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Alberto Quintavalla & Klaus Heine

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Priorities and human rights

Alberto Quintavalla and Klaus Heine

Rotterdam Institute of Law and Economics, Erasmus University Rotterdam, Rotterdam, The Netherlands

ABSTRACT

This article intends to further the debate about a possible hierarchy in the implementation of human rights. To this end, it proposes a theory which may serve as a stepping stone towards the achievement of shared and well-defined priorities, taking scarcity as a starting point to analyse the implementation of human rights. The proposed theory builds on the so-called Maslow pyramid which displays a common pattern of behaviour aimed at addressing priorities based on human needs. Scrutinising its methodological principle we develop a theory based on 'instrumentality'. Although this allows for an informed ranking of human rights, it leaves the substantive importance of human rights untouched.

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Introduction

International human rights law is a large complex area of legislation aimed at promoting human rights at international and domestic level. Within this framework, UN bodies have repeatedly called on states to ensure the full realisation of all human rights. Yet, the current design of human rights law does not foresee explicit and shared priorities in the implementation. While the advancement of *all* human rights shall take place simultaneously, the international community does not provide uniform standards nor clear guidance on how to implement human rights.

Moreover, such an approach meets with practical difficulties: since many human rights are costly and not self-implementing, governments face inevitable trade-offs in the short term. Scarcity of resources – especially when grave – prevent states from implementing *all* human rights at the same speed. Economic constraints and political costs often call for a prioritisation of human rights.

This contribution reflects upon the desirability of establishing basic priorities in the implementation of human rights. More concretely, it promotes a preliminary rank order of implementation. Although human rights are all placed on an equal footing with regard to their substantive importance, *explicated shared* priorities in the implementation process are not only possible but may also contribute to propel the advancement of

CONTACT Alberto Quintavalla ✉ quintavalla@law.eur.nl 📠 Rotterdam Institute of Law and Economics (RILE), Erasmus School of Law, Erasmus University Rotterdam, Burgemeester Oudlaan 50, 3062 PA, Rotterdam, The Netherlands

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human rights. These priorities would serve as a guidance for states and set parameters for the human rights supervisory bodies.

The purpose of this article is neither to show the shortcomings in the current human rights legal framework nor to advocate a major change in its structure. Instead, the aim is to simply stimulate a reflection over a sensitive, but significant, issue – the establishment of some structural priorities in the implementation of human rights. We intend, in other words, to further the debate about a possible hierarchy in the implementation of human rights, proposing an approach which may serve as a stepping stone towards the achievement of shared and well-defined priorities.

The next steps in the analysis are as follows: the second section briefly outlines the contemporary structure of human rights law, pointing out how the indivisibility principle may affect a possible hierarchy in the implementation of human rights. The third section discusses the consequences of scarcity. The fourth section highlights the lack of explicit priorities in human rights implementation. The fifth section tentatively proposes the instrumentality principle in a bid to promote a preliminary order of implementation. The sixth section concludes with highlighting the main findings.

The contemporary structure of human rights law

International human rights law is an intricate system comprising a whole series of human rights. In the human rights framework, states should advance and respect *all* human rights enshrined in the ratified treaties. Thus, in order to ensure the fundamental unity of this vast array of rights,¹ the international human rights system relies on the indivisibility principle. This is – together with the universality principle² – an ‘essential attribute’³ of the legal framework for human rights:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.⁴

The need to stress the indivisible nature of human rights sprang in fact already from the ashes of the Second World War when international human rights law started its expansion.⁵ Although the Universal Declaration of Human Rights (UDHR) reflected the different political ideologies at the time of the Cold War by recognising both political and social rights, the initial draft of the ‘Covenant on Human Rights’ focused exclusively on civil rights. Because of this, some states – mainly belonging to the postcolonial world – demanded the inclusion of socio-economic rights so that states would be required to implement *all* human rights.

The ideological conflict between the US and Soviet Union, however, remained and led to the adoption of two separate treaties, namely the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Yet, the human rights legal framework continued to develop, with additional UN human rights treaties having been adopted over the years.⁶ Thus, the UN human right system currently consists of a number of treaties enshrining various human rights.

Within this framework, the indivisibility principle leads to the consideration of the human rights system holistically:⁷ the protection and respect of all human rights is a pre-requisite for the full enjoyment of *human dignity*. Any human rights violation would lead to a denial of the dignity that is inherent in every human being. As a consequence, *all* states should protect and advance *all* human rights equally.⁸

However, while there is agreement on the fact that human rights are mutually reinforcing and equally important at the conceptual level,⁹ controversy persists over how the indivisibility principle finds expression in reality.¹⁰ More precisely, the existing literature puts forward two diverse interpretations of the indivisibility principle, these being system-wide and partial indivisibility.¹¹ While the former implies that all human rights have an indispensable supporting relationship, the latter suggests that such relationship is less strong.¹²

Besides, the interpretation of that principle has important implications not only for the operationalisation of human rights *per se*¹³ but also for *how* to advance human rights.¹⁴ Supposing that any human right is essential to the realisation of others would result in the absence of priorities in human rights implementation. As Quane puts it, 'the concept of indivisibility and interdependence of human rights as originally conceived refutes any suggestion of a hierarchy of rights'.¹⁵ Yet, as it will be further elucidated in the fifth section, a possible hierarchy in the implementation of human rights would not be incompatible with a relationship of human rights on equal terms.

The scarcity problem – an overlooked issue?

Although legal scholarship places special emphasis on legal remedy,¹⁶ states' obligations under international human rights law consist of several activities. The role played by the judiciary is indeed only part of securing the enjoyment of human rights, and more specifically, an *ex post* remedy. To put it differently, only a human rights violation that has already occurred will trigger the courts' judicial activity.¹⁷

Instead, states have to uphold human rights also *ex ante*, undertaking the appropriate measures towards the realisation and consequential respect of human rights. Therefore, the obligations of a state are not limited to establishing an adequate legal framework and an effective enforcement mechanism aimed at protecting individuals against a human rights violation. States have also to allocate resources and gear policies towards the full implementation of human rights.¹⁸

In fact, the implementation of rights is not independent of the availability of resources – especially in view of the many positive state obligations.¹⁹ States often have to resort to specific activities that require extensive resources to implement human rights. For example, a state must establish coercive powers, a democratic political system, social programmes or judiciaries, which all require resources.²⁰ Yet, although there is a multiplicity of human rights to implement, states have a limited budget and must make choices. States, in other words, face a situation where there is an incongruity between limited resources and a multiplicity of objectives to pursue.

In addition to economic constraints, political costs may be involved.²¹ These indirect costs might as well play a significant role in the implementation of human rights. For instance, an authoritarian regime is more likely to bear a higher cost from implementing the freedom from torture and giving the opposition more political leeway rather than from

ensuring the right to health care and social services. That is because of the simple fact that the main objective of a ruling party in an authoritarian state is to keep office, which may include the torturing of the suppressed opposition. For that background different human rights have different 'price tags' for political leaders, depending on political context factors such as democracy, impartial judiciaries or integration into the world economy. As a result, both economic constraints and political costs make it very complicated, at least in the short term, to realise *all* human rights for *all* individuals at once.

However, as previously indicated, most of the countries have adopted several human rights treaties. According to these treaties numerous human rights should be respected and implemented. In addition, indivisibility – together with universality – is the underlying principle of the international human rights legal framework, meaning that states have to implement simultaneously all human rights for the benefit of all individuals. In other words, a state, irrespective of its political and economic situation, must respect *all* human rights resulting from the international and regional ratified conventions.²² What will vary due to the availability of resources will only be the actual level of implementation of each human right.²³

These principles dictate that the state cannot apply human rights selectively: all human rights are equal and all citizens enjoy the same human rights.²⁴ For instance, implementing firstly the human right to personal integrity overlooking the freedom of opinion would be contrary to the principle of indivisibility. Along the same line, the human right to religious freedom must be enjoyed by every individual and not only by selected groups of citizens. As a result, the legal structure and scope of human rights actually create considerable problems for the successful implementation of human rights in countries around the world. That does not mean that morally a high aspiration level of human rights has to be denied because of budgetary limitations, but the inescapable factual constraints of a budget have to be taken seriously.

One can easily see that considering budgetary and political constraints changes the discourse on human rights. Most strikingly one might opt for the implementation of human rights *either* simultaneously *or* among all individuals: limited resources can render the principles of universality and indivisibility mutually exclusive – at least in the short term, when budgetary and political constraints are given. To put it more succinctly, the methodological status of the principles of universality and indivisibility becomes to be scrutinised when scarcity enters the picture.

Therefore, it does not come as a surprise that there is a gulf between the moral aspirations of human rights on the one hand and the empirical possibilities in a specific situational context on the other hand. This has been recognised in the literature for quite some time.²⁵ What is perhaps more unexpected, is that the two principles work against each other in a world of scarcity: more universality will come at the price of indivisibility and *vice versa* as long as it is not possible to increase the budget up to the specific level where both principles are fulfilled.

Trade-offs between human rights exist not only at the doctrinal level of analysis, but also at the implementation level of single human rights, whereby scarcity affects the implementation of each human right in a different way. For example, it is conceivable that, the prohibition of torture will be less economically costly to implement compared to the human right to health.²⁶ In fact, in order to uphold the former human right the

state should *mainly* refrain from acting while in order to respect the latter governments would have to spend millions of money to build hospitals and to train doctors.²⁷

Thus, a country has to consider the different implementation costs of each human right. For instance, a government may decide to realise more human rights which are 'cheaper to implement' rather than to implement a single human right that is 'expensive to implement'. As a result, scarcity affects not only the implementation method (i.e. universality at the expense of indivisibility) but also which specific human rights will be implemented (e.g. freedom from torture and freedom of thought vs. human right to education). Scarcity has therefore a considerable impact on the human rights implementation.

For that background, we propose to take scarcity as a key element for the scrutiny of human rights implementation. However, before elaborating on that more profoundly, one might notice that scarcity is not the only factor affecting the implementation of human rights in legal practice. Another important aspect to consider is the extent of scarcity in a given human rights problem. In this regard, scarcity of resources plays out particularly with regard to developing countries and transitional states, both having very limited budgets.

Scarcity heavily influences the prioritisation of human rights and may dominate the setting of the human rights agenda. For instance, almost everybody agrees that states should allocate resources to fulfil the right to health, education and security. Yet, in developing countries, it is a question of deciding which of the said human rights should prevail. As Etzioni puts it, 'people are naturally inclined to refuse to choose between them [*human rights*] and to insist that both can be equally well served'.²⁸ Thus, in the case of countries with a limited budget, scarcity of resources may result in a situation where only one human right can be fulfilled, say for instance health. From that follows that 'to ignore costs is to leave painful tradeoffs conveniently out of the picture'.²⁹

However, there is no guarantee that the political decision-making process on prioritising human rights is democratically open nor is grounded in actual peoples' will. It is more likely that the political decisions are path dependent and historically contingent. Those decisions are not necessarily deliberate choices within a legal framework as human rights scholars would demand it, but historically contingent decisions of players striving for power. On the other hand, setting well-defined priorities among human rights by states and other players and acting accordingly should be a cascade of highly rational intertwined decisions.

To sum up, although human rights shall all be placed on equal footing, states cannot realise all human rights *simultaneously* for all individuals when it comes to the implementation phase. As a result, there is a need to prioritise human rights. Since all decision-making processes have to deal with allocating scarce resources it makes sense to take scarcity also as the starting point for analysing the implementation of human rights.

No explicit priorities in the human rights implementation: a tall order

It is acknowledged that governments are better placed to pinpoint what human rights issues are most pressing.³⁰ Because of this, the international community left the actual implementation of human rights to states' margin of appreciation.³¹ However, the broad treaty obligations, combined with a lack of explicit priorities established at the international level, may deprive the human rights discourse of its factual power.³² States, in

other words, could focus on implementing the set of human rights which is closer to their own interests. Besides, quantitative evidence confirms this decision-making: the implementation of human rights does not follow a common pattern across different countries.³³

Claiming that each state has full discretion in human rights implementation, though, is not completely accurate. According to a substantial number of scholars,³⁴ an implicit ranking in the implementation phase can be derived. In this regard, the doctrine of progressive realisation is an expression of such a possible ranking:³⁵ while states should respect and ensure political and civil rights once the ICCPR came into force, economic and social rights should be achieved progressively according to the available resources.³⁶ Thus, the reference to resource constraints plays a significant role in defining priorities in the implementation of – at least – some categories of human rights. Moreover, the lack of nationally justiciable obligations pre-supposes that economic and social rights are not a matter of immediate realisation.³⁷

Hence, the resulting human rights framework has led several individuals and interested organisations to perceive socio-economic rights as having a lower status compared to civil and political rights.³⁸ For instance, the movements for social and economic rights refer to themselves in terms of aid or economic development lobbies rather than human rights NGOs.³⁹ Similarly, human rights watchdogs have directed their efforts to mainly – if not solely – identifying and addressing violations of civil and political rights.⁴⁰ For that background, several governments and judiciaries have interpreted the notion of progressivity by applying double standards to the violation of political and civil rights on the one hand, and socio-economic rights on the other.⁴¹ This perception has therefore not helped the general advancement of human rights, and particularly of the socio-economic ones.

The progressive realisation clause, though, was originally intended to simply take into account the resource constraints that any state may face in human rights implementation. As proof of this, states are called to move as expeditiously as possible towards the full realisation of all human rights.⁴² In fact, the establishment of a progressive realisation clause does not necessarily mean that states have no obligations with regard to the implementation and respect of socio-economic rights: states are in principle not permitted to justify non-compliance with the ICESCR on the basis of this clause. However, one must recognise that it is very burdensome to determine if a state has violated its obligations with regard to the ICESCR.

Overall, the large number of competing demands for (limited) public expenditure makes it difficult to ascertain the state's will to take all the appropriate measures to implement all human rights. This difficulty arises from the absence of an agreement as to what human rights should be implemented first.⁴³ If it is clear that states should move as expeditiously as possible, shared and well-defined priorities when it comes to the implementation process have not yet been given. Instead, the Limburg Principles (no. 25 and 72) and the Maastricht Guidelines (no. 10) simply indicate that certain subsistence rights should be respected regardless of the actual availability of resources.

It follows that states, once they have fulfilled the minimum core obligations,⁴⁴ enjoy a considerable amount of discretion,⁴⁵ given the absence of well-defined priorities in the human rights implementation. Moreover, although it is possible to draw up an implicit ranking, inconsistencies in the implementation of such a ranking still occur. For instance,

in the Republic of Cuba massive violations of political rights coexisted with the respect of economic and social rights.

In summary, the assessment of the contemporary structure of human rights draws a complex picture, where the term ‘asymmetric’ might be an appropriate overall qualification. High moral aspiration meets with limited means, ratified international treaties meet with local legal discretion, and a highly sophisticated legal discourse is lacking a common methodological ground. Nevertheless, one can hardly imagine a modern world order without recourse to human rights at its core. Showing that it is possible to provide certain guidance in the implementation will be the purpose of the following sections.

‘Instrumentality’ as a sorting mechanism in human rights discourses

Rooted in human nature – the Maslow pyramid as a tool for prioritising human rights

Scholars have been eager for a long time to find a proper way to set priorities among human rights.⁴⁶ For instance, it has been argued that negative rights should have priority over positive rights,⁴⁷ or that non-derogable rights enjoy a higher position compared to other human rights.⁴⁸ As already discussed in the previous section, others argue that a *de facto* hierarchy of rights already exists and, accordingly, there is no need to set explicit priorities.

However, the purpose of this article is not to list all proposals about the issue put forward by legal scholars. It aims at tentatively proposing a methodological principle that allows for prioritising human rights at the implementation level, while leaving the underlying principles of the international human rights legal framework as a normative categorisation intact. That is the proposed theory should reconcile the impetus of human rights with the factual reality of scarcity in the world.

In the past, several scholars have already made attempts to answer this question suggesting diverse solutions. One of the most debated and influential theories has been the doctrine of basic human needs whereby priorities are derived from human needs.⁴⁹ This doctrine has been structurally connected to Maslow’s hierarchy of needs,⁵⁰ a motivational theory proposing five different levels of human needs hierarchically ordered.⁵¹ However, as it will be argued below, the existing approaches have ultimately identified human needs as the source of human rights and consequently human rights theorists have tended to gloss over hierarchical problems. Our approach, instead, aims to establish explicated and shared priorities in human rights implementation. The distinction between two types of hierarchy would thus allow acknowledging human dignity as the actual source of human rights. But before we will turn to the two hierarchies, it is good to preface that discussion with a somewhat more thorough overview of the current doctrine of basic needs. Although the review introduces no novelty in itself, it will enable the reader to recognise the contribution our approach is making to the debate.

The Maslow’s hierarchy of needs, which is depicted as a pyramid with several levels (see [Figure 1](#)), has indeed two strong features. First, it puts human needs in a rank order, employing a well-defined hierarchical structure. Once an adequate implementation of a need has been met, it is possible to fulfil a higher need (at the individual level the yet unfulfilled higher goal serves as a motivator for the individual to achieve the next

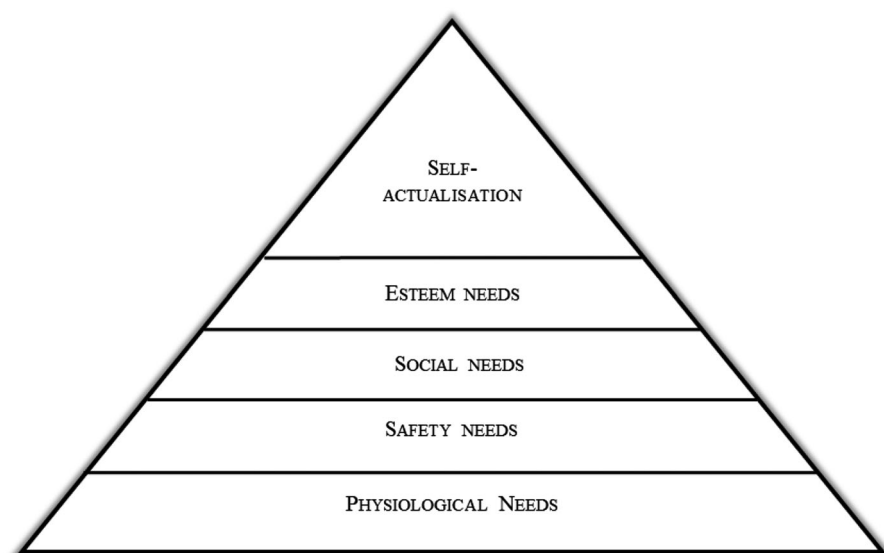


Figure 1. The Maslow pyramid.

Note: This figure was created based on Maslow's hierarchy of needs. See A. Maslow, *Motivation and Personality* (New York US: Harper & Row, 1970).

higher goal). Secondly, the Maslow pyramid is grounded in universally valid facts of human nature, thereby avoiding *cultural relativism*. More precisely, Maslow's hierarchy of needs is an assessment tool which displays a common pattern of behaviour aimed at addressing priorities based on needs: humans have different needs to fulfil that are hierarchically ordered on the basis of *human survival*. From the necessity to fulfil a need, a human gets motivation. In other words, an actual deprivation of certain needs triggers human action until these needs are fulfilled and higher needs become activated. The most basic needs to be met before an individual will desire higher needs are the basic physiological needs. Only when those basic needs are fulfilled can a human focus on higher needs and derive satisfaction from those higher needs.

In the light of this theory, a feasible path to assign priorities among human rights has been to define human rights in terms of 'human needs' and linking them together: the Maslow pyramid would thus provide a generic mechanism to sort human rights to different levels of priority according to human needs. In other words, connecting human rights with human needs produces a universal and rational order of priorities among human rights, where the most pressing human needs dominate the agenda and determine the human rights with the highest priority for implementation.⁵²

The fact that 'needs' refer to real necessities of an individual as a human being allows priorities to be set according to the situational context and empirical constraints. Thereby proponents of this approach stress that human needs will not be confused with wants. While the former consists of 'any requirement for a person's survival, health, or basic liberties', the latter means 'any perceived need, any desire, any perceived short-term or long-term interest'.⁵³ In this way an attempt has been made to be more specific about what a 'need' is and to exclude 'wants' from the agenda. However, it is easy to see that a 'perceived need' (a 'want') and a 'basic liberty' (a 'need') are no clear-cut categories and hence the

doctrine of basic needs is lacking an empirically grounded selection mechanism to differentiate consistently between human needs in a universal hierarchy.

The main advantages of setting priorities according to human needs are (1) the aim of linking facts with ethics and (2) to have a stronger moral claim of human needs over human wants since needs arise from nature and not from social conventions.⁵⁴ In other words, the underlying assumption of the doctrine of basic needs is that the source of human rights stems from human needs, namely on what is *necessary for human survival*.

As already indicated, the doctrine of basic needs lacks a clear-cut selection mechanism to build a consistent hierarchy of needs. Therefore, it is not possible to tightly link scientifically ascertainable needs to the source of human rights.⁵⁵ For that background, it does not come as a surprise that human rights theorists do not share unanimously the scientific basis of human needs and, according to the critics, the term 'human needs' becomes almost as controversial as human rights. In the absence of an agreement on what human needs precisely are, 'the concept of human dignity undoubtedly made it easier to reach an overlapping consensus' as a source of human rights.⁵⁶ Admittedly, there is also no consensus about what 'human dignity' precisely is and what its implications are, but traditionally judges have grounded human rights on human dignity and produced case law.⁵⁷

What makes the doctrine of basic needs quite interesting from a methodological point of view is its implied concept of 'instrumentality'. Since human survival is the central goal in the doctrine of basic needs, priorities of human rights are set in accordance to this goal. In other words, basic needs will be arranged in a hierarchical structure where the lowest (most fundamental) levels are composed of needs that are necessary for human survival. Once these levels are met, it will be possible to progress to higher levels of human needs. The lower levels of the hierarchical structure will be composed of needs that are not only basic but also *instrumental* to the emergence of other higher needs.

Instrumentality can be therefore considered as a distinctive feature of the doctrine of basic needs. However, instrumentality might be applied also to human rights. For instance, Shue points to instrumentality when he refers to basic rights as rights whose enjoyment 'is essential to the enjoyment of all other rights'.⁵⁸ Basic rights, as in the case of basic needs, are instrumental to the emergence of non-basic rights. Hence, the respect of a basic right may lead to the enjoyment of a certain set of non-basic rights. Correspondingly, the denial of a basic right inhibits not only the enjoyment of that specific right but also of all other non-basic rights (that arise once the basic right is fulfilled). It follows that, at least with respect to implementation, a basic right must not be sacrificed for a non-basic right. In this regard, the basic rights are always the starting point for setting priorities in a hierarchy of rights.

Two different types of hierarchy

It makes sense to further elaborate on a concept of human rights implementation that refers to economic and political scarcity on the one hand and instrumentality on the other, aiming at an order of human rights. The Maslow pyramid is a useful tool for prioritising human *needs*. However, this contribution wants to take it a step further. We aim at a baseline model that allows for prioritising human rights at the implementation level, while leaving the relationship of human rights on equal terms intact. To that aim, it becomes

necessary to draw a clear distinction between a hierarchy among human rights and a hierarchy at the implementation level.⁵⁹

These two types of 'hierarchy' are interrelated but they are not the same thing. The first type of hierarchy relates to the substantive importance of each human right. Should the rights be ranked, it would mean that a certain right enjoys *per se* a higher position than any other rights. This approach would have major consequences for the respect and protection of human rights. If there is a dispute resulting from conflicting human rights, courts should not balance human rights depending on the particular case. Rather, they have to give priority to the specific human right that enjoys – according to the established hierarchy – a higher position compared to the other human right involved. As a result, this type of hierarchy would lead 'higher' human rights to trump *in limine* other human rights, not allowing courts to look at the relative importance of the right in the specific case.

Instead, the hierarchy of implementing human rights simply indicates that the implementation of a certain right takes precedence over another. Such a hierarchy is concerned with establishing the necessary sequence for the realisation of an overriding, ultimate objective. In this respect, the purpose of human rights is to ensure a life of dignity, providing a firm basis for 'freedom, justice and peace in the world'.⁶⁰ To ensure such a life of dignity, governments need to realise each single human right. However, the attainment of certain human rights depends on the implementation of others. For example, to realise the right to political participation, the government must ensure that citizens are familiar with the basic contours of the democratic process. To do this, it must in turn ensure that all citizens are granted access to a basic level of education. This entails that certain (parts of) human rights shall be implemented sequentially. Thus, claiming that individuals shall have access to a basic level of education before they can vote neither means that the overriding goal is to make people literate nor is to make them vote. The simple point we intend to make here is instead about sequencing: certain human rights must be implemented first, before other consequential rights can be enjoyed. In so doing, priorities in the implementation would merely pinpoint what rights individuals have at a given moment and what rights they will have in the future (as well as the order of implementation thereof). This order, alien to morality-laden decisions, will ultimately not prevent every human right being of equal importance.

The latter point is of utmost relevance for this analysis since the relationship of human rights on equal terms must be left intact as a normative principle. Making a selection of what are the (parts of) human rights that should be implemented first does not necessarily mean that certain human rights have a lower importance compared to others, nor that certain human rights must be restricted. Instead, it means that a certain right (or part of it) takes precedence in the implementation over another. The establishment of these priorities would only be the reflection of a temporary situation, without affecting the substantive importance of the rights at stake.

This order of implementation, though, must not completely bind the judicial decision-making. Specifically, in the case of a dispute concerning the right to political participation and the freedom of opinion, courts would still have the possibility to give priority to the former, dismissing in a certain way the hierarchy in the implementation. This would be possible because the proposed hierarchy does not relate to the substantive importance of each human right, arising instead at the implementation level. In this regard, judicial authorities might enjoy a considerable margin of discretion, having their own autonomy

from the governmental activities. As a consequence, the concern of some scholars arguing that a prioritisation of human rights would lead the courts to decide which rights take precedence without reluctance and hesitation can be significantly watered down.⁶¹ On the other hand, it might be thought that the theory developed here makes no difference to substantive outcomes. This would certainly be the case on a classical realist reading of human rights law whereby rights exist only if they are implemented.⁶² However, so long as one believes that not all law is radically indeterminate, our theory offers modest scope for improvement. More specifically, the hierarchy of implementation would propose a logical way of partially limiting discretion of state authorities. If a doctrine on (say) instrumentality is adopted, it becomes harder and rhetorically costlier for all the actors concerned to overturn the said doctrine.⁶³ By structuring discretion, our theory aims to make certain policy outcomes likelier than others.

As claimed above, the implementation phase would consist of a given period of time wherein states need to fulfil all human rights obligations progressively. A system of shared and well-defined priorities might therefore serve as an analytical and structural method for sequencing the implementation of human rights in all states. This type of hierarchy would aim at providing enhanced legal certainty and coherence, deterring states from implementing the set of rights closer to their interests. If states want to show that they strive to respect the human rights legal framework, they need to adhere to a structured implementation order previously set up and agreed. As a result, the said system purports to bring more transparency, raising legitimate expectations in terms of what the order of implementation will be.

In addition, shared priorities might function as a clearer standard of state performance with regard to meeting human rights obligations. Since it will take some time for states to fulfil all human rights obligations, the human rights supervisory bodies would need a measuring tool for state compliance. In the absence of such a tool, the human rights record of each state would be difficult to assess, leaving more leeway for states, as is currently happening in the case of economic, social, and cultural rights.⁶⁴ In so doing, the said priorities would provide some guidance to states' obligations relating to the implementation process. States must invest resources to fulfil first certain specific human rights, subordinating the implementation of other rights to the realisation of the former rights, basic in the implementation. This measuring tool for state compliance, however, will not stand alone, meaning that it will complement the already existing measures of state performance such as judging 'whether the decision-making process demonstrates awareness and respect' for human rights.⁶⁵

In summary, distinguishing between two types of hierarchy would not solve (an already existing) temporary situation of a *de facto* inequality. However, explicated shared priorities in the implementation process would allay the fears of having an overly high level of discretion for the implementing states.

The baseline model integrated within the current human rights framework

The previous section has clarified that the proposed hierarchy does not affect the substantive importance of human rights. We will now focus on the development of a baseline model that can be integrated within the current human rights framework. In practice, this part intends to hypothesise a preliminary order of human rights implementation.

The outcome of this process will be a theory that aims at reconciling the incumbent structure of the Maslow pyramid and its methodological principle with the source of human rights, i.e. *human dignity*.

Human dignity is generally acknowledged as *the* source of human rights. There is wide consensus that human rights rest on a life of dignity, this being a broader concept than human survival. As Donnelly and Whelan put it, 'we have human rights not to what we need naturally as animals for survival but to what we need for a life of dignity'.⁶⁶ It follows that a person is denied a life of dignity if she has the wherewithal to eat but she cannot freely exercise her faith.⁶⁷

In line with that reasoning, human rights are means to achieve human dignity. In this regard, Donnelly forcefully claims that 'human rights reflect a particular specification of certain *minimum preconditions* for a life of dignity in the contemporary world' [emphasis added].⁶⁸ However, a more detailed appraisal of the relationship between human dignity and survival shows that the former encompasses the latter. Or, taking the view from the opposite side, human survival is a necessary but not sufficient condition for human dignity. A person cannot live a life of dignity without the basic conditions of survival.

Because of this, it is possible to discuss human survival in terms of *human rights*. As proof of this, one may cautiously use the following syllogism. (A) If human survival is a part of human dignity and, (B) if human dignity is formed of *all* human rights then (C) human survival is formed of some human rights. As a result, whilst human dignity requires the implementation of *all* human rights, human survival is attained with the realisation of *some* human rights. Therefore, applying the instrumentality principle to the relationship between human dignity and survival means that the human rights essential to human survival shall be implemented first. That is, the human rights essential to human survival are ultimately essential to human dignity. Yet, such reasoning shall not produce any threat to the preservation of the moral aspirations of human rights. The heart of the argument is that the implementation of *some* human rights to achieve human survival merely reflects a temporary and contingent decision.

Additionally, among the human rights to achieve human survival – and accordingly human dignity – a further differentiation can be made according to their 'functions' in relation to the implementation of other human rights. That is, the human rights placed at lower levels are the ones *instrumental* to the implementation of the human rights placed at higher levels. As a result, the implementation of the human rights at the lower levels do not automatically mean that the other human rights will be easily realised, but it is the prerequisite for a successful implementation of other human rights.

In fact, as claimed in the previous sub-section, a well-defined order of implementation would serve as an analytical and structural method for sequencing human rights obligations. Such a comprehensive system would provide states with a clearer implementation plan consisting of hierarchically and functionally ordered obligations. Realising the 'first steps' of human rights obligations would make it difficult for states to refrain from implementing the 'higher' human rights, also given the legitimate expectations of its citizens. As Kaufman empirically demonstrated, it is very likely that the realisation of certain rights spurs the respect for other rights.⁶⁹ Against this background, one may presume that the realisation of basic rights have a positive spillover effect on the 'higher' human rights obligations.

Before attempting to develop a baseline model, it must also be highlighted that each human right might take various levels of implementation, these being high, medium, low and, non-implementation.⁷⁰ The existence of these different achievement levels of human rights would contribute to address the relevant issue of interrelated rights. The complex web of dependencies among different human rights have indeed actual implications for their ultimate implementation. In this regard, the right to food and the right to take part in the democratic process may serve as a good example. Governments can implement and respect the right to food in different ways providing for instance either an adequate nutrition or the wherewithal to avoid starvation. However, it may be that a higher level of (say better implemented) right to food can only be realised through enhanced public participation in the democratic process. Therefore, considering such levels of implementation would allow us to refer *at least initially* to the lowest degree of human rights implementation.

Such a model would enable to progress to a higher, less basic right insofar a *sufficient* level of implementation of the basic right has been achieved. In the above-mentioned example of the right to food and the right to take part in the democratic process, having adequate nutrition is not a prerequisite (instrumental) for the exercise of political rights while preventing starvation is a necessity (sufficiently instrumental) for citizens to take part in political processes. Hence reaching an adequate level of implementation of the right to food would mean avoiding potential starvation rather than providing adequate nutrition. This would also allow moving forward more quickly in the realisation of higher rights, without awaiting the full (say high quality) implementation of basic rights.

To conclude this first part on the structural relations of our theory, instrumentality is meant to underline a hierarchical relationship of two elements, where one element is a prerequisite for the other. According to the degree of implementation, priorities have to be set. Insofar as it is not accurate to claim that a certain (set of) right(s) have absolute priority over another, setting priorities should be relative. A weakly implemented human right needs further efforts of implementation. This does not contradict the idea that the achieved level of implementation will be a determinant factor to assess the right's priority over another. This is also valid if basic rights *in the implementation* – the rights placed at the lowest levels – are involved, meaning that basic rights cannot trump *in limine* other non-basic rights. Instead, a basic right can get priority in the implementation process only when an adequate level of implementation (to progress to a consequential human right) has not yet been achieved. For instance, if the right to food conflicts with the right to take part in the democratic process, the former will dominate the latter only in the case that the right to food has not yet achieved an adequate level of implementation. As a result, the identification of sufficient levels of implementation becomes an analytical and empirically task.⁷¹

It then becomes intriguing to make a first attempt to outline more explicitly how a preliminary order of human rights implementation would look like. Placed at the lowest level is the human right to life. Ranking the human right to life at the base level is easily explained: in order to enjoy (first human survival and then) human dignity and other 'consequential' human rights, an individual must be alive. From that follows that the human right to life shall be the paramount right in the implementation process. Despite enjoying a specific protection in the human rights regime, the human right to life can be interpreted to encompass a set of different human rights. Basic requirements for life are indeed

freedom from torture as well as access to food and water. Therefore, these latter rights must be provided by the state that, failing this, is held responsible.

In addition, it is interesting to note that in the right to life, the provision of certain socio-economic rights (right to adequate food, water and sanitation) might complement the civil-political right to life – enshrined in both Article 3 UDHR and Article 6 ICCPR. This finding is particularly relevant for the human rights legal framework since it seems that civil and political rights can be on the same footing as socio and economic rights. On the contrary, most of the current human rights scholarship derives a completely different (implicit) ranking through the doctrine of progressive realisation.⁷² Thus, our baseline model can also help to overcome the endless debate on the legal status of socio and economic rights.

States are not only required to implement immediately the right to life. They also shall respect negative obligations, which is refraining from unjustifiably interfering, because negative obligations do not entail any economic costs. However, negative obligations do not fully coincide with civil and political rights, because the realisation of these latter rights may also require positive action as well as significant resources.⁷³ As a result, two important assumptions must be taken into account when it comes to developing this baseline model for prioritising human rights implementation. First, the negative obligations must be immediately implemented alongside the human right to life. Secondly, this would imply that when it comes to develop this model it is only possible to consider *economic* scarcity. Meaning that states cannot refuse to implement their obligations on *political* grounds.

Subsequently, we believe that the right to safety – comprising a series of rights aimed at protecting the individual from any injury, be it physical or psychological – comes after. As the human right to life is instrumental in protecting – for instance – the right to safety, the right to safety is instrumental in protecting subsequent rights that may be fully enjoyed only in the case where an individual is free from any physical and psychological harm. For instance, the right to strike cannot be fully enjoyed if an individual is threatened by any potential harm. Or, individuals cannot enjoy the right to marry when there are forced marriages. Once these two sets of rights are identified, the remaining human rights can be ordered accordingly, abiding by the methodological principle of instrumentality. Besides, when it comes to the higher levels the social context where human rights have to be implemented play a role. This, however, does not go against a shared prioritisation of human rights implementation, especially at the lowest levels.

It must be stressed that this is a first attempt to achieve shared and well-defined priorities in human rights implementation within a basic framework. A more fine grained discussion where empirics play a role is certainly possible and needed in the future. What is relevant at this stage of research is that our approach has the potential to shed new light on the prioritisation of human rights implementation. More precisely, what can be learned is that the methodological principle of instrumentality can contribute to establishing priorities among human rights more firmly. Since limited resources make it hard to realise all human rights at the same standard for all individuals in the short term, there is a need to take contingent and temporary decisions as to how to set priorities. A feasible path is to adopt a methodological principle that would leave the substantive importance of human rights untouched but still allow for an informed ranking of human rights. The instrumentality principle serves this goal.

Concluding remarks

This article elaborated on establishing some basic priorities in the implementation of human rights. To this end, a puzzle had to be put together. We started by inquiring how the interpretation of the indivisibility principle may affect a possible hierarchy in the human rights implementation. Subsequently, the first piece of the puzzle was put together with the scarcity problem. The article continued considering the lack of explicit priorities and some attempts to prioritise human rights. The Maslow pyramid deserved particular attention and its underlying methodological principle was scrutinised. Once we clarified that there might exist different types of hierarchy, it became possible to tentatively propose a new baseline model on the implementation of human rights. This theory builds on the instrumentality principle and aims at providing an outline of *explicated shared* priorities in the implementation process.

The final outcome of this article has not been to advocate a major change in the current human rights legal framework. Instead, it has been proposed that while human rights should all be placed on the same footing, their implementation should have a well-defined and shared order. In so doing, *explicated shared* priorities allow states to have a more concrete and attainable implementation plan, serving as both a guidance for the states and parameters for the human rights supervisory bodies. In this respect, our research might be specifically applicable in case of developing and transitioning states who need to work towards the improvement of their human rights record, further developing an effective implementation plan.

Notes

1. D.J. Whelan, 'Untangling the Indivisibility, Interdependency, and Interrelatedness of Human Rights', *University of Connecticut, Human Rights Institute* 7 (2008): 1–12.
2. Human rights are universal 'in the sense that today we consider all members of the species *Homo sapiens* "human beings" and thus holders of human rights'. See J. Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, NY: Cornell University Press, 2013), 10.
3. J. Donnelly and D.J. Whelan, *International Human Rights* (Boulder, US: Westview Press, 2018), 57.
4. United Nations. Vienna Declaration and Programme of Action, World Conference on Human Rights. (1993) UN Doc. A/ CONF.157/ 24.
5. Donnelly, *Universal Human Rights*, 88.
6. Additional major UN treaties are, for instance, the Convention on the Elimination of All Forms of Racial Discrimination (CERD); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW).
7. Donnelly, *Universal Human Rights*, 27.
8. Donnelly and Whelan, *International Human Rights*, 61.
9. Yet, it must be noted that the indivisibility principle has changed meaning over time. Although the original purpose was to stress that states shall have the obligation to implement all human rights *equally*, around the 1970s the indivisibility principle became more a rhetorical flourish added to ensure equal importance to all human rights. But with the end of the Cold War, the indivisibility principle returned to its original meaning. See Donnelly and Whelan, *International Human Rights*, 3.
10. J.W. Nickel, 'Rethinking Indivisibility: Towards a Theory of Supporting Relations Between Human Rights', *Human Rights Quarterly* 30, no. 4 (2008): 984–1001; J.W. Nickel,

- 'Indivisibility and Linkage Arguments: A Reply to Gilabert', *Human Rights Quarterly* 32, no. 2 (2010): 439–46; P. Gilabert, 'The Importance of Linkage Arguments for the Theory and Practice of Human Rights: A Response to James Nickel', *Human Rights Quarterly* 32, no. 2 (2010): 425–38. D.J. Whelan, *Indivisible Human Rights: A History* (Philadelphia, US: University of Pennsylvania Press, 2010).
11. Nickel, 'Indivisibility and Linkage Arguments'.
 12. S. Soiffer and D. Rowlands, 'Examining the Indivisibility of Human Rights: A Statistical Analysis', *Journal of Human Rights* 17, no. 1 (2018): 89–106.
 13. D.L. Cingranelli and D.L. Richards, 'Measuring the Level, Pattern, and Sequence of Government Respect for Physical Integrity Rights', *International Studies Quarterly* 43, no. 2 (1999): 407–17. Soiffer and Rowlands, 'Examining the Indivisibility of Human Rights'.
 14. Nickel, 'Indivisibility and Linkage Arguments'.
 15. H. Quane, 'A Further Dimension to the Interdependence and Indivisibility of Human Rights: Recent Developments Concerning the Rights of Indigenous Peoples', *Harvard Human Rights Journal* 25 (2012): 49–84, 49.
 16. Donnelly, *Universal Human Rights*, 36.
 17. As a partial disagreement, one may claim that there are some activities of the judiciary that aim at preventing violations.
 18. A.A. Cançado Trindade, 'The Interdependence of All Human Rights—Obstacles and Challenges to their Implementation', *International Social Science Journal* 50, no. 158 (1998): 513–23, 519.
 19. S. Holmes and C.R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York, US: WW Norton & Company, 2000), 15.
 20. A. Etzioni, 'Life: The Most Basic Right', *Journal of Human Rights* 9, no. 1 (2010): 100–10.
 21. Please consider that our approach does not contain political costs as a justification for violating human rights obligations.
 22. Trindade, 'The Interdependence of All Human Rights', 519.
 23. Donnelly, *Universal Human Rights*. R.J. Vincent, *Human Rights and International Relations* (Cambridge, UK: Cambridge University Press, 1986).
 24. E. Klein, 'Establishing a Hierarchy of Human Rights: Ideal Solution Or Fallacy?', *Israel Law Review* 41, no. 3 (2008): 477–88.
 25. Etzioni, 'Life: The Most Basic Right'. Nickel, 'Rethinking Indivisibility'. J. Philips, 'On Setting Priorities Among Human Rights', *Human Rights Review* 15, no. 3 (2014): 239–57. Donnelly and Whelan, *International Human Rights*.
 26. Should the political costs be considered, the result might be the opposite.
 27. As a partial disagreement, one may claim that in order not to act arbitrarily the state needs to have a (costly) proper justice system in place. However, these are transversal costs, meaning that also the implementation of the human right to health requires such a justice system.
 28. A. Etzioni, 'A Right above All Others', *Azure* 5768 (2008): 31, 32.
 29. Holmes and Sunstein, *The Cost of Rights*, 24.
 30. Donnelly, *Universal Human Rights*.
 31. This dose of discretion has originally been the result of the political will of the states: at the drafting stage of international human rights treaties, states have made sure that international institutions would have had little power in compelling countries to act.
 32. E.A. Posner, 'Human Welfare, Not Human Rights', *Columbia Law Review* 108, no. 7 (2008): 1758–802.
 33. Cingranelli and Richards, 'Measuring the Level, Pattern'. L.C. Keith, 'The United Nations International Covenant on Civil and Political Rights: Does it Make a Difference in Human Rights Behavior', *Journal of Peace Research* 36, no. 1 (1999): 95–118.
 34. M. Green, 'What We Talk about When We Talk About Indicators: Current Approaches to Human Rights Measurement', *Human Rights Quarterly* 23, no. 4 (2001): 1062–97. I.E. Koch, 'The Justiciability of Indivisible Rights', *Nordic Journal of International Law* 72, no. 1 (2003): 3–39. E. Wiles, 'Aspirational Principles or Enforceable Rights-The Future for

Socio-Economic Rights in National Law', *American University International Law Review* 22, no. 1 (2006): 35–64.

35. In addition, some other alternative hierarchies of human rights have been put forward. See further the fifth section.
36. One may compare Article 2.1 of the ICESCR with Article 2.1 of the ICCPR. While the ICESCR invites states 'to take steps (...) to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights in the present Covenant', the ICCPR declares 'each State Party to the present Covenant undertakes to respect and to ensure to all individuals (...) the rights recognised in the present Covenant'.
37. Donnelly, *Universal Human Rights*, 242. The difference in the realisation between political and civil rights and social and economic rights is also discussed at a regional level where, in the context of the European economic crisis, there was some guidance in the implementation.
38. S. Leckie, 'Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights', *Human Rights Quarterly* 20, no. 1 (1998): 81–124.
39. D. Otto, 'Rethinking the Universality of Human Rights Law', *Columbia Human Rights Law Review* 29 (1997): 1–46, 38.
40. K. Roth, 'Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization', *Human Rights Quarterly* 26, no. 1 (2004): 63–73.
41. Leckie, 'Another Step Towards Indivisibility'.
42. See the General Comment No. 3, paragraph 9 of the Committee on Economic, Social and Cultural Rights and the Limburg Principle No. 21.
43. Gilibert, 'The Importance of Linkage Arguments for the Theory and Practice of Human Rights', 436.
44. Please note that also the question of what 'minimum core obligations' means is far from clear.
45. P. Alston and G. Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', *Human Rights Quarterly* 9 (1987): 156.
46. Klein, 'Establishing a Hierarchy of Human Rights'. Besides, it is also possible to claim that the capability approach, as developed by Sen and Nussbaum, have a core of capabilities. Each state shall ensure the human rights expressed in terms of these capabilities. However, by following this approach, the source of human rights rests on capabilities and not dignity. See e.g. M. Nussbaum, 'Capabilities as Fundamental Entitlements: Sen and Social Justice', *Feminist Economics* 9 (2003): 33–59. A. Sen, 'Human Rights and Capabilities', *Journal of Human Development* 6, no. 2 (2005): 151–66.
47. Philip, 'On Setting Priorities among Human Rights'.
48. T.C. van Boven, 'Distinguishing Criteria of Human Rights', in *The International Dimensions of Human Rights*, eds. K. Vasak and P. Alston (Westport, US: Greenwood Press, 1982): 43–59. T. Farer, 'The Hierarchy of Human Rights', *American University International Law Review* 8, no. 1 (1992) 115–19. T. Koji, 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights', *European Journal of International Law* 12, no. 5 (2001): 917–41, 920.
49. Koji, 'Emerging Hierarchy in International Human Rights and Beyond', 926.
50. Donnelly, *Universal Human Rights*. Vincent, *Human Rights and International Relations*.
51. A.H. Maslow, 'A Theory of Human Motivation', *Psychological Review* 50, no. 4 (1943): 370–96.
52. C. Brockett, 'A Hierarchy of Human Rights' (paper presented at annual meeting of the American political science association, New York, New York, August 31–September 3, 1978).
53. C. Bay, 'Self-Respect as a Human Right: Thoughts on the Dialectics of Wants and Needs in the Struggle for Human Community', *Human Rights Quarterly* 4, no. 1 (1982): 53–75, 67.
54. Vincent, *Human Rights and International Relations*.
55. Donnelly, *Universal Human Rights*.
56. J. Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights', *Metaphilosophy* 41, no. 4 (2010): 464–80, 467.
57. P.G. Carozza, 'Human Dignity and Judicial Interpretation of Human Rights: A Reply', *European Journal of International Law* 19, no. 5 (2008): 931–44. C. McCrudden, 'Human Dignity

- and Judicial Interpretation of Human Rights', *European Journal of international Law* 19, no. 4 (2008): 655–724.
58. H. Shue, *Basic Rights: Subsistence, Affluence, and American Foreign Policy* (Princeton, US: Princeton University Press, 1980), 19.
 59. Furthermore, Donnelly puts forward a similar (three-fold) distinction when it comes to the universality of human rights: rights are universal at the level of the concept whereas they are relative at the level of interpretation and form. See also both the second and fourth sections.
 60. See the first sentence of the Preamble to the United Nations Universal Declaration of Human Rights. Furthermore, see also the next sub-section.
 61. Philips, 'On Setting Priorities among Human Rights', 246.
 62. Jerom Frank, *Law and the Modern Mind* (Abingdon, UK: Routledge, 2017).
 63. Kennedy, 'A Left-Phenomonological Critique of the Hart/Kelsen Theory of Legal Interpretation', in *Problemas contemporaneos de la Filosofia del Derecho*, eds. Cáceres Nieto and Floresand Saldana (UNAM, 2005).
 64. Alston and Quinn, 'The Nature and Scope of States Parties' Obligations'. R.E. Robertson, 'Measuring State Compliance with the Obligation to Devote the Maximum Available Resources to Realizing Economic, Social, and Cultural Rights', *Human Rights Quarterly* 16, no. 4 (1994): 693–714.
 65. Robertson, 'Measuring State Compliance', 702.
 66. Donnelly and Whelan, *International Human Rights*, 24.
 67. Ibid, 26.
 68. Donnell, *Universal Human Rights*, 132.
 69. Specifically Kaufman shows that the implementation of 'first-generation' rights (political liberties) have a significant positive impact on the implementation of 'second-generation' rights (socioeconomic rights). See D. Kaufmann, 'Human Rights and Governance: The Empirical Challenge', in *Human Rights and Development: Towards Mutual Reinforcement*, eds. P. Alston and M. Robinson (Oxford, UK: OUP, 2005).
 70. Nickel, 'Rethinking Indivisibility', 992, Nickel, 'Indivisibility and Linkage Arguments', 440.
 71. Although the sufficient level of implementation may differ depending on the individual, current research shows that it is often possible to derive a specific amount of what is considered as essential. For a review of the case of water see E. Feitelson, 'What is Water? A Normative Perspective', *Water Policy* 14, no. S1 (2012): 52–64, 54.
 72. It must be noted, however, that the Human Rights Committee in its General Comment 6 took a broader interpretation of the right to life urging the states to take positive measures necessary to support life. See United Nations, General comments of the Human Rights Committee of the International Covenant on Civil and Political Rights. UN Doc. CCPR/C/21/Rev.1 (May) New York: United Nations Publications (1989). As a result, the proposed broad interpretation of the human right to life comprises the right not to be deprived of his own life and the right to have the appropriate means of subsistence.
 73. As Shue, *Basic Rights*, has shown, there is no correspondence between on the one hand 'positive' rights and economic and social rights, and on the other hand 'negative' rights, and political and civil rights. In this regard, it is put forward what was argued in the memorandum to the Third Committee of the Covenant on Economic, Social and Cultural Rights by Israel in 1952.

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Notes on contributors

Alberto Quintavalla is a PhD candidate at the Rotterdam Institute of Law and Economics. He has been visiting researcher at the Hebrew University of Jerusalem in 2016.

Klaus Heine is Jean Monnet Professor of Economic Analysis of European Law. He is also the Director of the Erasmus Graduate School of Law.