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Chapter 3

The Body Counts: Civilian Casualties and the Crisis of Human Rights

Amy Ross[1]

Introduction

This chapter explores the role of bodies within the complex historical development of the laws of war, and the contemporary crisis of human rights. Establishing the identities of the killed, and the killers, is crucial to the distinction between violence that is determined to be criminal and/or prohibited, and violence that is sanctioned and/or celebrated as heroic. Counting certain bodies as the victims of human rights abuses (and the associated failure to count other bodies), is an integral aspect of the politics of violence and human rights. By examining which "bodies count" and how, this chapter addresses the ways in which violence is understood as either acts of war, or crimes of war. Bodies are sites of struggle within the human rights universe.

The crisis of human rights, as discussed in this volume, is multidimensional. While discourse surrounding the protection of human rights has expanded steadily since the end of World War II, the widespread and systematic violation of human rights has also increased – despite the growth of laws, institutions and movements organized around the protection of human rights. It is a paradox: alongside the twentieth-century developments associated with the protection of human rights, violence against innocents is also on the rise. Whereas "In World War I only 5 percent of all casualties were civilian; in World War II that number was 50 percent; and in the conflicts through the 1990s civilians constituted up to 90 percent or more of those killed" (Chesterman 2001, 2). Central to this paradox is a debate concerning what qualifies as "human," what rights (if any) are inherent to all humans, and when an act of violence constitutes a human rights abuse. Counting (and accounting for) the bodies in violence is essential for determining the nature of the violence. When too many dead bodies turn up in war, and these bodies are determined to be "innocents," that action can be seen as the antithesis of "noble warfare," and therefore, rather, a violation of human rights.

For example, the image of the dead bodies uncovered in mass graves near Srebrenica (see Figure 3.1) depicts a horrible event. The twisted and intertwined remains invoke an image of the individual bodies that once existed; the tangle

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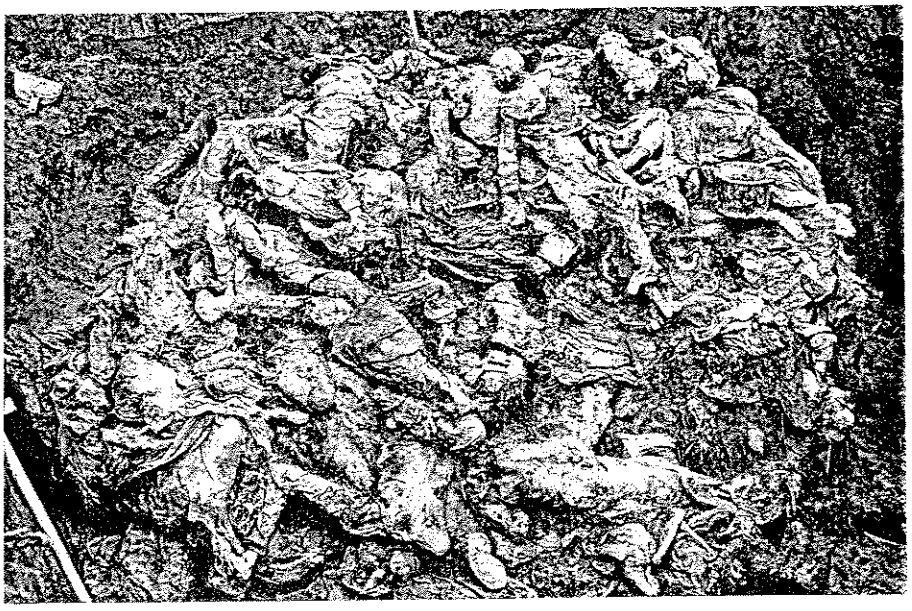

Figure 3.1 Grave at Pilice collective farm near Srebrenica, Bosnia, 1996. Photo by Gilles Peress, courtesy of Magnum Photos

of multiple bones provoke the horror of the de-humanization of the body as it becomes a part of the pit. That something incredibly dreadful happened in this place is indisputable. But was it a crime of war, or an act of war? Is it the inevitable consequence of battle (as the defense argued at the genocide trial for General Radislav Krstic before the International Criminal Tribunal for the former Yugoslavia), or is it genocide, as the prosecutors argued? (The prosecution won – see ICTY 2006).

Whether the violence is understood to be an act of war, or crimes of war, is of critical importance in the prevention of such violence. As the contributors of the Crimes of War project write:

> ... even as they watched the Towers fall, and in the pivotal days that followed, leaders disagreed about how, exactly, to define what they were seeing. Was it war? Terrorism? A crime against humanity? An unprecedented combination of atrocities? Definitions matter, for they determine what sort of response is permissible and what body of international law applies. (Crimes of War 2001)

The chapter is organized in two parts. The first is a genealogy of the historical evolution of the laws of war, international humanitarian law and human rights, with an emphasis on the socially-constructed divide between violence that is sanctioned, and that which is considered illegal. The second part analyzes how the body counts, that is, how attempts to determine or obfuscate the identity of the victims of violence influence the legality/legitimacy of such violence, and the consequential options available for the prevention of abuses and protection of human rights.

Part I: A History of Innocence

Centuries of ethical and political debates have focused on the appropriate means of waging war. Over time, the idea took hold that some people should be spared the violence of war, and that if too many of these innocents were harmed the war itself could be considered "unjust." Violence directed against the weak grew to be considered criminal.

Codes of conduct for soldiers, and prescriptions concerning who could be the legitimate target of warfare, date back to early civilizations (Neier 1998). Ancient societies in Egypt and India banned certain types of warfare, and the English courts codified "rules of chivalry" to regulate warfare between knights (Beigbeder 1999; Ignatieff 1997). Such norms and practices cross time and space, indicating their centrality to the practice of warfare, rather than restricted to a particular culture or historical moment.

Michael Ignatieff (1997) calls these norms "the warrior's honor." In an essay of that title, Ignatieff explains that these codes of conduct were centered on the premise that a just, honorable war should be a competition between strong, honorable men fighting other, strong, honorable men. War had to be differentiated from mere barbarism. These rules of chivalry (allegedly) elevated the battlefield into a realm of legitimacy, where laws governed the conduct of warriors. These codes of conduct made the violence of battle legitimate, instead of simply slaughter.

Hugo Grotius, a Dutch scholar and the "father" of international law, codified many of these ancient norms into laws in 1625. In doing so, Grotius drew upon religious and philosophical traditions that sought to determine the appropriateness of battle and organized killing (McKeogh 2002). Grotius rejected the notion of collective guilt: that all members of the community of the enemy deserved to be killed in war; "Nor is it enough that by a kind of fiction the enemy may be regarded as forming a single body."[2] In the eighteenth century, a Swiss diplomat, E. de Vattel, developed Grotius' doctrine further into an argument concerning "just war." De Vattel asserted that only defensive wars are just, whereas aggressive wars are unjust (ibid).

By the nineteenth century, public awareness concerning the treatment of the sick and wounded bodies of soldiers contributed to a demand for a response. Most scholars attribute this new development to the advent of the war correspondent in the American Civil War. War became simultaneously more visible, and more savage. With the invention of Morse Code and technological advances in photography, war correspondents generated war reports. Previously, reports from the battlefields were submitted by the general, who tended to report on heroism and glory. The dead rarely had the opportunity to share their stories.

The war correspondent shifted this equation slightly, and the public reacted. In response to this new public exposure to the horrors of the battlefield, President Abraham Lincoln passed legislation (the Lieber Code for Armies in the Field 1863) governing the conduct of soldiers (Neier 1998, 14).

In Europe, similar sentiments worked their way into law. The Crimean War served as the seminal moment. Jean-Henri Dunant, a wealthy Swiss national, witnessed the

2 Translated from Grotius' *De Jure Belli ac Pacis* (McKeogh 2002, 104).

Battle of Solferino in 1859 and became obsessed with the images he had seen of the war dead and wounded. In A Memory of Solferino, he described the horrors of the battlefield, the ground dark with blood, severed body parts, splintered bone fragments, wounded men desperately flailing about, and local peasants harvesting the corpses for boots and other booty. Dunant's work did more than describe the horrors of battle; he went on to offer specific proposals to how the wounded should be treated; "Would it not be possible, in time of peace and quiet, to form relief societies for the purpose of having care given to the wounded in wartime by zealous, devoted and thoroughly qualified volunteers?" (see ICRC 1986). Dunant began to lobby for an international convention that would allow for first-aid societies to care for the wounded (from both sides) in battle. Dunant established the Red Cross (so named due to the association with the Swiss flag) in Geneva.

The birth of international humanitarian law is generally credited to 1868 and the Declaration of St. Petersburg, a treaty signed by the majority of the powers in Europe. These governments agreed to "the technical limits at which the necessities of war ought to yield to the requirements of humanity," i.e., to prohibit weapons that result in unnecessary suffering beyond the legitimate goal of war. The Declaration of St. Petersburg declared that "the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy" (Rosenbaum 1993; Weschler 1999; Ignatieff 1997).

The international humanitarian law of the nineteenth century led the foundations for contemporary human rights law. International humanitarian law is expressly concerned with the laws of war, the correct conduct of states and armies during war, and the treatment of civilians – specifically the sick, the wounded, prisoners, ship-wrecked persons, women, and children: i.e. those other than the "strong men" considered the appropriate target of violence during legitimate battle (Weschler 1999). International humanitarian law therefore, departs from the early norms and ideologies concerning warfare in two critical ways. First, international humanitarian law attempts to limit the damage a state can inflict during war – even if that war is considered a just war. As such, international humanitarian law impinges on sovereignty in precisely the way that earlier aspects of international law reinforced the autonomy of states. Secondly, international humanitarian law recognized and codified distinct human identities, with violence against certain bodies considered abhorrent – again, even within the practice of a just war.

Geneva, and later The Hague in the Netherlands, became the centers of a series of initiatives that greatly amplified international humanitarian law. The first "Geneva Convention" (1864) was the product of a meeting of representatives from sixteen countries, including the United States, to discuss ways to improve medical services on the battlefield. A series of agreements followed ("The Geneva Conventions"). In its early stages, this body of law was restricted to the bodies of soldiers. The Geneva Conventions, the Hague Conventions (1899, 1907) and other elements of international humanitarian law sought to impose constraints on warfare without outlawing war itself.

Despite these initiatives of international humanitarian law, the new scale of destruction of World War I was a grim reminder as to the limits of law and the brutality of battle (Winter 1995; Winter and Sivan 1999). For some, the very extent of the death and destruction was a compelling case that war would be, from that point

on, out of the question. For others, World War I proved the failure of international law to prevent war, to restrict armaments, or to prevent human death and destruction.

World War II is recognized as a critical moment in global consciousness and consensus regarding the human costs of warfare. The conclusion of the war stimulated the growth of human rights law, and the emergence of a global human rights regime. Jack Donnelly (1993) argues that the human rights regime arises from the "demand" generated from the Holocaust, with the Nuremberg Trials and international laws and norms (specifically, the Universal Declaration of Human Rights and the Genocide Convention), created to "supply" a response to these demands. The international instruments and local social movements organized around human rights have become powerful and extensive, launching a "revolution" in international law (Manasian 1998). A critical feature of this transformation was the development of the concept of the innocent civilian.

The Nuremberg trials were innovative on two counts. Firstly, individuals were to be held accountable for actions taken as officials of the state. Secondly, individuals were judged guilty for "crimes against humanity" for actions against citizens of their own state. Whereas "war crimes" addressed actions between combatants, "crimes against humanity" concerned the actions of civilians (including leaders of state) against citizen/civilians.

"Victors' justice" refers to the notion that the trials were an example of justice as an execution of authority (Foucault 1979). Critics contend that the post-World War II trials represent "victors' justice" rather than justice due to 1) the lack of trials for Allied officials for war crimes, and 2) the fact that the Nazis were tried for *ex post facto* crimes, that is crimes that were established in law, after the activities of these particular individuals. In this context, the Nuremberg and the Tokyo trials are merely the result of a victorious alliance of armies imposing its will on a defeated people, in order to demonstrate its victory/authority/power to the world community. The central problem associated with victor's justice is that it takes a "victory": increasingly, since the end of the Cold War, conflicts are being resolved through negotiated settlements, without one clear victor. Hence Nuremberg fails as a contemporary model, as "victors" and "victories" are increasingly rare. A further problem ascribed to victor's justice is that it is imposed from an outside authority (from "above") and hence fails to resonate with the local community associated with the crimes.

Despite the caveats and complaints regarding this form of "victor's justice," what is clear is that these trials represented a shift: the security of "humanity" (existing everywhere) was the domain and concern of "international" law (again, existing everywhere).

The Universal Declaration of Human Rights originated during this moment of international consensus concerning the purported need to protect populations from mass violence. The approval (1948) and entry into force (1951) of the Convention on the Prevention and Punishment of Genocide further asserted the supremacy of international law over domestic law and state sovereignty. The Genocide Convention established that perpetrators of such a crime could be held accountable under international law, even in the absence of applicable domestic law. The Genocide Convention further detailed that an individual acting in his/her role as head of state would be accountable under international law.

A series of treaties and conventions followed in the next several decades. The Geneva Conventions were upgraded and extended, and the Universal Declaration of Human Rights was divided into two parts (1952), reflecting the growing ideological divide between the United States and the Soviet Union. The United Nations served as the place where such initiatives were developed.

These initiatives were a departure from international law that had previously avoided addressing such concerns out of principles of sovereignty; "Human-rights law ... touches governments at their most sensitive point: how they exercise power over their own citizens. Never before have states agreed to accept so many restrictions on their domestic behavior, or to submit to international scrutiny" (Manasian 1998, 5).

The existence of the United Nations established a communicative and normative framework, where the human rights regime found a home. The post World War II period witnessed the growth of a web of NGOs. According to the World Bank, while statistics about global numbers of NGOs are notoriously incomplete, it is currently estimated that there is somewhere between 6,000 and 30,000 national NGOs in developing countries. Individually, such organizations may cover as few as two national societies, but in their operations together they create what scholars have termed a "global network" (Keck and Sikkink 1998). NGOs can be "particularly unruly" (see Waters 1995) as their capacity to link diverse people in relation to common causes and interests can potentially challenge the state.

Despite the reluctance of the superpowers, in 1977 the Geneva Conventions were extended, partially in response to atrocities in Vietnam. Article 85 of the First Additional Protocol of 1977 specifies that grave breaches in international armed conflict include:

> 3a) ... making the civilian population or individual civilians the object of attack; b) launching an indiscriminant attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects (UNHCR 2007).

In sum, laws governing the appropriate reasons to go to war, and the appropriate conduct during war, have expanded the notion of protected persons, or "innocents," and therefore inappropriate targets of war. An expanding human rights movement has increased the visibility of the victims of violence. Yet despite this expansion in law, politics and social network, civilian casualties have increased. Those conducting war increasingly sought to explain away these casualties as a fact of war; the inevitable consequences of war, or "The Fog of War."

Part Two: Knowledge, Ignorance and Which Bodies Count

Katherine Verdery argues that dead bodies are particularly important symbols in the struggles that take place over what constitutes the "truth" of a particular conflict. Bodies can mean a great many different things to a great many different people, Verdery observes, hence it is the "complexity" of dead bodies that make them particularly good material for political agendas. She writes: "Dead bodies ... don't talk much (although once they did). Words can be put in their mouths – often quite

ambiguous words ... it is thus easier to re-write history with dead people than other kinds of symbols ..." (Verdery 1999, 29).

Dead bodies may influence the telling of the historical narrative. Dead bodies may also tell a particular version of events. The bodies of the dead contribute to the body of evidence (Stover and Peress 1998). Some of this evidence can reach a court of law, which may evaluate whether a crime of war or an act of war occurred.

But without knowledge of the victims of violence, it is difficult to determine what happened, and in particular to secure accountability. Struggles over the type of "evidence" provided by the bodies of those killed during conflict represent attempts to influence the aftermath of the violence. Such evidence can be powerful material in cases against perpetrators. For that reason, human rights activists have seen knowledge and accountability as essential features in curbing impunity and securing human rights.

For example, in Latin America, the principle of "the right to the truth" was a response to practices of repression such as "disappearances", extra-judicial assassinations, and other forms of violence that have been called "deniable forms of repression."[3] Ignacio Martín-Baró, a prominent social psychologist who lived and worked in El Salvador, wrote shortly before his assassination that the power of this particular form of terror was the state's ability to deny responsibility for these crimes, while simultaneously making the entire society aware that it could kill with impunity. Martín-Baró was one of six Jesuits assassinated by the Salvadoran military in November 1989.

Establishing the truth became important, therefore, precisely because the regime was able to carry out its terror by lying, presenting distortions of the truth or covering up important information. Since secrecy was an essential feature in the operation of the violence, exposure and accountability was a necessary element of the prevention of future violations. In the face of violence conducted under the cover of state secrecy, the demands for "the right to the truth" rested on the logic that if the truth could be made a matter of open and public record, accountability would replace impunity and future violations would be deterred. Demands for an accurate accounting of the violence pursued knowledge of the atrocities as a weapon against impunity.

The pursuit of "the right to the truth" in Latin America spawned social movements organized around demands of *habeas corpus*, literally "you have the body." In its specific legal usage, *habeas corpus* refers to a writ requiring that a detained person be brought before a court at a stated time and place to decide the legality of his/her detention or imprisonment. These social movements, such as the Madres de la Plaza de Mayo in Argentina, provided a vehicle for protest, and importantly, drew international attention to the occurrence and extent of the atrocities.

Although the overt demands were for information regarding the bodies of missing loved ones, the implicit political objectives were for political and judicial accountability, and in some cases, a complete regime change from the military rule associated with the violent practices, to a (theoretically) more accountable

3 Ayreh Neier used this term to highlight the distinctive nature of the violence ascribed to the state: "Human Rights and Accountability" lecture, Center for Human Rights, University of California, Berkeley, April 1994.

democratically elected civilian government. The "right to the truth," then, was taken as both an attack against the structures of power considered to be responsible for the repression, as well as an important therapeutic response to recover from the pattern of "deniable repression" practised (to various degrees) in Latin America.

In many sites in Latin America plagued by the phenomenon of "disappearances" and massacres conducted under the cover of state secrecy, exhumation projects have persisted. In Guatemala, public and private initiatives sought to exhume the graves of massacre victims, even at great risk (see Figure 3.2). Although commonly called "clandestine cemeteries," survivors in communities often knew exactly where the bodies were buried. In some cases, those that had managed to escape the massacre had returned home to bury their dead; in other cases the military forced villagers to bury the dead. Often the so-called "clandestine cemetery" was located in the town center.

While the body and the story it tells has inspired social movements around demands for knowledge and accountability, other sectors are driven by the need to ignore, deny or cover-up these same bodies. The construction of ignorance associated with the victims of violence often involves the deliberate failure to account for the dead body. It is difficult to determine how many Iraqis have died as a result of the US invasion (March 2003) and occupation. There are estimates – only estimates. Perhaps the best-known estimate of civilian deaths from the fighting is that of the Iraq Body Count project. This British-based group of researchers has systematically examined the western press and collated all accounts of civilian casualties. They tabulate all deaths that are independently reported by two sources. Based on this

Figure 3.2 **Exhumation site in Comalapa, Guatemala, 2003. An organization of widows has struggled to gain access to the land, so as to retrieve the bodies of massacre victims. Photo by Peter Frey, University of Georgia**

methodology, they estimate civilian casualties from the invasion until September 2006 at around 45,000.

As is acknowledged by Iraq Body Count, such accounts likely underestimate deaths. Certainly some battles and other military actions, and resultant Iraqi deaths, fail to be reported unless the United States and/or other foreign forces suffered casualties. Additionally, for much of the invasion and occupation western reporters have been prevented from moving about Iraq independently, meaning that even such high-profile claims of mass civilian deaths as the killing by US bombing of upwards of 45 Iraqis at a wedding party in the town of Mogr el-Deeb in May 2004, failed to be independently verified. All estimates of Iraq civilian deaths since the invasion are probably on the low side.

In order to address the question of how many Iraqi deaths have occurred, a team of public health researchers from the Johns Hopkins Bloomberg School of Public Health, the Columbia University School of Nursing, and the College of Medicine at Al-Mustansiriya University in Baghdad undertook two epidemiologic surveys of "excess Iraqi" deaths since the March, 2003 invasion. This research team combined epidemiologic expertise with a background in studying people in disaster and emergency situations and an in-depth knowledge of Iraq.[4]

The results of the research, published in the British medical journal *The Lancet*, are shocking. The researchers estimated that 650,000 "excessive deaths" have occurred in Iraq since the US invasion in March 2003 (Roberts et al 2004, 2006). Professor Juan Cole observed on his indispensible blog, Informed Comment (in response to an even earlier 2004 study), that "The troubling thing about these results is that they suggest that the US may soon catch up with Saddam Hussein in the number of civilians killed. How many deaths to blame on Saddam is controversial ... (but) it is often alleged that Saddam killed 300,000 civilians" (Cole 2004). Cole pointed out that if the trends in civilian casualties were correct, than the US was outpacing Saddam Hussein in its violence.

The *Lancet* study was seconded by other experts in demography and mass atrocity, and dismissed as speculative by US President George Bush. Others, closer to the violence, remarked that the figures were totally plausible, and resonated with life on the ground in Iraq. An anonymous Iraqi female blogger, "Riverbend," wrote (in response to the failure to accept *The Lancet* report: "We literally do not know a single Iraqi family that has not seen the violent death of a first or second-degree relative these last three years. Abductions, militias, sectarian violence, revenge killings, assassinations, car-bombs, suicide bombers, American military strikes, Iraqi military raids, death squads, extremists, armed robberies, executions, detentions, secret prisons, torture, mysterious weapons – with so many different ways to die, is the number so far fetched (Riverbend 2006)?"

Why do we have only estimates? The Iraq Body Count quotes General Tommy Franks as insisting, "We Don't Do Body Counts." The same source quotes US

4 Members of the team have carried out research and consulting in many parts of the world, including Iraq, sub-Saharan Africa, and Eastern Europe and have worked with such organizations as the World Health Organization and the US Centers for Disease Control.

military spokesman Col Guy Shields at a press briefing in Baghdad on August 4th, 2003 saying that there was no accurate way to keep a record of civilian deaths:

> Well, we do not keep records for the simple reason that there is no really accurate way. There's times when we have conducted operations, and we're pretty certain that there are casualties, and we'll go back and check. And there's nobody there ... In terms of statistics we have no definite estimates of civilian casualties for the whole campaign. It would be irresponsible to give firm estimates given the wide range of variables. For example we've had cases where during a conflict, we believed civilians had been wounded and perhaps killed, but by the time our forces have a chance to fully assess the outcomes of a contact, the wounded or the dead civilians have been removed from the scene. Factors such as this make it impossible for us to maintain an accurate account (Iraq Body Count 2006).

This "unknowability" is troubling, and it is at odds with another stated US policy of providing reparations for Iraqi civilians killed or injured in the course of the occupation. How can the military provide financial compensation to the innocent civilians, if it lacks records of who was killed or injured? Indeed the unknown – the construction of ignorance – is an essential part of the conduct of the military assault on Iraq. Without knowledge of the numbers and means in which the casualties occurred, it is impossible to determine the criminality of the events. It is this constructed ignorance that provides the Bush Administration with its alibi: Without full awareness of the extent of civilian casualties, it is difficult to make important determinations concerning the "justness," and legality, of US military actions. Determining the numbers, identities and circumstances of the civilian deaths in Iraq is a necessary step. And then the knowledge must be converted into action. Every body must be counted and then, case by case, evaluated to determine whether the lives were lost due to acts of war, or crimes of war – or a crime against humanity, masquerading as a war.

Conclusion

Killing happens everywhere. Killing has been a regular feature of human activity, thoughout time and space. Some forms of killing claim to be justifiable and moral; consider euthanasia, capital punishment, or violence conducted in self-defense. Some forms of killing claim to be legal, whereas others are considered criminal – murder. The line between what is "killing" and what is "murder" is often highly contested. In war, some forms of killing can earn a medal, and other forms of killing can lead to a court martial. For those involved at the top of power structures, sometimes one can earn power and punishment – the presidency, and then a jail cell, or a jail cell and then the presidency – consider the careers of Slobodan Milosevic or Nelson Mandela. This distinction between appropriate "killing" and that which is considered criminal (i.e. murder) – is at the heart of the distinction between violence understood as a "human rights abuse" and violence understood as legitimate warfare. The bodies involved in this violence become a site of struggle in which the meaning of the violence is contested.

The laws of war and human rights are located at a socially-constructed divide between violence that is permitted, and that which is considered illegal and subject to sanction. Attempts to conduct war (and justify its legitimacy and legality) rely upon the assertion that the war is "just" (Falah, Flint, and Mamadouh 2006). A central element to the "justness" of war is that the lives sacrificed are only those of combatants, and that if innocents are killed, these bodies are "collateral damage." Such a conversion of identities is necessary if violence is to be accepted as war, or legitimate aggression. In turn, the assertion of civilian identities (non-combatant status) is therefore a critical element in the struggle to expose acts of war as crimes of violence: when conducted in a widespread and systematic manner, crimes against humanity.

The "human rights story" is often told as one of evolutionary linear progress. But the story is hardly one of uninterrupted forward progress, rather advances alongside mounting casualties. This is consistent with the nature of the laws of war, which were developed in a complex compromise that rather than outlawing war, served to regulate and permit war. The significant violence inflicted on bodies, and the struggles over the fate of bodies are a part of a tangled dialectic of violations and the attempts to end such violations. But it is therefore necessary to have knowledge about the circumstances of the casualties. The assertion of civilian identities (non-combatant status) is a critical element in the struggle to expose acts of war as crimes of violence.

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