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The Duty to Assist Famine Victims

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The phenomena of hunger and famine have been recorded throughout history. Ancient Chinese writings extensively discuss the problem. In Confucius' *Great Model of the Canon of History*, food is listed as the first of eight responsibilities of government.¹ Public grain policies have been implemented in China for nearly 4000 years.² Similarly, writings of ancient Greek and medieval scholars reveal concerns with crop failures and hoarding of food.³

Despite this history of world hunger, there is little agreement today on its causes or remedies. The number of people who are starving today, or who have died of starvation or hunger-related diseases over the past decade, is unknown.⁴ Even more pronounced than conflicts over its statistical measurements are disagreements over the causes and cures of hunger. Colonialism, neocolonialism, climate, dysfunctional trade policies, poor development policies, political corruption, and rural poverty all have been blamed for causing hunger.⁵ Proposed cures have been equally diverse and sometimes contradictory. Facing this complex of legal, political, economic, social, and cultural factors, one may question whether either international or domestic law can eliminate or diminish world hunger; yet, pessimism only preserves the status quo.

Despite profuse disagreement on the problem of hunger, some consensus exists. One suggestion to which agreement has been pronounced

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1. See Spitz, *Right to Food for Peoples and for the People: An Historical Perspective*, in "THE RIGHT TO FOOD: FROM SOFT TO HARD LAW" 45 (SIM Right to Food Project 1981).

2. *Id.* at 46.

3. *Id.* at 43-47.

4. Estimates vary from 460 million to over 1.1 billion people. See FOOD AS A HUMAN RIGHT at v (A. Eide & W. Eide eds. 1984). "FAO estimates that nearly 500 million people in the world today suffer from severe undernutrition." NATIONAL COMMITTEE FOR WORLD FOOD DAY HUNGER PRIMER 3 (1984) (emphasis in original). One estimate is that, of the hunger-related deaths each year, three-fourths occur in children under the age of five and that hunger is the cause of 60% of all infant deaths. *Id.* at 4.

5. See, e.g., C. CHRISTENSEN, THE RIGHT TO FOOD: HOW TO GUARANTEE 23-25 (World Order Models Project—Working Paper No. 6, 1978); N. TWOSE, BEHIND THE WEATHER, WHY THE POOR SUFFER MOST: DROUGHT AND THE SAHEL 4-6 (Oxfam Public Affairs Unit 1984); Ghee, *Law and Development: Food First*, in "THE RIGHT TO FOOD: FROM SOFT TO HARD LAW" 58-62 (SIM Right to Food Project 1984); Künnemann, *The Human Right to Food: A Strategy for an International Network*, in "THE RIGHT TO FOOD: FROM SOFT TO HARD LAW" 90-103 (SIM Right to Food Project 1984); Plant, *The Right to Food and Agrarian Systems: Law and Practice in Latin America*, in "THE RIGHT TO FOOD: FROM SOFT TO HARD LAW" 74-89 (SIM Right to Food Project 1984).

is emergency assistance.⁶ Because droughts, floods, or other natural disasters temporarily destroy a population's ability to feed itself, short-term food needs must be met through direct assistance. But recognition of this need for emergency assistance should not overshadow the difficulties of long-term development. The roots of hunger and poverty must be addressed. This process will require more concerted, rational planning.

Although economic and political dislocations lead to chronic food shortages, climatic conditions also cause failures in food production. Africa has suffered an increasingly severe drought during seven of the past eight years,⁷ bringing 35,000,000 people to the brink of starvation.⁸ In Ethiopia alone 7,000,000 people are starving.⁹ In Brazil also, a five-year drought has brought many people close to starvation.¹⁰ While long-term development of national food reserves may alleviate future tragedies, the short-term disasters require transporting food to stricken people at prices they can afford. Even for the long term, as the FAO Committee on World Food Security has stated, "the establishment of food reserves providing full insurance against domestic crop failures or other contingencies is seldom feasible or economic in low-income countries."¹¹

A coordinated system of food reserves has been viewed as a crucial component of an effective food security system since the world food crisis of 1973-1974.¹² It has been proposed that developed countries, and others in a position to do so, earmark grain or funds as food security reserves to ensure sufficient supplies to meet emergency import requirements of low-income, food-deficit countries. The United States and Sweden have taken steps to realize this goal.¹³ While such aid helps meet the most urgent

6. Disasters may bring into focus all the basic social and economic problems of a society. In one case, in Guatemala, a serious earthquake was found to have affected the poor to a far greater extent than the more affluent sectors of the country. See Oxfam America News, Fall 1983, at 8, col. 3. Hardest hit were the Indian communities. It was clear that, along with disaster relief, technology to prevent similar consequences, such as stronger housing, agrarian reform, and a diversified economy, were needed strongly. See *id.*

7. *Id.* at 1, col. 2. The current situation is worse than the period of 1972-1973, in which an estimated 200,000 people died. *Id.* Beginning in 1983, individuals and organizations were predicting that Ethiopia would be one of the worst hit areas. Kaufman, *Parched, Africa Needs Food Urgently*, N.Y. Times, Oct. 14, 1983, at 6, col. 3.

8. San Francisco Chron., Oct. 30, 1984, at 14, col. 1.

9. Russel, *Ethiopia—Flight from Fear*, TIME, Jan. 21, 1985, at 36; San Francisco Chron., Oct. 30, 1984, at 14, col. 1.

10. *An Unnatural Disaster*, Oxfam News, Apr.-May 1984, at 6-7.

11. See COMM. ON WORLD FOOD SEC., WORLD FOOD SECURITY: SELECTED ISSUES AND APPROACHES ¶ 27, at 4 (9th Session, Rome, Apr. 1984).

12. *Id.* ¶ 63, at 9.

13. *Id.* ¶ 65, at 9. As the Committee on World Food Security noted:

The urgent need for special reserves has been dramatically confirmed by the Africa food emergency in 1983/84, when it was estimated that food aid deliveries would have to double in a single year if the food deficits of 22 critically affected countries were to be fully met. The grim experience of the current African food crises, together with that of 1979/80, could provide valuable lessons in identifying

food shortages, it may distort consumption patterns and discourage the production of traditional crops, which causes even greater long-term food security problems.

This Article is concerned with short-term internationally declared emergencies: situations of famine resulting from natural disasters, or substantial food shortages resulting from a mixture of factors. That food aid is available is undeniable: "If total world food supplies were divided equally—all food grown divided in equal portions—there would be plenty for everyone, with some to spare."¹⁴ Nonetheless, food security is established on a precarious basis. While food reserves exist in wealthier developed countries, governmental policies may prevent those reserves from being tapped. Elsewhere, food reserves may be available only at prices too high to meet the needs of the poor. Often, reserves are established as part of domestic agricultural policies, without regard to the needs of famine areas. In times of scarcity, reserves come under the control of private exporters or of exporting countries, in which governments have at best only a secondary interest in ensuring that the hungry poor receive adequate food.¹⁵

The question then arises whether there is an international right to food and whether that right imposes an obligation on states that have food surpluses to assist those states facing famine, by directly assisting them in the short-term and contributing to a global reserve system in the long-term. In answering these questions, recourse will be made not only to positive international law expressed in treaties and declarations, but also to general principles of law reflected in common provisions of national legislation throughout the world.

The following analysis examines whether the duty to assist those in peril, which is recognized in numerous national laws, can be extended to require food surplus nations to assist famine victims in other states.

As a preliminary matter, it may be questioned whether law is necessary or useful to ensure assistance to famine victims. An affirmative response would be based on several considerations. First, voluntary measures have failed to adequately remedy the effects of famine. Deaths and disabilities continue at high rates while food surpluses exist in wealthier countries.¹⁶

weaknesses in arrangements for prompt and sufficient relief to the affected people. *Id.* ¶ 66, at 10.

14. NATIONAL COMMITTEE FOR WORLD FOOD DAY HUNGER PRIMER 5 (1984). For example, if everyone in the world in 1981 had eaten two pounds of cereal per day, there still would have been a two-month reserve for famine protection. *Id.*; see also C. CHRISTENSEN, *supra* note 5, at 4.

15. C. CHRISTENSEN, *supra* note 5, at 27-28. World-wide cooperation to insure against weather-induced production changes would prove more efficient. *Id.* at 28. Agencies with multilateral control could achieve this through regularized procedures. Because crop failures will occur due to climatic conditions, any claimed right to food should include adequate global food reserves.

16. A recent report of the United Nations Food and Agricultural Organization found that food pledges to 21 African countries hardest hit by the 1984-1985 famine are 2.2

Second, social science research on individual rescue actions indicates that law may modify the behavior of strangers toward those in need.¹⁷ It has been suggested that such a law would increase intervention and reinforce cooperative motivation by those thrown together in emergency situations.¹⁸ Finally, the articulation of a duty reaffirms the right to food by recognizing the legitimacy of a claim to food by the holder of the right and a corresponding responsibility of a duty-holder to protect and implement that right. As Henry Shue has said, a right "provides (1) the rational basis for a justified demand (2) that the actual enjoyment of a substance be (3) socially guaranteed against standard threats."¹⁹ Moreover, Shue adds that the right helps to "preserve effective institutions for the enjoyment of what people have rights to enjoy."²⁰

The right to food is expressed in positive international law. Several instruments on both the global and regional level expressly recognize this human right. The Universal Declaration of Human Rights pronounces a common standard of achievement for all peoples²¹ and calls on all individuals and organs of society to take measures nationally and internationally to implement the right to food.²² Article 11 of the United Nations Covenant on Economic, Social and Cultural Rights not only recognizes the right to food, but also requires that states take individual and cooperative measures that are necessary to ensure an equitable distribution of world food supplies.²³ On a regional level, the American Declaration of the Rights and Duties of Man recognizes the right to food as part of the right of every person to the preservation of his health.²⁴ In this regard, the Inter-American Commission on Human Rights has recognized that "the more developed countries have an obligation vis-à-vis the less developed countries" to implement international economic rights.²⁵ Read together with

million tons short of the minimum needed to prevent millions from starving to death. *Food Pledges to Africa Are Lagging*, U.N. Says, San Francisco Chron., Jan. 29, 1985, at 10, col. 2. Moreover, only one-half the aid pledged during 1984 was actually delivered. *Id.*

17. See Rudzinski, *The Duty to Rescue: A Comparative Analysis*, in *THE GOOD SAMARITAN & THE LAW* 122 (J. Ratcliffe ed. 1966); Note, *The Duty to Rescue in Tort Law: Implications of Research on Altruism*, 55 IND. L.J. 551, 556-61 (1980).

18. See M. SHAPO, *THE DUTY TO ACT: TORT LAW, POWER & PUBLIC POLICY* 66-67 (1977).

19. H. SHUE, *BASIC RIGHTS—SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* 13 (1980).

20. *Id.* at 17.

21. See G.A. Res. 217, U.N. Doc. A/810 preamble at 72 (1948).

22. See *id.* art. 25, at 76.

23. Art. 11, International Covenant on Economic, Social and Cultural Rights of 16 December 1966, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 50-51, U.N. Doc. A/6316 (1967).

24. O.A.S. Res. XXX, American Declaration of the Rights and Duties of Man, art. XI (adopted by the 9th International Conference of American States, Bogotá, 1948), reprinted in *THE ORGANIZATION OF AMERICAN STATES AND HUMAN RIGHTS 1960-1967*, at 563 (1972).

25. INTER-AMERICAN COMM. ON HUMAN RIGHTS, O.A.S. ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1979-1980, at 152 (1980).

other international treaties and statements, these documents reflect an international consensus that everyone has the right to food and that states have corresponding obligations to respect, ensure, and fulfill this right.

The exact dimensions of each state's duties, either domestically or internationally, have not been developed. In formulating proposals, one source of international legal obligations is "the general principles of law recognized by civilized nations."²⁶ Although this language has been uniformly interpreted by neither the International Court nor commentators, it may allow application of laws and principles common to many countries.²⁷

If application of principles of municipal law is an acceptable means of enforcing broad legal obligations such as those flowing from the right to food, then the question arises whether a duty to rescue constitutes a "general principle of law" within the terms of article 38 of the International Court. If such a duty constitutes a general principle of law within article 38, the next question is whether the duty may be extended to economic circumstances such as starvation, or whether the duty must be limited to immediate, noneconomic perils such as assault or traffic accidents.

Continental legal systems, following the tradition of Roman law,²⁸ generally require assistance to those in peril and provide criminal and civil penalties for violators. Such statutes exist in Belgium, China, France, Germany, Italy, Denmark, Hungary, Czechoslovakia, the Netherlands, Norway, Poland, Portugal, Romania, Switzerland, the U.S.S.R., and Turkey.²⁹ The obligation applies to strangers and is not fault based. The French statute is typical: anyone who abstains from rendering assistance to a person in peril when he could do so without risk to himself or to third parties may be punished by up to five years in prison and a fine of 20,000 French francs.³⁰ The duty applies if the peril is constant and necessitates immediate intervention, regardless of its cause or nature.³¹

26. See Statute of the International Court of Justice, ch. II, art. 38(1)(c), 59 Stat. 1055, 1060, T.S. No. 993, at 30, 3 Bevens 1153, 1187 (1945).

27. *E.g.*, Temple of Preah Vihear (Cambodia v. Thailand), 1962 I.C.J. Reports 23, 26, 31-32; The Diversion of Water from the Meuse (Netherlands v. Belgium), 1937 P.C.I.J., ser. A/B, No. 70, at 76-78; Factory at Chorzów, 1928 P.C.I.J. ser. A., No. 17, at 32; see MANUAL OF PUBLIC INTERNATIONAL LAW 143-48 (M. Sørensen ed. 1968). See generally B. CHENG, GENERAL PRINCIPLES OF LAW 1 (1953); Hicks, *International Order and Article 38(1)(c) of the Statute of the International Court of Justice*, 2 SUFFOLK TRANSNAT'L L.J. 1 (1978).

28. In Roman law the doctrine of *negotiorum gestio*, originally an extended agency concept, applied in the classical period to provide compensation for one who delivered medical care for another person's slave, repaired another person's house, and supplied food for another person's family when necessary. Dawson, *Negotiorum Gestio: The Altruistic Intermeddler*, 74 HARV. L. REV. 817, 819 (1961).

29. Rudzinski, *supra* note 17, at 91, 91-92 & n.3, 129 app.

30. CODE PENAL, art. 63, § 2.

31. Judgment of Jan. 21, 1954, Cass. crim., Fr., 1954 Recueil Sirey [S. Jur.] I 178;

Common-law jurisdictions have shown more hostility toward imposing a duty to rescue on strangers.³² In American law the traditional view, expressed in the *Restatement of Torts*, provides that "[t]he fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."³³ American courts originally adopted a strict no-duty rule, describing the rescuer as "a mere volunteer" or "officious intermeddler" and sometimes imposed damages for actions undertaken.³⁴ One court has indicated that if a man were to see a two-year-old child sitting on a railroad track with a train approaching, he would have no duty to save the child even if he could do so without harming himself.³⁵ More recently a court held that a woman who watched a mother violently abuse her three-month-old baby had no legal duty to rescue the baby.³⁶ The notorious *Yania v. Bigan*³⁷ is the example of an extreme application of this rule. In that case the court held that there was no duty to rescue a drowning person who, because of the defendant's taunting, had jumped into water on the defendant's land.³⁸

Various reasons have been advanced for the traditional common-law approach. In an earlier discussion, Professor Ames explained that the common law should prevent harm, rather than force people to confer benefits.³⁹ More recently, Professor Linden advanced judicial economy as the reason for the reluctance of the courts to impose a general duty to assist.⁴⁰

Other commentators have examined the practical questions whether a potential rescuer would know that a duty exists and whether a court or jury would be able to balance the conflicting interests of the rescuer and victim.⁴¹ The problem of conflicting interests appears to concern those commentators who question whether it is reasonable to expect one to endanger oneself to assist a stranger.⁴² Balanced against the potential harm to the rescuer is the lower risk to the victim: inaction does not carry

Judgment of May 31, 1949, Cass. crim., FR., 1949 Recueil Sirey [S. Jur.] I 126. During 1962, fifty-two persons were imprisoned and twelve fined for failing to render assistance. Tunc, *The Volunteer and the Good Samaritan*, in *THE GOOD SAMARITAN AND THE LAW* 43, 57-58 (J. Ratcliffe ed. 1966).

32. See Linden, *Rescuers and Good Samaritans*, 34 MOD. L. REV. 241, 241 (1971).

33. See RESTATEMENT (SECOND) OF TORTS § 314 (1965).

34. See Dawson, *supra* note 28, at 817.

35. See *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 260, 44 A. 809, 810 (1898).

36. See *Pope v. State*, 284 Md. 309, 323-25, 396 A.2d 1054, 1063-64 (1979).

37. 397 Pa. 316, 155 A.2d 343 (1959).

38. See *id.* at 321-23, 155 A.2d at 346.

39. See Ames, *Law and Morals*, 22 HARV. L. REV. 97, 103-13 (1908-1909).

40. See Linden, *supra* note 32, at 242. Professor Linden noted that "[t]he early courts were hesitant to undertake the job of requiring people to help their neighbours for their hands were full enough trying to prevent them from attacking one another." See *id.*

41. See, e.g., Scheid, *Affirmative Duty to Act in Emergency Situations—The Return of the Good Samaritan*, 3 J. MAR. J. PRAC. & PROC. 1, 4 (1969).

42. See, e.g., Linden, *supra* note 32, at 256-59.

the same risk of harm as harmful action and thus is less morally repugnant. Furthermore, the moral value in assisting others would be undercut by imposing a legal obligation.⁴³ Another argument against duties to assist is that they infringe on individual liberty. This argument is based on the belief that law may justifiably interfere with a person's liberty and property only to prevent harm to others.⁴⁴ Even if the purpose were legitimate, imposing an obligation to assist restricts liberty more than demanding cessation of harmful action and thus is to be avoided.

Regardless of these arguments, the traditional common-law approach has been severely limited through recent legislative and judicial developments in the United States and other common-law jurisdictions. Vermont⁴⁵ and Minnesota⁴⁶ have codified a general duty to assist. Penal legislation throughout the country and the world requires those involved in an automobile accident, regardless of fault, to stop, give information, and render whatever assistance is necessary.⁴⁷ Courts have imposed civil liability for additional damage suffered when one party has failed to render assistance, regardless of fault.⁴⁸ In addition, almost all states have encouraged assistance by enacting "hold harmless" statutes that prevent victims from suing their rescuers.⁴⁹ California even provides possible governmental compensation for injury, death, or damage suffered by private citizens who render assistance.⁵⁰

American courts have carved out three exceptions to the no duty rule, when: (1) the rescuer created the peril, either innocently or negligently;⁵¹

43. See Woosley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 VA. L. REV. 1273, 1292 (1983).

44. *Id.* at 1293.

45. See VT. STAT. ANN. tit. 12, § 519(a) (1973):

A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.

46. See MINN. STAT. § 604.05 (1984).

47. See, e.g., ARK. STAT. ANN. § 75-903 (1979); CAL. VEH. CODE § 20003 (West 1971); CONN. GEN. STAT. § 14-224 (1970); GA. CODE § 40-6-270 (1982); IDAHO CODE § 49-1003 (1980); LA. REV. STATS. ANN. §§ 14-100, 32-414(B)(2) (West 1974); MISS. CODE ANN. § 63-3-401 (1972); N.J. STAT. ANN. § 39:4-129 (West 1973); N.M. STAT. ANN. § 66-7-203 (1978); S.C. CODE ANN. § 56-5-1230 (Law. Co-op. 1976); TEX. REV. CIV. STAT. ANN. art. 6701d, § 40 (Vernon 1977); W. VA. CODE § 17C-4-3 (1974); Highway Traffic Act, ONT. REV. STAT. 1960, ch. 172, § 143(1).

48. See, e.g., *Brooks v. E.J. Willig Truck Transp. Co.*, 40 Cal. 2d 669, 679, 255 P.2d 802, 808-09 (1953).

49. See, e.g., CAL. HEALTH & SAFETY CODE § 1799.102 (West Supp. 1985); MASS. GEN. LAWS ANN. ch. 112, § 12B (West 1983); N.Y. EDUC. LAW § 6527(2) (McKinney 1972).

50. CAL. GOV'T CODE § 13970 (West 1980); see Gregory, *The Good Samaritan and the Bad: The Anglo-American Law*, in *THE GOOD SAMARITAN AND THE LAW* 23, 35 (J. Ratcliffe ed. 1966).

51. See *Montgomery v. National Convoy and Trucking Co.*, 186 S.C. 167, 176-77, 195 S.E. 247, 251-52 (1938) (defendants held liable for breaching duty to warn oncoming

(2) the rescuer has undertaken to assist, creating reliance on further aid;⁵² or (3) the relationship between the individuals involved leads to an expectation of assistance.⁵³ These relationships often are found on the basis of economic circumstances or positions of trust and are particularly easy to impose where the duty-holder derives an advantage from the relationship.

Canadian law on the duty to assist is similarly unsettled. Some provincial legislation exempts from liability one who assists at the scene of an accident.⁵⁴ Courts have upheld a duty to assist and applied it to those who aided and abetted a sexual assault when their assistance to the victim could have reasonably been expected,⁵⁵ to masters of ships to assist any stranger found at sea who is in danger of being lost,⁵⁶ and to the owner and employees of a bar situated near a busy highway to assist the drunken patron they ejected.⁵⁷

Generally, courts have not applied the duty to assist, either statutorily or through common law, to situations of economic peril. The language in statutes and cases, however, does not appear to preclude such application. Thus, it may not be unreasonable to extend the duty to assist to the case of starving individuals, depending on how one distinguishes that case from cases in which the duty has been applied. Are the objections overcome if the duty is imposed on states in an international context rather than on individuals within a community?

International instruments provide a right to food and require states to establish a legal order, both nationally and internationally, in which

motorists whose views were blocked by hill below which defendant's truck was stalled and obstructing road); *Summers v. Dominguez*, 29 Cal. App. 2d 308, 312-13, 84 P.2d 237, 239 (1938).

52. See *Szabo v. Pennsylvania R.R.*, 132 N.J.L. 331, 332-35, 40 A.2d 562, 563-64 (1945) (defendants held liable for breaching duty to exercise due care and stay with ill co-worker, after bringing him to his unoccupied home where he later died); see also *International Terminal Operating Co. v. N.V. Nederl. Amer'k Stoomv. Maats.*, 393 U.S. 74, 75 (1968).

53. See *Rodriguez v. Inglewood Unified School Dist.*, 152 Cal. App. 3d 440, 447-48, 199 Cal. Rptr. 524, 528 (1984) (identifying six factors to be considered in establishing a special relationship: (1) the certainty of the injury; (2) the closeness of the connection between the defendant's conduct and the injury suffered; (3) the moral blame attached to the defendant's action; (4) the policy of preventing future harm; (5) the extent of the burden to the defendant and consequences to the community of imposing a duty; and (6) the prevalence of insurance for the risk involved). Among those relationships that have given rise to a duty to assist are: therapist or doctor/patient, employer/employee, carrier/passenger, lifeguard/swimmer, manufacturer/consumer, and landowner/visitor. *Caldwell v. Bechtel, Inc.*, 631 F.2d 989, 1000 (D.C. Cir. 1980); see, e.g., *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 434-38, 551 P.2d 334, 342-45 (1976) (defendant therapist held liable for breaching duty to warn murder victim of patient's intention to kill her); see also M. SHAPO, *supra* note 18, at 7-60.

54. See, e.g., Good Samaritan Act, B.C. REV. STAT. ch. 155, § 1 (1978).

55. See *R. v. Black*, 72 W.W.R. 407, 421-23 (1970).

56. See *Horsley v. MacLaren*, 11 D.L.R.3d 277, 281 (1970).

57. See *Menow v. Honsberger*, 7 D.L.R.3d 494, 501-03 (1970).

this right may be exercised. This framework could support the enforcement of a duty to assist famine victims. Yet, it is sometimes asserted that economic rights are positive in nature and, therefore, either are not true rights or are less important than negative civil and political rights.⁵⁸ Professor Salmond distinguishes a positive right as one “correspond[ing] to a positive duty, and . . . a right that he on whom the duty lies shall do some positive act on behalf of the person entitled,” while a negative right “corresponds to a negative duty, and is a right that the person bound shall refrain from some act which would operate to the prejudice of the person entitled.”⁵⁹ Salmond adds that the former is the right to gain a benefit and the latter merely the right not to be harmed.⁶⁰

The concepts of positive and negative rights—action and inaction—are considerably intertwined. Civil rights, generally considered to be negative, may impose extensive positive obligations. For example, the right to a fair trial requires appointing judges and administrators, building courtrooms, and acquiring juries. Conversely, a positive right, such as the right to food, may in some instances be implemented passively by simply not interfering with a population’s ability to produce or otherwise acquire food. Thus, the right does not absolutely determine the nature of the duty.

The objections to affirmative legal duties—that breaching negative duties carries a greater certainty of harm than breaching positive obligations and that positive duties restrict liberty more than negative duties—seem based on a set of assumptions about the probability of harm to the victim and the degree of sacrifice required of the rescuer. Death more likely will result from the affirmative act of killing than from failing to feed a starving person (someone else may step in), and the burden is less in abstention. The conclusion is that no duty to assist the starving person should lie. But in famine situations the first assumption may be false. If food-rich countries do not assist, there is no one else to step in; famine victims are unable to provide basic sustenance. Death is as certain in this context as in the context of an armed conflict. The second assumption, that affirmative duties impose a greater burden, implies that a duty to provide economic assistance would violate the liberty and property rights of those required to assist. It clearly would limit these rights, but a limitation is not necessarily a violation.

The purpose of a basic right is to provide a shield, some minimal protection against helplessness, for those unable to protect themselves.⁶¹ It is a social guarantee to fulfill a basic need and acts as a restraint on

58. See Bossuyt, *La distinction juridique entre les droits civils et politiques et les droits économiques, sociaux et culturels*, 8 HUM. RTS. J. 783 (1975); Vierdag, *The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights*, NETH. Y.B. INT’L L. 69 (1978).

59. See J. SALMOND, JURISPRUDENCE 251 (10th ed. 1947).

60. See *id.*

61. See H. SHUE, *supra* note 19, at 13.

economic and political power. But the correlative duties to basic rights may be positive or active in nature. Although a duty to assist would limit property rights, insofar as property rights guarantee unlimited use of the property, the traditional balancing of rights would support this result. To secure a basic right, other nonbasic rights may be limited. But the protection of a basic right may not be sacrificed to secure the enjoyment of a nonbasic right.⁶² Rights are basic when the enjoyment of all other rights depends on their fulfillment. The right to food, as part of the right to life and personal security, is such a basic right. As Professor Shue stated:

Any form of malnutrition, or fever due to exposure, that causes severe and irreversible brain damage, for example, can effectively prevent the exercise of any right requiring clear thought and may, like brain injuries caused by assault, profoundly disturb personality. And, obviously, any fatal deficiencies end all possibility of the enjoyment of rights as firmly as an arbitrary execution.⁶³

Thus, on the rights side of the balance there is arguably little, if any, functional distinction between civil and economic guarantees.

On the duty side of the balance, other objections remain. Positive duties may be unquantifiable, unenforceable, and too expensive to carry out. Furthermore, the duty-holders may be unidentifiable, their individual obligations unascertainable. To the extent that these objections are valid, they apply to all positive obligations. Identifying duty-holders could be equally difficult even in situations in which a general obligation might be recognized, such as an auto accident on a busy street or a drowning swimmer on a crowded beach. It is unclear who the duty-holder is in such cases as between the first car and the last, the nearest swimmer and the strongest. In the case of Kitty Genovese, more than thirty people heard her cries for help and none went to her aid.⁶⁴ Are all or none responsible? Identifying duty-holders and allocating duties may be less complicated and burdensome in the economic arena than in the case of an assault because the economic duty would be divisible. Imposing the duty on society lessens the burden on individuals because it places each person in an equal position with respect to both rights and duties—a position based on resources and need rather than the fortuity of being the first or next to pass by.

The argument that it is impossible to determine the scope of the obligation loses force in the economic arena if the obligation is societal (and international) rather than individual. A system of world food reserves based on annual yield would allocate the duty equitably among those actually in a position to assist. The duty then clearly would shift from year to year as production and climates change. Of course, whether based on potential production or actual production, allocation decisions would be difficult.

62. *Id.* at 19.

63. *Id.* at 24-25.

64. A. ROSENTHAL, THIRTY-EIGHT WITNESSES 11 (1964).

Such a system, however, would support the internationally recognized right to food and implement the correlative duty to assist, by applying principles already recognized in legal systems throughout the world.

Even the restrictive common-law rules of causation, reliance, and special relationship could support a duty to assist famine victims. When developed countries' trade and aid policies have contributed to agricultural policies that have exacerbated the effects of natural disasters and contributed to famine conditions,⁶⁵ those countries should recognize a duty to assist the victims of the peril they helped to create. Countries that have made food aid pledges have induced reliance that would support a duty even under the common law. Additionally, former colonial countries may owe a particular duty based on their relationship to their former colonies. In sum, the three recognized exceptions to the common-law, no-duty rule⁶⁶ can be found in the case of famine and would therefore support implementation of a duty to assist famine victims. Furthermore, common-law countries have increasingly recognized a general duty to rescue, perhaps because the early common-law approach, which denied a duty to assist as well as any recovery to an injured rescuer (who even might be held liable for any damage caused), "could hardly have encouraged altruism."⁶⁷

Finally, the question of allocating risk must be addressed. In the world community, risk must be allocated among individuals and the community. More specifically, the question arises whether individuals should be forced to assume the risk of starvation when food surplus countries have contributed to famine through their trade and other economic policies. By having recognized the right to food, the international community no longer asks individuals to bear the risk of starvation. Implementing a duty to assist would contribute to the fulfillment of this right by alleviating famine conditions. Because the duty to assist those in peril is recognized in most non-common-law countries and has increasingly been given effect in common-law jurisdictions, this doctrine justifies requiring famine relief as part of an international implementation of the right to food.

65. See C. CHRISTENSEN, *supra* note 5, at 17-31.

66. See *supra* text accompanying notes 51-53.

67. Linden, *supra* note 32, at 241.