

A Review of a Classic Book: Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy*, 2nd ed., (Princeton, NJ: Princeton University Press, 1996) pp ix + 236.

Decades before the international community began its debate about the nature of the duties of businesses with regard to human rights, political philosopher Henry Shue laid out his influential theoretical framework of rights and duties. In Shue's seminal work, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy*, originally published in 1980 with a second edition in 1996, he sought to elaborate a moral response to a world characterized by the growing gap between the affluent and the poor. In the subsequent decades that gap has grown still wider, magnified by the influence of private wealth, both individual and corporate, which has further complicated the human rights landscape.

This review considers how Shue's classic work holds up in the context of global marketplace winners and losers. In this review, I explain Shue's central ideas about the content of basic rights, his assertion that the rights to physical security and subsistence are equivalent as basic rights, and his elaboration of the correlative duties that are incumbent upon all in societies in order to guarantee those basic rights. The review then considers what insights those ideas bring to mind regarding the normative responsibilities of businesses for protecting and respecting human rights.

At the core of Shue's argument is his idea of 'basic rights', which he defines as the minimum demands each person can claim against the rest of humanity, or 'the line beneath which no one is allowed to sink'.¹ Shue identifies two of these basic rights, personal security and subsistence, as the centerpiece of his moral argument and he uses the two rights to debunk the false dichotomy cited to justify the primacy of 'negative' rights over the progressive implementation of 'positive' rights. By emphasizing the moral equivalency of the physical wellbeing that results from adequate food, clean water, and basic health care to that which results from freedom from violence, Shue's take on the fundamental nature of subsistence rights aligns closely with that of most global human rights advocates today.² His early and persuasive arguments remain a theoretical touchstone to support economic and social rights defenders, in a world where these rights are given more lip service than enforcement.

Of even greater interest in relation to the study of business and human rights, however, was the book's careful elaboration of the moral duties that give meaning to these basic rights, including the duty of every actor and institution—both public and private—to contribute to, or at least not to harm the enjoyment of the rights to personal security and subsistence. 'Taking rights seriously means taking duties seriously', was how Shue positioned his work in the Afterword to the book's second edition.³ While the original book was motivated by the politics of its day and thus made an effort to extend the moral

¹ Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy*, 2nd ed., (Princeton, NJ: Princeton University Press, 1996) 18.

² For a recent overview of definitions of human rights see George G Brenkert, 'Business Ethics and Human Rights: An Overview' (2016) *Business and Human Rights Journal* 1:2, 277–306.

³ *Ibid*, 167.

theory specifically to U.S. foreign policy, it is its deep and nuanced discussions about moral duties that continue to have dividends in a very different world.

The book puts forth a typology of the duties which are owed collectively to each human being; his three-fold categories of duty—avoidance of a violation, protection, and aid—obviously correspond quite closely to the respect, protect, fulfil categories that later became the foundation of economic and social rights jurisprudence. Shue attempts to assign these three sets of duties in a social and global context that falls short of every person and institution respecting the basic rights of every other. He makes the case that, ‘in the vast middle range between the barbaric and the ideal’,⁴ no right can be fully guaranteed unless all three types of duties are met.

Specific duty bearers are not fixed in Shue’s analysis because the facts call for different duty bearers in different circumstances, including state and non-state actors. ‘How to work this out’, he acknowledges in an understatement, ‘is difficult and important’.⁵ Such decisions remain ‘difficult and important’, as witnessed in the debates surrounding two approaches to business and human rights at the United Nations, the non-binding treaty approach of the 2011 Guiding Principles on Business and Human Rights, and the legally binding treaty approach taking place within the U.N. Human Rights Council. Because of these different approaches, Shue’s theoretical arguments about duties and duty bearers are worthy of being revisited, especially regarding subsistence guarantees for the world’s poor.

Shue’s investigation in *Basic Rights* begins with the general structure of a moral right, which he defines as: ‘1) the rational basis of a just demand 2) that the actual enjoyment of a substance be 3) socially guaranteed against standard threats.’⁶ Shue’s formulation is notable for its emphasis on the demand extending beyond the person merely having a right, to the person’s actual enjoyment of the right. He explains, ‘A proclamation of a right is not the fulfillment of a right any more than an airplane schedule is a flight’.⁷ In order to realize the full spectrum of rights, there are minimum essential rights that must be fulfilled. Shue refers to these as ‘basic rights’.

While human beings make claim to many rights, according to Shue there are only a small subset of rights which qualify as basic, in the sense that they are absolutely essential to the enjoyment of all other rights. He asserts that basic rights may never be sacrificed because no other non-basic right could be actually realized without the fulfillment of the basic right upon which it stands. In legal terms, these rights might be equivalent to peremptory norms, though Shue uses a slightly different calculus than that in international law; his conception of basic rights is ‘to provide some minimal protection against utter helplessness to those too weak to protect themselves’.⁸

Based on this moral logic, Shue demonstrates how subsistence rights can be justified as basic in the same way as security rights, given that ‘deficiencies in the means of subsistence can be just as fatal, incapacitating or painful as violations of physical security’,⁹ thus depriving the individual of his or her capacity to enjoy any other right.

⁴ Ibid, 170.

⁵ Ibid, 62.

⁶ Ibid, 13.

⁷ Ibid, 15.

⁸ Ibid, 18.

⁹ Ibid, 24.

Shue further defends the basic nature of subsistence rights by refuting the negative/positive duality that has been used to justify the priority given to civil and political rights under international law. The dichotomy is based on false assumptions. The enjoyment of physical security, notes Shue, requires not just negative, but also positive action, such as maintaining police forces, criminal courts and prisons. Likewise, subsistence rights call for not just positive action, but depend on others avoiding the deprivation of a person's only available means of subsistence—a negative action. Shue underscores that social institutions, which are constructed so that we can collectively implement and enforce positive action, are needed to guarantee the enjoyment of every right.

Rights should not, then, be categorized as positive or negative, but as basic and non-basic, and the consequent moral priority must be to secure basic rights for everyone. With this as the end goal, Shue turns to the book's central purpose: to construct the practical moral underpinnings that would give immediate and universal effect to all basic rights, including subsistence rights. The questions at the core of the book concern what social arrangements are necessary to guarantee these rights, who should be held responsible for securing basic rights and what are their obligations?

One of the ways in which Shue illustrates the need for this analysis is with a hypothetical describing a landowner whose crops constitute a quarter of the food for the village. The landowner then enters into a ten-year contract with a company to use the land to grow flowers rather than food, resulting in malnutrition for the village. Rejecting a market-based explanation which would absolve the farmer and the company of blame for the malnutrition which is suffered as a result of the flower-growing contract, Shue concludes instead, 'The malnutrition was a social disaster ... the product of specific human decisions permitted by the presence of specific social institutions and the absence of others.'¹⁰ Shue identifies the various actors responsible for the malnutrition: the parties to the contract and the society itself, whose government could have found various ways to avert the malnutrition that resulted from the contract. Each of these actors had particular duties to ensure that the villagers did not starve. The farmer and the company should have avoided the deprivation by continuing to grow food for the villagers. The society, composed of all who live in the village including the farmer and the company, had duties to protect those likely to be hungry by engaging in reasonable due diligence, and by designing institutions that would have prevented the foreseeable deprivation. Lastly, the society had a duty to come to the aid of the villagers who were deprived of their subsistence rights.

According to Shue, the duty to respect—to avoid deprivation of subsistence rights—is universal and applies to every individual and institution, including businesses. This means that commercial, governmental or private 'schemes' that leave anyone less able to provide for subsistence are unacceptable, 'whatever aggregate miracles they may be achieving or whatever benefits that they expect to bestow upon the future poor'.¹¹

Shue argues that the first two sets of duties—to respect and protect—are actually deeply intertwined. Both must be met with regard to basic rights, 'because complete

¹⁰ Ibid, 44.

¹¹ Ibid, 112.

reliance on either one alone is probably not feasible and, in the case of duties to protect, almost certainly not desirable'.¹² Shue does not further articulate why a protection-only model is not desirable, but presumably it is because it might favor a government model that is too coercive or not representative of the moral will of those governed. It also might provide disincentives to moral actors who are best positioned to avoid the violation in the first place. According to Shue, whatever balance is struck between self-restraint and restraint imposed by those in power will have an enormous effect upon the quality of life of those living in the social system in question.

He again uses a transnational agribusiness example to illustrate his point. Shue's position is that both the transnational company and the governments involved—both home and host—have the duty to respect and to protect the subsistence rights being affected by their action or inaction. Shue does not take on the challenge of specifying the balance of duties, much less how to address the problem of intransigent companies and/or weak and intransigent governments. He asserts only that, 'between the bearers of the two duties, the job of preventing deprivation ought to get done'.¹³ For advocates, this is an unsatisfying point in his argument but, after all, this is a book about moral philosophy—telling us where the duties lie, not necessarily how to enforce them.

Where Shue's argument does take us, however, is to an understanding of the importance of the social institutions in implementing the duty to protect—institutions which have the knowledge and authority to establish a workable balance of duties. Multiple social institutions are at play at the local, national and international levels, composed of individuals and organizations as well as private and public corporations, which play a role in imposing self-restraint in relation to basic rights. This idea certainly embraces the due diligence responsibilities of both governments and companies, and could even be extended to the precautionary principle, which has migrated from environmental law into human rights discourse. Shue is clear that the duty to protect through institutional design should not stop with traditional functions of law enforcement or regulatory agencies, but include 'the kinds of chronic threats that require imaginative legislation'.¹⁴ Elaborating further in the Afterword, Shue explains that, 'Institutional design must combine judgments about what it is fair to expect people to do, what it is efficient to ask people to do, and what it is possible to motivate people to do.'¹⁵

Not surprisingly, it is the third category of duties (in Shue's terms, the duty to aid—or in more recent conceptions—the duty to fulfil or to remedy) that is the toughest to pin down. Traditional moral philosophy would articulate that a stronger moral duty to aid is owed to those who are one's special responsibility, like family members, employees, or those we have harmed, than to the victims of more general social failures, or natural disasters. Yet, by using the 'priority principle', Shue argues that if implementing universal basic rights is the overall objective, then those rights must always be given priority no matter who, or what, is responsible for threats or deprivations.

¹² *Ibid.*, 61.

¹³ *Ibid.*, 62.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, 170.

Under this model, the global community has an obligation to achieve universal basic rights by sacrificing anything except the basic rights of others. Shue asserts that this would not be burdensome in practice since, based on the priority principle, those with the most would be called upon to provide only a small portion of their wealth to ensure that those with the least are able to survive. It is the affluent—‘those who spend absolutely large amounts in the satisfaction of mere preferences’¹⁶—who should be tapped first to aid those whose basic rights are deprived because it is the enormity of their wealth that makes social acceptance of poverty falling beneath subsistence morally unacceptable. This gap creates inequalities that are degrading, inequalities characterized by protected affluence and unprotected subsistence. Shue’s formulation was intended to inform development programmes, among other sources of wealth.

These judgments about duties and duty bearers lie at the heart of the ongoing business and human rights discussion in the international community. On one track, the United Nations Human Rights Council’s open-ended working group is starting to draft a legally binding instrument to regulate business and human rights. On the other track, the Council is seeking to implement the non-binding but influential UN Guiding Principles on Business and Human Rights that it endorsed in 2011,¹⁷ which were produced under the direction of Special Representative John Ruggie.

The centerpiece of Ruggie’s Guiding Principles is the ‘Protect, Respect, Remedy’ framework, which chooses a balance of duties that keeps the legal burden of protection squarely with the state, while imposing on businesses an expansive responsibility to respect human rights. Ruggie intentionally uses the term ‘responsibility’ rather than duty to signal the social norms that exist over and above compliance with laws and regulations.¹⁸ These responsibilities are morally incumbent upon businesses but do not impose direct legal obligations, except perhaps for international criminal behavior. The third pillar of the framework, remedy for violations by business, is envisioned to include judicial, state-based non-judicial and non-state-based remedies.¹⁹ Again, these remedies are limited legally, binding only to the extent that a government is able and willing to impose them.

How a binding treaty would strike a balance of duties between business and government is yet to be determined. If the treaty drafters follow the lead of the UN Sub-Commission’s path-breaking 2003 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises, the duty imposed upon businesses, ‘within their respective spheres of activity and influence’, would be broader than in Ruggie’s principles, imposing a full set of obligations ‘to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law ...’²⁰ These binding duties would be implemented in national or international courts, and businesses would further be liable for reparations to victims and ‘restitution, compensation and rehabilitation for damage done or property taken’.²¹

¹⁶ Ibid, 119.

¹⁷ UN Doc. A/HRC/RES/17/4. of 16 June 2011.

¹⁸ John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton, 2013) 91–2.

¹⁹ Ibid, 102.

²⁰ UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), Art. 1.

²¹ Ibid, Art. 18.

The project being undertaken in the international community should be informed by Shue's emphasis on institutional design. While Shue is determined that it is possible to identify the moral building blocks of a design that will ensure, at a minimum, the most basic rights to all people, he also imagines that it is possible for such a design to take into account its relative fairness to the duty-bearers. Institutional design regarding corporate responsibility, for instance, must weigh fairness, efficiency, and feasibility for each and all duty-bearers. Shue's logic would indicate that the legal norms and mechanisms being designed or monitored by the Council should not assume that businesses will honor their duty to respect. In a world that is situated 'between the barbaric and the ideal', businesses must be expected to assume a substantial level of duties to protect and to aid those deprived of basic rights. The ultimate question that we return to is, what is the appropriate moral balance of those duties? According to Shue, the greatest emphasis should be at the first level of default: 'at duties to protect, broadly interpreted to include the design and maintenance of institutions that make it as easy as possible for people to honor their duties ... [and] as hard as possible to commit, and to get away with, deprivation'.²²

The difficult balancing act regarding business's obligations to respect, protect, and aid in the enjoyment of basic human rights is not easily resolved in a generalized fashion; institutions must be designed with the flexibility to adjust the balances along the way. Those engaged in designing fair and effective laws and institutions would benefit from a return to the moral principles elaborated by Henry Shue. His arguments do not resolve any of the questions, but reaffirm both the difficulty and the worthiness of the institutional negotiations that are already taking place.

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²² Shue, note 1, 173.