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### Whose Responsibility to Protect? The Duties of Humanitarian Intervention

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# Whose Responsibility to Protect? The Duties of Humanitarian Intervention

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**ABSTRACT** *The International Commission on Intervention and State Sovereignty's report, The Responsibility to Protect, argues that when a state is unable or unwilling to uphold its citizens' basic human rights, such as in cases of genocide, ethnic cleansing, and crimes against humanity, the international community has a responsibility to protect these citizens by undertaking humanitarian intervention. An essential issue, however, remains unresolved: which particular agent in the international community has the duty to intervene? In this article, I critically examine four ways of assigning this duty. Although I highlight the benefits of institutionalising the responsibility to protect, I argue that we should adopt, in the short term at least, a consequentialist solution: humanitarian intervention should be the responsibility of the intervener that will be the most effective.*

**KEY WORDS:** Humanitarian intervention, the responsibility to protect, the duty to intervene, consequentialism

## Introduction

Something of a watershed moment for humanitarian intervention was the report by the International Commission on Intervention and State Sovereignty (ICISS) in 2001, *The Responsibility to Protect (R2P)*. The report argues that we should replace the notion of sovereignty as *control* – according to which a state has freedom to do what it wants to its own people – with the notion of sovereignty as *responsibility*, according to which a state has the responsibility to uphold its citizens' basic human rights. This responsibility primarily lies with the state, but if a state is unable or unwilling to uphold its citizens' basic human rights, such as in cases of genocide, war crimes, ethnic cleansing, and crimes against humanity, its sovereignty is temporarily suspended. In such cases, the responsibility to protect these citizens transfers to the international community, which has the 'responsibility to react' robustly to the crisis. This may involve undertaking humanitarian intervention, providing that certain 'precautionary principles' have first been met.<sup>1</sup>

Although far from being fully implemented, the language of a responsibility to protect has, to a certain extent, caught on. The United Nations

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(UN), state officials, and non-governmental organisations (NGOs) regularly use the language of the responsibility to protect in relation to humanitarian intervention. Most notably, at the 2005 UN World Summit (the high-level plenary meeting of the 60th session of the General Assembly), states agreed that there exists a universal responsibility to protect populations. In doing so, they indicated their preparedness to undertake humanitarian intervention 'should peaceful means be inadequate' and when 'national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity' (UN 2005: 30).

What is striking about the *R2P* is that it not only argues that state sovereignty is contingent on the protection of individuals' basic human rights (and, in doing so, asserts the justifiability of humanitarian intervention), the notion of a responsibility to protect suggests that humanitarian intervention is, in certain circumstances, morally obligatory. That is, it shifts away from the view that humanitarian intervention is only morally permissible – a *right* – towards the view that it is a responsibility that falls on the international community – a *duty*. In circumstances of the mass violation of basic human rights, such as in Rwanda in 1994 and Darfur since 2003, the international community has the right to intervene *and* a responsibility to do so, and is morally culpable if it fails to fulfill this responsibility.<sup>2</sup>

However, an essential issue remains unresolved. It is unclear *who*, in particular, in the international community has the responsibility to protect in response to the mass violation of basic human rights. To be sure, the primary responsibility to protect lies with the state suffering the humanitarian crisis. The difficulty arises when this responsibility transfers to the international community because this state is unwilling or unable to protect its citizens' basic human rights. The problem, as Thomas Weiss notes, is that the term 'international community' is vague and 'without a policy edge. Using it allows analysts to avoid pointing the finger at which specific entities are responsible when the so-called international community fails to respond or makes a mess of things' (2001: 424).<sup>3</sup> We need then to be more specific: who exactly in the international community has the responsibility to protect – the duty to undertake humanitarian intervention – when the state that is primarily tasked with this responsibility is unable or unwilling to halt the mass violation of basic human rights within its borders? Is it, for instance, the UN, the North Atlantic Treaty Organisation (NATO), a regional organisation (such as the African Union (AU)), a state, group of states, or someone else?

ICISS's answer is that '[t]here is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes' (2001a: xii). States at the 2005 World Summit adopted a similar view (see Stahn 2007). Yet the requirement for UN Security Council authorisation identifies only a *procedure* that agents should follow when discharging the responsibility to protect. It does not identify which particular *agent* has this responsibility.

Why is it that we need to assign the responsibility to protect? As things stand, states can use the ambiguity surrounding the responsibility to protect

to circumvent the commitment made at the 2005 World Summit to tackle egregious humanitarian crises. The result is that the responsibility to protect is not being properly discharged and populations are continuing to be blighted by the mass violation of basic human rights, most notably in Darfur and Somalia. As Alex Bellamy asserts, ‘there is a real danger that appeals to a responsibility to protect will evaporate amid disputes about where that responsibility lies’ (2005: 33).

More specifically, there currently exists an *unassigned* duty to intervene which falls on the international community in general but no one in particular. For this duty to be claimable, it needs to be assigned to a specific agent. Thus, the supplementary volume to the *R2P* argues that if citizens’ basic human rights are to be protected, ‘it is necessary to identify not only counterpart obligations but also specific obligation-bearers’ (ICISS 2001b: 147). Kok-Chor Tan (2006a) frames the issue in the language of perfect and imperfect duties. Unless an agent is identified as the primary agent of protection, he argues, the duty to protect will remain an imperfect one – it is a duty that cannot be morally demanded of any particular state. To generate a perfect duty to protect – that is, a duty that *can* be demanded of a specific agent and therefore is effectively claimable – a condition is needed to identify a particular agent, which Tan (2006a: 96) calls an ‘agency condition’. Although the language of perfect and imperfect duties can be misleading because it differs from the normal use of these terms in political philosophy (which Tan admits), the central problem is nevertheless clear: ‘[i]f agency is not specified, one can easily see why potential agents can have the discretion of not acting in *all* cases of humanitarian crisis if for each case there are alternative agents who can as well perform the action required by duty’ (Tan 2006a: 96).

Tan (2006a: 97–106) goes on to consider briefly three potential ways of assigning the duty to intervene: first, looking to a *special relationship* between a potential intervener and those needing protection; second, looking to the *capability* of a potential intervener; or, third, an *institutionalisation* of the duty to protect (which he ultimately prefers). In what follows, I build on Tan’s analysis by considering in greater detail the potential ways of assigning the responsibility to protect.

More specifically, I critically evaluate four approaches. I start by outlining why we should take seriously the consequentialist solution, which asserts that (1) humanitarian intervention should be the responsibility of the intervener likely to be most effective. The next section considers two solutions that involve special relationships: (2) looking to an intervener that is responsible for causing the crisis and (3) looking to an intervener has a special bond with those suffering the humanitarian crisis. I argue that, given that there exists a general, unassigned duty to intervene, they are a not persuasive way to assign the responsibility to protect. The following two sections consider the fourth solution: (4) an institutionalisation of the duty to intervene. Although I highlight the potential benefits of this solution, in contrast to Tan I claim that there is reason (in the short term at least) to prefer the first, consequentialist solution.<sup>4</sup>

### The Importance of Effectiveness

Let us start by seeing why we should take the first, consequentialist solution seriously, which aims to establish a norm that the most effective intervener has the duty to intervene. A degree of consequentialism in the context of humanitarian intervention is intuitively appealing (see Heinze 2005). It seems self-evident that if humanitarian intervention is to be morally acceptable, it should be expected to be successful at achieving a humanitarian outcome. The reason we call for humanitarian intervention is to affect positively the humanitarian crisis, to decrease the level of human suffering. If an intervener cannot be expected to do this, to achieve good consequences, at least to some extent, then it is doubtful if its intervention can be justifiable. More precisely, it is vital that humanitarian intervention is effective since it involves military force and there is a risk that the use of force will increase the amount of human suffering in the target state. Hence, Tom Farer argues that the ‘one sure thing about force is that it destroys things . . . to propose to invade a society, to thrash around breaking things, and then to leave without significantly ameliorating and possibly even aggravating the situation is unacceptable’ (2005: 219). At the very least, then, interveners should be effective. Indeed, this is reflected in most lists of conditions for justifiable humanitarian intervention, which, like the *jus ad bellum* conditions for just war, assert that humanitarian intervention must possess a reasonable prospect of success (e.g., Caney 2005, Farer 2005, and ICISS 2001a).

Yet why should we hold that the *most* effective intervener has the responsibility to protect? My reasoning is this. *Qualitatively*, the sort of suffering typically involved in a humanitarian crisis – the violation of basic human rights, such as torture, killing, rape, physical and mental injury, and family bereavement – is perhaps the greatest moral wrong that can happen to an individual. We tend to think that rape, torture, and murder are more morally problematic than a restriction of freedom of speech, inequality, and so on. *Quantitatively*, a humanitarian crisis usually involves the *mass* violation of basic human rights. As such, it involves (i) the worst moral wrong (ii) on a massive scale. Accordingly, it is of the utmost moral importance that the humanitarian crisis is effectively tackled. It follows that, since the *most* effective intervener will have the *greatest* beneficial impact on the worst moral wrong on a massive scale, it is paramount that the most effective agent be assigned the duty to intervene.

What do I mean by ‘effectiveness’? The effectiveness of an intervener is determined by whether it is successful at tackling the mass violation of basic human rights in the political community that is subject to intervention. This should be compared to what would have been likely to happen if it had not intervened (the counterfactual) and considered in the long term, which requires the intervener both to resolve the humanitarian crisis and to prevent an immediate recurrence of it. This does not mean that humanitarian intervention must tackle all the problems that a society faces. Instead, intervention should make a significant and lasting improvement of the

human rights situation of those suffering the crisis. Nor does this mean that short-term results are of lesser importance. As John Clarke asserts, where possible, the intervention ‘must be tailored to suit these long-term objectives, though . . . securing an immediate cessation of hostilities will, in some cases, trump other objectives’ (2001: 3). If a state’s intervention is expected to save 50,000 lives in the short term but cost 40,000 lives in the long term, this is still a positive outcome in the long term (10,000 lives have been saved). Moreover, what we are concerned with is the *expected* effectiveness of an intervener. Deciding who should discharge the responsibility to protect is a forward-looking (*ex ante*) question. It asks us to consider which intervener is likely to be effective (or has a special relationship with those needing protection or has been formally assigned the duty to intervene) and therefore should be tasked with humanitarian intervention.<sup>5</sup>

To determine whether an intervener will be effective, we need to assess whether it possesses the following five qualities.<sup>6</sup> First, and most obvious, an intervener needs sufficient military resources. These include: (1) a high number of armed, motivated, and trained – and, ideally, experienced – military personnel; (2) military equipment such as helicopters, armoured-personnel carriers, and communications equipment; (3) strategic lift capacity (in both air and sea forms) to be able to move personnel and equipment to wherever the humanitarian crisis is in the world; (4) and logistical support to sustain this force abroad (without its resorting to looting, etc.) (O’Hanlon 2003). Although some of these are not always required – Tanzania obviously did not need sea- and air-lift capacity for its 1979 action in Uganda – many humanitarian interventions require all four capacities.

Second, if an enduring solution is to be achieved, non-military resources are required to accompany the military ones. More specifically, political and economic resources are required for tackling the causes of the conflict, running any transitional authority, and reconstructing the political community. Hence, Michael Bhatia notes that it ‘is the nonmilitary and political dimension that determines overall success or failure’ (2003: 124).

To use military and non-military resources successfully, an agent of intervention needs, third, to have a suitable and realistic strategy for both aspects. For decisions about whether and how to intervene to have a good chance of success, Alan Kuperman argues, ‘they must be informed by realistic appraisals of the prospects of humanitarian intervention rather than wishful thinking about the ease of saving lives with force’ (2001: 119). An intervener needs to make an accurate assessment of the situation on the ground and how it can tackle it with its resources, noting its own limitations.<sup>7</sup>

Fourth, an intervener requires the ability to respond in a timely manner. On the one hand, it needs to be able to intervene when the situation is *ready* for intervention. In many cases, this means an early intervention since prevention of the humanitarian crisis can often be the most effective type of humanitarian intervention. On the other hand, an intervener needs to be able to use its resources *quickly*. To a certain extent, this also is a question of

the agent's capabilities, since it needs the necessary military and non-military resources for quick intervention.

Fifth, and more indirectly, those in the political community that is subject to its intervention need to *perceive* that it is legitimate. Perceived legitimacy makes the running of any occupation much smoother, since those subject to the intervention are more willing to yield to its demands and rules, and therefore the chances of achieving long-term peace and stability are greatly increased. Factors that can influence perceived legitimacy include whether the intervener follows principles of international humanitarian law, whether it has UN Security Council authorisation, and whether it reflects, in its decision-making during intervention, the opinions of the local population.

In addition, geographical proximity can influence the effectiveness of intervention since a regional intervener will typically have a vested interest in resolving the crisis (ICISS 2001b: 210). A nearby humanitarian crisis may cause border incursions, an influx of refugees, financial hardship, and political instability for the whole region. This element of self-interest increases the likelihood that the intervener will maintain their presence during the reconstruction stage, which is necessary for long-term success. In addition, fewer financial and military resources (such as air- and sea-lift capabilities) are required for regional intervention. However, it is important not to overstate the case. The link between successful intervention and regional interveners is not always certain since these agents are often ill-equipped and lack the financial resources to undertake humanitarian intervention.

The overall effectiveness of an intervener depends, first, on the degree to which it possesses these five characteristics and, second, on the circumstances in which it is acting. Both the probability and magnitude of success vary according to the situation. For instance, there may be more local resistance to intervention in State A than in State B, and so the probability of success in State B is higher, but State A is enduring a worse humanitarian crisis, so there is more scope for the intervener to achieve a greater magnitude of success in State A. To determine an intervener's likely effectiveness, then, we need to look to whether it possesses the requisite qualities, as well as looking at the particular contingencies of the humanitarian crisis. We should also look to an intervener's track record of humanitarian intervention to see whether its previous interventions have been successful. This may, however, be only partially useful. An intervener may have been effective in the past because it has acted only in more straightforward cases, so it might not be similarly effective in the future.

Before I say anything more in defence of holding that the most effective intervener should act, let us consider the next two ways of designating the responsibility to protect, which concern a special relationship between a potential intervener and those suffering the crisis.

### **Special Relationships and the Duty to Intervene**

I will consider two sorts of special relationship. The first is negative in that it concerns an agent that is responsible for creating the humanitarian crisis. For

instance, a regional hegemon may have previously destabilised the region. The intuition at work here is, to put it crudely, that those that create the mess should clear it up. The second type of relationship is positive: it concerns a potential intervener that has a special bond with those suffering the humanitarian crisis. This bond might be historical, religious, or cultural. A humanitarian crisis, for instance, in a Commonwealth state might mean that Britain and other Commonwealth states possess an obligation to act.

Whether these two potential options are a persuasive solution to who should undertake the responsibility to protect partly depends on the position that one holds on the duty to intervene. According to what I will call the 'General Duty Approach' (in essence, the approach adopted by ICISS), there is a general, unassigned duty to undertake humanitarian intervention. To assign this duty, we need to look to an additional reason (or an 'agency condition'), such as capability or special relationship.

By contrast, according to what I will call the 'General Right Approach', there is a general right to intervene, but not a general, unassigned duty to do so. On this approach, there exist *negative* duties to non-compatriots, for instance, not so cause them harm, but there exist few, if any, *positive* duties to non-compatriots, particularly one as demanding as humanitarian intervention. For most agents, humanitarian intervention is only supererogatory: it is morally permissible, but not morally obligatory. That said, according to this General Right Approach, a certain agent might still have the duty to intervene. But for it to do so, there needs to be a strong reason why it should act. It is not simply a case of *assigning* the duty to intervene. Rather, the duty to intervene needs to be *generated*.

One reason why, on the General Right Approach, an intervener could possess the duty to intervene is that it caused the humanitarian crisis. It violated its negative duty to avoid harming non-compatriots, and therefore has a duty to resolve this crisis. Another way that the duty to intervene could be generated on this approach is from special ties. Although we have negative duties towards non-compatriots, the argument runs, we possess positive duties towards fellow citizens, for instance, to provide welfare. It may also follow that we also have positive duties towards certain non-citizens that we have close affinities to, particularly when they are in extreme peril.<sup>8</sup>

However, being the intervener most likely to be effective does not seem to be able to generate the duty to intervene. It may be argued that assigning the responsibility to protect to the most effective intervener is unfair on that intervener since it places an unduly heavy burden on this intervener. This, of course, is an important issue (I consider it in detail below), but the objection here is more fundamental: it is not simply a question about the unfairness of *assigning* the duty to intervene, which assumes that there is a duty to be assigned. Rather, it is a question of the *existence* of this duty. Unlike for the positive and negative special relationships, there does not seem to be a strong enough reason why an effective intervener is obliged to go beyond its negative duty to refrain from harming those beyond its borders. Simply being the most effective actor does not generate a positive duty to act.



So, if one adopts the General Right Approach, the first solution – looking to the most effective intervener – seems deeply unpersuasive, but the second and third solutions, which depend on special relationships and can generate the duty to intervene, seem more plausible.

*Problems with the General Right Approach*

However, the General Right Approach is problematic. To start with, the notion that we have a general duty to intervene (as suggested by the General Duty Approach) is intuitively compelling. Consider the alternative in which there is no such duty and inaction in the face of extreme human suffering is acceptable. If this were the case, states did nothing wrong by failing to prevent the genocide in Rwanda. As Michael Walzer concludes, ‘intervention is more than a right’ (2002: 25).

More substantively, the General Right Approach’s claim that we possess only *negative* duties to those beyond our borders can, in fact, still generate a general, unassigned duty to undertake humanitarian intervention (as endorsed by the General Duty Approach). Thomas Pogge’s (1992) institutional cosmopolitan defence of humanitarian intervention is relevant here. It is not only tyrants and interfering states that are responsible for humanitarian crises. The lines of causality are far more complex, and we are all, to a certain extent, implicated in the imposition of a global institutional scheme that leads to severe humanitarian crises by, for instance, upholding the system of resource privileges that can lead to significant, bloody conflicts over the right to sell natural resources. In doing so, we violate our negative duty not to harm others. It follows that we possess a duty to mitigate the human rights violations produced by the existing international institutional scheme. The duties here include to redistribute wealth to those who do badly out of the current arrangements, as well as a duty to undertake humanitarian intervention in certain circumstances.

Even if one finds these causal claims unpersuasive, the duty to intervene, as Tan (2006a) asserts, seems to be a logical corollary of the right to intervene. Given the stringency of the conditions that are necessary for humanitarian intervention to be permissible, it follows that humanitarian intervention must be a duty (Tan 2006a: 94). In his words, ‘[i]f rights violations are severe enough to override the sovereignty of the offending state, which is a cornerstone *ideal* in international affairs, the severity of the situation should also impose an obligation on other states to end the violation’ (Tan 2006a: 90). In this context, John Lango (2001: 183) argues that if we have established that there is a right to intervene, and therefore overridden a *prima facie* obligation not to intervene, there is a burden of proof required to show that humanitarian intervention is not a duty. Yet, satisfying this burden of proof is difficult.

One reason why the symmetry between a right and a duty to intervene is sometimes denied is the excessive costs of humanitarian intervention, both in terms of soldiers’ lives and resources.<sup>9</sup> These costs mean that a state does not have an obligation to intervene – it is instead supererogatory. What this

overlooks, however, is that an intervener would not have a *right* to intervene if intervention is excessively costly to its people. Suppose that the Mozambican government decides to intervene in Russia with the purpose of resolving the humanitarian crisis in Chechnya. Mozambique's minimal financial resources are all tied up in the intervention and, as a result, it is unable to provide vital services, such as clean water provision, for its home population. In this scenario, the Mozambican government would violate its fiduciary obligation to look after the welfare of its citizens and would therefore have neither a *duty* nor a *right* to intervene. This is not to say that government acts legitimately only when it occupies itself *exclusively* with the interests of its citizens, which would risk treating all humanitarian intervention as unjustifiable (see Buchanan 1999). Rather, the point is that the *primary* role of government is to promote its own citizens' interests. By viewing this fiduciary obligation as primary, this more moderate approach allows room for government to possess certain obligations to those beyond its borders, including undertaking humanitarian intervention.

This leads us to an important point. To have the *right* to intervene, an intervener needs to possess the qualities necessary for its intervention to be justifiable (in essence, *jus ad bellum* conditions or what ICISS (2001a) call the 'precautionary principles'). It needs, for instance, to follow international humanitarian law, to be welcomed by the victims of intervention (external support), to have the support of its own people (internal support), to not undertake intervention that is excessively costly (both domestically and globally), and to have a reasonable expectation of success.<sup>10</sup> It follows that, to have a *duty* to intervene, an intervener would first need to meet these permissibility criteria so that it has a *right* to intervene. Otherwise, it could not act on this duty; it would not have the right to do so. Note that all four potential ways of assigning the responsibility to protect that I consider assume that the interveners meet these permissibility criteria, and so possess the right to intervene.

There are further reasons for adopting the General Duty Approach. Henry Shue (2004) argues that basic human rights imply correlative duties to enforce these rights, including undertaking humanitarian intervention. Likewise, ICISS (2001a: xi) claim that that the foundations of the responsibility to protect (and, as a corollary, the duty to intervene) lie in the concept of sovereignty, the responsibilities of the Security Council, the developing practice of states, regional organisations, and the Security Council, and, crucially, legal obligations under human rights and human protection declarations and other legal instruments.

Moreover, from an interactional cosmopolitan approach, Carla Bagnoli (2006) argues that the duty to intervene stems from the moral obligation to respect humanity, independent of any consideration of special relationships. To flesh this out further, we can say that there is a duty to prevent, to halt, and to decrease substantial human suffering, such as that found in large-scale violations of basic human rights. This duty to prevent human suffering does not depend on high levels of interdependence; instead, it is universal, generated from the fundamental moral premise that human suffering ought

to be tackled. This duty to prevent human suffering translates, first, into an *unassigned, general* duty to intervene for potentially justifiable interveners (those that meet the permissibility criteria). Second, it translates into an *assigned* duty for those whose intervention would potentially be justifiable and have an additional reason to be identified as possessing the duty to intervene, such as being the most likely to be effective.

More generally, the duty to prevent human suffering translates into a duty to ensure that the responsibility to protect is discharged. For those agents that cannot intervene justifiably (perhaps because they would not be effective, lack the resources to intervene, or would not be able to intervene without excessive cost to themselves), there is no duty to undertake humanitarian intervention. Instead, the more general duty to prevent human suffering translates into other, more specific duties, which also ensue from the duty to prevent human suffering. These might include duties: to work towards becoming more effective interveners (perhaps by improving capability); to prevent human suffering in other ways (such as by using diplomatic pressure and giving aid); to assist (and not to resist) those that are attempting to tackle human suffering; and to press for reforms to the current mechanisms and agents of humanitarian intervention so that human suffering is tackled (including, perhaps, the development of a new institutional arrangement for humanitarian intervention).<sup>11</sup>

To recap: whether these two potential options are *clearly* better ways to assign the responsibility to protect depends, to a certain extent, on whether one adopts the General Right Approach or the General Duty Approach. If one holds the former – that there is only a general right to intervene – then it seems that these two potential factors are better candidates than looking to the most effective intervener, since being the most effective intervener does not seem to be able to generate an obligation to intervene. Yet there are significant problems with the General Right Approach. If instead one holds the General Duty Approach – the view that humanitarian intervention is generally a duty – then special relationships are not required to generate the duty to intervene since this duty *already* exists. In other words, we are not concerned with finding ways of justifying why a particular agent has the duty to intervene. Rather, we are looking for the *most appropriate way of assigning this duty*. Looking to special relationships might still be a desirable option, yet this is less obviously the case.

#### *Problems with These Two Solutions*

In fact, these two potential solutions are not plausible ways of assigning the general, unassigned duty to intervene on the General Duty Approach.<sup>12</sup> Let me start with the first, negative relationship, which holds that the intervener that is somehow responsible for the crisis has the responsibility to protect. An obvious difficulty is that identifying the actors that are responsible for the humanitarian crisis can be tricky. Sometimes this is all too obvious, but, at other times, it can be difficult to disentangle the role that a potential

intervener played in causing the humanitarian crisis from the roles that other, especially domestic, actors played.<sup>13</sup>

It might be argued in response that intervention by the agent responsible for the crisis is required for some sort of reparative justice – and that this should trump other concerns. However, this would be an odd, and largely unconvincing, notion of justice in this context: those who suffered the injustice in the first place – those suffering the humanitarian crisis – could end up being worse off. This is because those that are responsible for the crisis, if they were to intervene, could face high levels of resistance among the local population and so would struggle to undertake effective humanitarian intervention.

Likewise, the positive type of relationship (that we should look to the intervener that has a special bond with those needing intervention) also has its problems. It is doubtful whether many special bonds exist among international actors that are sufficiently strong.<sup>14</sup> It is not clear, for instance, that the communal affinity of the *umma* (the Muslim community) is sufficient to identify a Muslim state as the appropriate intervener when another Muslim state is suffering a humanitarian crisis (see Hashmi 2003). Furthermore, even if there were a few special bonds strong enough to make a difference, in many other cases there would not be. This would leave us with the original problem of specifying which agent should intervene in these cases.<sup>15</sup>

Furthermore, it is not clear why an agent that is responsible for the crisis or one that has special ties with those suffering the crisis should be preferred to the most effective intervener. If one takes humanitarian intervention generally to be a duty, as the General Duty Approach does, what seems to matter most is that this duty is effectively discharged. ICISS argue that the language of responsibility and duties ‘focuses the international searchlight back on where it should be: on the duty to protect communities from massacre, women from systematic rape and children from starvation’ (2001a: 17). And when the focus is on those suffering the humanitarian crisis, what is most important is that their suffering is ended, and so the most effective agent intervenes. This seems more morally urgent than an intervener making up for its past injustices or assisting those with which it has ties.

### **Institutionalising the Responsibility to Protect**

Having largely rejected the second and third solutions, let us now consider the fourth solution. This involves the clear designation of the responsibility to protect to a specific institution, such as the UN, AU, EU, or a new agent specifically designed to discharge this responsibility, such as a permanent UN rapid reaction force.

At face value, this solution would seem to be best way of assigning the responsibility to protect, even if it is not currently within the realms of political possibility. Indeed, this solution could be ideal for several reasons. First, formerly assigning this duty to a particular agent could ensure that this agent discharges it when the situation demands. In doing so, it could respond to a standard objection to intervention: that humanitarian intervention is

selectively carried out in response to certain humanitarian crises, but not others (Tan 2006b: 296). Institutionalising the duty to intervene could also help to ensure that, when it does occur, humanitarian intervention is effective. It may be, for instance, that other agents pool resources so that they are more efficiently used by the agent with the institutionalised duty to intervene. This institution may also gain significant experience in undertaking humanitarian intervention.

Thus, a central argument for establishing an institutional solution is consequentialist. Designating the duty to intervene formally to one specific institution will ensure that this duty is effectively discharged. Note that, if this argument is valid, this solution will cohere with the first: the institution assigned the responsibility to protect will be the most effective intervener.

There are non-consequentialist justifications for this solution as well. Institutionalising the responsibility to protect could remove much of the current contestation surrounding humanitarian intervention by judging whether intervention would be justifiable (i.e., whether it meets the permissibility criteria). Formally designating the responsibility to protect to a specific institution could also help to discourage abusive intervention that claims to be humanitarian. This is because, by formally designating who should intervene, the only agent that could legitimately claim to be engaged in humanitarian intervention would be the designated intervener. This solution could also be justified procedurally. That is, an institutional solution could be based on democratic decision-making and assign the burdens of humanitarian intervention fairly between international actors.

Accordingly, not only could this solution be effective (and so cohere with the first solution), it could also resolve disagreement, prevent abuse, and be procedurally justified. It would appear, then, to be the most favourable way of assigning the duty to protect. Indeed, as suggested above, the duty to prevent human suffering indicates that there may be an obligation to set up such a scheme.

### **Ideal and Non-Ideal Institutional Solutions**

We need to distinguish, however, between an *ideal* institutional solution and a *non-ideal* institutional solution.<sup>16</sup> An ideal institutional solution would assign the responsibility to protect to an agent that could discharge this responsibility in all cases where and whenever necessary, and have the advantages outlined. Achieving such an ideal is, of course, highly desirable. The problem, of course, is that we are a long way from achieving this solution; current international institutions are far from this ideal. It would require significant reform of current international institutions, such as the creation of a large-scale, permanent UN standing force and suitable authorising institutions, perhaps along the lines of the global democratic institutions proposed by David Held (1995). This is not to detract from the desirability of this solution.<sup>17</sup> It is simply to admit that such an institution would require significant reform of the international system and, for this reason, we may need to pursue other ways of assigning the responsibility to protect in the short- to mid-term.

One apparent alternative is a non-ideal institution. We could formally assign the responsibility to protect, for instance, to the UN as it currently exists. Indeed, this might seem to be the most appropriate way of assigning the responsibility to protect. The UN's jurisdiction, as outlined in its Charter, is universal and includes matters of peace and security. It is also widely accepted as being able to undertake or to authorise humanitarian intervention legally. Alternatively, regional organisations could be assigned the responsibility to protect within their regions.

Yet this option seems less persuasive than the first, consequentialist solution. The risk with a non-ideal institutional solution is that we could assign the responsibility to protect to an institution that has significant difficulty in discharging this responsibility. Indeed, it may lack many of the advantages of an ideal institutional solution outlined. For example, if we were to institutionalise the duty to intervene at the UN in its current form, it would have real trouble intervening in response to all – or even most – of the severe humanitarian crises worldwide. In addition, it may be too conservative in its assessments of when the permissibility criteria for justifiable humanitarian intervention have been met. For instance, Russia and China, being generally opposed to humanitarian intervention, would be likely to be overly cautious in their assessments.

Moreover, institutionalising the responsibility to protect in a non-ideal institution may reduce only the number of abusive interventions that claim a *humanitarian* justification. It would be unlikely to reduce the number of abusive interventions *overall*. States that want to engage in abusive intervention could simply present a different justification for their action, such as anticipatory self-defence. As ICISS suggest, '[s]trong states which are – for reasons good or bad – determined to intervene in a weak state have no shortage of legal rationalizations for their actions' (2001b: 67).<sup>18</sup>

So, although the ideal institutional arrangement is the most desirable way of assigning the responsibility to protect, problems of feasibility may mean that we should prefer instead the first solution, at least in the short term. Even though this solution does not resolve problems of disagreement and is not necessarily procedurally just, it would be best at ensuring that a humanitarian crisis is effectively tackled. Given the importance of preventing human suffering, this is a vital consideration.<sup>19</sup>

One immediate objection is that the first, consequentialist solution gives priority to unilateralism over multilateralism. In response, it is worth noting that on occasion the most effective institution may still be the UN, especially given its degree of perceived legitimacy among conflicting parties. Likewise, regional organisations may sometimes be more likely to be effective than states because of their geographical proximity. The problem is that *institutionalising* the responsibility to protect in these organisations would task them with humanitarian intervention in *all* situations, including those that they are not best placed to deal with. Alternative, unilateral options, such as India's intervention in East Pakistan in 1971, Tanzania's intervention in Uganda in 1979, and NATO's intervention in Kosovo in 1999 – all of which lacked

multilateral support but helped to prevent and halt violations of basic human rights – would be foreclosed.

My point, then, is that until we develop a legitimate and effective institutional arrangement to undertake humanitarian intervention, both unilateral *and* multilateral solutions should be on the table in response to the mass violation of basic human rights. Circumstances should dictate which of these options are chosen. More specifically, it should be the intervener that will be able to tackle the crisis most effectively.<sup>20</sup>

### **Three Further Objections**

Let us now consider three further objections that may be raised against this solution.

#### *(i) Ineffective Norm*

To start with, there may be difficulty establishing a norm that the most effective intervener has the duty to intervene. Moreover, even if we were to establish this norm, it may not be strong enough to compel the most effective intervener to undertake humanitarian intervention, which may be reluctant to intervene for a variety of reasons. Therefore, although the responsibility to protect would be discharged effectively *when* it is discharged, it would not be discharged *frequently*.<sup>21</sup>

Nonetheless, these practical obstacles might be surmountable. To start with, the problems in establishing a norm that the most effective intervener has the duty to intervene should not be over-exaggerated. Although not fully established, this norm seems to have had an impact on interveners' behaviour. NATO's interventions in Bosnia and Kosovo, for instance, could be interpreted as partially due to a realisation that it would be the most effective agent to tackle these crises. Furthermore, if states and other actors accept the responsibility to protect and grasp the gravity of the sorts of situations that this notion involves (i.e., genocide, ethnic cleansing, and crimes against humanity), there may be mounting pressure for this responsibility to be discharged in the most effective way possible. And as this norm does grow, its power to influence states may increase as well.

Notwithstanding, the most effective intervener might sometimes be reluctant to intervene. However, looking to the second, third, or fourth most effective intervener. However may still be preferable to other solutions. The consequentialist rationale is essentially the same: we should prefer intervention by the second, third, or fourth most effective intervener because it is likely to be the most effective at tackling the mass violation of basic human rights in the circumstances (i.e., when the most effective intervener refuses to act).

#### *(ii) Who Decides Effectiveness?*

Another apparent problem with this solution is that there can be differing interpretations and judgements about which intervener is most effective.

Given this indeterminacy, agents may be able to falsely claim, but with some plausibility, that they are the most effective (perhaps to justify a self-interested intervention). This, the objection runs, could increase the risk of abusive intervention. Who then is to determine which intervener is most likely to be the most effective?

One solution to the problem of indeterminacy, favoured by many (e.g., Buchanan & Keohane 2004; Pogge 2006), is to have institutions that formally decide whether an intervener possesses the morally relevant qualities. The goal here is to establish something akin to a (model) domestic legal system, which has set processes to determine an agent's intention, as well as to make judgements on other morally relevant concerns (such as its likely effectiveness). It would silence much of the contestation by listening to competing claims and deciding in a fair and accurate manner which is correct. If put in place at the international level, such a system would be able to adjudicate on which intervener is most likely to be effective.

The development of an international adjudicating institution would be highly desirable. Indeed, one of the benefits of an ideal institutional solution outlined above is that it would be able to decide in a fair manner whether an intervention would meet the permissibility criteria. Unfortunately, like the ideal institutional solution, such an adjudicating institution is hardly on the cards.

A more practicable solution, defended by Thomas Franck (2003; 2006), is to have various actors play a 'jurying' function by evaluating the justifiability of an intervener's action, including its motives, proportionality, and likely effectiveness. Indeed, Franck argues that such 'jurying' already takes place. Examples include the defeat in the Security Council of Russia and China's attempt to admonish NATO's action in Kosovo, the silent acquiescence in response to Tanzania's intervention in Uganda, and the mildness of the disapprobation of India's intervention in Bangladesh (Franck 2006: 151).<sup>22</sup> According to Franck (2003: 228–229), 'jurying' is conducted in three forums: the International Court of Justice; international political forums, such as the Security Council and General Assembly; and the 'court of public opinion' informed and guided by the global media and NGOs. In these forums, Franck argues, states should make the ultimate decision, although the UN secretariat and agencies, the media, and NGOs have an important role in the assessment process.

The notion of 'jurying' is a plausible way of determining effectiveness. However, Franck's own account is perhaps too state-centric and unduly optimistic about the impartiality of states. As Pogge (2006: 170) argues, a jury of states is susceptible to undue influence, such as the pressure put on members of the Security Council in the build-up to both Iraq wars to reach the 'right decision'. Moreover, certain states may be overly cautious in their judgement of effectiveness because, on the one hand, they generally oppose humanitarian intervention, asserting instead the sanctity of state boundaries, or, on the other, are concerned that they would be required to intervene or provide resources. For this reason, it is important that non-state perspectives should be included in any jurying role.<sup>23</sup> In particular, the decisions on an



intervener's likely effectiveness should incorporate leading NGOs and global public opinion, as well as states. Even though such actors may have questionable partiality as well, they will help to balance states' views on humanitarian intervention.<sup>24</sup>

It may be objected, first, that these actors (states, NGOs, and global public opinion) will frequently fail to make a coherent, unified decision on humanitarian intervention and, second, even if they do make a decision, it will be difficult to determine what this is. Both these criticisms are, to a certain extent, correct, and provide further reason for why we should look to develop a more formalised adjudicating institution. However, we should not discount completely the ability of these actors to make a clear decision, such as the widespread condemnation of Israeli action in Lebanon in summer 2006 and Russian action in Georgia in August 2008. Nor is it impossible to determine what this decision is. The opinions of states can be inferred from resolutions in the General Assembly and Security Council, pronouncements by regional organisations, and from statements by heads of states and governmental officials. NGOs also frequently publicise their opinions, such as the strong refutation of the humanitarian credentials of the Iraq War by the Executive Director of Human Rights Watch, Kenneth Roth (2006). Similarly, a sense (if not a perfect measurement) of worldwide public opinion can be obtained from sources such as the Eurobarometer and WorldPublicOpinion.org.

A further criticism is that any decisions by these actors would fail to constrain powerful states. Again, this is often true. In fact, any scheme to decide the applicability of international rules and norms is likely to face this problem. Yet many states are influenced by the opinions of their peers, the criticism of NGOs, and global public opinion, if for no other reasons than wanting to be seen as good international citizens and domestic electoral pressures. Indeed, it can be plausibly claimed that the jurying function of states, NGOs, and global public opinion already has played a significant role in constraining states. Consider, for instance, the widespread view, despite the claims of the US and the UK, that the 2003 war on Iraq was illegal and largely unjustifiable. This view, although not sufficient to constrain these states at the time, seems to have had a large impact on their behaviour, and international relations more generally, since.

*(iii) Fairness and Effectiveness*

It may also be objected that the first solution imposes an unreasonably heavy burden on the most effective intervener. For instance, it would be unfair on NATO if it always has the duty to intervene. States, the UN, and regional organisations should do their bit too. This objection is a version of a standard objection to consequentialism: it is excessively demanding. In this case, the objection is that this solution is excessively demanding on the most effective intervener. Indeed, this is the reason why Tan (2006a: 102) shies away from placing the responsibility to protect on the most effective agent.

To see the force of this challenge, it helps to distinguish between three ways that the issue of unfairness could arise. First, having the most effective agent intervene could be unfair because that agent has to do all the intervening. The duty to intervene may fall on the same agent in different cases. Other agents would not have the duty to intervene because their intervention would not be the most effective. The second and third potential types of unfairness differ from this in that they involve the most effective agent covering for other agents' non-compliance with their duties. In the second, other interveners fail to intervene and so the duty to intervene falls on an intervener that has already done its fair share. Suppose, for instance, that States A and B would be the two most effective interveners, but are unwilling to act. The duty then falls on State C to intervene since it is the third most effective intervener. This seems unfair on State C because it has already done its fair share. It has already undertaken humanitarian intervention several times recently. The third type of case in which the issue of unfairness could arise would be when the most effective intervener has to act because of the behaviour of those who caused the humanitarian crisis (e.g., governmental persecution of a certain ethnicity). It is because of these individuals' non-compliance with their duty to protect their citizens that the most effective intervener has the burden of intervention. In these three ways, then, adopting this consequentialist solution could seem unfair to the most effective intervener.<sup>25</sup>

In response, there are at least four points that, to a certain extent, mitigate this potential unfairness.

First, as suggested above, there currently exists an unassigned duty to intervene. As such, an intervener's expected effectiveness does not have to *generate* the duty to intervene. Rather, effectiveness merely *specifies* who has the duty to intervene. That this may be unfair on the most effective intervener is still an issue, but it is less of an issue because this intervener *already* has a duty (albeit an unassigned one) to intervene.

Second, which intervener possesses the duty to intervene may vary according to the circumstances since different interveners may be effective in different circumstances. Indeed, if an intervener is already intervening somewhere else, or if it has already intervened somewhere else recently, then, for reasons of overstretch, it may be unlikely to be the most effective agent for a further intervention. The duty to intervene would therefore fall on another agent.

Third, the most effective intervener in many cases would be rich Western states, since they tend to have the most military and financial resources. That the duty to intervene might fall on these rich states does not seem unduly unfair.<sup>26</sup>

Fourth, although other agents may not have the duty to undertake humanitarian intervention, as outlined above they may nevertheless have other, associated duties, related to the responsibility to protect and the prevention of human suffering, which are equally demanding. These might include funding the intervention and providing equipment, and will further offset any apparent unfairness.

This reply also helps to repudiate a further criticism: the most effective interveners have an incentive to *run down* their capabilities and other agents have an incentive to *fail to develop* their capabilities so that they do not possess the duty to intervene (see deLisle 2001: 546). Actors that fail to maintain their capacity to intervene would violate these other duties. Furthermore, as suggested above, states have a duty to ensure that the responsibility to protect is properly discharged, which may include the development of the capability to intervene.

Nonetheless this objection about fairness might still be claimed to have some purchase. However, we can easily modify this solution so that it is not so demanding. One option would be a principle of beneficence that asserts that the demands on a complying agent should not exceed what they would be if everyone complied with the principle that should govern their conduct (see Murphy 2000). For our purposes, those complying with the duty to prevent human suffering would not be required to do more than they would have to if everyone complied with this duty. This principle of beneficence, however, is not best suited to humanitarian intervention, since intervention always involves cases where someone has failed to comply with their duty, that is, where a government is unable or unwilling to fulfill its duty to uphold its citizens' basic human rights. So, humanitarian intervention requires at least one agent to do more (i.e., to intervene) than would be required if there were full compliance with the responsibility to protect.

My alternative suggestion is that this solution be amended so that agents have a duty to make a *reasonable and substantial effort* to protect populations suffering from the mass violation of basic human rights. This means that the duty to intervene still falls on the most effective intervener, but if this agent has already made significant effort to prevent human suffering in ways which go beyond what would be required of it if there were full compliance with this duty (such as by undertaking several recent humanitarian interventions), then, for reasons of fairness, the duty to intervene should fall on the next most effective intervener. In practice, however, most agents have not done their bit to prevent human suffering – consider the number of humanitarian crises and amount of human suffering that currently go unchecked. The duty to intervene, according to this condition, is therefore likely to continue to fall on the most effective intervener.

## Conclusion

My aim has been to assess various options for assigning the responsibility to protect. Much depends on particular political contingencies that are beyond the scope of the moral theorising of this article. My conclusion is a tentative one. We should prefer the first solution – the most effective intervener has the duty to intervene. It is tentative because, first, this solution also has its problems (such as risks of unfairness) and, second, an ideal institutional arrangement that has the capacity to intervene when and wherever required in a fair and democratic manner would be a highly desirable way of assigning the responsibility to protect. Still, this is a distant goal. For now at least, we

should focus our attention on the intervener that will be the most effective. The moral pull of this solution is strong. Given the seriousness of the concerns of the responsibility to protect – with the mass violation of citizens’ basic human rights – it is of the utmost importance that this responsibility is effectively discharged. This solution simply argues that we should most effectively discharge the responsibility to protect.

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### Notes

- <sup>1</sup> I define humanitarian intervention as ‘forcible military action by an external agent in the relevant political community with the predominant purpose of preventing, reducing, or halting an ongoing or impending grievous suffering or loss of life.’ I will use the ‘responsibility to protect’ to imply a responsibility or duty to undertake humanitarian intervention. As such, I am concerned with cases, first, when the state primarily tasked with the responsibility to protect is unable or unwilling to uphold its citizens’ basic human rights and, second, when other options, short of military intervention (such as targeted sanctions), have not been effective, or are unlikely to be so. These other aspects are important parts of the responsibility to protect doctrine, but not the focus of this article.
- <sup>2</sup> To be sure, the notion of a duty to intervene is one of the most ambitious aspects of the R2P and the hardest for certain states to swallow. This is reflected in the agreement reached at the 2005 World Summit, which watered down the legal obligation to intervene. Yet even the language used in this document retains the sense that humanitarian intervention is not morally optional in certain circumstances.
- <sup>3</sup> For a discussion of the problems with defining ‘international community’, see the symposium in this journal (Hodge 2003, Kovach 2003, and Lucas 2003).
- <sup>4</sup> There are other potential ways of identifying who has the duty to intervene, but these four options are the most morally interesting.
- <sup>5</sup> For a more detailed account of how effectiveness should be defined, see Seybolt (2007: 30–46) and Pattison (2008a; forthcoming).
- <sup>6</sup> This list is not meant to be exhaustive. There may be other qualities that are important for effective intervention; I focus on the qualities commonly cited as essential.
- <sup>7</sup> See, further, Seybolt (2007), who claims that this is the central factor in an intervener’s success.
- <sup>8</sup> An institutional assignment of the responsibility to protect may also be able to generate this duty, given duties to fulfill institutional responsibilities.
- <sup>9</sup> See, further, Lango (2001) on this issue.
- <sup>10</sup> For defence of these principles, see Caney (2005), Farer (2005), ICISS (2001a), and Tesón (2005). I consider the importance of internal and external support for humanitarian intervention in Pattison (2007b).
- <sup>11</sup> Similarly, Tan (2006a, 106) argues that the duty to protect implies a duty to ensure that this duty is properly discharged, which in turn implies a duty to set up a permanent international humanitarian defence force. Note that the duty to prevent human suffering of noncompatriots is not the *only*, or even, always the *primary* responsibility that a government owes. As discussed above, its fiduciary obligations to its own citizens will sometimes mean that it should *not* act on this duty if, for instance, intervention is likely to be excessively costly to its citizens and soldiers. Likewise, a government may have a duty to *refrain* from intervention that destabilises a surrounding region. These countervailing

- duties *not* to act may, then, sometimes outweigh the duty to prevent human suffering, and therefore the duty to intervene. How these conflicting duties should be weighed will depend on the particular contingencies of the case, such as the seriousness of the humanitarian crisis, the likelihood of success, and degree of the costs that the intervener will have to bear.
- <sup>12</sup> Some of the objections that I raise will also show that, even if one adopts a General Right Approach, these two solutions are unconvincing.
- <sup>13</sup> These difficulties in determining causality may also apply to the institutional cosmopolitan case for the general, unassigned duty to intervene.
- <sup>14</sup> That these relationships are not sufficiently strong poses even greater problems for this solution when adopting the General Right Approach, since these relationships are required to *generate*, rather than *specify*, the duty to intervene.
- <sup>15</sup> Tan cites the opposite problem where ‘there may be more than one potential agent with historical ties to those in need of protection, in which case the agency problem reappears’ (2006a: 102).
- <sup>16</sup> Strictly speaking, even a perfect institution to undertake humanitarian intervention is a matter of *non-ideal*, rather than *ideal*, theory. This is because a humanitarian crisis involves circumstances of non-compliance – where the state primarily responsible for upholding its citizens’ basic human rights is unable or unwilling to comply with its duty to do so. In general, ‘ideal theory’ concerns principles that characterise a well-ordered society under favourable circumstances, whereas ‘non-ideal theory’ concerns principles that govern how we are to deal with severe injustice (Rawls 1999: 8, 216). For simplicity’s sake, however, I will refer to an institutional arrangement that can undertake humanitarian intervention effectively, fairly, and democratically as ‘ideal’.
- <sup>17</sup> Indeed, I defend a similar proposal in Pattison (2008b).
- <sup>18</sup> See, further, Pattison (2007a). Moreover, these two options may also be unfeasible in the short term. Many states may oppose formerly assigning the responsibility to protect to the UN because they wish to retain the option of unilateral action or, conversely, reject outright the permissibility of humanitarian intervention. Similarly, assigning the responsibility to protect to regional organisations is unlikely in the near future because it would require significant reform of the international system: the UN Security Council would no longer be required to authorise humanitarian intervention by a regional agency (as required by Article 53 of the UN Charter).
- <sup>19</sup> It may be responded that a non-ideal institutional arrangement is a necessary stepping stone to achieve an ideal institutional solution. But this is speculative, and the transaction costs in terms of the ineffective prevention of human suffering may be significant (and more certain).
- <sup>20</sup> I question in more detail the moral significance of international authorisation for humanitarian intervention in Pattison (2007a).
- <sup>21</sup> Variations on these objections may also be levelled at the second and third solutions, which also rely on a normative consensus (i.e., that there should be a norm that ensures that the agents that have a special relationship with those suffering the crisis intervene when necessary).
- <sup>22</sup> Franck’s primary focus is on cases where humanitarian intervention is morally justifiable but of questionable legality according to a strict reading of the UN Charter.
- <sup>23</sup> See, further, Lu (2006: 205) who argues that non-state perspectives should be included since it is the protection of the members of the wider community of humanity that ultimately grounds the justification of humanitarian intervention.
- <sup>24</sup> As such, ‘jurying’ is best seen as a metaphor. It is less formalised than a domestic jury is and global ‘jurors’ may not meet the standards that we would expect in a domestic setting.
- <sup>25</sup> A further problem with any apparent unfairness is that it could lead to effective interveners being unwilling to intervene because they feel that they have already done their bit (see, further, Shue 2004: 27).
- <sup>26</sup> This is especially the case if one believes that rich states have acquired their wealth in unscrupulous ways.

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