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## **Eight Arguments against Double Effect**

**Ezio Di Nucci**

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## **Eight Arguments against Double Effect**

Ezio Di Nucci (*Universität Duisburg-Essen*)<sup>1</sup>

*Abstract* I offer eight arguments against the Doctrine of Double Effect, a normative principle according to which in pursuing the good it is sometimes morally permissible to bring about some evil as a side-effect or merely foreseen consequence: the same evil would not be morally justified as an intended means or end.

As I write – it is the beginning of August 2014 – the IDF is continuing its operation to demilitarize the Gaza stripe. It has been, no matter your politics, tragic: international media outlets speak of around 1400 deaths in Gaza and around 60 Israelis fatalities.<sup>2</sup>

The political situation is very complicated, maybe too complicated for an ethical analysis. That is why for the purposes of this paper, I will greatly simplify it: civilians are dying. Whether the death of civilians is being aimed at appears to make a legitimate difference to the normative evaluation of events. Whether civilian deaths are being aimed at (which for the purposes of this paper should be understood to be interchangeable with ‘intended’) is an empirical question: a question which this paper

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<sup>2</sup> <http://www.theguardian.com/world/2014/jul/31/gaza-faces-precipice-death-toll-tops-1400>.

cannot answer (my own personal impression from media reports is that it is quite obvious that Hamas rockets are aimed at civilians and that it is an open question if and how many civilian deaths are aimed at by the IDF). The question addressed in this paper is therefore not the difficult empirical question of whether civilian deaths are being aimed at in this particular conflict; it is rather the normative status of aiming at civilian deaths in armed conflicts more in general.

The distinction between killing civilians in the context of an armed conflict without aiming at their death and killing civilians in the context of an armed conflict by aiming at their death is an old one: it can be traced back at least to Aquinas and maybe even to Aristotle (Di Nucci 2014a & 2014b); and it has close links to one of the pillars of the Judeo-Christian tradition, the Ten Commandments, one of which is against killing. The so-called *Doctrine of Double Effect*, which I criticize in this paper, has arisen exactly as an attempt to reconcile some killing with the Ten Commandments.

The problem is easy to see: the prohibition against killing is very general; it does not mention kinds of killings or different circumstances so that, on the face of it, it does not allow for any exceptions. But then how can it possibly be reconciled with killing in war or killing in self-defense (or, for that matter, with euthanasia)? An easy way out may be a radical non-violent stance (but even that would face the problem of not allowing for violence rather than just not provoking violence). And anyway, not very

many people would be in a position to preach and practice radical non-violence coherently.

This is then how the search for a criterion which would allow for some exceptions to a general prohibition starts: and the Doctrine of Double Effect is one such criterion. It says, in its most general formulation, that in pursuing the good it is sometimes morally permissible to bring about some evil as a side-effect or merely foreseen consequence: the same evil would not be morally justified as an intended means or end. The crucial distinction is, in short, between bringing about intended harm and bringing about unintended harm: the latter appears to be less ethically problematic than the former; to the extent that the latter may sometimes be justified, the former is on the other hand never justifiable according to the Doctrine.<sup>3</sup>

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<sup>3</sup> Here some representative definitions of double effect:

- 1) McIntyre in the Stanford Encyclopedia of Philosophy: “sometimes it is permissible to bring about as a merely foreseen side effect a harmful event that it would be impermissible to bring about intentionally” (<http://plato.stanford.edu/entries/double-effect/>);
- 2) Woodward in the Introduction to his standard anthology on DDE: “intentional production of evil... and foreseen but unintentional production of evil” (2001: 2);
- 3) Aquinas, which is often credited with the first explicit version of DDE: “Nothing hinders one act from having two effects, only one of which is intended, while the other is beside the intention” (Summa II-II, 64, 7);
- 4) Gury: “It is licit to posit a cause which is either good or indifferent from which there follows a twofold effect, one good, the other evil, if a proportionately grave reason is present, and if the end of the agent is honourable – that is, if he does not intend the evil effect” (Boyle's translation 1980: 528);
- 5) Mangan: „A person may licitly perform an action that he foresees will produce a good and a bad effect provided that four conditions are verified at one and the same time: 1) that the action in itself from its very object be good or at least indifferent; 2) that the good effect and not the evil effect be

Applying this distinction to killing, we get the following: intended killing is never justifiable, while there are conditions under which unintended killing may be justified. Aquinas, for example, famously argued that in cases of self-defense, we may sometimes make an exception to the general prohibition against killing because we do not intend to kill the aggressor: the killing is *praeter intentionem* (see footnote 3).

It is also easy to see what an important role this distinction plays within the general dialectic between deontological and consequentialistic approaches in ethics: distinguishing between intended killings and unintended killings and arguing that general prohibitions against killing are only meant for intended killings preempts classic utilitarian counterexamples: and war and self-defense could be taken to be some such counterexamples. In an important way, then, double effect considerations are a Kantian reply to utilitarian counterexamples, so their place is at the heart of moral theory.

It is therefore very important to establish whether a normative distinction between intended harm and unintended harm is plausible. Here I offer eight arguments against

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intended; 3) that the good effect be not produced by means of the evil effect; 4) that there be a proportionately grave reason for permitting the evil effect" (1949: 43).

I have written at length on double effect elsewhere: Di Nucci 2008, Di Nucci 2012, Di Nucci 2013a, Di Nucci 2013b, Di Nucci 2013c, Di Nucci 2013d, Di Nucci 2014a, Di Nucci 2014b, and Di Nucci (forthcoming).

this distinction to argue that we should abandon the Doctrine of Double Effect: I take each of these eight arguments to be, alone, sufficient to show that the Doctrine of Double Effect should be abandoned. First of all let me say, though, that I will not have the chance to get into much detail in this short paper: for more information on each of these arguments, please see my new book *Ethics Without Intention*, where these eight arguments and the Doctrine of Double Effect more in general are discussed in much greater detail.

**First argument:** I show that the counterfactual test of intention fails to distinguish between intended means and merely foreseen side effects. **Second argument:** I present the argument from marginally bad means, according to which the Doctrine implausibly rules against cases where the intended means are morally negligible. **Third argument:** I dispute the moral intuitions that are supposed to motivate the Doctrine, as for example killing one to save five in trolley cases (I also present some empirical data against those intuitions). **Fourth argument:** I show that the problem of closeness makes the Doctrine unworkable because we can always argue that the agent did not intend the bad means. **Fifth argument:** I defend a counterexample to the Doctrine – the so-called *Loop Variant* – from Frances Kamm’s recent attempt to deal with it by arguing that means are not necessarily intended: I show that Kamm’s distinction between ‘in order to’ and ‘because of’ means does not work. **Sixth argument:** I show that influential thought experiments in the double effect literature, such as *Terror Bomber & Strategic Bomber*, face a dilemma: either there is no moral difference

between the two consequentialistically identical cases – so that the Doctrine draws a moral distinction without a difference – or the moral difference is explained by normative considerations which are more fundamental than the distinction between intended means and merely foreseen side effects. **Seventh argument:** I argue that the Doctrine provides no moral guidance because it cannot tell us what to do; it is therefore a useless normative principle. **Eighth argument:** I argue that the Doctrine fails even if we water it down to a responsibility attribution principle.

#### *First argument*

The counterfactual test of intention is one (superficial) way in which one could try to distinguish between intended means and merely foreseen side effects, and therefore one possible argument for the fundamental distinction behind the Doctrine of Double Effect. The idea is that to test whether some effect is intended one should ask what the agent would do in a parallel scenario where everything is the same apart from the fact that somehow the agent's action no longer brings about that effect: if the agent would no longer perform the relevant action, then that effect was intended.

Let us take the effect of civilian deaths in armed conflict. The test asks us to check whether the actions causing those civilian deaths (say rockets or air strikes) would be performed even if they – for whatever reason – were known not to have the effect in question: if yes, then the effect is not intended; if no, then the effect is intended. And one could indeed try to argue that Hamas rockets known not to cause harm to civilians

would not be launched (because that's the point of those strikes) but that IDF missions known not to harm civilians would still be carried out because their aim is to demilitarize Gaza or defeat Hamas or whatever.

Apart from the historical accuracy of these considerations, here we see the difficulty with the counterfactual test and at the same time the difference between distinguishing intended harm from unintended harm on the one hand and distinguishing intended harm as ends or means from unintended harm as side-effect on the other hand. Hamas rockets are supposed to weaken Israel by targeting civilians, so that civilian deaths are an intended means to some other end: therefore it is easy to imagine that, if for whatever reason those rockets would be known to weaken Israel without causing civilian deaths, the rockets would still be launched – showing, according to the counterfactual test, that those civilian deaths are not intended. So the counterfactual test fails as an argument in favor of the Doctrine of Double Effect because instead of distinguishing between intended means or ends on the one hand and unintended side-effects on the other, it just distinguishes between means and ends.

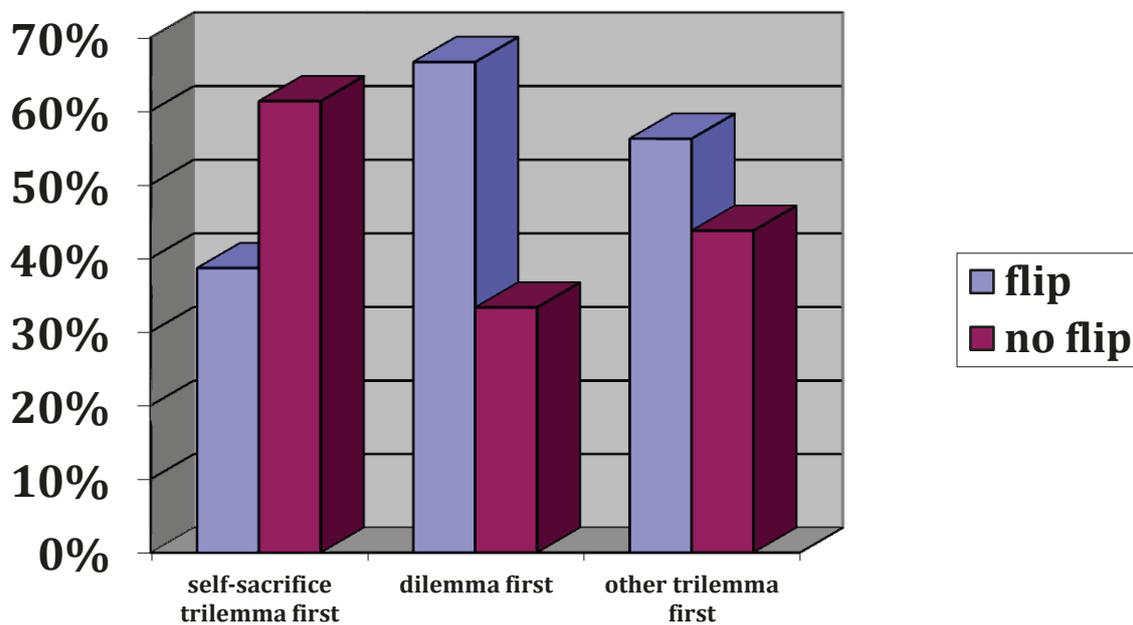
### *Second argument*

This is easy. The Doctrine of Double Effect is implausible because it does not allow for only marginally bad means. A general prohibition against all intended harm is just implausible: sometimes the harm is so negligible and the consequence so beneficial,

that it would be crazy not to allow the negligible harm in question; but the Doctrine of Double Effect does not have the resources to allow for negligible intended harm, as when I push my friend over in order to save him from being run over; I may have caused him to sprain his ankle, but nobody would condemn my behavior: indeed, in the absence of alternatives, everybody in their right mind would praise me for having pushed him over.

*Third argument*

My third argument against double effect is best summarized by presenting some data I have collected on moral intuitions on double effect cases.



See elsewhere for details on these experiments (Di Nucci 2013c & Di Nucci 2014a).

Here just a very quick summary. Trolley cases, in which we kill one to save five, are often thought to be evidence of the intuitive appeal of double effect; in my

experiments I show that it is far from obvious that people have, in trolley cases, intuitions that support the Doctrine of Double Effect, as a majority of subjects in my study do not opt to kill the one to save five. Intuitions are very important in the debate on double effect because the argument for a normative distinction between intending harm and merely foreseeing harm is based on supposed moral intuitions about particular cases such as the trolley problem.

#### *Fourth argument*

According to the problem of closeness, the normative distinction between intending harm and merely foreseeing harm is unworkable because we can always argue that the relevant harm was merely foreseen and the Doctrine of Double Effect offers no criterion to rule out any of these cases: so that (to take one of Philippa Foot's famous scenarios) if we blow up a fat guy to pieces whose body is obstructing the exit of the cave where we are stuck, then we can say that the death of the fat guy was a merely foreseen (unintended) consequence of freeing up the cave's mouth – and the Doctrine has no criterion to stop this and endless other implausible applications.

#### *Fifth argument*

As we have already mentioned, the trolley problem is thought to provide evidence in favor of double effect in so far as we can say that we do not intend to kill the one, we only intend to divert the trolley to save the five and we merely foresee that diverting the trolley will kill the one. This account has been challenged by Judith Thomson's so-

called Loop Variant, where the side track leads back to the main track so that when we divert the trolley to save the five, if the one had not been on the side track, the five would have been run over by the trolley from the other side: killing the one in the Loop Variant really is a means to the end of saving the five, then.

Frances Kamm (2007) has recently addressed this issue by distinguishing between 'in order to' means and 'because of' means, where only the former are prohibited while the latter kind of means may sometimes be allowed. According to Kamm, the Loop Variant is an example of the latter kind of means: we do not divert the trolley in order for it to hit the one; but we divert the trolley because it will hit the one: namely, if we thought that it would not hit the one we would not divert, but that does not imply, according to Kamm, that we aim at hitting the one. But the crucial question is whether we *intend* to hit the one: Kamm must show that we do not intend to hit the one even though we need him to be hit in order to save the five. And in *Ethics Without Intention* I show that Kamm fails to prove that in the Loop Variant we do not intend to hit the one (Di Nucci 2014a, Chapter Seven).

### *Sixth argument*

Double effect faces a dilemma: take two consequentialistically identical cases, such as the often used scenario of the Terror Bomber and the Strategic Bomber, both of which bomb a munitions' factory and a school, while only the Terror Bomber but not the Strategic Bomber intended to bomb the school. Either there is no moral difference

between the two bomber pilots, because Terror Bomber would have planned and acted just like Strategic Bomber had she too received the orders that Strategic Bomber received (or had she too been in the circumstances that Strategic Bomber was in; or had she too had the motives that Strategic Bomber had) – and in that cases the Doctrine of Double Effect would draw a normative distinction where there is no moral difference; or the moral difference between Strategic Bomber and Terror Bomber is explained by something more fundamental than a difference in plans, strategy, or intention: for example a despicable motive or prejudice which one pilot has but the other one lacks.

#### *Seventh argument*

The Doctrine of Double Effect is a useless moral principle, because it does not tell us how we may permissibly act. Suppose that a member of the IDF asks herself whether or not she may kill civilians within military operations: to answer that she may kill civilians only on the condition that the killing of those civilians is only an unintended side effect of her actions is no answer at all; how is one supposed to make sure that one only merely foresees the killing of civilians rather than intending it while planning a military operation? Much more plausible and useful than the Doctrine of Double Effect is, in this context, the following principle: the probability of civilian deaths should be kept as low as possible. But this very vague principle, which military ethicists must then fill with normative content, is very different from the Doctrine of Double Effect.

### *Eighth argument*

Let us briefly look at my final argument against the Doctrine of Double Effect: after seven arguments against double effect as a principle of moral justification, one may wonder whether the point of the Doctrine is a different one, namely responsibility attribution, so that unintended harm should be blamed less than intended harm. In Chapter Twelve of *Ethics Without Intention* I argue that whether or not the harm is intended as ends or means or merely foreseen as a side effect makes no difference to responsibility attributions. Agents are not only responsible for their intended intentional actions but also for their unintended intentional actions: indeed, agents are also responsible for more than just their intentional actions, so that all of the actions between which double effect proposes to distinguish are actions for which agents are responsible.

Still, there is a domain within which considerations similar to those motivating double effect may legitimately play a role. Think of the difference between convicting and sentencing in legal philosophy: we may speak of a *moral correlate of sentencing* where a person A has to decide what to make of her relationship with person B in light of a certain action of B. The question is, at that stage, no longer whether or not B intended to do that thing or whether she has done it intentionally or whether B is culpable or responsible for the action in question: all these questions have been already settled and A is simply asking herself what to – now – make of B and their relationship in light

of what B has done. I think that at this stage it is both normal and fair to look at the attitudes and motives of B, for example for the question of whether or not to forgive B.

In conclusion: don't ask yourself whether or not civilian deaths were intended as ends or means or merely foreseen as side effects if you want to know if a particular operation is justified. As my arguments against double effect show, that is the wrong question to ask if what you are after are answers to issues of both permissibility and responsibility.

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