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BUILDING THE HISTORIC RECORD: REPORTING ON WAR CRIMES AND INTERNATIONAL TRIALS

David Freudberg[†]

I appear not as an attorney or a scholar or a soldier, but simply as a journalist trying to follow the journalistic credo: Comfort the afflicted and afflict the comfortable.

I am also here to present some of the questions, as I see them, facing American society in this tempestuous period of war in Iraq. A question at the very top of the list to be faced by everybody is: what are the effects upon civilians?

In the war on Afghanistan, following the tragic events of September 11, 2001, the military's impact upon Afghan civilians was substantially marginalized in most news coverage. Following the outbreak of hostilities, it took many weeks before a focus upon civilian casualties entered the front page of the New York Times.¹

Economist Marc Herold at the University of New Hampshire undertook to track civilian deaths and injuries, based upon media and other generally reliable reports as best he could compile them, and determined that, at about two or three months after U.S. bombing began, more civilians had been killed by U.S.-led military operations in Afghanistan than had been killed on September 11th in the United States.² So, why do we not adequately focus upon the maiming and the murder of civilians since protecting innocent people is the most fundamental concern of U.S. national security as well as all international jurisprudence relating to war crimes?

The great horror of the September 11th attack was that the zealots who plotted the violence callously disregarded the life of human beings who

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¹ Eric Schmitt, *Pentagon Says U.S. Airstrike Killed Women And Children*, N.Y. TIMES, Mar. 13, 2002.

² Marc Herold, *Daily Casualty Count of Afghan Civilians Killed by U.S. Bombing and Special Forces Attacks, October 7 Until Present Day*, available at <http://pubpages.unh.edu/~mwhherold/AfghanDailyCount.xls>. (last visited Feb. 16, 2004).

were civilians. The perpetrators were perfectly willing to take blameless mothers and children and businesspeople flying commercial airlines and crash them into towers, taking their lives as well as the lives of the people who were in and around those towers. That was the greatest sin that they committed.

And so, as Americans, we must make sure that we don't, in the eerie Vietnam-era phrase, "destroy the village in order to save it."³ As a people who have shown the world the pathway to freedom, who hold human rights as sacred, and who have legally bound our nation to human rights standards, we have inherited a special duty to safeguard these rights, and most particularly to protect civilians' basic rights to peace and safety.

And yet worldwide, the highest proportion of war deaths today is suffered not by armed combatants, but by defenseless and guiltless civilians – a trend compounded by military strategy and new technology employed in many conflicts, including those prosecuted by the United States. The number of civilians who died in World War I is estimated at five percent.⁴ By World War II, in which mass slaughter of civilian populations became official policy, the civilian toll had surged to about fifty percent.⁵ And by U.N. estimate, some eighty percent or more of war victims today are civilians!⁶ The killing of toddlers and grandmothers and schoolteachers and medical workers and others by today's ruthless machinery of organized violence is the central, horrible fact of modern war. And yet, you would be hard-pressed to know that, based on our national policy debates and, indeed, our media coverage.

The International Physicians for Prevention of Nuclear War was awarded the Nobel Peace Prize in 1985. This organization has estimated, through its British affiliate that most of the people who will die in Iraq will be civilians.⁷ And who are the Iraqi people? Roughly half of them are fourteen years old and under. So, to kill civilians in Iraq is to kill children. And to those children, we owe the exercise of asking the question: What will be the extent of civilian damage from this war? Will it be a constant subject of international discussion or will it be shrugged off as collateral damage?

³ James Der Derian, *A Virtual Theory of Global Politics, Mimetic War and the Spectral State*, Proceedings of the Ninety-Third Annual Meeting of the American Society of International Law Power Lecture, Mar. 24-27, 1999 (quoting anonymous Vietnam soldier).

⁴ See generally CIVILIANS IN WAR (Simon Chesterman ed. 2001).

⁵ See generally *Id.*

⁶ See generally *Id.*

⁷ INTERNATIONAL PHYSICIANS FOR THE PREVENTION OF NUCLEAR WAR, *War in Iraq: The Human Costs, IPPNW Protests Decision to Halt Civilian Casualty Counts*, Dec 12, 2003, available at <http://www.ippnw.org/IraqCivilianCasualtiesCPA.html> (last visited Feb. 16 2004).

I believe the United States as a country is sensitive to the loss of innocent life, but will our media coverage reflect that? The spooky discussion of thermo-nuclear war that was entertained by the most senior officials of the United States in the saber-rattling prior to the Iraq war is undeniably a discussion about civilian death on an unprecedented scale. It defies the imagination even in this time in which one boundary of decency after another has been shattered. A thermo-nuclear war, which was raised in early 2003 by Secretary of State Colin Powell, would murder civilians in the hundreds of thousands. Yet in a season of gut-level fear and a widely held view that Americans should pull together, shock barely registered in reaction to actual public consideration of thermo-nuclear war by the nations top policy makers. So, we have entered a different time.

Thus, in building the historical record of war conduct particularly at a time when militarism so often means war against civilians, our media bear a special responsibility to assemble that record. Warrior governments, with rare exception, cannot be expected to volunteer the details of atrocities committed. So, it requires painstaking inquiry by others. Ideally, over time, this will become the province of the International Criminal Court which itself will be judged by the thoroughness and fairness of its procedures. Still, the new court will be greatly dependent upon civil society, including the news media, to alert the Office of the Prosecutor to possible crimes.

Yet, in most mainstream American coverage of the U.S.-led war in Iraq starting in 2003, media reporting of civilian deaths and injuries is difficult to find. The emphasis was in quite another direction. The movie-like battlefield images that were transmitted by reporters embedded with the troops became the ultimate *Reality TV* production. The thrill of young soldiers wielding high-tech weaponry, the desert wind against their backs, initially provided compelling pictures.

In many media outlets, the tally of hundreds of American soldiers who died in the conflict has been updated daily – a tragic toll that, of course, continued to mount months after the proclaimed cessation of major combat operations. But virtually never in those media reports did one hear updated counts, or even estimates, of Iraqi soldiers, let alone civilians, whose deaths represent no less a human tragedy and no less a news event – given the propaganda value of such deaths to anti-American constituencies. Most media coverage is so skewed and disproportionate that, ironically, it was the sad loss of NBC reporter, David Bloom, who passed away from non-combat causes, that may have garnered more airtime on American broadcasts than any other death in the war.

There were some laudable exceptions to this pattern, such as a moving, lengthy story by NPR's Ann Garrels who brought her microphone to hospital wards following the U.S. bombing of a marketplace in Baghdad. Employing the unique power of radio, sounds of sobbing relatives may have left a more lasting impression than the images of jeeps and tanks sent by embedded reporters. It made one wonder whether the cause of fair and

responsible reporting might not have been better served if the TV networks, where most Americans receive their news, had included more interviews with doctors and nurses at civilian Iraqi hospitals, and fewer commentaries by retired U.S. generals walking us through maps of battlefields.

If civilian casualties are the gravest sin of war and when inflicted systematically the greatest crime, where was one to obtain a big picture about them – even so crude a measure as of the number of innocents killed, in the case of the 2003 invasion of Iraq? The difficulty in finding an answer, at least in the dispatches appearing in most of the American media, signifies the great distortion of what has come to be standard war reporting in the United States. As of this writing (August, 2003) the Pentagon count of U.S. war dead, in a volunteer army, has exceeded 300, a heart-breaking calamity for each of their families. And what of the families of innocent Iraqi non-combatants, such as bystanders shot during a firefight, or the teacher shot in a small village, who died from attacks directly attributable to U.S.-led (Coalition) forces?

Websites such as the British-based <http://www.iraqbodycount.org>, drawing upon more than 300 published reports from such sources as the Associated Press, the International Committee of the Red Cross, Reuters and Amnesty International, tabulate that Iraqi civilian deaths range between 6,113 and 7,830. Averaged, civilian deaths at the hands of U.S.-led forces were thus about 23 times greater than American military deaths. The number of civilian Iraqi injuries attributed to the U.S.-led intervention is estimated from the same reports at 20,000. (The methodology of these grim calculations is provided in great detail online.)

Civilian deaths attributable to forces other than the U.S.-led coalition are an equally grave human rights concern for which I know of no trustworthy detailed documentation. It urgently bears comprehensive investigation.

A second question of great importance now is whether media coverage in this new period will be sufficiently unrestricted to allow the functioning of the very democratic system our leaders ostensibly seek to protect. In other words, will war be allowed to trump democracy? The U.S. presidential election in 2004 will be decided in part upon the information that Americans have as to the conduct of their government in this war. And so we ask: will the citizenry have the information it needs? Will that information be accurate and sufficient? The jingoism and drive to support our troops must not be allowed to drown out sober reporting of the actual events of war.

ABC-TV news anchor, Peter Jennings, a rather middle of the road figure in the American media establishment, said recently in an interview that the basic posture of the U.S. Department of Defense is to give no information to the press. The tension between the military and the public's right to know has reached that level. But in our American republic, the military was certainly never intended to be autonomous; on the contrary, it

serves under the control of the Executive and is thus accountable to those who hire and fire the Executive: the voting citizenry. This fundamental power arrangement must never be altered, especially in times of dire threat. Otherwise, we have relinquished democracy in order to save it.

After leading the Allied troops against Nazism, after serving eight years as Commander-in-Chief, Dwight Eisenhower famously cautioned against the build-up of excessive power by the military-industrial complex.⁸ This was no empty warning. Vigilantly checking military power, which operates on the use of brute force directed by an unquestioned chain of command, is democracy's vital bulwark against military dictatorship. There is a solid basis for the public's reasonable right to know what the military is doing. It is healthy for journalists, in general, to be watchful and wary of so powerful an institution as government, and particularly to be skeptical of governments waging war, and particularly when wars main victims are civilians.

In war time, there is an understandable tendency among many journalists to concentrate on the pronouncements of those waging war. The words and deeds of warriors should be sharply scrutinized. But this must be balanced by coverage of unofficial sentiments expressed by those outside the halls of power who may be less beholden to the vested interests.

It appears that the Bush administration, and a large segment of the American public, was rather surprised by the extent of the vast peace protest that took place on the weekend of February 15, 2003. That was an amazing moment of human history, perhaps unprecedented. About 7 million people came out all over the world peacefully, everywhere – even in New York with all the police in riot gear, and the amazingly tight quarters that hundreds of thousands of demonstrators, exercising their First Amendment privilege. I was there covering it. At one point I wandered into one of the pens which they were crammed into. Every block there was a rectangular pen with four barricades. Even under those trying circumstances, in bitter cold, there were only a handful of arrests; it was overwhelmingly peaceful. Democracy was alive, not only in the U.S. but all over the world. Why was that such a surprise? Why was this movement was so under-reported in the American media until the event itself occurred and could not be denied? There had been some coverage of a growing antiwar movement, but certainly nothing that would seem proportionate to the degree of popular support that was manifested on that day. There is some drastic imbalance here. The people were speaking all over the world.

Our mass media, so often lamentably playing the role of stenographers to official power, must shift their emphasis. In a time of unprecedented government and military might, let our journalists' subject official power to

⁸ Dwight D. Eisenhower, Farewell Radio and Television Address to the American People, Jan. 17, 1961, *in* Public Papers of the Presidents of the United States: Dwight D. Eisenhower 1035 ¶ 421, 1038 (1961).

more probing standards of analysis, and let the voices of popular democracy be more attentively heard.