DOUBLE EFFECT AND DOUBLE INTENTION: A COLLECTIVIST PERSPECTIVE

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I. Introduction

I find myself in agreement with much of Jeff McMahan’s analysis. Yet I have argued in the past (initially against Judith Jarvis Thomson, but also against McMahan¹) that it is insufficient, and misleading, to think about warfare and its moral assessment in merely individualistic terms. My disagreements with McMahan’s discussion here are mostly linked to the same fundamental reservation.

McMahan describes a clear-cut dichotomy between the individualist perspective—which he endorses—and collectivist approaches. These he characterizes as recognizing (in warfare) only collective moral agency, precluding individual responsibility. But in my view, we should reject this very dichotomy and adopt instead a dual moral perspective. Our focus should not be exclusively on individual choice, action, and responsibility: This should be combined with a collective perspective. In my comments here I will illustrate this by examining McMahan’s discussion of terrorism and intention. I hope thereby to show that the description of warfare as a set of individual acts must be supplemented by its description as a conflict between collectives—between nations acting through their respective armies.

A crucial challenge for my position lies in the question of how these two disparate perspectives can be combined; but I cannot take up that challenge here. Rather, I shall merely try to show what can be gained by adding a collectivist perspective. Moreover, since this perspective is complex, and its differences from the individualistic perspective comprise several aspects, this discussion will focus on only one of these aspects.

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aspects, namely, the difference in the definition and assessment of intention as related to the Doctrine of Double Effect (DDE).

II. Collateral Damage and Mental States

McMahan’s discussion of intention focuses on what appears to be the most urgent matter for non-pacifists wishing to fight morally, especially insofar as they abhor terrorism. The evil of terrorism lies, first and foremost, in its intentional attacks upon noncombatants. But almost any army will knowingly kill noncombatants—it will inflict what has come to be called “collateral damage.” In his essay, “Terrorism without Intention,” David Rodin has poignantly asked whether such foreseen (but unintended) killings are not just as bad as intentional killings. In addressing this crucial issue, McMahan’s point of departure is the well-known contrast between the so-called Tactical Bomber and the Terror Bomber:

[Suppose there is a munitions factory with a civilian area right next to it. We have just cause and destroying the factory will make a significant contribution to victory. Because of this the inevitable killing of civilians is proportionate. But killing the civilians would be comparably effective as a means of achieving the just cause, by terrorizing and intimidating the population.

Tactical bomber drops a bomb on the munitions factory foreseeing that this will kill the civilians but not intending to kill them.

Terror bomber drops a bomb in exactly the same spot because creating a big explosion by detonating the munitions in the factory is the most effective way to kill the civilians. He destroys the munitions factory as a means of killing the civilians, as a means of achieving the just cause.

The difference between the two acts is in the intention only. If an agent’s intention in acting doesn’t affect the permissibility of his act, then it’s hard to find a moral difference between the acts of the

tactical bomber and the terror bomber. More generally, it's hard to find a moral difference between acts of war that kill innocent people as a side effect and acts of terrorism that kill innocent people as an intended means.\textsuperscript{3}

McMahan goes on to show convincingly how the desire to evade ascribing this moral significance to intention has led several philosophers to engage in intellectual contortions. Clearly he is right: The difference cannot be reduced to differing circumstances on the ground, and certainly not to any difference in the physical acts of the air crew (which by stipulation are identical in both cases). By elimination, we arrive at what seems to be the sole remaining difference, the contrast in individual intentions. And indeed, "intention" figures crucially in the traditional doctrine that lies at the basis of this discussion, the DDE. Yet although this appears to be the only difference, it is not easy to accept. As Thomson has argued,\textsuperscript{4} it seems very hard to endorse such contrasting judgments of acts that are identical in execution and in foreseen consequences, solely on the basis of a subjective mental stance: "I know that X will happen, and choose to act in a way that will bring it about, but do not intend it."

In an early response to a similar concern, Walzer offered a revision of the relevant condition in the traditional DDE. According to the traditional formulation, it is permissible to produce a bad side-effect if (among other conditions) the agent does not intend that bad effect, whether in itself or as a means for the main (legitimate) effect of his or her act. But Walzer says: "The principle of double effect, then, stands in need of correction. Double effect is defensible, I want to argue, only when the two outcomes are the product of a double intention: First, that the good be achieved; second, that the foreseeable evil be reduced as far as possible."\textsuperscript{5}

The traditional doctrine requires only a single intention, aimed at the legitimate effect; with respect to the evil effect, its demand is merely negative: that it not be intended. Walzer, however, requires a specific intention with regard to this effect.

\textsuperscript{3} This formulation is a citation from the draft version of McMahan's manuscript; the distinction and its problems are well-rehearsed in the literature. See Jeff McMahan, The Morality and Law of War: The Hourani Lectures ch. 6 (Walter Sinnott-Armstrong ed., forthcoming 2007). This article is based on the manuscript form of the book; all page numbers refer to the pages of the manuscript, on file with the author (emphasis added N.J.Z.).


\textsuperscript{5} Michael Walzer, Just and Unjust Wars 155 (1977)(emphasis in the original).
Obviously, the actor cannot intend that it not happen, since he foresees that it will (or might) indeed occur. But his second intent can be to reduce its likelihood, severity, or both. Thus Walzer reformulates the relevant condition. It now requires that: “The intention of the actor is good, that is, he aims narrowly at the acceptable effect; the evil effect is not one of his ends, nor is it a means to his ends, and, aware of the evil involved, he seeks to minimize it, accepting costs to himself.”

The critical addition is of course the positive requirement in the last line. I wish to explore, first, just how this makes a difference; and then, to show the significance of carrying Walzer’s suggestion beyond its explicit reference to individual intention and effort, applying it to the (implicit) context of collective decision-making and action.

Walzer’s addition contains a double requirement. The actor, aware of the evil involved, is justified only if he (1) seeks to minimize it, and in doing so (2) accepts costs (i.e., risks) to himself. What precisely is the relation between these two requirements—or are they part of a single requirement? One reading of Walzer’s stipulation is that the only way the actor can credibly demonstrate that he is in fact seeking to minimize the unintended evil is by placing himself at increased risk. But this seems highly problematic on two related counts, with regard to both principle and practice. As for principle, why should a person’s moral standing be hostage to his ability to prove anything to others? On the practical level, suppose there are two ways to attack the military target, one with a much smaller risk of harming noncombatants, but both equally safe (or equally dangerous) for the attacking soldiers. Admirably seeking to minimize the evil, the soldiers choose the mode of attack that will harm fewer noncombatants. Suppose that there is no effort that can further reduce the evil, whatever additional risks the soldiers are prepared to accept. Why should this count against them?

Clearly, then, accepting increased risk to the military personnel cannot be a necessary condition for fulfilling the condition of “double intent.” Rather, it must be understood as a contingent requirement. It will often be the case that in pursuing (roughly) the same military objective, some of the risk can be transferred from noncombatants to combatants. Since the soldiers are obligated—within certain limits—to accept such a transfer, failing to do so would demonstrate the lack of true “double intent.”

6 Id. (emphasis added N.J.Z.).
Thus the fundamental requirement is the first: The actor must seek to minimize the evil. How is this different from simply not intending the evil? "Seeking" implies an active effort, in addition to motivation. So if there is more than one way to act, and the possible actions differ in their impact upon noncombatants, it is in the choice among them that this effort should find expression. And if it is thus expressed, the requisite "double intention" is validated, regardless of any increased risk or cost to the soldiers. (Still, rejecting an option that is safer for the noncombatants simply because it involves some increased risk to the soldiers is not consistent with having the requisite second intention). But what if it so happens that there is only one way to achieve an important military objective—or if there are two ways, but each involves equal risk of harm to noncombatants? It seems that the "seeking" boils down to the counterfactual assertion, "If there were another option, he would have taken it."

If we are to endorse the action of the Tactical Bomber, this cannot depend on there being some alternate mode of attack—riskier for the noncombatants and/or safer for himself—that he has eschewed. For the sake of clarity, we should focus on a core scenario without any such options. In that scenario, the permission once again seems to hang on the agent's mental state. Under Walzer's corrected version, purity of intention (=lack of an intention that the evil occur) is here replaced by the disposition that makes the counterfactual assertion true. If we are troubled by Thomson's critique regarding intention, this substitution seems to offer scant comfort. Yes, in other circumstances the bomber would have acted differently. But how can that affect the moral assessment of what he actually did?

In his concluding remarks, McMahan states that although it is hard to give an account of how intention affects permissibility, the implications of rejecting its significance are unacceptable—as he has convincingly shown throughout the chapter. He stresses that "the main arguments that have been advanced to show that intention is irrelevant to permissibility are not decisive and [...] it is therefore premature to reject the significance of intention." Although I agree that we should seek to uphold the moral significance of intention, I will not attempt here to follow up on that suggestion. Instead, I wish to examine what happens when we shift our perspective and try to judge not individual deeds but collective action.

7 McMahan, supra note 3, at 99.
III. What Can a Collective Do (or Fail to Do)?

At the heart of Max Weber’s doctrine, known as “methodological individualism,” is the assertion that true human action cannot be ascribed to a collective, since action (as distinct from behavior) is essentially intentional, whereas a collective has no mental states. This seems true as far as it goes: Strictly speaking, a collective cannot act intentionally. Yet arguably (pace Weber) a collective can act meaningfully in the sense that its actions can be geared to a certain function or serve a significant purpose. Such actions are functional or purposeful not by virtue of any intention, but by virtue of the aggregate effects of interactions among individuals, shaped by structural features of the collective that they constitute.

Even if we accept this notion of collective action, it seems that there is no sensible way of evaluating such action in the moral terms we have been discussing here. Both the traditional view of DDE, which stipulates a single intention, and Walzer’s version, which requires a double intention, seem equally inapplicable to assessment of collective action. By the same token, my analysis above of Walzer’s position seems to lead to an identical conclusion. Even if what matters is not precisely an intention but a disposition, it is still a mental state, and can likewise not be ascribed to a collective. However, by delving more deeply into the reason that such a disposition should matter, I hope to show that its collective correlate can make perfect sense and carry much moral weight. Indeed, it is the collectivist (corrected) version of DDE that

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9 There has been an extended scholarly debate on ascribing action, responsibility and the like to groups of various kinds, from the haphazard mob to the formally structured corporation or state. See, e.g., the essays collected in Collective Responsibility (Larry May & S. Hoffman eds., 1991); and also Larry May, The Morality of Groups (1987), and see also idem, Sharing Responsibility (1996); David Copp, Responsibility for Collective Action, 22 J. Soc. Phil. 22 (1991); Peter French, Collective and Corporate Responsibility (1984); Gregory Mellema, Individuals, Groups and Shared Moral Responsibility (1988); idem, collective responsibility (1997).

Regarding warfare in particular, see Larry May, War Crimes and Just War (2007); see especially ch. 2, 5, & 8; regarding intention specifically see Philip Pettit, Akrasia, Collective and Individual, in Weakness of Will and Practical Irrationality 68-96 (Sarah Stroud & Christine Tappolet eds., 2003).

See Iris Marion Young, Justice and the Politics of Difference (1990). In ch. 2, “The Five Faces of Oppression,” she explains how one group can oppress another by virtue of structural aspects of how they are socially constitutes as groups, without the individuals in the dominant group ever necessarily intending to oppress the members of the other group. Id. at 39-55.
offers the best prospect of accounting for the difference between Tactical Bomber and Terror Bomber.

To restate Walzer's version of the DDE here, the actor must first of all not seek directly to attack noncombatants. But in order to avoid violating noncombatant immunity, he must also seek—or be prepared to seek—a way of achieving the military goal that poses less of a threat to the noncombatants. This positive requirement can be explained in two distinct ways:

(1) Being disposed to prefer options with less harm to noncombatants constitutes (an element of) a worthy character.

(2) Being thus disposed indicates that due weight is accorded to the rights of the noncombatants not to be killed (or injured).

Note a crucial difference. Whereas in (2) the value lies in the rights of the people who are to be protected, in (1) moral value inheres in the disposition itself. (1) is a clear instance of the approach known as "virtue ethics," and offers directly a putative explanation of the role played by the agent's mental stance. This is so because in terms of the virtue approach to ethics, an act carries moral value only on account of what it reflects of the agent's character, i.e., insofar as the act gives expression to the actor's virtue (or vice). What matters is the mental state accompanying the act; and it is posited that Tactical Bomber's mental state is virtuous, since he would prefer not to harm noncombatants. It seems clear that this account is restricted to individuals, for virtues, in the sense of subjective dispositions that consciously guide action, can properly be attributed only to individuals.

By contrast, (2) addresses the objective moral status of the people who might get hurt. Here the agent's disposition at the time of the act (or at any other time) has no importance in itself. We care about it only insofar as we have no better indication that the requisite weight has been given to these people's rights. It would be better to have a more concrete indication, such as those described by Walzer: The pilot flies lower, taking a greater risk for the sake of improved precision and fewer noncombatant casualties; the soldier—facing possible enemies in hiding—risks shouting a warning before lobbing a grenade into the cellar, giving civilians a chance to emerge. But as argued above, individuals in battle often do not have such options, and we must judge their decision as it was taken. For these individuals, the scope of moral choice
is often quite narrow: e.g., to fly or not to fly a particular bombing mission; to shoot or not to shoot in the presence of a "human shield," etc. Absent any actual option to seek alternatives, the overridden value of the lives lost in "collateral damage" is feebly affirmed in the counterfactual: if given another option, the agent would have taken it.

But this narrow focus on individual options and individual choice leaves the most important factor out of the picture. If what matters is giving real weight to noncombatant immunity, then worrying about that within the timeframe of the aerial mission or the combat engagement is usually much too late. Sometimes, this can be done by the same agents at an earlier point, e.g., during the pre-mission briefing. More often, however, the relevant timeframe and setting involve an entire set of other people, most or all of them unknown to the agent assigned to carry out the actual shooting or bombing. These numerous people act, or fail to act, at various times and with varying levels of awareness regarding the impact their behavior might have on the moral circumstances of combat actions. Tracing their individual intentions, dispositions, or characters is neither possible nor necessary for determining whether appropriate weight has been given to noncombatant rights and lives. Rather, this determination properly addresses collective, organizational action.

Here we come to the crux of the matter. It is highly misleading to think of, say, an air force pilot merely as an individual agent. He is acting on behalf of the national collective and, more importantly for our discussion here, as part of a war effort conducted collectively by the military organization. It is only as part of that effort that his action can (if at all) be justified in the first place, and it is in the context of that effort that it must be morally evaluated. First of all, backtracking one step, we want to look at the planning session that produced the orders for the mission in question. What were the military objectives, and what means were considered for achieving them? One hopes that terrorist attacks against noncombatants were ruled out completely. Moving then to the positive requirements of "double intent," we should ask what alternatives were examined (or ignored) with regard to protecting noncombatants. Asking this kind of questions constitutes significant progress, but if we stop here, we have likely still not addressed the most important issues. The planners' capacity to envision and consider options is restricted by the kind of intelligence that has been gathered and made available to them. To what extent does the value of noncombatant lives guide

11 Indeed, the collective perspective is analytically inherent in the basic concepts: "tactical bombing," "air force," "war" etc.

12 Walzer as well sometimes considers "military planners," in addition to "soldiers" or "pilots."
intelligence-generating efforts, both short and long term? Above all, how is respect
for noncombatant immunity expressed in the shaping of overall military strategy and
tactics, in the formulation of rules of engagement, and in the training and system-wide
controls required for effective implementation?

Let me illustrate some of these points with a recent example. A well-publicized
incident in the course of the Second Lebanon War, in the summer of 2006, was the
aerial bombing of a building in the Lebanese village Qana, in which many non-
combatants (including several children) were killed. I do not have direct access to
the facts regarding the Qana incident, so my discussion will be based on the account
given in the official IDF report. This is entirely appropriate since my objective is
not to ascertain the true facts of the matter or to assign guilt, but rather to focus on
the mechanisms that produce such a bombing (or fail to prevent it). After briefly
sketching the background, I will cite the IDF report, and in particular its attempt to
justify the bombing.

The Hizballah militia, backed by Iran and based in Lebanon, was engaged in
shooting rockets at Israeli towns—undoubtedly, terrorist activity. A central element
of Israel’s reaction consisted in aerial bombing of launch sites, many of which were
located within Lebanese villages. The civilians were warned to flee; some of those
who remained could legitimately be harmed (according to the DDE) in the course
of anti-rocket warfare, provided that certain conditions were met. Although there is
room for debate regarding the precise conditions and their specific implementation, it
seems clear that noncombatant immunity cannot be used to shield the rocket-shooters,
e.g., if they have based their launchers in an ordinary apartment building.

According to the IDF report, “if the IDF had possessed information that there
were civilians in the building, the strike would not have been carried out.”13 Evidently,
this was because there was no definite information that the bombed building in fact
contained rocket-launchers. It had not been ascertained that civilians were not present,
nor were there grounds to presume that the specific building was empty—although the
population had been told to flee, and many had indeed escaped. What, then, justified
the bombing? The report explains:

13 IDF Report regarding the bombing that had occurred in the early hours of July 30th, published
asp?chl=1&sl=HE&id=7&docid=55482 (last visited July 22, 2007) [in Hebrew] (my translation
N.J.Z.).
The strike against the building was carried out in accordance with the policy of the High Command. The policy determines that IDF forces are permitted to open fire upon suspicious structures within villages whose inhabitants have been warned, and likewise upon structures in proximity to locations from which rockets are launched toward the State of Israel.14

One could well hope for greater precision in the wording of rules of engagement. Just what are “suspicious structures”—what is the content and strength of suspicion that justifies a strike? No less perplexing is the alternate “proximity clause.” Presumably, the rationale here is that the rocket-firing terrorists may have fled to a nearby structure, where they hide with their equipment between launches. But what distance counts as being “in proximity”—20 meters? 200? 2,000? How long after the launch—can it be several days? What if the launch was from the middle of the village, so that nearly all its structures are “in proximity” to the launch location?

It is not that the High Command was prepared to allow strikes aimed at civilians, or even that it had no concern over their fate. But one would like to imagine a team working intensively to draft the right language, thinking carefully about the military objectives and the risk to noncombatants. After the fact, the policy was quickly recognized as faulty: The same press release containing the report also announced that the chief of the High Command had “issued an order that the rules of engagement be immediately examined and updated.”15

I do not mean to create a false impression that exercising the requisite care for civilian lives is entirely, or even chiefly, a matter for an army’s central command. Even had the high-level orders not been crafted so sloppily, their responsible implementation would depend on sustained efforts on many levels. Sometimes the issue lies in the hands of the end-point actor, the bomber or shooter—in line with the individualistic perspective commonly favored by moral philosophers.16 But more often the pilot (or artillery soldier) cannot know enough, and must rely on the efforts of others—the intelligence teams and those who direct their projects and resources, the teams that

14 Id. (emphasis added N.J.Z.).
15 Id.
16 In Israel, there is repeated anecdotal evidence of pilots refraining at the last moment from releasing their bombs, having realized that the expected harm to noncombatants is far greater than envisioned in their briefing. By no means do I wish to detract from the moral courage of such individuals.
assemble sets of potential targets (sometimes called a ‘target bank’), the operations officer who assigns certain of those targets for a particular mission and so on. There is a necessary distribution of moral labor, and individual contributions can only be understood in the context of the collective action.

IV. Individual and Collective Action and Liability

To reiterate: whether appropriate respect is shown for noncombatant lives is not something that can or should be determined only—or even primarily—by examining individual intentions. The test is system-wide and essentially functional. When we witness military operations that fail in this respect and consider that they could have been conducted otherwise, we properly presume collective wrongdoing. We might go on to explore the ways and causes of this wrongful conduct, and often there will be several distinct (though sometimes complimentary) explanations—focusing on particular elements in the military organization (some of these may well be individuals) or on some of its structural features. Quite possibly, the civilian casualties could have been reduced or avoided in more that one way; an argument between reasonable positions might ensue with respect to the change(s) that will be most effective in achieving such reduction in the future: better wording, change of task definitions, an adjustment in organizational structure etc. “But this sort of argument takes place post facto;” its point of departure is the recognition of failure at the collective level.

It is notoriously difficult to assign individual blame or responsibility for collective wrongdoing.17 Despite the difficulties, I share the prevalent view that individuals should not be permitted to evade personal responsibility by hiding behind the collective mechanisms. Insofar as possible, individual responsibility should be traced and recognized. Yet this is often possible only partially, and in any event is not a pre-condition for recognizing the fact of collective wrongdoing. Looking at an army’s conduct of a battle or a war, we can tell that it not seeking to minimize noncombatant “collateral damage” whether or not (and in any case well before) we can determine which individuals are responsible for this or who of them is morally culpable.

17 For a discussion specifically focused on war crimes, see Sanford Levinson, Responsibility for Crimes of War, in War and Moral Responsibility 104-133 (M. Cohen, T. Nagel, & T. Scanlon eds., 1974).
In the broader context, we can likewise assess a nation’s conduct, since an army is normally not a free-standing organization but rather an instrument of policy, collectively determined and implemented by the nation’s political institutions. Thus it can be entirely appropriate to assert that “nation X is conducting warfare without proper regard for civilian lives.” A collective is to blame for attacks that harm civilians—though not aimed against them—unless it can point to collective action that constitutes the positive requirement of the DDE in Walzer’s version.

How does all this help us with our original difficulty, namely, the challenge of providing a satisfactory explanation of the difference in moral evaluation of the Tactical Bomber versus the Terror Bomber? As long as we focused exclusively on the individual agent, the explanation seemed to depend on a problematic contrast between two externally identical acts, by virtue of distinct mental states that seem too close to make a real difference. Expanding our view to examine the collective action provides a contrast in the entire set of objective circumstances. The Terror Bomber acts as part of a morally decrepit military and political organization, in which terror tactics are part of an accepted strategy. Although this is likely to be reflected also in his illicit intentions as an individual, it is the collective decision-making process that defines the bombing as criminal. By contrast, the acts of the Tactical Bomber—even when individually he lacks any leeway to seek alternative military solutions, and independent of his individual intentions—are part of a collective effort that meets the necessary positive requirement.

All this leads to a more general observation. Our moral judgments about warfare (and other political matters as well) take place on two levels, since they address two kinds of actions: individual and collective. An exclusive focus on individual agency yields a flat picture, lacking a crucial dimension. I have endeavored to show here in some detail how problems that appear in this picture can be surmounted once we shift to a dual perspective—one that includes the collectivistic view alongside the individualistic.

I have argued elsewhere\(^\text{18}\) that such a dual perspective holds the best promise for formulating an account of the so-called “moral equality of soldiers.” This equality, which is a central feature of traditional just-war theory, means that in war a soldier

may kill enemy soldiers as such, without regard to their individual guilt or liability for their nation's war-making, or indeed to any individual action or behavior apart from merely being a member of the military. This license to kill enemy soldiers is reciprocated in a liability to be killed by them—hence the "equality." Obviously this formulation cannot by definition be justified from an individualistic perspective. McMahan, who does adhere solely to such a perspective, therefore seeks to introduce significant modifications in the traditional teaching. Were it true that this individualistic perspective is the only appropriate approach, he would be right; I have tried to show that this is not so. Even when an enemy soldier is not liable, as an individual, to be killed, killing him is nevertheless permitted in the context of legitimate collective action against the collective of which he is a part.

As indicated at the outset, I could not expect, in a single essay, to map out the contours of the proposed dual perspective, let alone explore it in detail. But I hope that my detailed examination in a particular context—that of the DDE—suffices to show that adding a collectivist perspective to our moral judgments of warfare is both necessary and valuable.