

## Afghanistan, Operation “Enduring Freedom”

### A. The United States uses cluster bombs

**N.B. As per the disclaimer <sup>[1]</sup>, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents.** Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: GARDAZ, Samuel, “Les états-Unis utilisent des bombes à fragmentation”, in *Le Temps*, Geneva, 26 October 2001. Original in French, unofficial translation.]

#### The United States uses cluster bombs

*The United Nations confirmed on Thursday that nine Afghan civilians had been killed by controversial weapons. [...]*

The United States each day unleashes a little more of its range of weapons against the Taliban and seems to have gone one step further this week. On the twentieth day of the bombing of Afghanistan, US aircraft are said to have dropped cluster bombs on targets close to Herat in the west and on the fronts north of Kabul and near Mazar-i-Sharif. On Thursday a Pentagon official admitted anonymously that such weapons had been used.

### **Victims in Herat**

According to the United Nations spokesperson in Islamabad, these missiles – which scatter hundreds of bomblets if they open before they touch the ground – have claimed the lives of nine civilians in Herat since the start of the week. For technical reasons, these sub-munitions, which are the size of a soft drink can, do not necessarily explode when they hit the ground and turn into *de facto* mines. One of the nine victims is said to have set off one of these sub-munitions by handling it.

### **The UN wants explanations**

The United States' use of cluster bombs, a controversial weapon which has not been formally prohibited by international treaty, has angered several humanitarian organizations. The United Nations, which is carrying out de-mining campaigns in Afghanistan, asked Washington for clarification. The International Committee of the Red Cross (ICRC) did not give an opinion. In an "official statement" issued on Wednesday, it merely expressed its increasing concern "about the impact in humanitarian terms of the war in Afghanistan". Darcy Christen, deputy ICRC spokesman, pointed out that "the ICRC only gives an opinion about the legitimacy of military means employed as a last resort and always bases its views on its own intelligence gathered in the field". Like the other international organizations, the ICRC has evacuated its expatriate staff from Afghanistan.

An ICRC project

Cluster bombs, which were last used by the United States in Kosovo in 1999, are controversial. According to a Human Rights Watch report dated January 2000, in May 1999 the US supreme command issued a secret order prohibiting their use by its armed forces. Next December in Geneva, when the United Nations Convention on Certain Conventional Weapons of 1980 is reviewed, the ICRC will propose, among other recommendations, that it be prohibited to use sub-munitions, including cluster bombs, against military targets near populous civilian areas.

A bomb which splits into many others [...]

Cluster bombs are tubes which each contain 200 to 300 sub-munitions. Dropped by plane or fired by the artillery, the bombs release these sub-munitions, each the size of a soft drink can, at an altitude of between 100 and 1,000 metres. These sub-munitions can cover an area of 200 metres by 400 metres, the equivalent of eight football pitches. By scattering shrapnel over a range of 76 metres, each bomblet has an explosive force capable of piercing through armour plating, wiping out troop concentrations or neutralising minefields. Cluster bombs were used during the Viet Nam war and turn into mines when their sub-munitions do not explode: according to NATO, 29,000 sub-munitions did not explode in Kosovo.

## **B. Bombing of ICRC warehouses**

### **1. ICRC, Press Release of 16 October 2001**

[Source: ICRC, Press Release, 01/43, 16 October 2001; available on <http://www.icrc.org>

[21]

ICRC warehouses bombed in Kabul

Geneva (ICRC) – Shortly after 1.00 p.m. local time today, two bombs were dropped on an ICRC compound in Kabul, wounding one of the organization's employees who was

guarding the facility. He was taken to hospital and the latest reports from ICRC staff in the Afghan capital indicate that he is in stable condition.

The compound is located two kilometres from the city's airport. Like all other ICRC facilities in the country, it is clearly distinguishable from the air by the large red cross painted against a white background on the roof of each building.

One of the five buildings in the compound suffered a direct hit. It contained blankets, tarpaulins and plastic sheeting and is reported to be completely destroyed. A second building, containing food supplies, caught fire and was partially destroyed before the fire was brought under control.

The ICRC strongly regrets this incident, especially as one of its staff was wounded. It has approached the United States authorities for information on the exact circumstances.

International humanitarian law obliges the parties to conflict to respect the red cross and red crescent emblems and to take all the precautions needed to avoid harming civilians.

## **2. ICRC, Press Release of 26 October 2001**

[Source: ICRC, Press Release, 01/48, 26 October 2001; available on <http://www.icrc.org>

[2]

### **Bombing and occupation of ICRC facilities in Afghanistan**

Geneva (ICRC) – The International Committee of the Red Cross (ICRC) deplores the fact that bombs have once again been dropped on its warehouses in Kabul. A large (3X3 m) red cross on a white background was clearly displayed on the roof of each building in the complex. Initial reports indicate that nobody was hurt in this latest incident.

At about 11.30 a.m. local time, ICRC staff saw a large, slow-flying aircraft drop two bombs on the compound from low altitude. This is the same compound in which a building was destroyed in similar circumstances on 16 October. In this latest incident, three of the remaining four buildings caught fire. Two are said to have suffered direct hits.

Following the incident on 16 October, the ICRC informed the United States authorities once again of the location of its facilities.

The buildings contained the bulk of the food and blankets that the ICRC was in the process of distributing to some 55,000 disabled and other particularly vulnerable persons. The US authorities had also been notified of the distribution and the movement of vehicles and gathering of people at distribution points.

The ICRC also deplores the occupation and looting of its offices in Mazar-i-Sharif which were taken over by armed men three days ago. Office equipment, including computers, and vehicles were stolen. ICRC representations both to local authorities and to the Taliban ambassador in Pakistan have had no effect.

The ICRC reiterates that attacking or occupying facilities marked with the red cross emblem constitutes a violation of international humanitarian law.

### **3. Release from the Central Command of the United States of America**

[Source: *U.S. inadvertently strikes residential area and ICRC warehouses*, Centcom release number 01-10-06, 26 October 2001.]

**October 26, 2001**

**Release number: 01-10-06**

**For immediate release**

**U.S. Inadvertently strikes residential area and ICRC warehouses**

Macdill AFB, FL – At approximately 8 p.m. EDT yesterday (Oct. 25), two U.S. Navy F/A-18C Hornets each dropped one 2,000-pound GPS-guided Joint Direct Attack Munition (JDAM) on warehouses used by the International Committee of the Red Cross (ICRC) in Kabul, Afghanistan.

At approximately the same time, an F/A-18C intending to strike the warehouses inadvertently dropped one 500-pound GBU-12 bomb in a residential area approximately 700 feet south of the warehouses.

At 4 a.m. EDT today (Oct. 26), two B-52H Stratofortress bombers each dropped three 2,000-pound JDAMs on the same warehouse complex.

The ICRC in Geneva has issued a statement indicating that no one was hurt in this incident. The U.S. sincerely regrets this inadvertent strike on the ICRC warehouses and the residential area.

Although details are still being investigated, preliminary indications are that the warehouses were struck due to a human error in the targeting process. Two [sic] of the six warehouses hit had been inadvertently struck by the U.S. aircraft on Oct. 16 because the Taliban had used them previously for storage of military equipment, and military vehicles had been seen in the vicinity of these warehouses. Regarding the F/A-18C that inadvertently struck the residential area, initial indications are that the bomb's guidance system malfunctioned.

U.S. forces intentionally strike only military and terrorist targets. The U.S. is the largest donor of food and other humanitarian aid in Afghanistan, and U.S. forces are aggressive supporters of the worldwide effort to help the Afghan people. The U.S. has been a strong and longstanding supporter of the ICRC.

#### 4. Fannie, 8 years old, on Radio-Canada.

[Source: Commentary by Fannie, 8 years old, Montréal, Canada, during the programme “Le Point”, Télévision de Radio-Canada, 13 November 2001; unofficial translation.]

They made mistakes; this morning they launched missiles. I heard that they had launched them into a Red Cross building. I think that it is true we can make mistakes, but I think that they should have made the mistake elsewhere.

## Discussion

1.
  - a. Although the use of cluster bombs was not specifically prohibited in 2001, was it authorized in all circumstances? In what circumstances could the use of such a weapon have constituted a violation of IHL? (P I, Arts 35 <sup>[3]</sup> and 51(4) <sup>[4]</sup>)
  - b. Is the use of a weapon that in most cases affects the civilian population indiscriminately prohibited in all circumstances?
  - c. Is the fact that the sub-munitions of such a weapon are transformed *de facto* into anti-personnel mines sufficient grounds to prohibit it under the rules banning the use of mines? Does the fact that the United States of America is not party to the Mine Ban Convention authorize it to use anti-personnel mines? If it were party to the Convention, could it still use cluster bombs? Is the use of such weapons prohibited by the fact that the United States is party to Protocol II to the 1980 Convention on Certain Conventional Weapons? [See Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996 (Protocol II to the 1980 Convention), **and** Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel

Mines and on their Destruction]

2.

- a. Was the attack on the ICRC warehouses a violation of IHL? If so, because the red cross emblem was displayed on the warehouses? Because the warehouses were being used by the ICRC? Because they contained relief supplies intended for civilians? Because they were not military objectives? (GC I, Arts 9 <sup>[5]</sup>, 19 <sup>[6]</sup>, 38 <sup>[7]</sup> and 44 <sup>[8]</sup>; GC IV, Arts 10 <sup>[9]</sup>, 18 <sup>[10]</sup>, 142 <sup>[11]</sup> and 143 <sup>[12]</sup>; P I, Arts 48 <sup>[13]</sup>, 50 <sup>[14]</sup>, 51(2) <sup>[14]</sup> and 52(2) <sup>[15]</sup>)
- b. What is the purpose of the emblem displayed on the ICRC warehouses? Would it have been lawful to attack the warehouses if the emblem had not been displayed on them? How would your legal opinion of the attack be different if the emblem had not been displayed on the warehouses? (P I, Arts 48 <sup>[13]</sup>, 50 <sup>[14]</sup>, 51 <sup>[14]</sup>, 52(2) <sup>[15]</sup>, 52(3) <sup>[15]</sup> and 57 <sup>[16]</sup>)
- c. According to IHL, was Fannie right to think that the United States should not have made a mistake? Would it have been more acceptable if the United States had made a mistake elsewhere? Does an attack targeting or affecting civilian property “by mistake” (i.e., where the attacker does not intend to target or affect civilian property) violate IHL? Could this attack in particular, like any other attack carried out by mistake, be a violation of IHL? A war crime? (P I, Arts 57 <sup>[16]</sup> and 85(3) <sup>[17]</sup>; ICC Statute, Arts 30 <sup>[18]</sup> and 32 <sup>[19]</sup>)
- d. What precautions must the attacker take to avoid mistakes? What could indicate, in this case, whether the United States took or failed to take such precautions? (P I, Arts 51 <sup>[20]</sup>, 52(2) <sup>[15]</sup>, 52(3) <sup>[15]</sup> and 57 <sup>[16]</sup>)
- e. If an attacker takes all precautions prescribed by IHL but nonetheless hits or affects civilian objects, does he violate IHL?
- f. What did the ICRC mean when it drew attention to the distance between the warehouses and the airport? Is it important that the aircraft was flying at low altitude and that the US authorities had been notified of the location of the warehouses and that vehicles might be moving and people gathering around them? What additional evidence would you like to see clarified in order to determine whether the attack was or was not a violation of IHL? (P I, Arts 51 <sup>[20]</sup>, 52(2) <sup>[15]</sup>, 52(3) <sup>[15]</sup> and 57 <sup>[16]</sup>)

g. Was the ICRC entitled to display the red cross on the warehouses? Even though they did not contain (only) medical supplies? Why does the ICRC use the red cross and not the red crescent in Afghanistan? (GC I, Arts 9 <sup>[5]</sup>, 19 <sup>[6]</sup>, 38 <sup>[7]</sup>, 42 <sup>[21]</sup> and 44(3) <sup>[8]</sup>)

3.

a. Did the occupation and looting of ICRC offices violate IHL? If so, is this because the offices displayed the red cross emblem? Because they were used for ICRC activities? Because they were not a military objective? (GC IV, Arts 4 <sup>[22]</sup>, 10 <sup>[9]</sup>, 33(2) <sup>[23]</sup>, 142 <sup>[11]</sup> and 143(5) <sup>[12]</sup>)

b. What additional evidence would you like to see clarified in order to determine whether the occupation and looting were or were not a violation of IHL?

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