

THE INDIVISIBILITY OF HUMAN RIGHTS AND THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

GAUTHIER DE BECO*

Abstract This article argues that a new understanding of the indivisibility of human rights has emerged through the Convention on the Rights of Persons with Disabilities (CRPD). The CRPD has blurred the distinction between civil and political rights, on the one hand, and economic and social rights, on the other. After showing how this distinction has been blurred in the Convention, the article critically analyses the impact this has had on the concept of indivisibility, as well as its consequences for international human rights law more generally. It shows that there is now a shift away from a preoccupation with different categories of rights and towards concern for the real and actual enjoyment of human rights.

Keywords: civil and political rights, disabled people, economic and social rights, human rights, indivisibility.

I. INTRODUCTION

The concept of indivisibility has been an important subject of academic inquiry in the field of international human rights law. As debate on the issue has lost its appeal, this article considers the impact of the Convention on the Rights of Persons with Disabilities (CRPD) adopted in 2006 on this debate,¹ and suggests that it has resulted in a new understanding of the indivisibility of human rights. It argues that the Convention has pushed boundaries as it cuts across distinctions between civil and political rights, on the one hand, and economic and social rights, on the other. The mutual interlinkage of both sets of rights is an integral feature of the rights protected by this Convention.

* Reader in Human Rights, University of Huddersfield, gauthier.debeco@gmail.com. The author wishes to thank Paul Hunt (University of Essex), Margot Salomon (London School of Economics), Jenny Goldschmidt (University of Utrecht), Surya Subedi (University of Leeds), Michael Stein (Harvard University), Ian Cram (University of Leeds) and Jean d'Aspremont (University of Manchester and Sciences Po) for their valuable comments on an earlier version of this article. He benefited from feedback during a presentation on the topic at the occasion of the 16th Association of Human Rights Institutions (AHRI) Conference organized by the Netherlands Institute of Human Rights in Utrecht on 2–4 September 2016. The author is also grateful for the helpful comments of the two anonymous reviewers as well as the editor-in-chief. All errors remain his sole responsibility. ¹ Convention on the Rights of Persons with Disabilities (2006) 46 ILM 443.

Several scholars have claimed that the distinction between the two sets of rights has actually been blurred in the CRPD.² Through legal and doctrinal analysis, the article goes a step further by both investigating the validity of this claim and by considering what the blurring of the distinction between the two sets of rights means for the concept of indivisibility. Taking as examples rights usually assigned to each of these categories, it demonstrates that the Convention rights cannot be separated into two distinct sets of rights if they are to carry real meaning. This article also examines both the practical and theoretical implications of this understanding of indivisibility for international human rights law. Looking beyond the issue of disability, it suggests that less emphasis should be placed on the different categories of rights and more emphasis upon the real and actual enjoyment of human rights. The article seeks to place the issues that need to be addressed in order to make these rights more of a reality at the centre of academic enquiry.

While the role of States in implementing human rights is explored, the question of the judicial protection of economic and social rights is not examined. Not only has it already attracted considerable academic attention,³ but it is also of little practical relevance in respect of their realisation.⁴ Also, only the universal human rights instruments adopted within the UN are considered.

This article begins with a brief history of the concept of indivisibility within international human rights law (section II). This is followed by a consideration of how the CRPD has blurred the distinction between the two sets of rights, and highlighting the challenge this poses for its proper interpretation (section III). It concludes by looking at how the proposed understanding of indivisibility affects the obligations of States, shifting attention to the real and actual enjoyment of human rights (section IV).

II. INDIVISIBILITY IN INTERNATIONAL HUMAN RIGHTS LAW

A. *Civil and Political and Economic and Social Rights*

Over 50 years ago, States adopted the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social

² T Degener, '10 Years of Convention on the Rights of Persons with Disabilities' (2017) 35 NQHR 153–4; P Bartlett, 'The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law' (2012) 75 MLR 757; T van Boven, 'Categories of Rights' in D Moeckli, S Shah, S Sivakumaran and D Harris (eds), *International Human Rights Law* (2nd edn, Oxford University Press 2014) 148.

³ See *inter alia* F Coomans (ed), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Intersentia 2006); M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2009).

⁴ P Hunt *et al.*, 'Implementation of Economic, Social and Cultural Rights' in S Sheeran and N Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2014) 545.

and Cultural Rights (ICESCR).⁵ The original intention was not to draft two Covenants but to adopt a single binding international legal instrument building on the Universal Declaration of Human Rights (UDHR).⁶ This approach was eventually rejected by the negotiators, the rationale being that there was a need for different methods for the implementation of particular categories of rights.⁷ While civil and political rights were deemed legally enforceable, economic and social rights were regarded as aspirational goals. Therefore, whilst a supervisory committee was set up for the ICCPR, no such committee was established for the ICESCR.⁸ Human rights have ever since generally been divided into two sets of rights, namely civil and political rights, or ‘first-generation rights’, and economic and social rights, or ‘second-generation rights’.⁹

The two sets of rights were supposed to result in different kinds of obligations. On the one hand, civil and political rights created ‘negative obligations’. As provided for by Article 2(1) of the ICCPR, States Parties have ‘to respect and to ensure to all individuals ... the rights recognized in the ... Covenant’. These obligations are of immediate effect, since the duty of State Parties is only to abstain from contravening the Covenant. On the other hand, economic and social rights entailed ‘positive obligations’. According to Article 2(1) of the ICESCR, a State Party must ‘take steps ... with a view to achieving progressively the full realization of the rights recognized in the ... Covenant ... to the maximum of its available resources’. Because of the scarcity of such resources, States Parties are allowed to achieve the objective over a certain period of time.

This obligation regime has been tempered by the UN treaty bodies now charged with monitoring the implementation of the two Covenants. As regards the ICCPR, the Human Rights Committee (HRC) considers that ‘[t]he legal obligation under article 2, at paragraph 1, is both negative and positive in nature’.¹⁰ While civil and political rights entail immediate obligations, States Parties must also take concrete action to ensure their

⁵ International Covenant on Civil and Political Rights (1966) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (1966) 993 UNTS 3.

⁶ UNGA, Universal Declaration of Human Rights (10 December 1948) A/RES/217.

⁷ W Osiatyński, ‘The Historical Development of Human Rights’ in Sheeran and Rodley (n 4) 14–15; O De Schutter, *International Human Rights Law* (2nd edn, Cambridge University Press 2014) 18–19; E Riedel, G Giacca and C Golay, ‘The Development of Economic, Social and Cultural Rights in International Law’ in E Riedel, G Giacca and C Golay (eds), *Economic, Social, and Cultural Rights in International Law Contemporary Issues and Challenges* (Oxford University Press 2014) 7–9.

⁸ Riedel, Giacca and Golay (n 7) 7.

⁹ C Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford University Press 2014) 136–9; M Sheinin, ‘Characteristics of Human Rights Norms’ in K Krause and M Scheinin (eds), *International Protection of Human Rights: A Textbook* (2nd edn, Åbo Akademi University 2009) 22. The former include the freedom from torture, right to liberty, right to privacy, right to access courts, freedom of opinion and freedom of assembly. The latter include the right to health, right to food, right to housing, right to education, right to work and right to social security.

¹⁰ HRC, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (26 May 2006) CCPR/C/21/Rev.1/Add.13, para 6.

enjoyment.¹¹ The Committee on Economic, Social and Cultural Rights (CESCR)¹² also advised that States Parties must fulfil ‘a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights’ in the ICESCR.¹³ Economic and social rights, therefore, create immediate obligations, which include the prohibition of discrimination.¹⁴

Such a reading of the two Covenants already laid bare the porosity of the distinction between civil and political rights, on the one hand, and economic and social rights, on the other. In addition, an extensive literature grew up around economic and social rights, which both improved the understanding of their content and helped to reaffirm their legal basis.¹⁵ A new regime of obligation was conceptualized, consisting of obligations to respect, protect and fulfil, which proved a turning point. This tripartite typology was initially proposed and developed by Eide and Shue¹⁶ and subsequently applied by the CESCR Committee.¹⁷ It has also come to be used for civil and political rights,¹⁸ undermining the view that the two sets of rights concern different kinds of obligations.

The adoption of several group-specific human rights treaties further contributed to the weakening of the distinction. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Convention on the Elimination of All Forms of Discrimination against

¹¹ A Seibert-Fohr, ‘Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to Its Article 2 para 2’ (2001) 5 UNYB 414–16.

¹² ECOSOC Res 1985/17 (28 May 1985). The role of overseeing the implementation of the ICESCR was initially given to ECOSOC, which subsequently established the CESCR for this purpose.

¹³ CESCR, *General Comment No 3: The Nature of State Parties Obligations (Art. 2, Para. 1)* (14 December 1990) E/1991/23, para 9.

¹⁴ CESCR, *General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2)* (29 May 2009) E/C.12/GC/20, para 7; ‘Maastricht Guidelines on Violations of Economic, Social and Cultural Rights’ (1998) 20 HumRtsQ 691 (para 11).

¹⁵ See *inter alia* M Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development* (Clarendon Press 1995); P Hunt, *Reclaiming Social Rights: International and Comparative Perspectives* (Ashgate 1996); A Eide, C Krause and A Rosas (eds), *Economic, Social and Cultural Rights. A Textbook* (2nd edn, Martinus Nijhoff 2001); I Merali and V Oosterveld (eds), *Giving Meaning to Economic, Social, and Cultural Rights* (University of Pennsylvania Press 2001); M Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003).

¹⁶ A Eide, *The Right to Adequate Food as a Human Right: Final Report* (7 July 1987) E/CN.4/Sub.2/1987/23; H Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (2nd edn, Princeton University Press 1996) 52.

¹⁷ CESCR, *General Comment No 18: The Right to Work (Art. 6)* (24 November 2005) E/C.12/GC/18, paras 19–28; CESCR, *General Comment No 15: The Right to Water (Arts 11–12)* (20 January 2003) E/C.12/2002/11, paras 17–29; CESCR, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12)* (11 August 2000) E/C.12/2000/4, paras 30–7; CESCR, *General Comment No 13: The Right to Education (Art. 13)* (8 December 1999) E/C.12/1999/10, para 46; CESCR, *General Comment No 12: The Right to Adequate Food (Art. 11)* (12 May 1999) E/C.12/1999/5, paras 14–15.

¹⁸ R Künnemann, ‘A Coherent Approach to Human Rights’ (1995) 17 HumRtsQ 327–31.

Women (CEDAW) prohibit discrimination in provisions addressing both civil and political and economic and social rights.¹⁹ It was, however, the Convention on the Rights of the Child (CRC) which first bridged the two sets of rights.²⁰ It provides not just a juxtaposition but a whole series of rights ‘that encapsulate different aspects of both sets of rights thereby reflecting their indivisibility’.²¹ While the CRC has a specific provision concerning ‘economic, social and cultural rights’,²² it is difficult to accurately define what rights fall within the scope of this category of rights regarding most of the Convention.²³ The incorporation of the different categories of rights into international legal instruments thus has become standard practice.²⁴ Such incorporation raises important questions that have not yet been studied in detail.

With the adoption of the Optional Protocol to the ICESCR (OP-ICESCR) in 2006, the CESCR Committee received the competence to consider individual communication concerning alleged violations of the Covenant.²⁵ This confirmed the legal enforceability of economic and social rights, which had gradually gained ground through numerous cases before domestic courts.²⁶ Although the OP-ICESCR has only been ratified by 23 States²⁷ and the HRC is much further ahead in exercising its quasi-judicial function,²⁸ the means for ensuring compliance with the two sets of rights have been equalized, at least in theory.

B. The Concept of Indivisibility

The impact of the division of human rights into two sets of rights has been mitigated by other means. Despite the adoption of the two Covenants, States

¹⁹ International Convention on the Elimination of All Forms of Racial Discrimination (1965) 660 UNTS 195; Convention on the Elimination of All Forms of Discrimination against Women (1979) 1249 UNTS 13.

²⁰ Convention on the Rights of the Child (1989) 1577 UNTS 3.
²¹ M Rishmawi, *A Commentary on the United Nations Convention on the Rights of the Child, Article 4: The Nature of States Parties’ Obligations* (Martinus Nijhoff 2006) 16.

²² Art 4 of the CRC provides that ‘[w]ith regard to economic, social and cultural rights, States Parties shall undertake all ... measures to the maximum extent of their available resources ... for the implementation of the rights recognized in the present Convention’.

²³ Rishmawi (n 21) 16. As stated by the Committee on the Rights of the Child (CRC Committee), there is ‘no simple or authoritative division of human rights in general or of Convention rights into the two categories’ (CRC Committee, *General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child* (27 November 2003) CRC/GC/2003/5, para 6).

²⁴ I Cismas, ‘The Intersection of Economic, Social and Cultural Rights’ in Riedel, Giacca and Golay (n 7) 455–6. This can also be observed with non-binding international legal instruments, such as the Declaration on the Rights of Indigenous Peoples (UNGA, Declaration on the Rights of Indigenous Peoples (13 September 2007) A/RES/61/295).

²⁵ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (10 December 2008) A/RES/63/117.

²⁶ Hunt *et al.* (n 4) 553.
²⁷ See <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3-a&chapter=4&clang=en>.

²⁸ The HRC and CESCR have considered to date 1854 and 16 communications, respectively. See <<http://juris.ohchr.org/search/documents>>.

were keen to stress the features common to both civil and political rights and economic and social rights. Not only was it stated that the two sets of rights create similar kinds of obligations, it was also argued that all human rights are indivisible and interconnected, which reflects the interrelationship between these sets of rights. This approach reached a milestone at the World Conference on Human Rights held in 1993, with the Vienna Declaration and Programme of Action proclaiming that '[a]ll human rights are universal, indivisible and interdependent and interrelated'.²⁹ This statement conveyed the guiding principle of human rights and has been repeated in several UN legal documents.³⁰ It is worth enquiring into its substance, by considering the meaning of the different cited concepts.

Universality flows from the very notion of human rights, although it has been challenged by arguments concerning cultural relativism.³¹ It has gradually become acknowledged that universality does not prevent cultural particularities from being taken into account.³² Both universality and relativity, therefore, are essential to understand the notion of human rights.³³ The fact that human rights are 'interdependent and interrelated' emphasises that they are mutually reinforcing. The interdependency and interrelatedness of human rights are provided for in the Preambles of both the ICCPR and the ICESCR, and were thrown into relief when it was decided to draft two Covenants.³⁴ This interdependence and interrelatedness can easily be illustrated in practice³⁵ with some rights having dimensions which fall within the scope of both sets of rights.³⁶ In contrast, the concept of indivisibility remains much debated and its meaning is still contentious.

There are two dominant approaches to this concept that have followed each other chronologically. The first, and traditional, approach is that civil and

²⁹ World Conference on Human Rights, *Vienna Declaration and Programme of Action*, A/Conf.157/23 (25 June 1993) Pt II, para 5.

³⁰ UNGA, World Summit Outcome (24 October 2005) A/RES/60/1, paras 13 and 120; UNGA, Res 60/251: Human Rights Council (15 March 2006) A/RES/60/251, Preamble; HRC, Res 5/1: Institution-building of the United Nations Human Rights Council (18 June 2007) A/HRC/RES/5/1, Preamble.

³¹ Such arguments have especially been made in the Asian context. See M Freeman, 'Universalism of Human Rights and Cultural Relativism' in Sheeran and Rodley (n 4) 54–7; Tomuschat (n 9) 68–70.

³² J Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 *HumRtsQ* 414–17; F de Varennes, 'The Fallacies in the "Universalism Versus Cultural Relativism" Debate in Human Rights Law' (2006) 7 *APJHRL* 76–82.

³³ J Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press 2013) 104–5.

³⁴ C Scott, 'Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights' (1989) 27 *OsgoodeHallLJ* 798–802.

³⁵ For instance, one cannot exercise the freedom of expression and freedom of assembly without the right to an adequate standard of living or exercise the right to education and right to work without the freedom of expression and freedom of association.

³⁶ For instance, the right to education has both a 'social aspect' and a 'freedom aspect', the last of which concerns the choice of education, and the right to work has both economic and political dimensions, via the right to form trade unions which is protected by the two Covenants.

political and economic and social rights have equal value,³⁷ and that there can be no hierarchy between them. According to this approach, giving precedence to a particular category of rights is ineffective, as neglecting one category hinders the fulfilment of the other. Human rights cannot be treated individually, but have to be applied in an integrated way. This was expressed in the Teheran Proclamation on Human Rights, which stated that ‘[s]ince human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic and social rights is impossible’.³⁸ Similarly, it has been argued that economic and social rights cannot be implemented without guaranteeing civil and political rights.³⁹

The problem with this way of understanding indivisibility is that it does not very much reflect current practice. An overview of the general comments of UN treaty bodies reveals that the two sets of rights are not examined together or, at best, that this is done in a largely acclamatory fashion. The HRC has not paid attention to their interrelationship, and only considered how the ICCPR rights themselves are interconnected.⁴⁰ The CESCR Committee has done so very briefly by referring also to civil and political rights.⁴¹ Even if the Committee on the Rights of the Child (CRC Committee) has highlighted indivisibility, it has not examined how both sets of rights are related even though its mandate covers the two sets of rights.⁴² In contrast, and as will be further explored, the Committee on the Rights of Persons with Disabilities (CRPD Committee) has done so in detail.⁴³ Most textbooks continue to discuss economic and social rights separately from civil and political rights,⁴⁴ though there are a few exceptions that combine the two sets of right.⁴⁵ There is thus an evolutionary

³⁷ J-P Thérien and P Joly, ‘“All Human Rights for All”: The United Nations and Human Rights in the Post-Cold War Era’ (2014) 36 *HumRtsQ* 381–2.

³⁸ International Conference on Human Rights, *Proclamation of Teheran: Final Act of the International Conference on Human Rights* (22 April–13 May 1968) A/CONF. 32/41 at 3, para 13.

³⁹ A Sen, *Development as Freedom* (Oxford University Press 1999) 149–51; O Guariglia, ‘Enforcing Economic and Social Human Rights’ in T Pogge (ed), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford University Press 2007) 353.

⁴⁰ HRC, *General Comment No 35 – Article 9 (Liberty and Security of Person)* (16 December 2014) CCPR/C/GC/35, paras 53–68; HRC, *General Comment No 32 – Article 14 (Right to Equality before Courts and Tribunals and to Fair Trial)* (23 August 2007) CCPR/C/GC/32, paras 58–65.

⁴¹ CESCR Committee, *General Comment No 22 on the Right to Sexual and Reproductive Health (Art. 12)* (2 May 2016) E/C.12/GC/22, para 10; CESCR Committee, *General Comment No 21 on the Right of Everyone to Take Part in Cultural Life (Art. 15)* (21 December 2009) E/C.12/GC/21, para 3.

⁴² CRC Committee, *General Comment No 19 on Public Budgeting for the Realization of Children’s Rights (Art. 4)* (20 July 2016) CRC/C/GC/19, para 30.

⁴³ CRPD Committee, *General Comment No 1. Article 12: Equal Recognition before the Law* (19 May 2014) CRPD/C/GC/1, paras 31–49; CRPD Committee, *General Comment No 2. Article 9: Accessibility* (22 May 2014) CRPD/C/GC/2, paras 34–48.

⁴⁴ J Steiner, P Alston and R Goodman, *International Human Rights in Context: Law, Politics, Morals* (3rd edn, Oxford University Press 2007); J Rehman, *International Human Rights Law* (Pearson 2010); I Bantekas and L Oette, *International Human Rights Law and Practice* (Cambridge University Press 2013); Krause and Scheinin (n 9); Sheeran and Rodley (n 4).

⁴⁵ De Schutter (n 7); Moeckli, Shah, Sivakumaran and Harris (n 2).

element in treating both sets of rights concurrently, although this remains a slow work in progress.

The second, more modern, approach to the concept of indivisibility stresses that human rights are strongly interdependent,⁴⁶ emphasizing that failure to take this into consideration impedes the implementation of human rights on the whole. This has led to discussion of whether the indivisibility of human rights means that they are mutually indispensable or just mutually useful.⁴⁷ The question concerns the threshold of indivisibility, that is, between 'full' and 'mere' interdependence, or between a strong and a weak concept of indivisibility. This requires an investigation of how civil and political and economic and social rights are actually intertwined, rather than just affirming the impossibility of prioritizing one category of rights over the other.

However, it is not always the case that human rights are indivisible in the sense that they are all mutually indispensable, let alone mutually useful: the degrees of indivisibility and connectedness between rights can vary.⁴⁸ This suggests that some sort of priority ought to be given to those rights that can accelerate the realization of others. From an empirical point of view, the indivisibility of human rights appears to be an exaggeration, and to claim that all rights belonging to a particular category are invisible from all those belonging to another one would be even more implausible.⁴⁹ Civil and political and economic and social rights are not invariably dependent upon each other, whatever their levels of interrelationship may be.

There is, then, lack of agreement concerning which of these two dominant approaches to the concept of indivisibility is most persuasive. The two sets of rights are rarely considered together and practice suggests that they can and are addressed individually. As a result, more is required in order to demonstrate the reality of indivisibility and to conceptualize it in a manner which contributes to the advancement of human rights. Perhaps, the statement that '[a]ll human rights are universal, indivisible and interdependent and interrelated' has been repeated so many times that it has become a kind of self-sufficient slogan that turns out to be more a wish than a reflection of reality. It seems reasonable to conclude that the indivisibility of human rights has been widely used as a means to compensate for the unfortunate division into two sets of rights carried out in opposition to the spirit of the UDHR.⁵⁰

⁴⁶ J Nickel, 'Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights' (2008) 30 *HumRtsQ* 987–91.

⁴⁷ P Gilibert, 'The Importance of Linkage Arguments for the Theory and Practice of Human Rights: A Response to James Nickel' (2010) 32 *HumRtsQ* 429–30; J Nickel, 'Indivisibility and Linkage Arguments: A Reply to Gilibert' (2010) 32 *HumRtsQ* 441–2.

⁴⁸ S Soiffer and D Rowlands, 'Examining the Indivisibility of Human Rights: A Statistical Analysis' (2016) *JHR* <<http://www.tandfonline.com/doi/abs/10.1080/14754835.2016.1255549>>.

⁴⁹ Nickel (n 46) 994–7.

⁵⁰ J Whelan, *Indivisible Human Rights: A History* (Pennsylvania University Press 2010) 208.

III. INDIVISIBILITY IN THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

A. *Blurring of the Distinction between the Two Sets of Rights*

As the most recent group-specific human rights treaty, the CRPD protects the human rights of disabled people. Proposed by Australia in 2002,⁵¹ it was adopted on 13 December 2006, and entered into force on 3 May 2008. By July 2018, there were 177 parties to the Convention.⁵²

The CRPD is said to build upon the social model of disability,⁵³ which considers disability to be a consequence of societal organization.⁵⁴ Even though it has been argued that the Convention supersedes this model,⁵⁵ the Convention is concerned about physical and social barriers faced by disabled people. This is reflected in its scope of application, which includes people 'who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.⁵⁶ However, the reality is far removed from the worthy objectives set by the CRPD. Disabled people have significantly fewer opportunities than others, and generally experience greater marginalization.⁵⁷

As noted by Sen, disabled people are often more reliant on the provision of additional resources than others in order to function on a daily basis.⁵⁸ As a result, and in order to protect their human rights, measures must be adopted to address the disadvantage faced by them. According to Mégret, the CRPD does more than simply ensure that the rights protected by other human rights treaties are applicable to disabled people.⁵⁹ It has enriched the notion of human rights by ensuring that these rights are tailored to their particular needs.

Echoing the Vienna Declaration and Programme of Action, the CRPD's Preamble reaffirms 'the universality, indivisibility, interdependence and interrelatedness of all human rights'.⁶⁰ This statement is a novelty for a human rights treaty,⁶¹ but it directs attention to the particular significance of the concept of indivisibility for disabled people. Accordingly, the Convention

⁵¹ G Quinn, 'Disability and Human Rights: A New Field in the United Nations' in Krause and Scheinin (n 9) 257.

⁵² See <<https://www.un.org/development/desa/disabilities>>.

⁵³ Bartlett (n 2) 758–61; P Harpur, 'Embracing the New Disability Rights Paradigm: The Importance of the Convention on the Rights of Persons with Disabilities' (2012) 27 *Disability & Society* 3–4; R Kayess and P French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 HRLR 24.

⁵⁴ M Oliver, *Understanding Disability. From Theory to Practice* (2nd edn, Palgrave Macmillan 2009) 42–6.

⁵⁵ T Degener, 'A Human Rights Model of Disability' in P Blanck and E Flynn (eds), *Routledge Handbook of Disability Law and Human Rights* (Routledge 2016) 39–40.

⁵⁶ Art 1, CRPD.

⁵⁷ World Health Organization (WHO) and World Bank, *World Report on Disability* (WHO and World Bank 2011) 39–40.

⁵⁸ Sen (n 39) 88; A Sen, *Inequality Re-examined* (Clarendon 1992) 20 and 28.

⁵⁹ F Mégret, 'The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights' (2008) 30 *HumRtsQ* 515–16.

⁶⁰ Preamble (c), CRPD.

⁶¹ The CRC's Preamble does not include such a statement.

has intermixed civil and political rights, on the one hand, and economic and social rights, on the other. Article 4(2) nonetheless provides that '[w]ith regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources ... with a view to achieving progressively the full realization of these rights'. This provision seems, *prima facie*, to perpetuate the distinction between two sets of rights, as in the ICCPR and ICESCR.

In fact, the CRPD did more than intermixing civil and political and economic and social rights; rather, it literally has done away with the distinction between the two sets of rights altogether. It is futile to try and determine which category of rights each of the Convention rights belong to. Although the proposal that economic and social rights be the subject of progressive realization was not disputed during the negotiations, an attempt to list the rights concerned eventually failed.⁶² The drafters did not clarify the scope of 'economic, social and cultural rights'. Instead, in Article 4(2) they followed the precedent set by the CRC.⁶³

The CRPD also did more than just take up existing rights. In addition to articulating these rights specifically with regard to disabled people, the Convention has added a number of '*sui generis* entitlements'.⁶⁴ These '*sui generis* entitlements' include aspects that were not anticipated in existing human rights treaties, in that they concern the participation of disabled people in society as well as the promotion of their independence and autonomy.

Importantly, the CRPD requires that States Parties 'take all appropriate steps to ensure that reasonable accommodation is provided',⁶⁵ and failing to do so is a form of discrimination.⁶⁶ The duty to provide reasonable accommodation, therefore, is of immediate application. It is not only part of the general obligations, but is to be found in specific provisions of the Convention too.⁶⁷ This duty applies to both civil and political and economic and social rights.⁶⁸ The immediacy of the obligation narrows the sphere of progressive realization, and thus contributed to a further weakening of the distinction between the two sets of rights.

Two particular examples help demonstrate the extent to which the two sets of rights have been conflated throughout the CRPD, illustrating the approach to

⁶² B Flóvenz, 'The Implementation of the UN Convention and the Development of Economic and Social Rights as Human Rights' in O Arnardóttir and G Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff 2009) 265–6. ⁶³ See (n 22). ⁶⁴ Mégret (n 59) 506. ⁶⁵ Art 5(3), CRPD.

⁶⁶ Art 2, CRPD. Art 2 of the Convention defines reasonable accommodation as 'necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'.

⁶⁷ Art 13(1) (access to justice), 14(2) (right to liberty and security of the person), 24(2)(c) (right to education) and 27(1)(i) (right to work), CRPD.

⁶⁸ This had been confirmed earlier by the CESC Committee (CESCR Committee, *General Comment No 5: Persons with Disabilities* (9 December 1994) E/1995/22, para 15).

indivisibility taken in this Convention. The first is supposed to be drawn mainly from civil and political rights, while the second is supposed to be drawn mainly from economic and social rights.

The first example is the right to independent living. Article 19 of the CRPD provides that disabled people have the right to ‘choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement’.⁶⁹ The main concern here is with the widespread practice of institutionalizing disabled people, a concern discounted by previous human rights treaties. When done without their consent only because of having an impairment, such institutionalization constitutes a deprivation of liberty and can even amount to a form of mistreatment.⁷⁰ There is therefore an overlap between the right to independent living and the right to freedom of movement, as well as the right to liberty and the prohibition of torture, inhuman or degrading treatment or punishment, which are considered to be civil and political rights.

The right to independent living extends even further, as disabled people need support that meets their individual needs if they are to be able to define their own living arrangements. According to the CRPD Committee, this right requires that States Parties ‘take effective and appropriate measures to facilitate the full enjoyment of the right and full inclusion and participation of persons with disabilities in the community’.⁷¹ The CRPD stipulates that disabled people must be able to access ‘a range of in-, residential and other community support services, including personal assistance’.⁷² Such services ‘are not restricted to services inside the home, but must also be able to extend to the spheres of employment, education or political and cultural participation’.⁷³ Autistic people, for instance, require the provision of whatever support can be achieved, through house services, adapted communication and adequate training, that is fully embedded in the places where they live. The right to independent living is contingent on resolving issues related to economic and social rights. Should these issues be ignored, disabled people will remain segregated and the right to independent living will remain a dead letter. It makes no sense to assign this right, or even parts of it, to only one of the different categories of rights, because it results from the overlapping of such categories.

The second example illustrating the blurring of the distinction between the two sets of rights in the CRPD is the right to education. While this right is

⁶⁹ Art 19(a), CRPD.

⁷⁰ OHCHR, *Thematic Study on the Right of Persons with Disabilities to Live Independently and Be Included in the Community* (12 December 2014) A/HRC/28/37, paras 20–22; J Mendez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1 February 2013) A/HRC/22/53, paras 69–70.

⁷¹ CRPD Committee, *General Comment on Article 19: Living Independently and Being Included in the Community* (29 August 2017) CRPD/C/18/1, para 18.

⁷² Art 19(b), CRPD.

⁷³ CRPD Committee (n 71) para 29.

commonly said to be an economic and social right,⁷⁴ it also pertains to civil and political rights (through the right of parents to choose the education of their children).⁷⁵ Indeed, it has long been considered to illustrate the indivisibility of human rights.⁷⁶ By proclaiming a right to inclusive education, the CRPD further expands upon this indivisibility. Article 24 of the CRPD provides that States Parties must ‘ensure an inclusive education system at all levels and lifelong learning’.⁷⁷ This depends on making schools accessible to disabled children. According to the CRPD Committee, the right to inclusive education requires that States Parties adapt ‘educational environments to accommodate the different requirements and identities of individual students’.⁷⁸

This new emphasis on inclusion has led to an even greater overlap of both sets of rights, as it implies that schools should recognize and value pupils’ varied characteristics. By providing that the inclusive education system to be established must enhance ‘respect for ... human diversity’,⁷⁹ the Convention seeks to encourage greater acceptance of different types of disabilities. Deaf people, for instance, who see themselves as a linguistic community, consider sign language to be more than just a tool of communication.⁸⁰ The CRPD provides that States Parties must facilitate ‘the promotion of the linguistic identity of the deaf community’ in order to achieve their full participation in education.⁸¹ While the Convention is sometimes interpreted as authorizing segregated education for those who are deaf,⁸² it does protect them from the goal of assimilating them into the mainstream. The right to inclusive education requires that States Parties ensure both equal access to education and equal respect for human differences. This right no longer just includes aspects of both civil and political and economic and social rights, but involves a blending of them into a new form of right.

B. The Indivisibility of Human Rights and Disabled People

Consequently, the indivisibility of human rights is something that matters a great deal in the context of disability. The CRPD calls for measures to give disabled people control over their lives and at the same time seeks to foster their inclusion into society. It is therefore not by chance that the Convention

⁷⁴ Arts 13 and 14, ICESCR.

⁷⁵ Art 18(4), ICCPR.

⁷⁶ See (n 36).

⁷⁷ Art 24(1), CRPD.

⁷⁸ CRPD Committee, *General Comment No 4. Article 24: Right to Inclusive Education* (2 September 2016) CRPD/C/GC/4, para 9.

⁷⁹ Art 24(1)(a), CRPD.
⁸⁰ S Batterbury, ‘Language Justice for Sign Language Peoples: the UN Convention on the Rights of Persons with Disabilities’ (2012) 11 *Language Policy* 256–8.

⁸¹ Art 24(3)(b), CRPD. See also art 30(4), CRPD and CRPD Committee (n 78) para 56.

⁸² G de Beco, ‘The Right to Inclusive Education According to Article 24 of the UN Convention on the Rights of Persons with Disabilities: Background, Requirements and (Remaining) Questions’ (2014) 32 *NQHR* 286; O Arnardóttir, ‘The Right to Inclusive Education for Children with Disabilities – Innovations in the CRPD’ in A Eide *et al.* (eds), *Making Peoples Heard: Essays on Human Rights in Honour of Gudmundur Alfredsson* (Martinus Nijhoff 2011) 219–20.

avoids and moves beyond the distinction between the two sets of rights. As noted by Mégret, this distinction has done a disservice to disabled people.⁸³ Whilst the added value of the indivisibility of human rights has long been recognized, the CRPD shows that it is an imperative if disabled people are to benefit fully from these rights.

It is worth noting that earlier international legal instruments reflected the then prevailing welfarist approach to questions of disability.⁸⁴ Although this approach has been rejected with the adoption of the CRPD, issues concerning the provision and use of resources remain relevant to the protection of human rights for disabled people. Indeed, and more broadly, it has been claimed that welfare can be more efficient than human rights when it comes to increasing well-being.⁸⁵ The Convention has found a middle way by adopting an approach that acknowledges but goes beyond welfarist approaches. Whilst the removal of barriers requires the allocation of resources, this is not the main purpose.⁸⁶ The CRPD aims to give disabled people ‘the full and equal enjoyment of all human rights’,⁸⁷ which of course depends on but requires more than the adoption of welfare policies.

The situation is now such that it is impossible to classify the rights protected by the CRPD as being either civil and political or economic and social, and this Convention cuts across such distinctions. This makes it clear that it is wrong to think that both sets of rights are concerned with different areas of life and that they have an only superficial interconnection. It also means that it is wrong to think in terms of there being a hierarchy or questions of priority between them. As in the case of women’s rights,⁸⁸ privileging civil and political rights has been detrimental to the interests of disabled people. Should the socio-economic dimension be set aside and forgotten, human rights would be partially deprived of content. It is therefore imperative that this deeper connection between the two sets of rights be acknowledged. Not doing so fails to take into account the situation of disabled people and thwarts their full participation in society.

The result is not only that the CRPD has placed both sets of rights on an equal footing, but also that the very existence of the division into civil and political and economic and social rights has itself become a hindrance to the proper interpretation of the Convention. While human rights more often than not have been approached through the lens of this distinction, the CRPD has

⁸³ F Mégret, ‘The Disabilities Convention: Towards a Holistic Concept of Rights’ (2008) 12 *IJHR* 265.

⁸⁴ UNGA, Declaration on the Rights of Mentally Retarded Persons (20 December 1971) A/RES/26/2856; UNGA, Declaration on the Rights of Disabled Persons (9 December 1975) A/RES/3447 (XXX).

⁸⁵ E Posner, ‘Human Welfare, not Human Rights’ (2008) 108 *ColumLRev* 1775–82.

⁸⁶ Mégret (n 83) 265–6.

⁸⁷ Art 1, CRPD.

⁸⁸ R Johnstone, ‘Feminist Influences on the United Nations Human Rights Treaty Bodies’ (2006) 28 *HumRtsQ* 149–50.

compounded the different categories of rights throughout its different provisions.

This new appreciation of the indivisibility of human rights is not only a matter of implementation: it is embedded into the various rights as set out in the Convention. This not only affects the implementation of these rights and strengthens their interrelationship but also questions the entire approach of categorizing human rights into two distinct sets of rights. The CRPD has provided a more far-reaching and comprehensive way of understanding indivisibility that bears upon the very content of human rights. The crux of the issue is that the two sets of rights have become inseparable to the point where seeking to differentiate between them becomes pointless. Both sets of rights are co-essential as human rights of disabled people. Such an understanding recognizes not only that the distinction between the two sets of rights is artificial but also that all human rights have different features that can include civil, political, economic, social, cultural as well as other dimensions, and that all these dimensions are always interjoined.

However, this understanding may be conflicting with the obligation regime created by the ICCPR and ICESCR and extended in the CRPD. As Article 4(2) of the Convention makes the notion of progressive realization only applicable to economic and social rights, States Parties must be told which rights are concerned. Since, as will be seen in section IV, no definite answer can be given, other solutions must be found, one of which is to identify just what aspects of a particular right fall within the scope of either civil and political or economic and social rights.⁸⁹ This, however, is a mistaken approach. Dissecting the Convention rights might permit such formal identification but would not help their practical enjoyment. These rights are too hybrid to be successfully implemented by such an artificial device.⁹⁰ In the examples of rights given earlier, the choice of place of residence is hollow if autistic people cannot freely opt for living arrangements other than in institutions, because these are the only places where their particular needs can be adequately met or because the applicable legislation makes the assistance required inaccessible elsewhere. Similarly, the goal of inclusive education is worthless if deaf children must adapt to school by being obliged to give up aspects of their cultural identity that ties them to their deaf peers, who may of course include their own parents. And all of this while leaving aside the question of general obligations, including the duty to provide reasonable accommodation. As a result, civil and political and economic and social rights have unexpectedly become indistinguishable from each other within the CRPD. They have become so interwoven that fracturing them undermines the whole of the Convention.

⁸⁹ This is what the CRPD Committee proposed with the right to independent living (CRPD Committee (n 71) para 39).

⁹⁰ Flóvenz (n 62) 267.

The proclamation that '[a]ll human rights are universal, indivisible and interdependent and interrelated' and recognition of obligations to respect, protect and fulfil have drawn particular attention to the interrelationship between civil and political and economic and social rights. The CPRD has pressed ahead with this development, making the categorization of human rights into two distinct sets of rights difficult, if not impossible, to carry out. This Convention thus represents the next stage in the process of dissolving the distinction between the two sets of rights. This is not an isolated phenomenon but one that characterizes the entire CPRD. By going beyond established distinctions in the field of international human rights law, the Convention has brought out a more holistic view of human rights.⁹¹ Human rights must be seen increasingly as a single entity if they are not to be deprived of real meaning. This way of understanding indivisibility does not just attribute equal value to both sets of rights or argue that these sets of rights are actually intertwined, but reflects the idea that they are mutually inextricable from each other.

IV. THE REAL AND ACTUAL ENJOYMENT OF HUMAN RIGHTS

The fact that States could not agree upon the methods for implementing civil and political and economic and social rights eventually led to the adoption of both the ICCPR and the ICESCR. As has been seen, this crystallized a division of human rights into two sets of rights. This division emerged as a result of an ideological divide correlating to different viewpoints between 'West' and 'East' in the aftermath of World War II. The argument that Western States mostly dismissed economic and social rights would, however, have been a 'myth', since support for such rights would have been well alive during the drafting of the two Covenants.⁹² The truth is that these rights started to loose attraction in the 1970s, although they had roots that in fact go back as far as the French Revolution and, according to some, even as far as the Magna Carta.⁹³

⁹¹ Mégret (n 59) 524.

⁹² D Whelan and J Donnelly, 'The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight' (2007) 29 HumRtsQ 946. See however L Kang, 'The Unsettled Relationship of Economic and Social Rights and the West: A Response to Whelan and Donnelly' (2009) 31 HumRtsQ 1009–13; D Whelan and J Donnelly, 'The Reality of Western Support for Economic and Social Rights: A Reply to Susan L Kang' (2009) 31 HumRtsQ 1047–9; A Kirkup and T Evans, 'The Myth of Western Opposition to Economic, Social, and Cultural Rights? A Reply to Whelan and Donnelly' (2009) 31 HumRtsQ 226–7.

⁹³ W Osiatynski, *Human Rights and Their Limits* (Cambridge University Press 2009) 36; C O'Conneide, 'Austerity and the Faded Dream of a "Social Europe"' in A Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014) 170–1; G Van Bueren, 'More Magna than Magna Carta: Magna Carta's Sister – the Charter of the Forest' in R Hazell and J Melton (eds), *Magna Carta and Its Modern Legacy* (Cambridge University Press 2015) 196.

Following this, the categorization of human rights into two distinct sets of rights has been associated with the State as being either intervener or abstainer. This accentuated the dichotomy between ‘positive obligations’, on the one hand, and ‘negative obligations’, on the other. As once argued by Berlin,⁹⁴ freedom has been considered to be either positive or negative.⁹⁵ Nonetheless, the dichotomy between ‘positive obligations’ and ‘negative obligations’ is difficult to distinguish in practice, and from a policy perspective any right raises questions concerning distribution of resources.⁹⁶

As a result, the central issue is not whether but *how* States should use their resources in order to meet their human rights obligations. Whether they have done so requires considering both the amount of expenditure and the generation of revenues.⁹⁷ Moreover, the resources to be taken into account include not only financial, human and natural resources but also the national and international resources potentially available.⁹⁸ As this is a continuing process, it is essential to have regard to monitoring mechanisms that can offer an accurate picture of efforts undertaken, such as indicators and budget analysis.

Having said this, the ICESCR provides that economic and social rights must be realized progressively from within the State’s available resources.⁹⁹ The notion of progressive realization applies only to such rights, as the ICCPR makes no such provision. This notion can provide an excuse for States to evade their commitments, constituting something of a ‘monstrous serpent’ in international human rights law. Be that as it may, it also explains why considerations of whether States have followed through on these commitments has tended to concentrate on economic and social rights. While civil and political rights also call for steps to pursue their implementation, the unavailability of resources will not alter their possible violation. The focus, therefore, is on whether there has or has not been a breach even though the occurrence of such breaches necessitates going further with the goal of giving effect to those rights. As civil and political rights must be implemented immediately, there is little consideration of the actual need of realizing them too. This raises the question why social and economic rights are the only

⁹⁴ I Berlin, *Four Essays on Liberty* (Oxford University Press 1969) 121–2 and 131–4.

⁹⁵ There are, however, differences between the two concepts, since positive freedom involves giving increased powers to the State whereas positive obligations emphasize the steps to be taken with a view to guaranteeing human rights.

⁹⁶ E Posner, *The Twilight of Human Rights Law* (Oxford University Press 2014) 89–90; D Garland, ‘On the Concept of “Social Rights”’ (2016) 2 S&LS 626; J Griffin, *On Human Rights* (Oxford University Press 2008) 169.

⁹⁷ B Saul, D Kinley and J Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2014) 143–4.

⁹⁸ A Kendrick, ‘Measuring Compliance: Social Rights and the Maximum Available Resources Dilemma’ (2017) HumRtsQ 657; S Skogly, ‘The Requirement of Using the “Maximum of Available Resources” for Human Rights Realisation: A Question of Quality as Well as Quantity?’ (2012) 12 HRLR 393; R Robertson, ‘Measuring State Compliance with the Obligation to Devote the “Maximum Available Resources” to Realizing Economic, Social, and Cultural Rights’ (1994) 16 HumRtsQ 693.

⁹⁹ Art 2(1), ICESCR.

rights to be subject to progressive realization.¹⁰⁰ The problem is that this progressive realization is tied up with those rights as a result of the ICESCR.

In the end, it does, then, remain necessary to know which category a particular right belongs to. It is nevertheless suggested that this cannot really be known, and particularly so as regards the CRPD. As shown in the previous section, it is hardly feasible to associate CRPD rights with only one category of rights. While this could be done—wrongly—for particular aspects of one of the Convention rights, assigning such a right to one category of rights rather than the other not only inhibits its realization but runs the risk of undermining the very freedom that that right provides. The CRPD recognizes that the implementation of human rights will continue to be restricted if disabled people are unable to exercise these rights. Even if it is possible to distinguish between sets of rights at an abstract level, doing so produces serious obstacles with respect of its application.

As a result, the differentiation between duties of immediate application and duties of progressive realization has proven to be immaterial. Human rights are always concerned with both kinds of duties, but in any event they are not assignable to any category of rights as would be required to uphold this differentiation. The solution is not to abandon the notion of progressive realization which, on the contrary, should be more deeply and more fully appreciated. Rather, it means extending the methodologies that support this notion to the entire field of international human rights law.

Rather than dwelling on positive and negative obligations, with civil and political and economic and social rights in the background, it is important to appreciate how existing ‘regulatory regimes’ lead to acute forms of marginalization.¹⁰¹ As argued by Van Parijs, ‘real’ freedom is not a question of protecting positive or negative freedom but of securing a similar level of opportunities for everyone.¹⁰² This points to the necessity of insisting on focussing on the practical benefits which a right is intended to deliver and which may vary according to the circumstances.

As illustrated by the CRPD, the advent of group-specific human rights treaties has accelerated such ways of thinking about indivisibility. These human rights treaties entail greater sensitivity to the particular characteristics of protected individuals whose needs call for measures that go beyond the formal recognition of human rights. By guaranteeing appropriate support in furtherance of this end, the CRPD has given more tangible effect to the indivisibility of human rights. What has come to matter is the real and actual enjoyment of these rights, regardless of questions of categorization.

¹⁰⁰ J Nickel, *Making Sense of Human Rights* (2nd edn, Blackwell Publishing 2007) 151; De Schutter (n 7) 527.

¹⁰¹ C Sheppard, ‘Indignation, Socio-economic Inequality and the Role of Law’ (2015) 5 *Oñati Socio-legal Series* 240.

¹⁰² P Van Parijs, *Real Freedom for All: What (if Anything) Can Justify Capitalism?* (Oxford University Press 1995) 22–3 and 28.

Such an understanding of indivisibility could lead to another way of approaching the implementation of human rights. What would matter is no longer the timing of the implementation of these rights, that is, whether now or later, but the effectiveness of doing so, that is, the guarantee that these rights can in fact be and are in reality exercised and enjoyed. The European Court of Human Rights understood this very early on when it declared that the European Convention on Human Rights (ECHR) 'is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.¹⁰³ The effectiveness of human rights' implementation means that the actual exercise of such rights must be brought to the fore. The debate must not only concern the allocation of the resources necessary to reach that goal, which is where it usually stops, but must also include discussion of political arrangements in order to reach it. The requirement to provide enabling conditions for the exercise of human rights thus gives a socio-economic dimension to classical 'liberal' rights.¹⁰⁴

What is therefore important is to create a shift in focus by examining the means of improving the practical enjoyment of human rights. The true question that States must ask themselves is what they are to do in order to guarantee that human rights make sense for any individuals, whatever the situation that they might be in. This involves consideration not only of disability, race, gender, age and sexual orientation but also of poverty, environment, dependency, participation and any other human rights issues that require special attention.

In order to achieve this, human rights should be understood as *each and every* human right. For too long, human rights have received a narrow interpretation that puts economic and social rights in the background. The dichotomy between 'positive obligations' and 'negative obligations' originated from the desire to differentiate civil and political from economic and social rights, though it subsequently served to demonstrate that the two sets of rights call for similar kinds of obligations. Meanwhile, it has left a legacy that continues to lower the status of economic and social rights. The necessity of rooting those rights more firmly into international human rights law remains as pressing as ever in times of rising inequalities.

The proposed understanding of the indivisibility of human rights may help achieve this, since it contributes to the teasing out of the nexus between the notion of human rights and civil and political rights. It calls for restraint in aligning the content of human rights with any particular category of rights. It also discourages leaning upon these categories in order to differentiate what must be achieved both now and over time.

¹⁰³ *Airey v Ireland*, App No 6289/73, Judgment of 9 October 1979, para 24.

¹⁰⁴ J Anderson and A Honneth, 'Autonomy, Vulnerability, Recognition, and Justice' in J Christman and J Anderson (eds), *Autonomy and the Challenges to Liberalism: New Essays* (Cambridge University Press 2005) 129.

One possible objection to this way of understanding the indivisibility of human rights is that it may result in economic and social rights fading even further into the background. The answer to this objection is that drawing greater attention to these rights appears to have yielded limited results with regard to their implementation. Obligations deriving from economic and social rights, by and large, continue to be evaded.¹⁰⁵ The reason is that continued reference to different categories of rights can contribute to tacit denial of their equal status. Employing such categories creates scope for the pretence that these categories have divergent foundations.¹⁰⁶ They do have shared foundations,¹⁰⁷ whereas setting them against each other seemingly provides moral grounding for granting some rights more value than others. As stated by the Special Rapporteur on Extreme Poverty and Human Rights, '[a] conception of human rights that *implicitly* accepts a radical hierarchical distinction between the two sets of rights ... is one that is fundamentally incompatible with international human rights law'.¹⁰⁸ Hence, accepting that human rights are indivisible, as is argued here, and, moreover, acting accordingly might outweigh the purported beneficial effects of continuing to approach them as comprising distinct sets of rights.

V. CONCLUSION

This article has considered the indivisibility of human rights in light of the CRPD. Back in 1952, the so-called 'Separation Resolution' meant that there would be separate human rights treaties for civil and political rights, on the one hand, and economic and social rights, on the other.¹⁰⁹ The resultant division into two sets of rights was primarily driven by questions concerning legal enforceability. The article has advanced a concept of indivisibility which breaks down this division, and the CRPD can be seen as a further step in the process of undermining such an injudicious categorization of human rights. Repeating the mantra that human rights are 'universal, indivisible, and interdependent and interrelated' does not by itself bring this about. This article has, however, suggested that the Convention provides powerful insights into the indivisibility of human rights, and how this indivisibility might be better understood and realized.

The article argued that the CRPD has generated a new understanding of the indivisibility of human rights, insofar as it considers civil and political and

¹⁰⁵ P O'Connell, 'Let Them Eat Cake: Socio-Economic Rights in an Age of Austerity' in A Nolan, R O'Connell and C Harvey (eds), *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Hart Publishing 2013) 60–1 and 66.

¹⁰⁶ Whelan (n 50) 210.

¹⁰⁷ C Gearty and V Mantouvalou, *Debating Social Rights* (Hart Publishing 2010) 98–107.

¹⁰⁸ P Alston, *Report of the Special Rapporteur on Extreme Poverty and Human Rights* (28 April 2016.) A/HRC/32/313, para 63 (emphasis added).

¹⁰⁹ UNGA, Res 543 (VI) (5 February 1952) A/RES/543(VI).

economic and social rights as inextricably bound together. It has shown both how the Convention has led to the blurring of the distinction between the two sets of rights and how the blurring of this distinction has recast the way indivisibility needs to be approached. It has also analysed the problems caused by this new appreciation of indivisibility, especially with regard to the notion of progressive realization, and highlighted the consequent demand to put a greater emphasis on the actual and real enjoyment of human rights. This new understanding of the indivisibility of human rights could accelerate attention in scholarship on all matters affecting the actual exercise of these rights, because it emphasizes the supreme importance of focussing on the effectiveness of their implementation. This can also be a stepping stone towards elevating the position of economic and social rights under international human rights law generally.