*Practical Pacifism, jus in bello,
and citizen responsibility:
The case of Iraq*

Andrew Fiala
California State University, Fresno

ABSTRACT. This article discusses how ordinary citizens might apply principles of *jus in bello*. It reaches a sceptical conclusion about citizens' capacity to apply these principles and connects this with a practical approach to pacifism or, what might also be called, just-war pacifism. This discussion is oriented around events in the war in Iraq including the use of cluster bombs and the commission of war crimes. It uses these events to discuss the question of *jus in bello* and to also address the question of responsibility. The article argues that in a democracy responsibility citizen vigilance is required to ensure adherence to principles of *jus in bello*. The article critically engages recent discussions of just-war theory by Weigel, Walzer, Rawls, Elstain, and others.

KEYWORDS. Just war, *jus in bello*, pacifism, war in Iraq, war crimes, citizenship

The thesis of what I call “practical pacifism” is that ordinary citizens of democracies should be reluctant to affirm the use of military force because we lack adequate information and relevant expertise to judge whether wars fought in our names are justified.¹ This approach has much in common with what might be called “just-war pacifism” or what Rawls called “contingent pacifism” (Rawls 1971, 381).² In the present paper, I will apply this sceptical version of pacifism to the question of *jus in bello*. I will argue for two conclusions here. First, in a democracy, citizens have a responsibility to ask sceptical question about whether a war is being fought justly. Second, events in the war in Iraq give us a good reason to remain sceptical of warfare in general.³

JUS AD BELLUM, DEMOCRACY, AND PACIFISM

My primary focus in what follows will be a sceptical pacifist approach to the issue of *jus in bello*. But to set the stage for this discussion, it is necessary to flesh out the details of the sceptical pacifist approach to the issue of *jus ad bellum*. Some may argue against the thesis of practical or sceptical pacifism that since citizens lack information and expertise, they should defer to the judgments of competent political authorities. In the Christian just-war tradition, this follows from the Augustinian idea that the sovereign authority has a responsibility to protect the lives and rights of the people. This idea is often grounded in the further idea, expressed in chapter 13 of the book of Romans, that God ordains political authority and that a good ruler uses the sword to execute God's wrath on evildoers.

The difficulty of this idea is that it is based upon a traditional (i.e., un-democratic) notion of political sovereignty. It is true that in a democracy, political authorities have an obligation to protect the people against both internal and external enemies. This grounds both the power and the obligation to declare war. But in democratic governments, the people retain sovereignty: legitimacy rests in the hands of the people. Thus democratic governments do not execute God's wrath on evil doers; rather they execute the will of the people. One hopes that the people are interested in justice; and *liberal* democratic governments are also founded on principles of human rights. But in a liberal democracy, the people do not abdicate their responsibility for supervising the war-making powers of the government. Indeed, the principle of civilian control of the military aims to ensure that the people retain power over this crucial aspect of government.⁴ One might argue that the electoral process is the avenue through which democratic control is to be exercised and that between election cycles, citizens should defer to the judgment of their elected representatives. But sustained and principled public debate, along the lines outlined by defenders of the ideal of deliberative democracy, is an essential part of the process of the democratic process.⁵ The people should be

consulted when going to war – both through their representatives and through the processes of deliberative democracy. Clearly, in a democracy the people are entitled to make judgments about going to war.

Citizens have good reason to be reluctant to go to war, and scepticism about the justification of war is reasonable. A pacifist will not need to be convinced of this point, but defenders of the just-war tradition can also agree. As I understand this tradition, especially in light of its development out of Christian pacifism, there is a presumption against violence in the tradition. The horrors of war should be avoided unless a strong argument proves that war is morally necessary. This is usually done by focusing on the question of *jus ad bellum*: the proponent of war shows that there is a just cause for war, that recourse to war is proportional to the intended end of war, that war is a reasonable last resort, etc. One might add that in a democracy, the people bear the costs of war: so it is up to the government to convince the people that to go to war is a necessary and justifiable choice.

Recent events give us further reason to be sceptical of arguments in favour of war. Although the debate about the war in Iraq is on-going, one cannot deny that the initial rationale for the war turned out to be false: weapons of mass destruction (WMD) were not found in Iraq and even President Bush has admitted that this was a flawed basis for war. The WMD discussion gives us a reason to suspect that governments exaggerate threats, misrepresent data, and perhaps even deliberately lie in support of their war agendas. Similar problems have occurred in the past, for example in the notorious Gulf of Tonkin Resolution that led the U.S. into the Vietnam War. Thus it is reasonable to be sceptical of those who advocate going to war.

This scepticism is further justified if we turn to the issue of *jus in bello*. In the twentieth century, a focus on principles of *jus in bello* was used by “just-war pacifists” to argue that wars that use nuclear and other weapons of mass destruction could not be justified. Such weapons directly intend to harm noncombatants and thus violate the *in bello* principle of

discrimination. Recent wars have not employed nuclear weapons. Nonetheless, the just-war pacifist critique reminds us to be wary of other potential violations of *jus in bello*.

The wariness of this sceptical form of pacifism does not lead to absolute pacifism.⁶ Absolute pacifism holds that war can never be justified. Practical pacifism holds that war may be justifiable according to the principles of the just-war theory, but also that just wars are in fact rare and that the burden of proof rests on the one who claims that any given war is just.

JUSTICE IN WAR AND DEMOCRATIC RESPONSIBILITY

The problem of thinking critically about the application of principles of *jus in bello* is a perennial one. An example can be found in Shakespeare's *Henry V*. Prior to the battle of Agincourt, Henry and his soldiers discuss the relationship between the justness of the cause and the responsibility of the soldiers who fight for the cause. This example is of interest because it expresses two rival views about responsibility in war. The first view – what I call *concentrated responsibility* – concentrates responsibility at the top of the chain of command, while the second – what I call *diffused responsibility* – diffuses responsibility downward through the military force.

The idea of *concentrated responsibility* is expressed by one of Henry's soldiers, Bates, who claims, "If his cause be wrong, our obedience to the King wipes the crime of it out of us." Another soldier, Williams, continues: "But if the cause be not good, the King himself hath a heavy reckoning to make..." The idea here is that the commander-in-chief of a military force – i.e., the one who makes the decision to go to war – is ultimately responsible for the death and destruction that are caused by the soldiers who fight under him. This idea is closely related to the "superior orders" defence that is often offered by those who are accused of war crimes. But it should be noted that since Nuremburg, this defence is only

acceptable if the soldier believed that the superior order was a legally valid order and if he had no real moral choice in the matter. As the judgment at the Nuremburg trial puts it: “That a soldier was ordered to kill or torture in violation of the international law of war has never been recognised as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.”⁷

Ultimate responsibility for *ad bellum* judgments is concentrated at the top of the chain of command in the sovereign authority who is ultimately responsible for deciding whether the cause is just. Henry, it should be noted, does maintain that his “cause is just and his quarrel honorable.” The difficulty is that it is not clearly so to his soldiers. In the current war in Iraq, there is a similar sort of uncertainty about the issue of *jus ad bellum*. But military discipline requires that soldiers defer to the judgment of their superiors. And the principle of civilian control requires the military to obey the judgment of legitimate civilian leadership.

Concentrated responsibility works well to describe the way that responsibility for the *ad bellum* decision rests with the sovereign. But concentrated responsibility is also useful for describing the problem of a military force that violates, as a matter of policy, principles of *jus in bello*. The judgment at Nuremburg recognized, for example, that hierarchies concentrate responsibility at the top. As Arendt points out in her discussion of this theme, “in general the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hands” (Arendt, 247).

The second view, *diffused responsibility*, is expressed by Henry in response to his men. Henry indicates that the purity of each soldier’s soul is that soldier’s own responsibility, even while admitting that soldiers have a duty to obey the king. He says, “every subject’s duty is the king’s, but every subject’s soul is his own.” And indeed, Henry claims

that the king cannot be held responsible for the misdeeds of his soldiers. He says, “there is no king, be his cause never so spotless, if it comes to the arbitrement of swords, can try it out with all unspotted soldiers.” Even if an army fights in pursuit of a just cause, there will be corrupt soldiers who violate just-war principles. The idea of diffused responsibility holds that the sovereign is not ultimately responsible for the misbehaviour of such unjust warriors. This view diffuses responsibility downward through the chain of command. A similar view has been expressed by Bush Administration officials who have claimed that the notorious incidents at Abu Ghraib were the result of a few sadistic soldiers. The idea of diffused responsibility makes sense from the perspective of the commander-in-chief, who does not have direct command over each and every soldier. Indeed, President Bush made use of the notion of diffused responsibility in his ultimatum to Saddam Hussein (March 17, 2003), where he stated that Iraqi soldiers have a duty to disobey immoral orders. “It will be no defence to say, ‘I was just following orders.’” One would assume that the same idea should apply to American forces: soldiers have a moral duty that is greater than mere obedience.

For the most part, the idea of diffused responsibility only works with regard to the question of *jus in bello*. One should be careful, however, for if we take this idea seriously, then responsibility for war crimes is thought not to rest at the top of the chain of command – that is unless the commander were to order such crimes directly. War crimes are in fact often ordered from the top down. This was true in Nazi Germany. And in the real battle of Agincourt, Henry ordered his soldiers to kill their French prisoners in violation of what Shakespeare calls the “disciplines of war.” More recently, the Bush Administration has flirted with torture and has created conditions in which torture would be more likely to occur.⁸ Commanders are responsibility for the misbehaviour of their soldiers when they directly order or indirectly create conditions that make war crimes possible.

As a general principle when thinking about responsibility in war, it is preferable to make all parties involved more aware of their responsibility. A synthetic view thus might be called *shared responsibility*. This is the idea that all parties are responsible, even though different sorts of responsibility are located at different levels in the chain of command. This idea is especially appropriate for modern democratic armies in which citizen-soldiers both serve in the military and vote for civilian leadership. Soldiers should obey their commanders within limits established by the principles of *jus in bello*; and commanders have a responsibility to create the discipline that leads to respect for these principles. In a democracy, civilian leadership has a similar sort of responsibility. And ordinary citizens have an obligation to ensure that our soldiers fight justly and fight only in just wars.

A great deal of responsibility remains concentrated in the commander-in-chief, who has the ultimate responsibility both for making judgments about *jus ad bellum* and for creating and maintaining a disciplinary structure in which principles of *jus in bello* are upheld. With regard to the U.S. war against Iraq, the decision to go to war is the responsibility of the president; and the president is responsible for appointing civilian and military leaders who in turn establish rules of engagement, training, and discipline. But in a democracy, responsibility is also shared by the whole of the people. In a democracy where citizens authorize wars through the electoral process and through procedures of deliberative democracy, shared responsibility implicates the commander-in-chief, the soldiers who fight, *and* the citizens who authorize war. The decision to go to war in a democracy is supposed to be governed by democratic processes, and the representatives who make these decisions are supposed to be accountable to the people. Moreover, even though the military is a hierarchical and somewhat closed structure, in a democracy there is supposed to be civilian control of the military. With this control comes responsibility, including responsibility for how soldiers fight. Admittedly, this responsibility is indirect: citizens have no power to directly affect the rules of engagement. Nonetheless, citizens do have an obligation to ensure —

through representatives who exercise civilian control – that those who fight in our names adhere to principles of *jus in bello*.

It is not surprising that those in power advocate the idea of diffused responsibility: it allows them to avoid the implications of a theory of concentrated responsibility that would place the blame for atrocities at the top. I maintain, however, that that responsibility for atrocity rests, at least in part, at the top of the chain of command. Those at the top establish both the goals and the appropriate means to obtain these goals. Moreover, training and discipline are the responsibility of those at the top of the chain of command. We must not, then, allow commanders to duck their responsibility. But we should also recognize that in a democracy responsibility also flows up the chain of command toward the sovereign power that rests in the hands of the people. Thus, ordinary citizens have some responsibility to ensure that wars fought in our names are fought for just causes and that they are fought within limits prescribed by principles of *jus in bello*. And thus sceptical pacifism is a reasonable stance for citizens to adopt: we should be reluctant to authorize wars, unless we can be sure that they will be fought justly.

JUS IN BELLO, THE JUSTICE OF THE CAUSE, AND THE SLIDING-SCALE

It might seem that the primary focus for ordinary citizens who wonder whether a war is just should be the principles of *jus ad bellum* because ordinary citizens are better able to judge the application of these principles than the applications of principles of *jus in bello*. Those who adopt this position might agree with Walzer that *in bello* and *ad bellum* principles are “logically independent” (Walzer 1977, 21). According to this idea, it is possible for a soldier to fight unjustly in pursuit of a just cause; and it is possible for a soldier to fight justly in pursuit of an unjust cause. We see this in the idea of concentrated responsibility expressed by Henry’s soldiers. It seems that soldiers are ultimately not responsible for *ad bellum* decisions: questions

about just cause are decided at the top of the military hierarchy. On the other hand, it is plausible that soldiers are always required to fight according to the principles of *jus in bello*, even if the justice of the cause is in doubt. This idea is closely related to the idea of diffused responsibility.

An additional argument separating the two sets of principles is George Weigel's idea that the principles of *jus in bello* are focused on "contingencies," which are not the proper object of moral judgment (Weigel 2002).⁹ For Weigel, greater moral clarity is possible only when we focus on questions of *jus ad bellum*; questions of *jus in bello* are too difficult for us to answer due to the details and complicated nature of the information we would need to make sound judgments about this. Weigel uses this distinction to argue against just-war pacifists who are "squeamish" about the means of war, especially the indiscriminate means of modern mechanized warfare. For Weigel, the question of means is secondary to the question of ends.

One could follow Weigel and claim that there is a division of labor in democracy with regard to who applies which part of the just-war theory. One might argue that while the justice of the cause matters to all of us, it is only soldiers in the field who can answer the question of whether a war is being fought by just means, since it is these soldiers who are doing the fighting. In this sense, responsibility for evaluating *ad bellum* questions belongs to all of us, while responsibility for *in bello* questions is left to soldiers and the military hierarchy. The idea here is that ordinary citizens should simply trust the professionals to do what is necessary in warfare and to do it justly.

But the claim that ordinary citizens should ignore *in bello* questions is inadequate. In a democracy, each of us is responsible for the behaviour of the soldiers who fight in our names. The idea of shared responsibility denies that we can simply leave war to the professionals. We ought not ignore the way our military fights and focus only on the outcome. Indeed, the idea of civilian control requires institutional safeguards and bureaucratic procedures for supervising the activities of the military. Citizen vigilance is an essential

part of this, as it is the will of the citizens that will force the bureaucratic apparatus to take its supervisory responsibility seriously.

In a democracy, citizens ought to ask critical questions about how our forces fight. Such questions should have been asked when it became clear that allied forces were bombing population centres in the Second World War. They should have been asked when it became clear that American forces were using napalm, Agent Orange, and other defoliants during the Vietnam War. And we should continue to ask these questions as our forces fight in Iraq and elsewhere in the war on terrorism. Citizens must continue to think critically about how wars are fought in our names because a democratic nation's military is ultimately responsible to the people. This is true for principled reasons that are tied to civilian control and democratic legitimacy: a democratic people's army is an army that exists to serve the interests and defend the values of the people. It is also true for pragmatic reasons: citizen vigilance will serve as a check on unbridled military force.

These claims about civilian control and democratic responsibility remain true whether the war was initially fought for a just or unjust cause. In a war fought for a just cause, citizen vigilance will ensure that the means remain morally acceptable. In wars fought for less obviously just causes, citizen vigilance is even more important. Having a just cause is not enough; ongoing critical evaluation of the means of fighting is essential. War is a complex human enterprise and our judgments about war should reflect this complexity. War crimes can be committed in pursuit of just causes; and heroism and valour can be exhibited in unjust conflicts. Once we have initiated a war (whether for just or unjust reasons), we have a responsibility both to fight justly and to focus on creating *post bellum* conditions for peace and the restoration of order.

An absolute pacifist may argue that fighting is always wrong and that the best solution is simply to stop fighting. Especially in a war fought for an unjust cause, the most plausible way to do right is for the unjust aggressor to stop fighting. The difficulty is that a simple retreat may produce

more long-term harm. In Iraq, for example, the U.S. is no longer merely an aggressor: the U.S. is now an occupying force whose primary task is one of stabilization in preparation for *post bellum* peace. One might say that the cause for which we are fighting has now shifted. As Walzer recently put this, there is a “new argument” now that we are the occupying power (Walzer 2004, 162). Prior to the war, the cause and the argument were about the removal of Saddam Hussein. Now the cause is stabilization. We have now shifted from *ad bellum* arguments to *post bellum* arguments. Tragically, the pursuit of *post bellum* justice may require continued fighting. Insurgent forces in Iraq are now targeting Iraqis. Iraqi police and military forces are unable to establish security and prevent the slide toward civil war. We have an obligation as the occupying power to create conditions for stability and peace. But as we fulfil this obligation, it is obvious that we must fight according to the principles of *jus in bello*. Indeed, these principles always apply regardless of the stage in the argument, *ad bellum* or *post bellum*.

Of course, continued occupation also antagonizes the insurgency. The question of when to withdraw from a conflict is a complex one requiring practical judgment. But the principle to be kept in mind is that the goal should be to reduce harm and establish order as quickly as possible while adhering to principles of *jus in bello*.

Although it seems obvious that once a war is launched, our focus necessarily shifts from *ad bellum* concerns to *in bello* principles, this does not mean that we can ignore the *ad bellum* question. Indeed the question of the initial justification of war points us toward the issue of who is ultimately responsible for damage done and who has the obligation to fix this damage and bear the cost of the fight for *post bellum* justice. Rawls give us some guidance about this. He postulates a sort of sliding-scale of justification that takes into account both *jus ad bellum* and *jus in bello*. He says in a passage that is quoted with approval by Walzer: “when a country’s right to war is questionable and uncertain, the constraints on the means it can use are all the more severe. Acts permissible in a war of

legitimate self-defence, when these are necessary, may be flatly excluded in a more doubtful situation” (Rawls 1971, 379; Walzer 1977, 229). The idea here is that if we are uncertain about our ends, we should be even more cautious about the means we employ in pursuit of these ends.

The difficulty of this sliding scale is that it can seem to be a simple sort of consequentialism: the better or more urgent our goal, then the more cavalier we can be about our means. This can lead to the subversion of just war limits in what Walzer and Rawls call “the supreme emergency”: if our very way of life were at stake, we would be justified, according to Walzer and Rawls, in violating principles of *jus in bello* (Walzer 1977, Chapter 16; Rawls 1999). I am very sceptical about this idea (see Fiala 2002). The principles of *jus in bello* should be held as principles that are not contingent on the urgency of our ends. The obligation not to deliberately target innocent noncombatants is the key principle here.¹⁰ If we give this principle up, then we head toward the slippery slope that culminates in consequentialist justifications of the use of terrorism in war. To see that this slope can indeed be slippery, consider the problem of what Jonathan Glover has called “military drift.” This occurs when military necessity – i.e., the need to win – leads fighting forces to violate the principles of *jus in bello* (see Glover 2000). The slippery slope of this kind of consequentialism can be found, for example, in the Allied bombing campaigns in the Second World War: what may have begun as a battle of supreme emergency in the case of Britain in 1940 became a battle that employed terror tactics in pursuit of unconditional surrender.¹¹

Once we move beyond the question of *jus ad bellum*, we have got to remain committed to the *in bello* principle that the innocent have a sacred immunity that cannot be deliberately violated no matter what end we are pursuing. The real thrust of any sort of pacifism and also, I think, the heart of the just-war theory is that we have an absolute duty to avoid harming the innocent. Indeed, we should reject attempts to finesse this point such as are found in Walzer’s (and Rawls’) idea of the supreme emergency exemption, just as we should reject arguments that attempt to

justify terror bombing or the use of other sorts of terrorism (See Kamm, Held, and Nielsen).

The justification of terrorism is not, I should note, Rawls' intention. Indeed, the point of the sliding scale, as Rawls originally formulates it, is to put a limit on the sort of crass consequentialism that can lead to terrorism. Moreover, Rawls acknowledges that when there is doubt about the cause, we have even greater reason to be concerned about respect for *in bello* principles. In this sense, the *in bello* principles are indeed logically independent: they hold for everyone regardless of the justness of the cause. The point of a Rawlsian "sliding-scale" should not be to justify atrocities as a response to supreme emergencies. Rather, it should be to remind us of the extreme diligence that is required in wars that are fought for dubious causes.

JUS IN BELLO IN THE CASE OF IRAQ

There are many difficulties for ordinary citizens who want to be able to assess whether wars are being fought within the limits of *jus in bello*. Most notably, we lack access and expertise. The question here is thus how we can judge whether a war is fought justly when we lack both access and expertise.

Judgments about the *in bello* principles of proportionality can only adequately be answered by those who understand the relative costs and benefits of certain actions in light of short- and long-term tactical and strategic goals. These are the "contingencies" that Weigel cites in order to downplay the import of *in bello* principles. Ordinary citizens lack access to tactical and strategic information; and even if we had the information, we lack relevant expertise to evaluate it. Similarly, discrimination requires that we not intentionally harm innocent noncombatants. But the standard just-war theory allows that the deaths of some innocents can be justified by the principle of double effect. And the idea of discrimination assumes

that it is a simple task to tell who is an innocent noncombatant. The problem is that, in the first case, ordinary citizens have no way of knowing whether and how the principle of double effect applies when innocent noncombatants are killed. Likewise, ordinary citizens have no way of knowing whether civilians who are reportedly killed are really innocent noncombatants.¹² These problems are exacerbated in conditions of urban warfare and in light of the way that insurgent forces deliberately muddle the combatant/noncombatant distinction.

A. THE NONCOMBATANT BODY COUNT IN IRAQ

Ordinary citizens cannot simply acquiesce in light of these difficulties for judging what is happening in a war. Rather, we should do our best to formulate careful judgments, even while acknowledging methodological difficulties. Moreover, as I shall argue here some obvious facts should be acknowledged as we think critically about the way war is fought. The first and most obvious one is that a military force that is concerned with *in bello* principles should be self-critical. That is, a military force that is trying to be proportionate in its use of force and that is trying to discriminate between legitimate targets and innocent noncombatants should take care to assess and reassess its actions. And this critical self-assessment should be made open to the public so that the public can fulfil its obligation of citizen vigilance.

However, we have good reason to be sceptical of our military today because it has deliberately evaded this duty. General Tommy Franks is widely reported as saying with regard to the war in Afghanistan that “we don’t do body counts.” And the same is true in Iraq. To my knowledge, the US military has not publicly estimated the number of civilian casualties. Ordinary citizens have no way of knowing whether classified casualty assessments exist. However, we can safely assume that they do: the military is interested in these numbers for a variety of reasons, tactical,

strategic, technological, and moral. At any rate, a responsible military should be interested in this question and the cavalier attitude of General Franks is disturbing. The public has a right and an obligation to know the damage that is being caused in our names. By either ignoring the body count or keeping it secret, the military gives the unsavoury appearance of callousness. Moreover, the suspicion is that there is indeed something to hide, as if the costs of this war in terms of noncombatant casualties cannot be justified.

This point is emphasized not to say that U.S. and Coalition forces have in fact violated the principles of *jus in bello*. Rather, I aim only to show the difficulty confronted by ordinary citizens who want to be able to judge the war effort. At best we must admit that we have no good reason to trust the military on this question because they have not provided evidence that they are respecting the principles of *jus in bello*. In other words, the burden of proof rests on the military: they must show us that the war has been fought justly. In this regard, I disagree with Jean Elshtain who has written in defense of the war in Afghanistan that “it is very clear that every effort is being made to separate combatants from non-combatants, and that targeting civilians has been ruled out as an explicit war-fighting strategy” (Elshtain 2003, 67). I am not claiming that the U.S. is deliberately targeting noncombatants. Rather, my point is that we do not know whether or not this is true. Elshtain continues: “The United States must do everything it can to minimize civilian death – and it is doing so. The United States must express remorse for every civilian death in a way that is not simply rote – and it is doing so. The United States must investigate every incident in which civilians are killed – and it is doing so” (69). I hope that what she says is true. However, The U.S. military has not done a good job of proving that these claims are in fact true. And the military has an obligation to prove to the people that it is upholding these standards.

Despite the lack of information from military sources, there have been several reputable attempts to come up with an accurate body count.

According to the Iraq Body Count project (www.iraqbodycount.net), as of September 2006 there have been between 43,000 and 48,000 civilian deaths in this war. A rival estimate by Roberts and Burnham published in November, 2004 in the medical journal, *The Lancet*, puts the number of Iraqi deaths caused by the war at 100,000. Regardless of how we assess the different methodologies used in these estimates, it is safe to say that a significant number of Iraqi noncombatants have died.¹³

Of course, these numbers tell us nothing by themselves about whether *in bello* principles have been violated. Some of these deaths may be caused by the insurgency. Others who have been killed may have themselves been part of the insurgency. But it is plausible that some of the deaths are the result of warfare aimed at the regular Iraqi army – early in the war – and now at insurgents. More troubling, however, is the fact that early in the war many of these deaths were the result of aerial bombing and artillery campaigns that employ cluster bombs, which are indiscriminate killers. Still we do not know how or whether the principle of double effect could be used to justify these deaths.

A report by Human Rights Watch, however, points us toward a judgment. This report from the early days of the war (2003) emphasized the problem of cluster bombs. These bombs spread damage beyond the immediate target; and unexploded bomblets can remain on the scene and cause harm at a later time. Nonetheless, HRW reported that the U.S. Department of Defense was committed to carefully planning the aerial campaign. This careful planning included extensive “collateral damage estimates” before targets were approved: these estimates were intended to minimize civilian death. Indeed, HRW cited a Washington Post report that claimed that targets for which there was a collateral damage estimate of more than 30 civilian deaths had to be approved by then Secretary of Defense Donald Rumsfeld himself. HRW thus admits that the U.S. military was aware of the need to minimize noncombatant death, that they had procedures in place that were designed to help them comply with this demand, and that this procedure concentrated responsibility up the chain of command. Nonetheless,

HRW does claim that the U.S. failed to adequately protect noncombatants in several ways. Here are a few of the report's conclusions.

- Attacks on “leadership targets” were both ineffective and caused disproportionate collateral damage.
- Attacks on electrical power facilities and media installations were difficult to justify.
- The use of cluster bombs should be more controlled; and there should have been a plan to deal with unexploded ordinance.
- Finally, the report lamented the fact that, as yet, there was no thorough investigation of collateral damage by the military itself.

The question remains: how can we (ordinary citizens) know what is going on? How can we adequately assess the question of whether principles of *jus in bello* are being upheld? There are some reasons to be sceptical here. The numbers provided by Iraq Body Count and by Roberts and Burnham support a sceptical stance. And the HRW report shows us that, despite a good-faith effort on the part of the military, questions remain. Therefore, the burden of proof rests on the military.

We have good reason to be sceptical of whether this war is being fought within proper limits. And the same sceptical problems will arise in future wars because the military does not “do body counts” or at least, they do not make these public. We will return to the question of what we should do about this scepticism in a moment. Before turning to this question, let us consider another aspect of *jus in bello*.

B. WAR CRIMES IN IRAQ

Although the principles of proportionality and discrimination are among the most important of the principles of *jus in bello*, we should also consider other aspects of what Walzer calls “the war convention,” which is the established set of norms that govern combatant behaviour, as found in long-established customs of war, in military procedure, and in interna-

tional law and conventions such as the Geneva Conventions. Several recent events beg us to consider these issues. First, we should consider the abuse and torture that occurred at the Abu Ghraib prison, at Guantanamo Bay, and elsewhere in the war on terrorism. Second, we should consider cases in which US soldiers have shot and killed wounded Iraqis. One such incident was captured on video in November of 2004: a U.S. Marine killed a wounded insurgent in a mosque in Fallujah. Another one resulted in a U.S. Army Sergeant pleading guilty in early December of 2004 to a murder charge for killing a wounded Iraqi youth. And third, we should consider the recent case in which American soldiers are accused of raping and murdering an Iraqi girl and her family in Mahmudiya.

Torturing prisoners and killing wounded enemies are violations of “the war convention,” i.e., those conventions for warfare that primarily focus on the treatment of combatants (I am assuming for the sake of argument that the Iraqis involved were combatants). And rape is a war crime: an activity that is *mala in se* and so banned.

Before rushing to judgment here, however, we should acknowledge that it is possible to imagine arguments that would justify some of these atrocities. Soldiers could appeal to what might be called “military necessity”: if the Abu Ghraib prisoners had important information about the growing insurgency, for example, then the abuse might be justified on consequentialist grounds if it was thought that these actions would force them to divulge information that could be used to quell the insurgency. Moreover, the torturers could appeal to the notion of concentrated responsibility and make the claim that they were “just following orders.” Recall, however, that I argued previously that although responsibility is concentrated up the chain of command, this does not fully absolve soldiers of responsibility for misdeeds.

The argument from military necessity is easier to justify when it is directed at combatants who may in fact have operational knowledge and who are or may once have been a direct threat to the soldiers involved. The action of the Marine who shot the wounded insurgent in

the Fallujah mosque makes sense from the standpoint of military necessity if we recall that the victim was an insurgent who had been fighting against the Marines and if we recall that the insurgents had employed the tactic (itself a war crime) of booby trapping the bodies of dead and dying insurgents. Further justifications may be offered. In the murder case, the soldier claimed that he killed the youth to put him out of his misery.

But the rape and murder case in Mahmudiya cannot be justified on any such grounds. Rape is always a crime of war – there can be no justification for it. The deliberate killing of prisoners and neutralized combatants is a war crime. And although there has been ongoing debate about the use of torture in the war on terrorism, torture remains a crime. The U.S. military – to its credit – condemns and punishes such actions. The military should be commended for responding to these incidents with investigations and military trials. Thus, in fact, none of the attempts at justification discussed above will work. The U.S. Army's report on Abu Ghraib indicated, for example, two basic explanations of the Abu Ghraib abuses: (1) moral corruption on the part of a small group of sadistic soldiers, (2) a lack of discipline on the part of leaders.¹⁴ In other words, the Army appeals to notions of both diffused and concentrated responsibility. These explanations are supplemented in this report by considering command and control problems, doctrinal ambiguity, poor training, and inexperience on the part of the soldiers involved. The same sorts of problems can be found in the case of other violations of the rules of engagement and war crimes.

My goal here is thus not to condemn the entire military force for these actions. The very fact that the military has investigated and condemned these incidents shows that our military is committed to the principles of the war convention and that they admit that rape and other atrocities remain crimes of war.

These cases remind us that war is a nasty business and that no army consists entirely of "unspotted soldiers." And this fact gives us – citizens

who authorize war – further reason to be sceptical of it. One may try to evade this conclusion by claiming that the ultimate blame for much of the civilian casualties in Iraq rests, for example, on Saddam Hussein's regime, since it placed military targets in civilian centres, using civilians as shields. The blame could be placed both on the former military and on the insurgents who deliberately removed their uniforms and insignia in an attempt to blend in with the civilian population. In the same way, the insurgency could be blamed for the death of the insurgent in the mosque in Fallujah, since it is the insurgency, after all, that has booby trapped bodies and led to the conditions in which the U.S. Marine would have been suspicious of the wounded man. Moreover, the insurgency itself is guilty of war crimes both in its use of terrorism and in its use of decapitation as a method for dealing with hostages. It is obvious that some of the blame does rest on the insurgents.

But the much publicized incidents discussed here remind us that even well intentioned armies risk violating the standard principles of justice in war. Soldiers can be sadistic and fuelled by rage. This can be exacerbated by poor discipline, poor training, or lack of clear rules of engagement. And the strategies of the insurgency make it clear that it will be quite difficult for soldiers – even soldiers committed to justice in war – to fight effectively while maintaining the distinction between combatants and noncombatants and while remaining committed to the rules of engagement. To put it bluntly: war is a chaotic business that inevitably leads to violations of the principles of justice in war. And a counter-insurgency war makes this even more likely. This is why citizens should be reluctant to authorize war to begin with: we cannot be sure that wars fought in our names will be fought within proper limits. Indeed, these cases (and others from wars fought in the twentieth century) remind us that we have good reason to suppose that wars fought in our names will result in violations of the war convention and of principles of *jus in bello*.

CONCLUSION

If we suspect that the means to some end will be immoral, then we should not pursue the end. It is possible that wars can be fought justly. But the case of Iraq reminds us that even well-trained armies violate principles of *jus in bello*. Soldiers will occasionally use more violence than is proportional; they will have a difficult time distinguishing between combatants and noncombatants; and some soldiers will engage in heinous crimes like torture and rape. The fact of the matter is that when we unleash the dogs of war, some of these dogs will run wild. We should recall that Henry V made this claim when he admitted that the king cannot assume that all of his soldiers will be “unspotted.” But Henry made this claim to evade his responsibility. It is not enough to claim that we didn’t intend for our soldiers to torture and rape or that we expected them to discriminate more fully between combatants and noncombatants. After all, we should have known that war – by its very nature – involves a flirtation with atrocity. We know in advance that atrocities will be committed.

Judgments about war must acknowledge that war – even wars fought by modern armies in pursuit of a just cause – creates conditions in which brutality and cruelty are likely. It is naïve to assume that our soldiers will all be unspotted. And it is not sufficient merely to prosecute war crimes after the fact; we must anticipate that war crimes will be committed before we send our troops to war. This should make us more reluctant to authorize war to begin with, since we all share responsibility for the wars that are fought in our names. This alone is enough to lead one toward just-war pacifism: war is to be avoided because we know that principles of *jus in bello* will be violated even by the best of armies.

The just-war pacifist critique should be the default position for ordinary citizens. It is up to the military to prove to us that they will fight (and are fighting) within proper limits. This is even more important when there is dispute about the cause of the war, as Rawls’ indicated in his discussion of the sliding scale. We are always justified in demanding that

our soldiers fight as scrupulously as possible; and in war that is not clearly just, we are even more justified in making this demand. For a military force to claim simply that “we don’t do body counts” is not an appropriate response. Nor is it appropriate for responsibility for violations of the war convention to be diffused onto those at the lower levels of the chain of command. The public deserves a thorough accounting for suspected violations and the ascription of blame must focus on the top levels of the chain of command.

My goal here is not to condemn the many honourable men and women who are serving in the armed forces. Rather I offer this argument in solidarity with them. They alone are not responsible for this conflict or how it is fought: we all are. The pacifist impulse to resist and question the justness of war remains an important part of democratic deliberation about war. And this scepticism about war may help to ensure that moral principles are adhered to when war does break out.

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NOTES

1. I have defended this idea in Fiala 2004a and 2004b.
2. For discussions of just war theory and pacifism, see Benjamin, Cady, Elstain, Glover, Hauerwas, Holmes, Johnson, Miller, Pavlishek, Ramsey, Rawls 1999, Teichman, US Catholic Bishops, Walzer, Wasserstrom, and Weigel.

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3. For a related approach, see Verstraeten; also see Fiala, 2004-2005.
4. The classic work on civilian control is Huntington. For more recent discussion see Kohn 1997 and 2002.
5. For a recent discussion of deliberative democracy that considers the war in Iraq, see Gutmann and Thompson; also see Benhabib, Young, and Cohen.
6. For further discussion of varieties of pacifism, see Fiala 2006a.
7. *Judgment of the International Military Tribunal for the Trial of German Major War Criminals* (<http://www.yale.edu/lawweb/avalon/imt/proc/judlawch.htm>). For discussion, see May.
8. For discussion of these crimes and conditions, see Hersh and Danner; for a recent discussion, see Jeffreys.
9. I criticize Weigel in Fiala 2004a. For further discussion of Weigel, see Hymers.
10. I hold this principle as an absolute limit, which leads to pacifism in practice. It is possible to imagine a war that is fought without violating this principle, which is why just war pacifism is not absolute pacifism. However, modern warfare – especially nuclear warfare – makes it more likely that this principle will be violated than not. For a recent discussion of the combatant/noncombatant distinct, see Brough 2004 and 2005.
11. For further discussion of the problem of pursuing unconditional surrender, see Anscombe 2004 and 2006.
12. For discussions of the difficulty of discrimination and the equally difficult notion of noncombatant “innocence,” see Anscombe 2006, Mavrodes, and Nagel.
13. We might debate the methodology of these reports. Iraq Body Count uses news reports to come up with its data – a death must be reported in two media sources to be registered in the count – and it attempts to report only noncombatant deaths. Roberts and Burnham used survey teams who conducted interviews at randomly selected spots throughout Iraq in the fall of 2004 and projected from these cluster surveys toward a nationwide casualty estimate. Roberts and Burnham, we should note, did not distinguish between combatants and noncombatants. It is not surprising that Roberts and Burnham came up with this higher number, as not every death is reported in the news and so not every death will make it into the Iraq Body Count tally.
14. The Army’s Report is found on the *Washington Post*’s website: http://www.washington-post.com/wp-srv/nationi/documents/fay_report_8-25-04.pdf.