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December 17, 2015

The Honorable Ashton Carter
Secretary of Defense
The Pentagon
Washington, DC, 20301

Re: Attack on MSF Hospital in Kunduz

Dear Secretary Carter,

We are writing to express our concerns about the ongoing investigations into the October 3 attack on the hospital compound of the humanitarian organization Médecins Sans Frontières (MSF) in Kunduz, Afghanistan.

Human Rights Watch, like so many other organizations that work in conflict and crisis zones around the world, was shocked by this attack. We greatly appreciate your pledges to conduct a thorough investigation, including your October 7 comments in Rome vowing to “hold accountable anyone responsible for conduct that was improper,” and your October 15 remarks in Washington, DC, that “if there are people who need to be held accountable, they need to be held accountable on the basis of [the] facts.” However, the conclusions of the recent military investigation led by Gen. John Campbell, the commander of US and international forces in Afghanistan, may not be sufficient to uphold your public commitments.

As described in General Campbell’s November 25 press briefing in Kabul, MSF’s initial report of the incident and other public information, as well as briefings our staff have received from Department of Defense personnel, we believe it is essential that you publicly and explicitly clarify that ongoing investigations into the Kunduz attack include a thorough inquiry that considers the possible criminal liability of US personnel, including at the command level.

If the current investigation does not include a criminal inquiry, we call on you to order a special criminal investigation into the Kunduz attack. We believe that there is a strong basis for determining that criminal liability exists and have outlined our analysis in the attached appendix.



HRW.org

As you know, individuals who commit serious violations of the laws of war with criminal intent – that is, intentionally or recklessly – are responsible for war crimes.¹ As we set out in the appendix, the various public accounts of the incident provided by the US military and MSF to date, as well as other sources, indicate that the events of October 3 warrant an investigation that considers criminal culpability. Such an investigation would consider several levels of the US military chain of command in Afghanistan.

We also call on you to take all necessary steps to ensure that the investigation is independent and not subject to undue command influence. The US military justice system does not have a good record of providing meaningful accountability for alleged war crimes committed in Afghanistan and Iraq. As you are certainly aware, a senior panel of the Defense Legal Policy Board came to the same conclusion in May 2013.² Relatively straightforward cases have been handled well, such as the case of Sgt. Robert Bales, who was convicted of murdering 16 Afghan civilians, but we have rarely seen criminal investigations, let alone prosecutions, of possible war crimes in more complex cases involving multiple levels of the chain of command.³ We believe it is very likely that a criminal investigation into the Kunduz attack will lack credibility both in the United States and abroad if it is carried out by personnel within the chain-of-command that directs military operations in Afghanistan.

We therefore urge you to exercise your full authority over any criminal inquiry by directing investigators to report directly to your office. This is best achieved by creating a special high-level and independent Consolidated Disposition Authority to control referrals of criminal charges and the convening of courts martial. We also recommend that you appoint an independent convening authority for courts martial. Taking this extra step would ensure that investigations and prosecutions are entirely independent of command influence. Both of these entities should be staffed by experts outside the regular military chain of command – civilian and former military personnel with appropriate substantive knowledge.

Your statements following the Kunduz attack expressed clear recognition not only of the seriousness of the incident but of the need for accountability. The international community, including the people of Afghanistan, are watching closely to see what credible, impartial and transparent steps are taken to uphold this commitment. Anything short of that will not only be an affront to the lives lost at the MSF hospital, but will burden US

¹ See International Committee of the Red Cross (ICRC), *Customary International Humanitarian Law* (Cambridge: Cambridge Univ. Press, 2005), rule 156, p. 574.

² Defense Legal Policy Board, “Report Of The Subcommittee on Military Justice In Combat Zones,” May 2013.

³ See Human Rights Watch, “By the Numbers: Findings of the Detainee Abuse and Accountability Project,” April 2006; Human Rights First, “Command’s Responsibility: Detainee Deaths in US Custody in Iraq and Afghanistan,” February 2006.

military operations — and the US government's commitment to the rule of law—in Afghanistan and elsewhere around the world.

We would be glad to discuss this matter in more detail with you or your staff.

Sincerely,

A handwritten signature in dark ink, appearing to read "S. Margon", with a long, sweeping horizontal line extending to the right.

Sarah Margon
Washington Director

Cc:

Secretary of State John Kerry, State Department
Attorney General Loretta Lynch, Department of Justice

Appendix

Information on the Kunduz attack indicating the need for a criminal investigation

The laws of war applicable to the armed conflict in Afghanistan prohibit attacks on hospitals and other medical units. Medical units carrying out medical purposes must be respected and protected in all circumstances, unless they are being used outside their humanitarian function to commit acts harmful to the enemy.⁴ Attacks on hospitals, as civilian objects, are serious violations of the laws of war.⁵

The MSF report of November 5, 2015, indicates specific knowledge by US military personnel of the precise location and nature of the MSF trauma center, or hospital, in Kunduz. According to that report, MSF personnel had, prior to the attack, repeatedly communicated its coordinates to the US Department of Defense. On September 29, as fighting was intensifying in Kunduz, MSF again emailed its GPS coordinates to the Defense Department, the Afghan Ministries of Interior and Defense, and the US Army in Kabul. MSF reported that “[c]onfirmation of receipt was received from both US Department of Defense and US army representatives, both of whom assured us that the coordinates had been passed on to the appropriate parties.”⁶

At the Defense Department’s November 25 press briefing, Gen. John Campbell acknowledged that the MSF coordinates were received and distributed, meaning that the hospital’s coordinates were entered in the military’s “no-strike” database. Despite the explanation provided in that press briefing, it remains unclear why US forces directly involved in this incident were unable to determine that the targeted compound was the MSF hospital. It also remains unclear why the aircraft was able to be directed to the target site without conducting “a normal mission brief and securing crucial mission essential related materials, including the no-strike designations which would have identified the location of the MSF trauma center.” One explanation provided on November 25 was that when the aircraft was first launched it was responding to what was initially assumed to be an emergency “troops in contact” situation.

According to a summary of the findings of the US investigation provided at the November 25 press briefing (the “summary of findings”), “the US SOF [Special Operations Forces] commander provided the aircraft with the correct coordinates to the NDS [Afghan National Directorate of Security] headquarters building, the intended target of the Afghan

⁴ See ICRC, *Customary International Humanitarian Law*, rule 28.

⁵ See generally, US Department of Defense, *Law of War Manual*, June 2015, pp. 478-81.

⁶ Medecins Sans Frontieres, “Attack on Kunduz Trauma Centre Afghanistan: Initial MSF Internal Review,” November 5, 2015, available at <http://kunduz.msf.org/>.

SOF.” According to this account, those coordinates were apparently inaccurate or mistakenly transmitted and, when used by the aircrew, correlated to an open field. The aircrew of the AC-130 gunship involved in the attack then “visually located the closest, largest building near the open field, which we now know was the MSF trauma center.”

The MSF hospital, according to the MSF report, had no military units within or near it. Moreover, MSF found that there was no fighting at or near the MSF hospital on the evening the strike occurred. It was so quiet on the night of October 2-3 that MSF staff took the opportunity to go outside their living quarters and bunker, into open air, for the first time in days. The UN Assistance Mission to Afghanistan has also released a report that concurs with MSF’s conclusions that there was no fighting in or around the hospital at the time of the attack.

At the November 25 press briefing, General Campbell noted that “personnel who requested the strike and those who executed it from the air did not undertake the appropriate measures to verify that the facility was a legitimate military target.” At the time of the attack, according to the press briefing, the crew was operating without a functioning electronic communication system, thus “preventing the operation of an essential command and control capability and eliminating the ability of aircraft to transmit video, send and receive e-mail or send and receive electronic messages.”

After the aircraft returned to its original orbit, the aircraft’s grid location system correctly aligned with the NDS facility instead of the open field. The aircrew, however, remained “fixated on the physical description of the facility,” rather than relying on the grid coordinates, according to General Campbell. According to the press briefing and other briefings provided by Defense Department officials, the aircrew told their operational headquarters at Bagram Airfield of their decision to engage the building. Minutes later the AC-130 began to fire its large caliber guns and 105 mm cannon at the hospital.

It is unclear from the press briefing why the AC-130 aircrew could not visually identify the hospital compound as a protected site when, according to the MSF report, it was the only compound in Kunduz lit up that night and had no armed combatants or weapons systems or military vehicles within it. While the rest of Kunduz had lost power, the hospital was running on generators to keep the operating theater and intensive care unit functional. The US investigation, however, found that “at night, the aircrew was unable to identify any signs of the hospital’s protected status.”

In early December, another explanation emerged for the targeting decision on October 3. According to media reports, Rep. Duncan Hunter received information from two US service

members that US Special Forces called in the airstrike on the MSF hospital—not the NDS facility—after Afghan forces told them it had become a Taliban command and control center.⁷ We are aware that Rep. Hunter has provided details to you.

Notably, the allegations reported by Rep. Hunter are consistent with an early statement by a US military official about the airstrike. On October 3, a US military spokesman stated that “US forces conducted an airstrike in Kunduz city at 2.15 am (local), 3 October, against individuals threatening the force. The strike may have resulted in collateral damage to a nearby medical facility.”

The allegations reported by Rep. Hunter also follow several statements by senior Afghan government officials in October alleging that the Taliban were firing from the hospital. Acting Defense Minister Masoom Stanekzai and National Security Adviser Hanif Atmar have both stated that Taliban forces were operating from within the MSF hospital (a claim MSF categorically rejects). Notably, at the November 25 press briefing, General Campbell stated, “The investigation also found that the US SOF commander relied primarily upon information provided by Afghan partners and was unable to adequately distinguish between the NDS headquarters building and the MSF Trauma Center.” In the past, US forces in Afghanistan have launched airstrikes based on erroneous information provided by Afghan counterparts, as a result of which the US military instituted a number of safeguards to minimize the risk of relying on erroneous information and thereby reduce civilian casualties.⁸

At the November 25 press briefing, General Campbell did not refer to an exchange that took place two days before the airstrike, on October 1. According to the MSF report, MSF received a question on October 1 from a US government official in Washington, asking whether the hospital or any other MSF location had a large number of Taliban “holed up,” and enquired about the safety of MSF staff. According to the *Los Angeles Times*, the official who emailed MSF was a top aide to Gen. Joseph Dunford. MSF replied that the hospital was completely full of patients, and that they included wounded Taliban combatants. (The MSF report states that the night of the attack, two days after said e-mail correspondence, there were over 130 patients in the facility, including 20 Taliban and four Afghan government soldiers.)⁹ The exchange between a senior official in the Office of the Joint Chiefs of Staff

⁷ “Servicemen Contradict Military’s Account Of Attack On MSF Hospital In Afghanistan,” *Associated Press*, December 9, 2015, http://www.huffingtonpost.com/entry/msf-hospital-afghanistan-attack_566869bae4b080eddf567cfb.

⁸ Human Rights Watch, “Afghanistan: Investigate Any Newly Disclosed Civilian Casualty Incidents,” July 26, 2010, <https://www.hrw.org/news/2010/07/26/afghanistan-investigate-any-newly-disclosed-civilian-casualty-incidents>.

⁹ David S. Cloud and Alexandra Zavis, “Doctors Without Borders: US asked if Taliban was at hospital before attack,” *Los Angeles Times*, November 5, 2015, <http://www.latimes.com/world/afghanistan-pakistan/la-fg-afghanistan-hospital-bombing-report-20151105-story.html>.

and MSF indicates awareness of Taliban at the facility, and raises the possibility that Afghan forces sought to target alleged Taliban personnel who were inside the MSF hospital as patients.

The allegations raised by Rep. Hunter, the claims by Stanekzai and Atmar, and the earlier inquiry by the Joint Chiefs all raise serious concerns about the intended target of the attack. The discrepancies between the allegations and the findings reported on November 25 need to be more thoroughly investigated.

A criminal inquiry should examine the role of all personnel that took part in the attack, including at the command level. The information provided by US Special Forces, and their interactions with Afghan forces, should be closely examined. With respect to the aircrew, the military summary of findings found problems in how they identified and remained “fixated” on their target, instead of aborting the mission due to a lack of detailed intelligence and electronic systems failures. An investigation should examine why the aircrew reportedly identified a building by sight as a selected target based only on its size and general location, and continued to fire on the target after no return fire or other signs of hostility were observed.

A criminal investigation should examine the possible liability of commanders exercising control over the aircrew and ground commanders. According to the summary of findings, the aircrew “transmitted to their operational headquarters at Bagram Airfield that they were about to engage the building ... [and] provided the coordinates for the MSF Trauma Center as their target,” However, headquarters personnel who were aware of the coordinates for the MSF hospital and had access to the no-strike list, “did not realize that the grid coordinates for the target matched a location on the no-strike list or that the aircrew was preparing to fire on the hospital.” According to General Campbell, 12 minutes after the attack began, a Special Operations Forces officer at Bagram received a call from MSF, but it took headquarters and the Special Operations commander 27 minutes “to realize the fatal mistake.” The summary of findings do not provide an account of headquarters did during those 27 minutes, by which time “the AC-130 had already ceased firing.” An investigation should examine why headquarters personnel did not match the coordinates for the MSF facility to the no-strike list, and why the response to the MSF call took as long as 27 minutes. A criminal investigation into the Kunduz attack should examine the reasons commanders bypassed or disregarded the safeguards created by the no-strike list and the protocols attached to it.