the application of municipal law. Captured

militants, whether national or not, may be tried for offenses they have committed provided the requirements of Common article 3 are observed (United Kingdom, Ministry of Defence 2005).

There are certain principles of customary international law that are applicable to an armed conflict of non-international character (ICTY 1995, paragraph 127; see Henckaerts and Doswald-Beck 2005). It is not always easy to determine the content of customary law applicable to internal conflict; however, the basic guide should be the principles of military necessity, humanity, distinction, and proportionality (United Kingdom, Ministry of Defence 2005). The right of the parties to the conflict to choose the methods and means of warfare is not unlimited (Hague Regulations 1907, Art. 22; Protocol I, 1977; Protocol II, 1977 Art. 35). The current law of the armed conflict is consistent with the economic and efficient use of force. The argument that in some cases the law of armed conflict might be ignored to achieve the purpose of the war is obsolete as the modern law of warfare takes into account military necessity (United Kingdom, Ministry of Defence 2005). The principle of humanity forbids inflicting unnecessary sufferings (Hague Regulations 1907, Preamble). All military operations shall be based on the principles of distinction, that is, a clear distinction must be made between military targets and civilian population and objects (Additional Protocol 1, 1977, Arts. 48 and 49(3)). The law of armed conflict, however, does not require that civilians and civilian objects shall never be damaged. For instance, civilian casualties are acceptable if they are proportionate to legitimate military goals. Any military attack must be proportional “to the concrete and direct military advantage anticipated” (Additional Protocol 1, 1977, Art. 51(5)(b)).

### **Applicable Domestic Law**

On a domestic level, several laws would apply but the 1973 constitution 1901 Frontier Crimes Regulation; 1860 Pakistan Penal Code; 1898 Code of Criminal Procedure Code; the 1952 Pakistan Army Act; and the amended 1997 Anti-Terrorism Act are the most relevant.

Most of the constitutional provisions are applicable to everyone at all times within Pakistan but chapter two—dealing with fundamental rights—is the most relevant for this discussion. Article 4 states that it is the inalienable right of every individual to enjoy the protection of law and to be treated in accordance with the law. Article 5 requires the loyalty of citizens to the state and the constitution. Article 8 prohibits making law that is inconsistent with or derogating from fundamental rights recognised by the constitution. These two articles override any other laws or customs that might conflict with fundamental rights. All citizens are equal before the law and are entitled to equal protection of the law (Art. 25). The constitution guarantees the security of person and life (Art. 9). No one shall be arrested and detained without being informed of the grounds for such arrest. An arrested person shall have a right to consult a lawyer of his/her choice and must be produced before a magistrate within twenty-four hours of such arrest. This, however, does not apply to those who are kept under preventive detention for acting against the security or integrity of Pakistan. Such a person may be detained for up to three months and his/her detention may be extended only by a review board (Art. 10). The dignity of the individual is inviolable and the use of torture for extracting evidence is prohibited (Art. 14). Those imprisoned shall not undergo compulsory service that is of a cruel nature or incompatible with human dignity (Art. 11). These constitutional provisions are applicable to everyone irrespective of domicile or nationality. These rules, therefore, equally apply to foreign fighters in the tribal areas of Pakistan. The president of Pakistan has the power to declare a state of emergency

in case of war or internal disturbance (Art. 232). During such emergency, fundamental rights, specified in the order, may be suspended by Presidential Order but such order must be approved by the joint session of the parliament (Art. 233). At the moment, an emergency is not declared in the tribal areas of Pakistan and therefore, fundamental rights remain in force.

The 1860 Pakistan Penal Code (PPC) takes effect throughout Pakistan (section 1). Every person acting contrary to the provisions of the PPC within Pakistan shall be liable to punishment (section 2). The phrase “every person” comprises all persons without limitation and irrespective of nationality, religion, or creed (All Pakistan Legal Decision 1958 Supreme Court [Ind.] 115). Most of the provisions of the PPC overlap with constitutional and common article 3 guarantees. The most relevant provisions of the PPC are offenses against the state (sections 121–130), offenses affecting the human body such as murder (sections 299–338), offenses related to kidnapping and abduction (sections 359–368), and offenses related to mischief by causing fire or explosives (sections 425–440). The amended 1997 Anti-Terrorism Act is a special and perhaps the most relevant law (see Fayyaz, 2008) which extends to the whole country. The 1952 Pakistan Army Act is mostly concerned with the organization and discipline of the armed forces but some of its provisions prohibit wilful damage and destruction of property (section 25), plunder (section 29), and conduct of a cruel, indecent, or un-natural kind (section 41).

### War Crimes in the Conflict

In the conflict between the security forces of Pakistan and the TTP, the law of armed conflict and other applicable laws are violated on a regular basis. The following accounts show that both parties to the conflict have committed and continue to commit war crimes under Common article 3 and customary law and crimes under domestic law.

### War Crimes by the TTP

The TTP seems to believe that they act according to the Islamic law of armed conflict. The Taliban in Afghanistan issued on 9 May 2009 an “Afghanistan Islamic Emirate Code for Mujahidin” whereas the TTP has no such written rules but it can be safely assumed that the TTP closely follow the Afghan Taliban’s Code for Mujahidin. This assumption is made on the basis of the similarity of conduct and avowed alliance between the two types of Taliban. Both groups also have a close nexus ideologically, territorially, and culturally. Here, however, the conduct of conflict by the TTP is examined under the international law of armed conflict. It is very difficult to pinpoint who is behind a particular incident of violence but one can examine those incidents for which either the TTP has claimed responsibility or has issued warnings that it will attack particular targets such as foreign nongovernmental organizations (NGOs) (Wazir 2007c) and later those targets were hit. Since early summer 2008, the TTP has stepped up their activities against the government forces. The *modus operandi* is that the TTP would give a warning to the government to stop operations in a particular area against the TTP; if the warning is not heeded, the TTP would attack the security forces, civilians, and civilian objects (Omer 2008).

### Targeting Civilians

The TTP has targeted civilian objects and killed hundreds of civilians since 2002. In some cases, killing civilians is deliberate while in others civilians are killed and property destroyed

as a result of indiscriminate firing and suicide bombing. Targets have included government officials, pro-government tribal elders, and health and foreign aid workers. It is difficult to note all such cases but a few are stated here by way of example. Those killed are either kidnapped or shot dead on the spot. On 9 November 2007, Federal Minister Amir Muqam's house was hit by a suicide bomber, killing four people including three security guards. He was threatened a few days before the attack (Yusufzai 2007b). On 2 April 2006, the dead body of Zahir Shah, a pro-government religious scholar, was found in South Waziristan. Several bullet wounds were found on his body (Kakar 2006). On 28 April 2007, Federal Interior Minister Aftab Sherpao's election rally was attacked in Charsada where thirty-one people died and dozens were injured (Khan and Khan 2007). On 27 January 2007, a suicide blast in Peshawar killed thirty-one people and wounded thirty others. Deputy Inspector General of Police, Peshawar and two local council chairpersons were among those killed in the blast (*Dawn* 2007c). In February 2007, Doctor Abdul Ghani of the Health Ministry of the NWFP was killed during a polio campaign in Bajaur Agency. In August 2008, the TTP commanders in Swat valley threatened several pro-government politicians and officials to put pressure on the government to stop operations against the TTP. The members of the Awami National Party—which has formed a government at the provincial level—were specific targets. The TTP attacked the house of the brother of a ruling party MP with rockets in Shah Derai area of Tehsil Kabbal, Swat killing ten people. The TTP spokesman for Swat chapter, Muslim Khan, said the attack was in revenge of innocent people killed in the Kabbal operation (*The News International* 2008c). On 9 June 2009, militants attacked the Pearl Continental hotel in Peshawar killing eleven people and wounding another fifty-five (Khan and Masood 2009). After two days, the TTP took responsibility for the bombing and said it was in retaliation for shelling on seminaries in Hangu and Orakzai a few days before (*Dawn* 2009b). Attacking civilians is a clear violation of Common article 3 and customary law of armed conflict. It is also against the PPC.

### ***Targeting Civilian Objects***

Tehrik-i-Taliban Pakistan has attacked several girls' schools and music shops in different tribal agencies of the NWFP. These attacks are systematic and seem to be part of the TTP's policy. The *modus operandi* of these attacks, however, is different from those of the Afghan Taliban in that these schools are attacked during the night when no civilians are present at the premises. On 2 August 2008, two girls' schools were blown up. The Taliban's spokesperson, Muslim Khan, accepted responsibility (Kakar 2008e). On 30 July 2008, the Swat chapter of the TTP took responsibility for blowing up a girls' school, an army guest house, and a tourist hotel (Orakzai 2008f). In a separate attack on a girls' school, a letter was left warning parents not to send their children to these schools because English/Western style education is given in these schools (Kakar 2008f). Letters of this kind are distributed during the night and are known both in Pakistan and Afghanistan as "night letters." Four schools were set ablaze in Dir district in June 2008 (Kakar 2008f). "At least 39 girls' schools were blown up or set ablaze by militants in Swat" [in June 2008] (H. Khan 2008c). Attacking music shops has become routine in the NWFP wherein several civilians are either killed or wounded. Deliberate targeting of civilian objects is against the customary law of armed conflict.

### ***Suicide Bombing***

Suicide bombing in armed conflicts has a very long history. It has been committed by the followers of many religions and in different times and regions of the world (Pape 2005).

“Suicide attacks are increasingly becoming alien to nowhere and no people. Worldwide, the number of terrorist groups employing them has grown over the past twenty-five years. In some of the world’s conflict areas they have come to be widely accepted, and even supported, by populations who presumably might once have recoiled at the idea” (UN Assistance Mission in Afghanistan 2007, 3). More than twelve hundred people have been killed in attacks, mainly suicide, in Pakistan since the beginning of 2008 (*The News International* 2008b). The TTP recruit and train individuals, mostly youths, for suicide missions. They proudly claim to have a large number of suicide bombers waiting for orders to go and kill (Fazlullah 2008). The TTP’s suicide bombers are known as “Fidayeen Squad” (Khan 2008d). The TTP started suicide bombing as a tactic against the Pakistani forces in 2002. There were terrorists’ attacks and bomb blasts before 2002 but they were of a sectarian nature: Shi’a and Sunni groups attacking each other (Sohail 2006; Hamdani 2007; Reuters 2007). For instance, the attack on a shrine on 27 May 2005 in Islamabad killing twenty people was of a sectarian nature (Asghar 2005). But since 2002, suicide bombing seems to be the new face of militancy (BBC Urdu 2002). As stated earlier, Targets are usually military objects to achieve military objectives. The attacks on military targets results in some civilian casualties. There are, however, many instances where civilians were targeted intentionally. Three major incidents of brutal suicide bombing follow. The common features of these incidents are: intentional killing and injuring dozens of civilians and the TTP taking responsibility, describing it as revenge for killing TTP’s fighters. On 21 August 2008, Pakistan Wah Ordnance Factory, when civilian employees were leaving the main gates immediately after closing hours, was hit by two suicide bombers. The blasts killed seventy people while injuring sixty-nine others. The TTP claimed responsibility saying that the TTP is sad over the deaths of civilians but the government forces are killing the women and children of the TTP (Iqbal and Asghar 2008). The ordnance factory is a military target but the TTP chose the time and spot of attack where the dominant number of people were civilians. In addition, civilians working in an ordnance factory do not lose their civilian immunity. They might be at risk of being attacked but they cannot be targeted (United Kingdom, Ministry of Defence 2005). On 20 August 2008, a hospital, a protected object under customary law, in Dera Ismail Khan was attacked by a suicide bomber killing thirty-two people while injuring twenty-six others. The TTP took responsibility and threatened more attacks if the government failed to halt operations against the TTP (Nawaz 2008; Mughal 2008). The most recent and devastating suicide attack was on Marriot Hotel Islamabad, which killed fifty-seven people including foreigners. It is not surprising that fingers were pointed at the TTP but after two days, a lesser known organization, Fidayeen Islam, accepted responsibility for carrying out the attack while threatening further attacks (Mehr 2008). Fidayeen Islam is believed to be an auxiliary group of the TTP who had claimed responsibility for suicide bombing in the past (Rashid 2007a). The TTP clearly breaches the customary principle of distinction between civilians and combatants.

Attacking civilians and civilian objects are prohibited under customary law and the 1949 Geneva Conventions. The TTP’s argument that the security forces of Pakistan are killing their fighters as well as their innocent family members is not tenable. As shown later, the TTP is correct about the killing of civilians by the security forces of Pakistan but this does not allow the TTP to act outside the law. The immunity of civilians is absolute until the civilians engage in hostile activity and lose their civilian status. The TTP’s suicide bombers are feigning to be civilians when they walk in the middle of public or attacking the security forces of Pakistan. Their behavior is perfidious and perfidy is a war crime (Hague Regulations, 1907, Art. 23(b)). The indiscriminate killing of people through suicide bombing violates the principle of distinction. Targeting protected civilians objects

such as girls' schools by the TTP is a war crime. The ICRC (2008b) reminded "all those involved in the armed conflict of their obligation to comply with international humanitarian law. In particular, they must ensure that the civilian population is respected and protected in all circumstances and take all feasible precautions to spare civilians from the effects of hostilities."

### ***Hostage-Taking and Kidnapping***

Hostage-taking and kidnapping by the TTP has become a common practice since 2004 (Orakzai 2008c). Its members kidnap members of the security forces, government officials, and those whom they regard as pro-government individuals. The majority of hostages are killed but the lucky ones might get swapped for TTP's fighters in the government's captivity or in some cases by paying ransom (Wazir 2008b). The government usually denies paying ransom and tries to attribute the release to the bravery of the security forces that most Pakistanis doubt. In many cases torture and inhuman treatment are reported. The list of abduction incidents is long but three cases of civilian abduction incidents are mentioned by way of example. On 2 September 2008, the TTP claimed that the four missing Chinese engineers were in their custody and its *Shura* was preparing a list of demands for the government of Pakistan to meet (H. Khan 2008a). They were released in 2009 but it is believed after payment of ransom by the government. Tariq Azizudin, Pakistan's ambassador to Afghanistan, was kidnapped on 11 February 2008 while on his way to Afghanistan. The TTP took responsibility by issuing a videotape asking the government of Pakistan, through the ambassador, to meet the TTP's demands (Kakar 2008d). He was released on 18 May 2008 under a deal with the local Taliban but the government of Pakistan denies any such deal (I. Khan 2008). A Polish engineer was kidnapped in Pakistan on 2 October 2008. The TTP claimed that he is in their captivity. On 15 October 2008, in video released by the captors, he said: "I'm in the hands of the Pakistani Taliban. . . . I demand that all those watching and listening to me, including Poles, put pressure on the (Pakistani) government to free those (Taliban) who are jailed. In this way, I will also be freed" (*The News International* 2008a). He was killed in early 2009. Hostage-taking is specifically prohibited by Common article 3 and is a war crime.

### ***Killing Suspected Spies***

A common pattern of killing of suspected spies by the TTP has emerged. The trend is on the rise in the tribal areas of Pakistan (Human Rights Watch 2007a) and has become a daily scene in the TTP-controlled areas (Human Rights Commission of Pakistan 2007). In the past four years, around four hundred people have been killed only in South Waziristan on grounds of spying for the United States (Wazir 2008c; Rashid 2006a). The tactic is used to deter people from giving information about Taliban activities either to the governments of Pakistan or Afghanistan or to foreign troops. These killings and abductions serve an additional purpose as well: spreading terror among the local population. Suspected spies are either shot dead or beheaded. The majority of dead bodies found have signs of torture and brutality. Usually, the TTP takes responsibility for these killings by attaching a note explaining why that particular person was killed. The note also, in many cases, gives a warning to potential spies. Here are a few examples. In South Waziristan, three dead bodies, full of bullet wounds, were found. A letter in Pashto—the local language—attached to the dead bodies said that they were American spies (Wazir 2008c; Human Rights Watch 2007b). On 27 June 2008, in the aftermath of the Dama Dola village attack in Bajaur

Agency, two men were shot dead in public on the allegation of spying for the United States. It was alleged that the information they provided led to the attack on Dama Dola that killed Taliban fighters. Taliban accepted responsibility for killing these people (H. Khan 2008b). A woman was killed on the grounds of spying for the United States in Bajaur Agency (Kakar 2008a). On 21 July 2008, in Miran Shah, two persons were killed for spying for the United States (*Dawn* 2008d).

Under the customary law of armed conflict, spies must be treated humanely. They are at the mercy of the capturing power subject to the right of a fair trial (Hague Regulations IV, 1907 Arts. 29–30). The TTP does have their own courts (a Taliban court is mainly a council of a few men) in the areas under their control. They usually claim that the spies confessed before the TTP's council to their crimes of spying. The practice of the TTP is against the law of armed conflict for two reasons. First, the TTP's claim of confession can be seriously questioned whether these confessions are not obtained under duress. Second, the type of justice the TTP is administering in the case of suspected spies does not meet the requirement of fair trial under international law.

### War Crimes by the Pakistani Forces

Since 2002, when small- and large-scale operations against militants in the tribal areas began, the public has been given the impression that the security forces of Pakistan are engaged in a war for the security of Pakistan and the implied message was that everything they do should not be questioned. Militants are painted as the enemies of Pakistan who needed to surrender or be killed to save the country. This sense of Pakistan's security being on the line made it difficult for commentators to question openly the conduct of various military operations whether these are within the legal framework: the law of armed conflict and domestic law. Commentators also do not want to run the risk of being branded as pro-militants and get into trouble with the security forces and intelligence agencies. There was and is a genuine belief that militancy must be eliminated but an objective examination of the way the security forces conduct operations against militants is also needed. What follows is a brief account of how the war against militants is conducted. The purpose here is not to discuss whether Pakistan should fight militants but it is to see how different military operations are conducted.

#### *Indiscriminate Killing*

The security forces have conducted several operations in different regions of the tribal areas. One of the common features of all these operations is the indiscriminate killings. On many occasions the security forces target places that they think are used by militants, resulting in the killing of dozens of civilians. The only information provided to the public by the Pakistan army is the number of what they regard as militants. The ISPR of the Pakistani army issues brief statements giving the number of suspected militants killed (e.g., "eleven militants have been killed and 15–20 injured in an exchange of fire with Security Forces in South Waziristan Agency") (ISPR 2008). On 2 September 2008, the Pakistan army said that the mission in Bajaur Agency was completed and objectives were achieved: security forces have killed five hundred and sixty militants (*Dawn* 2008b; see Perlez and Shah 2008a). Between 10–15 September, the security forces claimed to have killed one hundred and seventeen fighters of the TTP (Orakzai 2008a). On 26 September 2008, the Pakistani army claimed it had killed at least five hundred militants in the Bajaur operation (BBC Urdu 2008a). The problem with these killings

is that the security forces do not explain how many were militants and how many were civilians. They also remain silent as to whether civilians were killed and, if civilians were killed, such incidental killing was necessary for achieving military objectives. Independent sources indicate that on many occasions civilians, including women and children, were killed (Orakzai 2008b; H. Khan 2008d; A. Khan 2008). On 30 October 2006, Pakistani army jets bombed a *madrassa* (religious school) in Bajaur Agency, killing eighty people. Most of them were students from the local area (Rashid and Orakzai 2006; Khan 2006). The Pakistan army claimed that militants were hiding inside the seminary. All the dead bodies were put on display to show the people of Pakistan and the world that there were no militants. Also, no foreign militants among the dead were identified. There is also no record of whether the bodies of those foreign militants were handed over to their respective countries. No one can tell where they are buried. After launching operations Rah-i-Rast in Swat and Rah-i-Nijat in Waziristan in May–June 2009, the Pakistan army said: “so far 1592 terrorists have been killed” (ISPR 2009c). No one has seen the bodies or graves or weapons of these militants. The security forces also demolished houses of suspected militants (Asad 2009). The government also claimed to have arrested the family of Fazlullah, the chief of the Taliban in Swat (BBC Urdu, 9 June 2009). The security forces attacked two seminaries in Hangu districts wherein five women and several children were killed. The local people protested against the loss of civilian lives (Paracha 2009). Human Rights Watch (2009) called on both the Taliban and the security forces to minimize harm to civilians.

It seems that on many occasions the intelligence regarding militants is not sound and the security forces act on doubtful evidence. It also seems that no proper evaluation is made of a concrete military advantage to come out of hitting a particular target. If the Pakistani security forces kill an important militant but civilians are also killed during the attack, such incidental loss of civilians is permitted but the principle of proportionality needs to be strictly followed. The incidental loss of life and property must not be excessive to the realization of concrete military advantage.

### ***Operation Silence: Red Mosque Operation***

One of the operations where the most serious violations of the law of armed conflict and human rights occurred is Operation Silence or the Red Mosque Operation. The security forces started operations against the alleged militants inside the Red Mosque early in the morning on 10 July 2007. During the operation, around eight security personnel were killed whereas over a hundred students including the Imam of the mosque were killed (Rashid 2007b; see *Dawn* 2007b). The security forces did not give exact figures of how many were militants and how many were civilians. Several dead bodies were buried in a single mass grave during the night by the government personnel (Mehr 2007). Not a single militant was identified among the dead bodies. On 3 June 2008, General (Rtd) Gulzar Kayani said that phosphorus bombs were used against the students, which was cruel and un-necessary and called for an inquiry (BBC Urdu 2008c). The Human Rights Commission of Pakistan (HRCP) (2007) also joined the call for inquiry into the loss of innocent lives as the then Musharraf government tried to cover it up.

### ***Missing Persons***

After the attack on Afghanistan on 7 October 2001, the Bush administration offered hundreds of thousands of dollars as head money for key Al Qaeda and Taliban figures. The government of Pakistan, as an ally, started arresting suspected militants and cashed in

thousands of dollars. “We have captured 672 and handed over 369 to the United States. We have earned bounties totalling millions of dollars” (Musharraf 2006). “The phenomenon started with the great sweeps for al-Qaida suspects after September 11, but has dramatically increased in recent years, and now those who disappear include home-grown ‘enemies of the state’—poets, doctors, housewives and nuclear scientists, accused of terrorism, treason and murder” (Walsh 2007). Under the law of armed conflict and domestic laws of Pakistan, the security forces are allowed to detain militants but they should keep record of those arrested and let their relatives know the whereabouts of the detainees. There is no government record available to show the detention of these people, which is why these detainees are called “missing persons.” Amina Masood Janjua’s husband, Masood Janjua, was apprehended by Pakistani security forces in July 2005, along with another man, Faisal Faraz. The security forces have detained them since without filing any charges against them, and in some cases, even denying their detention. The two men (and even some children) are among hundreds of victims of enforced disappearance in Pakistan, held beyond the reach of the law or any outside monitoring. Their families continue to fear for the lives of their loved ones, aware that torture and other ill-treatment are routine in Pakistani places of detention. Those forced to fear for the fate of the “disappeared” are also victims of Pakistan’s plague of enforced disappearances (Amnesty International 2008, 2006). There are reports that some terror suspects in the custody of Pakistani intelligence agencies were tortured (Cobain and Norton-Taylor 2009).

### ***Extra-Judicial Killing and Soldier Abuse***

The HRCP conducted its own investigation in Swat after the military operation. The commission found mass graves and evidence of torture and extra-judicial killings (HRCP 2009). After the Swat operation in summer 2009, a video clip was put on YouTube where Pakistani soldiers were shown beating some local individuals (Hasan 2009). This caused real concern among the people of Pakistan and, perhaps under pressure from the public and the fact that it was difficult to deny the soldiers’ abuse, the Pakistan army said that they are investigating the matter.

The security forces of Pakistan have used jets and gunship helicopters in the fight against militants. On many occasions sound intelligence was not collected, which led to hitting the wrong targets, killing civilians. On numerous occasions, disproportionate force was used. The firing was indiscriminate, resulting in the deaths of civilians and destruction of civilian property. Hundreds of persons are arrested and detained without charges. The relatives of those detained do not know their whereabouts. Most of these people were kidnapped or picked up by the Pakistani secret agencies. Torture is reported in several cases. Indiscriminate firing and use of excessive force is against customary international law. Torture and inhumane treatment is against Common article 3. Detention without charge and trial is against the fundamental rights recognized by the constitution of Pakistan. The United Nations Security Council (2008) has consistently condemned acts of terrorism in Pakistan. It has, however, at the same time consistently stressed that states that employ “any measures taken to combat terrorism comply with all their obligations under international law, in particular international human rights, refugee and humanitarian law.”

### ***Local Lashkars***

The security forces of Pakistan also rely on local *lashkars*. A local *lashkar* is a group of armed men who get together to defend themselves or take revenge for wrongs done to them

by the TTP. A *lashkar* consists of young men carrying whatever arms they can lay their hands on and guided by motives of self-help and revenge. A *lashkar* is usually led by tribal leaders or other community figures. In the past, the government has tried to empower such *lashkars* (Ashraf 2009) by providing arms, while no training on the laws of war or use of weapons is given. In many cases, the TTP came back and killed many members of the *lashkar*. On 5 June 2009, a TTP suicide bomber killed thirty-three worshipers in a mosque in Upper Dir. As a response, the local people formed a *lashkar* of seven hundred men to avenge the deaths of their loved ones (Jan 2009). The *lashkar* claims to have killed dozens of militants, burning their houses and the houses of their sympathizers (Ashraf 2009; ISPR 2009a). In August 2008, the TTP killed six policemen, took their weapons, and disappeared into the mountains of Buner. The people of Buner formed a *lashkar* and attacked militants' hideouts and killed most of them. "A video made on the cellphone showed six militants lying in the dirt, blood oozing from their wounds" (Perlez and Shah 2008c). On 29 December 2008, the TTP struck back: a suicide car bomber set off an explosion in a school where polling was taking place for the election of the National Assembly. More than thirty people were killed and more than two dozen wounded (Oppel and Shah 2008).

The problem with the *lashkar* is that they are not part of the security forces of Pakistan. They do not have any formal or informal training in the law of armed conflict or use of weapons but the government encourages local tribesmen to raise arms against the militants. The TTP is working outside the law and so are *lashkars* by taking the law into their own hands. As their only motive is revenge, there is a greater risk that the law of armed conflict and human rights law would be violated. This can be seen in instances where the *lashkars* killed even the sympathizers of the TTP. As retaliation, militants attack villages and kill indiscriminately. In many cases the security forces did not come to the aid of *lashkars* when the TTP attacked them (Tavernise and Ashraf 2009). The security forces have the duty to protect civilians rather than encouraging them to pick up guns and take revenge. It is promoting lawlessness, which could lead to the commission of war crimes.

### Prosecution of War Crimes

It is clear from this discussion that war crimes and crimes against domestic laws are committed by the TTP as well as the security forces of Pakistan. The key question to examine is whether those accused of war crimes are prosecuted. The security forces of Pakistan were able to arrest key members of the TTP but unfortunately none of them has been either charged or prosecuted for war crimes. They were kept in captivity for a few days or weeks and then either mysteriously released or swapped for members of the security forces imprisoned by the TTP. The top lieutenant of Baitullah Mehsud, Rafiuddin, was arrested but released after cutting a deal with the government. In September 2008, he was rearrested under FCR (Saboor 2008; see Shah and Perlez 2008). The intelligence agencies of Pakistan arrested hundreds of persons but they are neither charged nor prosecuted. They are simply missing. The violation of the law of armed conflict and other relevant laws by the security forces is not an issue of concern for the security forces and the current civilian government. There is no record showing that someone from the ranks of the TTP or the security forces of Pakistan is charged for war crimes.

There is no reasonable prospect for the prosecution of war crimes. There are two reasons for this. First, the security forces believe that they are fighting for the security and future of Pakistan. Whatever damage they can inflict on the TTP is legal. Their view is supported by the civilian administration. This might be true but the question is not whether the TTP is a legitimate target. The question is to prosecute those who violated the law of

armed conflict and domestic law in carrying out operations against the TTP. It also means how the TTP fighters are dealt with when arrested or captured. Are they killed or detained, charged, and prosecuted according to law? The second reason is that the TTP is a lethal force. The fighters of the TTP routinely kidnap government officials and members of the security forces. The TTP usually ask the government to release the detained TTP's fighters in return for the release of government officials. The government is usually inclined to swap captives with the TTP. In some cases, ransom is paid to the TTP. This scene of quid pro quo prevents the successful prosecution of the TTP's members involved in war crimes. The government also understands and fears that prosecuting a top TTP's commander will cause strong retaliation from the TTP.

## Conclusion

The conflict in the tribal areas of Pakistan is bitter and violent. The law of armed conflict, human rights law, and domestic laws are violated. The conflict seems to intensify further, raising the possibility of more war crimes. The media portrayal and governments of countries such as Pakistan, the United States, and the United Kingdom tend to argue that it is only the militants who violate the law. This is a half-truth. Both parties to the conflict have committed war crimes. Militancy in the tribal areas is serious and genuine but should be fought only within the limits of municipal and international law. No matter how much one dislikes or disagrees with the TTP's agenda, the rules still need to be played by to defeat them. The key is to prevent war crimes. It is understandable that war crimes might still be committed but they need to be investigated and prosecuted. Otherwise, it would look as if war crimes are not only committed but condoned as well.

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