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The Bombing of a Hospital in Kunduz – “A Grave Violation of International Humanitarian Law”?

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Fokus

On 3 October 2015 a U.S. lead airstrike hit a hospital run by MSF in Kunduz. At least 22 people were killed. The organization calls it a grave violation of international humanitarian law.

Quellen

The Telegraph, America admits mistakenly bombing MSF's Kunduz hospital in Afghanistan, 6 October 2015. CNN, Is U.S. bombing of Afghan hospital a war crime?, 5 October 2015.

The Guardian, Afghan Hospital Bombing: MSF labels US airstrike a war crime as it withdraws staff, 4 October 2015.

In the early morning of 3 October 2015 a U.S. lead airstrike hit an Afghan hospital run by Médecins Sans Frontières (MSF) in Kunduz. The airstrike occurred at 2.15 am local time, and, according to MSF, went on for more than an hour. As a result of the attack, the hospital was damaged extensively and can no longer operate. The organization had to vacate the hospital immediately. At least 22 people were killed in the event: twelve staff members of MSF and ten patients, of which three were children. Another 37 people were seriously wounded. It was the humanitarian organization's single largest loss of life in 35 years of working in Afghanistan.

On the day after the attack the commander of the U.S. forces in Afghanistan said the U.S. troops had taken fire from inside the hospital and wanted to defend themselves. Two days later he corrected that statement saying that Afghan forces had been attacked by Taliban allegedly hiding in the hospital. According to his statement they had asked the U.S. air force to attack the hospital. In the meantime, the most senior U.S. commander in Afghanistan has admitted before a senate committee that the decision to attack the hospital was “a U.S. decision made within the U.S. chain of command”. He said, the hospital was “mistakenly struck”. MSF on the other hand denies that Taliban were in the facility, let alone that an attack was launched from within the hospital. The organization therefore calls the airstrike “a grave violation of IHL”.

Turning to the legal background: The conflict in Afghanistan has been subject to changing dynamics with varying actors and coalitions being involved. In essence, one can say that today it is a non-international armed conflict (NIAC) between the Afghan government, supported by foreign states, and non-state armed groups, most prominently, the Taliban. Thus, the conflict is governed by common Art. 3 of the Geneva Conventions and the Second Additional Protocol (AP II).

These rules contain the most fundamental principles of IHL, such as the principle of distinction and important rules concerning the protection of civilians. Now, in the present case, MSF, the U.S. and the Afghan administration respectively provide different versions of whether Taliban were in the hospital, which hampers the classification of the hospital: The principle of distinction obliges to distinguish between military and civilian objects and is applicable in every armed conflict, including NIACs, by its customary nature, affirmed in the ICTY's Tadić and Kupreškić decisions. In the case at hand, one can clearly argue that even if several Taliban fired against Afghan troops from within the fully operating hospital this would not eliminate the protection of the facility under IHL; it is not sufficient to render it a ‘military objective’. And if the military nature of the object is doubtful, it should be regarded as civilian and must not be attacked. But even if the hospital had lost its special protection, i.e. if the hospital had been a legitimate target for U.S. forces, they would have had to respect the principle of proportionality when conducting the airstrike. The principle strictly prohibits excessive collateral damage. The death and injuring of patients, MSF staff and other civilians in Kunduz would be highly disproportionate. Furthermore, it is provided that parties to an armed conflict have to take precautionary measures before conducting an attack. This obligation is not especially codified for NIAC – as it is for international armed conflicts in Art. 57 (1) AP I – but it flows from the principle of distinction and applies as customary IHL – a warning, however, was not received by MSF. MSF says further that when the attack started they immediately informed all relevant parties. This would mean the U.S. have clearly violated the principle of distinction by ignoring this distress signal and continuing the attack.

A definitive and reliable answer to the question whether the airstrike constitutes a violation of IHL can only be given when the information has been clarified and therefore establishing a commission to investigate the incident and finding all relevant facts would be an important starting point. The assessment of this paper is based only on information that has been given by MSF, the U.S. and the Afghan administration so far. However, as of yet, everything points to MSF's accusations being substantiated.

Verantwortung

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