Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights

Craig Scott

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Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights

Abstract
Using the doctrine of interdependence of human rights as a starting point, the author considers the extent to which international human rights norms located in the International Covenant on Economic, Social and Cultural Rights (ICESCR) "permeate" the parallel International Covenant on Civil and Political Rights (ICCPR), thereby permitting certain social and economic rights to be subjected to the individual petition procedure under the ICCPR's Optional Protocol. After elucidating the notion of interdependence, the author evaluates the salience of the concept in international human rights discourse, and weighs this against arguments for the continued normative separation of the Covenants based on justiciability as well as normative and jurisdictional conflicts. The author argues that a partial normative unity should be forged between the two Covenants by means of creative interpretation and by the forging of institutional linkages between the supervisory organs for the two Covenants. In light of the permeability presumption thus developed, the author then concludes with an analysis of decisions taken by the Human Rights Committee in the areas of equal protection of the law, the right to a fair hearing, freedom of association, and the right to life.

Keywords
International Covenant on Economic, Social, and Cultural Rights (1966 December 16); International Covenant on Civil and Political Rights (1966 December 16); Human rights

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THE INTERDEPENDENCE AND PERMEABILITY OF HUMAN RIGHTS NORMS: TOWARDS A PARTIAL FUSION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS

BY CRAIG SCOTT*

Using the doctrine of interdependence of human rights as a starting point, the author considers the extent to which international human rights norms located in the International Covenant on Economic, Social and Cultural Rights (ICESCR) "permeate" the parallel International Covenant on Civil and Political Rights (ICCPR), thereby permitting certain social and economic rights to be subjected to the individual petition procedure under the ICCPR's Optional Protocol. After elucidating the notion of interdependence, the author evaluates the salience of the concept in international human rights discourse, and weighs this against arguments for the continued normative separation of the Covenants based on justiciability as well as normative and jurisdictional conflicts. The author argues that a partial normative unity should be forged between the two Covenants by means of creative interpretation and by the forging of institutional linkages between the supervisory organs for the two Covenants. In light of the permeability presumption thus developed, the author then concludes with an analysis of decisions taken by the Human Rights Committee in the areas of equal protection of the law, the right to a fair hearing, freedom of association, and the right to life.

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I. INTRODUCTION

The interdependence of human rights is a term that is increasingly prominent in international human rights discourse. In particular, the notion of interdependence has assumed growing importance within the political organs of the United Nations (UN). Even so, as with much ritualistic language, our conceptions of the meaning and implications of the concept are largely inchoate.

The idea of permeability is put forward as one means of giving practical legal effect to the abstract doctrine of interdependence which has, thus far in its lifespan, existed as little more than a rhetorical slogan. By permeability I mean, in broad outline, the openness of a treaty dealing with one category of human rights to having its norms used as vehicles for the direct or indirect protection of norms of another treaty dealing with a different category of human rights. Norms that overlap, either implicitly as a product of the interpretative process or explicitly on the face of the textual provisions, are particularly relevant.

The specific goal of this article is to consider the extent to which human rights norms located in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) can permeate the norms in the *International Covenant on Civil and Political Rights* (ICCPR). Such permeability would permit economic rights to be subjected to the supervisory jurisdiction of the ICCPR's Human Rights Committee, specifically its Optional Protocol jurisdiction. Thus, individuals would be given access to a petition procedure that is not available under the ICESCR, restricted as it is to a reporting system of implementation.

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1 See the most recent General Assembly resolution entitled "[I]ndivisibility and interdependence of economic, social, cultural, civil and political rights" (Resolution 41/117 of 4 December 1986). This resolution is briefly discussed in Section (hereinafter S.) III.C.2. See S.III.A.1 for an elaboration of the concept of interdependence.

2 I would like to express my appreciation to Professor Rosalyn Higgins for coining this term. The definition, elaboration and application of the term remain my responsibility alone.

3 For the ICESCR, ICCPR and Optional Protocol, see Council of Europe, *Human Rights in International Law: Basic Texts* (Strasbourg: Council of Europe Publications, 1985) [hereinafter Basic Texts] at 14, 26 and 49, respectively. Permeability, therefore, refers in the present context to the flow of norms from the ICESCR to the ICCPR. A study of the flow
The doctrine of interdependence can serve as a starting point for developing a general interpretative presumption for permeability. The separation of the two Covenants does not mean that the human rights norms contained therein are separable. Instead, a partial normative unity can be gradually forged between the Covenants, by means of creative interpretation and by the forging of institutional linkages between the Human Rights Committee and the new Committee on Economic, Social and Cultural Rights. Such a process is more in keeping with the insights and imperatives of the interdependence of human rights than is the continued isolation of the two Covenants from each other.

II. SITUATING THE HUMAN RIGHTS COMMITTEE

This study attempts to deal with the general issue of permeability by using the ICCPR and the ICESCR as expository of norms from the ICCPR to the ICESCR is also desirable, but remains outside the scope of this article.

It must be emphasized that the terms economic rights and political rights are used purely for convenience. Furthermore, the term economic rights does not include commercial economic liberty rights or classical property rights; rather, it refers to the very different breed of economic, social and cultural rights found in the ICESCR. In the Canadian Charter of Rights context, academic commentators and the judiciary tend to use the term economic rights indiscriminately. For an article sensitive to the difference, see I. Johnstone, "Section 7 of the Charter and Constitutionally Protected Welfare" (1988) 46 U.T. Fac. L. Rev. 1.

vehicles. However, specific attributes of the Covenant system may render it more or less conducive to permeability than is the case with other legal systems, whether they be international or domestic. The analysis must be sensitive to these attributes, although not slavishly so.\(^5\)

This issue is as topical as it is important. The Human Rights Committee has had to deal directly with the permeability question in a number of views handed down from its 1986 and 1987 sessions, on issues such as whether economic rights from the ICESCR may be protected indirectly by the Article 14 fair hearing and the Article 26 equal protection provisions of the ICCPR.\(^6\) Increasingly challenging and controversial claims may soon follow, such as arguments for directly incorporating the right to an adequate standard of living, found in Article 11 of the ICESCR, into the right to life found in Article 6 of the ICCPR.\(^7\) Bold as the Committee has been in its most recent cases on Article 26, the possibility exists that it will draw a hasty and ultimately arbitrary line: for example, by distinguishing the

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5 For example, Article 38, Part III of the European Social Charter, 18 Oct. 1961, Gr.Brit.T.S. 1965 No. 38, 529 U.N.T.S. 89, contains the following reference: "It is understood that the Charter contains legal obligations of an international character, the application of which is submitted solely to the supervision provided for in Part IV thereof." The ICESCR, on the other hand, contains no comparable article. Clearly the presence of this provision introduces a factor into the analysis of permeability within the Council of Europe system which will not apply as regards the UN Covenant system. This is not to suggest that this factor need be determinative, as will become apparent from my reference to some relevant European Convention of Human Rights cases. Also, in a series of Indian Supreme Court cases, economic rights contained among the Directive Principles of State Policy of Part IV of the Indian Constitution have been implied into the political rights, or Fundamental Rights, of Part III despite the presence of an express non-justiciability clause governing the Directive Principles. The non-justiciability clause of the Indian Constitution is Article 37, which reads: "The provisions contained in this Part (IV) shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."


6 See Ss.V.A and B for discussion of these decisions. The Committee's decisions are known as views: see Optional Protocol 5(4), supra, note 3.

7 See Ss.III.B.1 and V.D for a discussion of this relationship.
direct protection from the indirect protection of economic rights, and by seeking refuge in inadequate conceptions of non-justiciability. This article seeks to forestall such retrenchment and, viewed in more positive terms, to lay the groundwork for a deeper and more dynamic interaction between the two Covenants.

Furthermore, the interpretation placed on the ICCPR is of considerable significance for the law and politics of human rights in Canada. With regard to the interpretation of rights in the Charter of Rights and Freedoms, the Supreme Court of Canada has emphasized the persuasive authority of interpretations placed by international quasi-judicial organs on international human rights treaties to which Canada is party. Regardless of the evolution of the Human Rights Committee's own jurisprudence, the theoretical insights of the notions of interdependence and permeability may be independently called in aid before the Canadian courts. Nor should it be ignored that Canada can be directly impleaded under the ICCPR communication procedure. Indeed, two of the recent permeability cases decided by the Committee involved Canada. Also, given that Canada appears to treat seriously the Committee's technically non-

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9 Probably the most well-known case involving Canada is Sandra Lovelace v. Canada (Communication No. 24/1977) in United Nations, Human Rights Committee: Selected Decisions Under the Optional Protocol (Second to Sixteenth Sessions) (United Nations, 1985) 83 [hereinafter Lovelace]. The only statistics available to me reveal that, as of 31 July 1982, there were 35 communications involving Canada, a figure only surpassed by Uruguay (55): United Nations, HRC: Selected Decisions, ibid at 158. It is my understanding that Canada remains the second most impleaded country under the Optional Protocol. The two permeability cases involving Canada are Y.L. v. Canada (Communication No. 112/1981) HRC 1986 Report, and J.B. et al. v. Canada, HRC 1986 Report 151. J.B. et al. v. Canada is the ICCPR version of the Alberta Reference, supra, note 8. The Human Rights Committee handed down its admissibility decision in that case prior to the release of the Supreme Court of Canada decision.
binding views, Canadian lawyers should be aware of the possibilities of international human rights law.10

The following inquiry may appear to take for granted a relevance and authority of international human rights law that, taken in isolation, would be suspect. Isolation could take two forms: first, the isolation of law and legal action from broader social and political processes; and second, the isolation of international law from municipal legal and socio-political activity.

On the first count, consider the experience of social-action or public-interest lawyers who have sought to use the legal process to vindicate claims for welfare rights. The primary value of the so-called legalization of welfare is that it allows marginalized and relatively powerless persons in society to use litigation as a strategic tool in the social struggle for their right to be human.11 There can be no doubt that "in the field of social welfare, the courts alone are most unlikely to be a useful vehicle for achieving social change.... The most important potential role for legal challenge can be that it can politicize issues by forcing them into the arena of political debate."12 One facet of this approach is that rights can be used as banners in the assertion of political claims. It has been suggested that welfare rights that are enshrined in constitutional and statutory instruments in Latin America, but that have remained underenforced

10 It appears that An Act to Amend the Indian Act (1985) S.C. 1984-85-86, c. 27, was enacted in response to the Human Rights Committee's finding of a violation of the ICCPR in Lovelace, ibid.


for decades, have been seized upon in precisely this instrumental fashion to assist in empowering persons deprived of those rights. And in what has been termed an "establishment revolution," the Indian Supreme Court has actively endorsed the creative interpretation of constitutional rights as part of the broader struggle of poverty-stricken Indian citizens to improve their living conditions. However, it is debatable whether international treaty norms, and the interpretations placed on them, have sufficient social rootedness for this instrumental use of human rights to transcend mere manipulation of the poor.

With this caveat in mind, the second type of isolation takes on importance. The ultimate test of the efficacy of international human rights law is its link-up with municipal courts and other social and political fora. Philip Alston has emphasized the domestic context in discussing the report-monitoring system of the new Committee on Economic, Social and Cultural Rights. It is no less crucial for the Human Rights Committee to be perceived, and to perceive itself, as playing a similar "secondary or supportive role."

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14 U. Baxi, "TSS," supra, note 11 at 306. This is Rajeev Dhavan's term. Whether the Supreme Court's activism is penetrating downwards and having any kind of empowering effect is impossible to say at this stage. What is worthy of note is the conscious attempt to identify with the poor.

15 See Bhagwati, "Public Interest Litigation" (1986) 2 The Commonwealth Law 61; Bhagwati, "Human Rights as evolved by the jurisprudence of the Supreme Court of India" (1987) 13 Commonwealth L. Bull. 236. In "Human Rights," Bhagwati refers (at 244) to the public interest litigation strategy of "making basic human rights meaningful and effective for the deprived and exploited sections of humanity."

16 One may note the fact that the Universal Declaration of Human Rights [hereinafter UDHR] has served as moral authority for the introduction of new constitutional provisions in various countries: see Commission on Human Rights, Preliminary Study of Issues Relating to the Realization of Economic and Social Rights, UN Doc. E/CN.4/988 (20 January 1969) at 144. Indeed, the Canadian Charter of Rights and Freedoms, supra, note 8, must be viewed in this light. As well, the Helsinki Final Act of 1975 serves as a banner in certain Eastern European countries. For the UDHR and the Helsinki Final Act, see Council of Europe, Basic Texts, supra, note 3 at 7 and 226, respectively.

17 Alston, "Out of the Abyss," supra, note 4 at 357.

18 Ibid.
Some states will directly apply views decided against them even though they are under no direct legal obligation to do so, but, for those that do not or that only partially do, progress depends on domestic courts treating the Committee’s views as authoritative or persuasive, as well as on political campaigners invoking the Committee’s considered opinions. Such effects are unlikely to occur unless the Committee is scrupulously conscious that its authority will derive not only from the increasing sophistication of its decisions, but also from the extent to which its interpretations appeal to the needs of those most deprived of the means of being human and tap into more modern understandings of certain rights that have evolved since the drafting of the Covenants.

Alston suggests that governments may be encouraged by the non-adversarial approach of the new Committee to apply traditional judicial implementation techniques to economic rights. But this essay proceeds on the premise that, so great is the shibboleth of the non-justiciability of these rights, many governments will not move in such a direction unless shown the way by force of judicial example (the Human Rights Committee and domestic courts) or political pressure. The Committee’s views are indeed structured so that appropriately disposed governments may see them as non-adversarial, constructive suggestions that help elucidate human rights obligations. But for those governments less inclined towards such a good faith, co-operative approach, a conceptualization of the

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19 See C. Tomuschat, "Human Rights in a World-Wide Framework: Some Current Issues" (1985) 45 Z. ausl. off. R. u. VR. 547 at 578, where he discusses how some governments faithfully heed the Committee’s views while others choose to insist on their non-binding character.

20 Ibid. See also A. Brudner, "The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework" (1985) 35 U. Toronto L.J. 219, in which Brudner argues for reliance on Committee decisions because of the Committee’s objectivity, impartiality and expertise. While Brudner seems to see authority as stemming from distance or abstraction from the social context, I take the opposite view that authority derives primarily from proximity to social context: see S.III.A.2. The latter perspective exhibits scepticism in its recognition that major obstacles to the efficacy and relevance of international human rights law are created by the very detached nature of that body of law.

21 See the discussion in S.V.D on the modern concept of the right to life, and citations in note 386.

22 Alston, "Out of the Abyss," supra, note 4 at 357.
municipal link-up must permit the government to be seen as an adversary in a broader social and political struggle. As will be discussed in later sections, the Committee can be seen both as a catalyst, as described above, and as an elaborator of the content of those obligations derived from economic rights that judicial or quasi-judicial bodies are competent to supervise.23

A final observation: this article proceeds from the premises that we all perceive the light of reason through different prisms of value, and that legal interpretation, especially in the human rights arena, is a value-laden activity that should not be cloaked by the pretence of value neutrality. If we are to take human suffering seriously,24 we must also consider seriously the fact that the poorest and most vulnerable members of all societies suffer most from deprivations of both political and economic rights. It is therefore the marginalized among us who would benefit most from concrete legal action premised on the notion of the interdependence of human rights. A first step at the international level would be to begin to break down the artificial separation of the two leading universal human rights instruments by means of a permeability presumption.

III. THE INTERDEPENDENCE AND PERMEABILITY OF HUMAN RIGHTS

In this section, I will first examine the possible analytical meanings of the concept of interdependence and corresponding kinds of permeability, and will then speculate on the purchase in social experience and meaning that the interdependence notion might have. I will undertake a detailed analysis of the UN General Assembly's decision to separate the Covenants, in order to determine whether this decision meant that the norms in the two

23 Ibid. at 351. Alston points out that the content of the ICESCR was not based upon any significant bodies of domestic jurisprudence as was the case with civil and political rights found in the ICCPR. In such a situation, elaboration at the international level will have a far greater role to play. See the discussion in Ss.IV.A and IV.B on the respective roles of the two committees in elaborating obligations attaching to economic rights.

24 Recall Baxi, "TSS," supra, note 11 at n. 65.
instruments were separable. Finally, I will look at the recent and current status of the principle of interdependence.

A. The Concept of Interdependence

1. Related and organic interdependence

The standard expression of the interrelationship among human rights in UN parlance takes the following form: "[A]ll human rights and fundamental freedoms are indivisible and interdependent." While it might appear that "indivisible" and "interdependent" must have distinct meanings, an overview of the relevant General Assembly resolutions warns against tying too much to semantics.

Even so, interdependence may be understood as having two senses: organic and related interdependence. In the organic rights sense (organic interdependence), one right forms a part of another right and may therefore be incorporated into that latter right. From the organic rights perspective, interdependent rights are inseparable or indissoluble in the sense that one right (the core right) justifies

25 See Article 1(a) of UN General Assembly Resolution 32/130, "Alternative approaches and ways and means within the UN system for improving the effective enjoyment of human rights and fundamental freedoms" (16 December 1977); Preamble to Resolution 41/117, supra, note 1; and Preamble and Article 6(2) of UNGA Resolution 41/128, Declaration on the Right to Development (December 1986).

26 In the Preamble to Resolution 32/130, ibid., the phrase is "interrelated and indivisible," while in Article 13 of The Proclamation of Tehran, 1968, Final Act of the International Conference on Human Rights, Tehran, U.N. Doc. A/CONF. 32/41, "indivisible" is used by itself. In the earliest resolutions invoking the concept -- those dealing with the question of whether to have one or two covenants -- the wording is "interconnected and interdependent": see UNGA Resolution 421(V), "Draft International Covenant on Human Rights and Measures of Implementation: Future Work of the Commission on Human Rights" (4 December 1950) and UNGA Resolution 543 (VI), "Preparation of two Draft International Covenants on Human Rights" (5 February 1952). These resolutions will be discussed in SS.III.B.1 and 2. Commentators invariably use the two terms interchangeably, with a preference for "interdependence," although this observation is only impressionistic: see T. Van Boven, "Distinguishing Criteria of Human Rights" in K. Vasak & P. Alston, eds, The International Dimensions of Human Rights, vol. I (Westport, Conn.: Greenwood Press, 1983) at 43; Van Boven only uses "indivisibility."
the other (the derivative right). To protect right \( x \) will mean directly protecting right \( y \). Organic or direct permeability may accordingly be seen as the direct protection of an ICESCR right because that right is incorporated into, or is part of, a particular right in the ICCPR.

To take a central example, that of the relationship between ICCPR 6(1) and ICESCR 11(1), the question is whether the "right to life" can be interpreted to include a "right to an adequate standard of living," various aspects of the latter right thus falling to be adjudicated in the name of the former. If sustainable, such an interpretation generates an implicit overlap between the two articles, raising issues of normative and jurisdictional conflict which must be addressed before a presumption for permeability can be established. A second example of organic permeability, involving some degree of explicit overlap, is the relationship between ICCPR 22 on freedom of association and ICESCR 8 on various trade union rights.

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For a discussion of the notions of core and derivative rights, see J. Raz, "On the Nature of Rights" (1984) 93 Mind 194 at 197-99. Raz notes at 197:

Just as rights are grounds for duties and powers so they can be for other rights. I shall call a right which is grounded in another right a derivative right. Non-derivative rights are core rights. The relation between a derivative right and the core right (or any other right) from which it derives is a justificatory one.

It should be noted that I have used "core right" more broadly than Raz. I have used the term in the sense of a grounding right, which may itself be a derivative of another right.

28 ICCPR 6(1), supra, note 3, reads: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." ICESCR 11(1), supra, note 3, reads:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing; and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

29 See S.IV.B where these issues are discussed.

30 See S.V.C.
Furthermore, two kinds of organic interdependence might be distinguished in theory. First, the logical or semantic entailment conception argues, for example, that for the right to an adequate standard of living (ICESCR 11(1)) to form part of the right to life (ICCPR 6(1)), the former derivative right must be a more specific form of the latter general core right. The relationship is one of logical entailment.31 Second, the effectivist or foundational conception asserts, for example, that the right to an adequate standard of living is part of or is justified by the right to life because the effectiveness of the latter right depends on it. The goal is to render rights meaningful and non-illusory. The relationship is justificatory in nature.32

That the two senses of organic interdependence are watertight is doubtful. The logically necessary sense retains its integrity only as part of an internally consistent view of the nature of the interpretative enterprise. In other words, it is only by virtue of a highly restrained and historicist view of interpretation that the right to an adequate standard of living in ICESCR 11(1) cannot be incorporated into the right to life in ICCPR 6(1). If, as a first step, the right to life is narrowly defined (for instance, as a right not to be violently deprived of one's life by state agents), then what can be

31 Judge Sir Gerald Fitzmaurice has, in several dissents in cases before the European Court of Human Rights, advanced what I call logical or semantic entailment as the test for implying a right. In the Golder Case (1975), 1 E.H.R.R. 524, (sub nom. Golder v. United Kingdom) Ser. A, No. 18 [hereinafter Golder, cited to E.H.R.R.], he said:

[An interpretation ... needs to have a positive foundation in the convention that alone represents what the parties have agreed to -- a positive foundation either in the actual terms of the convention or in inferences necessarily to be drawn from these -- and the word "necessarily" is the decisive one [at 563, para. 32].... The ejusdem generis rule ... requires that, if any implications are to be drawn from the text for the purpose of importing into it, or supplementing it by, something that is not expressed there, these implications should be, or should relate to, something of the same order, or be in the same category of concept, as figures in the text itself.... As has already been pointed out, the concept of the incidents of a trial has only one necessary implication, viz. that a trial is taking place -- that proceedings are in progress. It implies nothing in itself about the right to initiate them, which belongs to a different order of concept [at 573-74, para. 47].

32 Raz specifically denies that the analytical core/derivative notion means the logical entailment of rights: “The relation of core and derivative rights is not that of entailment, but of the order of justification.” Supra, note 27 at 198. It will readily be apparent that what is primarily at issue is a different understanding of what form of necessity is required in order that one right be implied or incorporated into another.
semantically derived form this core right is limited by that narrow definition. A different view of the interpretative task would produce a different starting point. A wider range of derivative rights would semantically flow from the right to life if that right were more purposively or teleologically defined in the first place. For instance, if the core right to life is interpreted according to an arguably more modern conception, so as to be understood as the right to live or the right to a quality life, the right to an adequate standard of living can logically be entailed by the core right. Thus, value choices can submerge the distinction between the logical entailment conception and the effectivist conception of interdependence.

Interdependence may also be understood in its related rights sense (related interdependence), according to which the rights in question are mutually reinforcing or mutually dependent, but

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33 See the exchange between (Sir) James Fawcett and Judge Fitzmaurice mentioned in the pleadings of the National Union of Belgian Police Case (1975), Eur. Court H.R. Ser. B, No. 17 at 238-42, for a clash between an effectivist and a semanticist.

Such semantic arguments are related not only to certain theories of legal interpretation but also to certain philosophical theories. Jack Donnelly has argued that implication of rights may run up against the instrumental fallacy: "Simply because A requires X to enjoy R does not entail that A has a right to X ... [T]he instrumental necessity of X for the enjoyment of A's right R does not establish that A has a right to X." See J. Donnelly, "In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development" (1985) 15 Cal. W. Int. L.J. 473 at 485. Donnelly was arguing against deriving the right to development from the right to self-determination. However, while logically true, it is historically inaccurate in the international human rights field. Economic rights were articulated, in part, because the significance of other more classical human rights depended on them. Instrumental necessity, then, has been treated as a good reason to recognize rights and can equally be treated as a good reason for implying a right. Logical entailment falls outside the terms of debate. I owe these points to Professor Vojin Dimitrijevic's comments at a conference entitled "Development, Environment and Peace as Human Rights: Is Calling Them Rights a Useful Strategy Toward Their Achievement?" (Oxford, 29 May-31 May, 1987) [unpublished]. It should further be noted that the instrumental fallacy appears to argue against mandatory entailment of rights by virtue of instrumental necessity. This also falls outside the terms of debate because of the value-laden nature of the interpretative arguments being advanced in this article. A fundamental premise is that choices are involved. My argument is not that the Human Rights Committee must adopt certain interpretations, but that the Committee should do so.

34 See infra, notes 386 and 387.
distinct. With related interdependence, rights are treated as equally important and complementary, yet separate. To protect right \( x \) will indirectly protect right \( y \). Related or indirect permeability may be viewed as distinct from organic permeability because it involves the question of whether a right in the ICCPR applies to a right in the ICESCR, and not whether this latter right is part of the former right. The political right is an autonomous right that can beneficially affect economic rights, but, in invoking the political right, no determination is made about the level of provision or adequacy of respect for the economic right as such. Two examples will clarify the point.

First, ICCPR 14(1) entitles a person to a fair and public hearing "in the determination ... of his rights and obligations in a suit at law...." The topical question is whether "suit at law" can include public law proceedings involving social welfare rights and, if so, which proceedings and which rights. The application of procedural due process, or principles of fundamental (procedural) justice in the Canadian context, is a complex and vast topic. The only point in this article is that a presumption for permeability should be a weighty but rebuttable consideration. For the purpose at hand, any protection of economic rights offered by ICCPR 14(1) would be indirect.

Second, there is the ICCPR 26 equal protection clause. It will be examined in some detail later. For present expository purposes, the question is whether "equal protection of the law" applies to rights in the ICESCR. The Human Rights Committee has recently answered this question in the affirmative, with the result that these rights will now receive the indirect protection of the autonomous

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35 Interdependence suggests a mutual reinforcement of rights, so that they are more valuable together, as a complete package, than a simple summation of individual rights would suggest; for example, having civil and political rights but not economic and social rights is not "half a loaf" but substantially less.


36 See S.V.I.B for citation and discussion.

37 See discussion in S.V.B.

38 See S.V.A.

39 Ibid.
There is, furthermore, an implicit overlap with ICESCR 2(2); this might be viewed as an organic overlap in that ICCPR 26 arguably has incorporated and is directly protecting ICESCR 2(2).

The terms related and organic rights have not been randomly chosen. They emerged from a concrete permeability situation before the organs of the European Convention on Human Rights, involving the issue of whether elements of Article 6 of the European Social Charter, including the right to strike, could be incorporated into Article 11(1) of the Convention. In the National Union of Belgian Police Case, the European Commission of Human Rights interpreted ECHR 11(1) as a "hybrid" right, containing elements of "a traditional liberal right or civil liberty, and an economic right." This fact meant that ECHR 11(1)'s language did "not exclude a construction to the effect that certain obligations with respect to trade union freedom may be incumbent upon the State, even in its capacity as an employer." In implying a right to consultation into ECHR 11(1), the Commission had this to say:

40 "Autonomous" in the sense that it is not tied to other articles as is ECHR 14(1).

41 For the text of ICESCR 2(2), see infra, note 299.

42 ECHR 11(1), in Basic Texts, supra, note 3, provides: "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests." ESC 6, in Basic Texts, supra, note 3, lays down:

With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake:

1) to promote joint consultation between workers and employers;
2) to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employer's organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;
3) to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and recognise:
4) the right of workers and employers to collective action in cases of conflict of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.


45 Ibid. at 48, para. 60.
[It cannot be denied that one of the fundamental elements of the right to take trade union action is the trade union's right to protect the economic and social rights of its members. Is it not by means of consultation machinery and, in a more general context, collective bargaining, that the union will be able to do so? 46

However, a dissenting minority took issue with this approach:

What may be called neighbouring or related rights, such as the right to collective bargaining, voluntary/compulsory conciliation and arbitration or the right to strike, do not come within the scope of the concept [of trade union freedom of association]... Without freedom of association these rights would not exist or at least [would] be of no practical value. They may be exercised and utilised effectively only where freedom of association is properly safeguarded but they do not ... form part of the very concept of freedom of association but are rather to be seen as an extension of such freedom. 47

To complete the development of our conceptual framework, we must finally refer to the subsequent arguments before the European Court (by the Commission's Principal Delegate, James Fawcett), which were designed to counter the minority's invocation of the idea of related rights:

In the exercise of Convention rights and freedoms, we may often find other rights involved which may on the one hand be called neighbouring or related rights yet separate. Or, on the other hand, they are organic or necessary to the exercise of the Convention rights and freedoms, so that even if they are not stated expressly in the Convention they [are] to be understood as being there. Now this distinction between what I would call neighbouring rights or related rights and organic or essential rights again must be carefully kept. The fact that rights in either group may be dealt with separately in various instruments is not decisive for their character. 48

Fawcett and the Commission majority thus saw ESC 6 rights as essential to making ECHR 11(1) non-illusory — that is, as organic to ECHR 11(1) — and at the same time saw ECHR 11(1) not only as

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46 Ibid. at 53, para. 72 [emphasis added].

47 Separate Opinion of Mr. Kellberg with which Messrs Sperduti, Welter, Mangan and Polak concurred, ibid. at 61, para. 4 [emphasis added].

48 Verbatim Report of the public hearings of the National Union of Belgian Police Case, supra, note 33 at 229 [emphasis added]. Fawcett, at 236, added:

... I believe it to be there, because we may either say that it is necessary to the protection of the interests of the individual members; in other words, it is what I have tried to describe as an organic or essential right and not merely an incidental one; or it can be regarded as necessary in general to secure the objects of freedom of association. I believe it would be possible to approach it in either way. The majority opinion in the Commission ... takes perhaps the second course. But I believe both courses are open.
an end in itself but as related to the indirect protection of other economic rights apart from esc 6 — that is, as a related right.  

2. Interdependence and social meaning 

Upendra Baxi has forcefully argued: "[T]here is an immeasurable distance between what we call 'human rights' and the right of all [to be] human.... This distance can begin to be traversed only if we claim the audacity to look at the human rights models from the standpoint of the historically oppressed groups." From the vantage point of the underside of history, the intimate relationship between all human rights has a potential grounding in social experience and a resultant meaning that may be far ahead of understandings generated in less oppressive conditions. Two points cannot be over-emphasized. First of all, the point of reference, in this discussion as well as in international human rights law, should be the promotion of being human or of the capacity to be human. The term human rights tends to push rights to the foreground, suggesting they are somehow tangible and objective entities that interact (for instance, interdependently), are violated, are promoted and so forth. The term interdependence attempts to capture the idea that values seen as directly related to the full development of personhood cannot be protected and nurtured in isolation. It is not meant to create the impression of relationships between rights as entities with some kind of objective existence that goes beyond intersubjective understandings. Admittedly, the ideas of related and organic rights are in danger of creating just this impression. It is important to remember that the idea of interdependence has been developed not for the sake of rights but for the sake of persons. 

49 Thus, the organic permeability of ECHR 11(1) to ESC 6 rights is in part motivated by ECHR 11(1)'s permeability in relation to other economic rights, which the exercise of trade union freedoms help protect. 

50 Baxi, "From Human Rights," supra, note 11 at 199. 

51 As opposed to the mainstream: see G. Gutierrez, The Power of the Poor in History (SCM Press, 1983) at 20-21.
Second, to say that the situation of the poor and oppressed in all societies is paradigmatic to the idea of interdependence is only to say that from the social reality of the poor and oppressed emerge dimensions of human need and personhood that other sectors of society ignore or deny. Whether human rights language is the best vehicle to express these deeper human dimensions is a separate and controversial story, but, once rights do find a place in mainstream vocabulary, the notion of interdependence is bound to be imbued with an intensity of experienced meaning that outstrips any purely intellectual understanding. This is especially so if

52 Alston has captured the essence of this:
The situation in Central America today, for example, cannot be adequately or productively analysed without taking full account of both sides of the human rights equation. In this sense, the much vaunted interdependence of the two sets of rights is not simply a hollow United Nations slogan designed to conceal an ideological split but an accurate reflection of the realities of the situation.
"Out of the Abyss," supra note 4 at 52.

53 It is well worth noting the views of non-governmental organizations (NGOs) which are active within the UN. A glance at the NGO contributions to the 1987 session of the Commission on Human Rights under the agenda item dealing with economic rights reveals a striking emphasis on the interdependence of human rights, and of human rights deprivations as fundamental to the experience of the poor in all societies.

ATD Fourth World, known for its involvement with the marginalized in developed as well as developing countries, offers the view of extreme poverty as "a violation of human rights as a whole." Extreme poverty can set off a chain reaction which has a lasting effect in preventing the persons concerned from exercising the rights and responsibilities that are normally attributed in their society. After giving many examples to support this contention, ATD Fourth World's representative made the following appeal:

[The situation of families living in extreme poverty shows that the lack of economic, social and cultural rights compromises the civil and political rights which are considered a priori as the easiest to guarantee. Their situation forces us to make a closer study of the question of the indivisibility of human rights.... How does it happen that human rights to which, in principle, all human beings are entitled, become in reality rights that cannot be exercised without a minimum of means?... The Commission on Human Rights should have access to the experience of the most underprivileged populations, not only because this is standard democratic procedure but also because the most poverty-stricken experience situations and draw conclusions that are beyond the conception of persons in a different situation.

human rights are thought of as a collection of socially and historically generated claims designed to recognize or secure deeply held values or perceived interests.\(^{54}\)

The Human Rights Committee should be concerned that its perspectives on human rights be linked to the social reality of those whose human existence is most threatened. Such linkages might perhaps be thought of in terms of upwards and downwards penetration of meaning. The upwards, experiential penetration of meaning roots human rights and the interpretation of legal norms in social experience. Peter Gabel has said that notions of human rights persist in a culture or in a societal setting as "something like an ethical memory," \(^{55}\) even after sight is lost of the historical and social circumstances that first generated the rights. He notes how our tendency to reify rights creates the illusion that the right to an experience can create the experience itself, and [reverses] the true relationship between the meaning of verbal concepts and the qualitative or lived milieu out of which they arise. From my point of view, the critique of rights is a critique of that reversal; it is aimed at clarifying the possible existential meanings that rights can acquire once their true relationship to existence itself has been understood.\(^{56}\)

On the other hand, downwards, informational penetration of meaning is similar to what Gabel is concerned about. On this view, information about human rights and the interpretations placed on them can funnel into an empowerment process, when intended beneficiaries of human rights guarantees compare formal, legal reality to their own experience of life.\(^{57}\) Some critics of the idea of rights tend to understate the value (if only instrumental) of the

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\(^{54}\) This dynamic generation of human rights might be seen as a kind of social labelling process. Rights, in formal terms, may be viewed as intermediate conclusions between statements of a right-holder's interests and others' duties: see J. Raz, "Legal Rights" 4 Oxford J. Leg. Studies 5. But, when we look to the content of human rights, those statements must be the product of human experience, not abstract from it, if the human rights argued for are to be meaningful to the right-holder.


\(^{56}\) Ibid. at 1598.

\(^{57}\) This gap can also be disempowering when people cannot see how they might make use of it, or when it is so wide that using legal norms as a point of reference or goal is of limited utility. Symbolic utility might remain: recall the discussion of rights as banners in S.II.
presence of theoretical concepts which, although they may not resonate in a particular society or sector of society, are open to appropriation, transformation, and, ultimately, enrichment. One function of the critique of so-called "bourgeois" rights, for instance, should be to broaden their applicability and significance by bringing to bear the experience and viewpoint of the socially and economically disadvantaged upon the original meaning.\footnote{58} Thus, one can envisage a dialectic of sorts between the interpretations placed on rights by the Human Rights Committee, the members of which attempt to adjust their interpretations to the perspective of disadvantaged persons, and the interpretations by disadvantaged persons themselves.

Let this not be taken as a hidden argument for the priority, in value or time, of economic rights. The interdependence concept rests on a very real insight into the need for the promotion in tandem of key rights from both traditional categories. As Alan Gewirth has put it, "[t]he effective distribution of civil liberties, far from being a passive effect of the proper distribution of food, housing, and health care, can strongly facilitate the latter distribution."\footnote{59} We have already touched on the indirect defence of positive legal entitlements by way of the right to a fair and public hearing and the right to equal protection of the law. Further, much has been made of the key role of the participation of the poor in the improvement of their own quality of life.\footnote{60} Intimately linked to

\footnote{58} See Sparer, "Fundamental Human Rights," \textit{supra}, note 11, and Baxi, "From Human Rights" and "TSS," both \textit{supra}, note 11. Gabel has recently put more emphasis on this idea: "[A]ppropriation would involve a kind of 'hermeneutic redemption' in which indeterminate abstractions are reinterpreted in accord with their true existential-ontological significance, and I think this is exactly what social movements should do when advancing new constitutional interpretations." See P. Gabel, "P. G. to M. Horwitz: A Letter" (July 1988) CLS, Newsletter of the Conference on Critical Legal Studies 44. See also M. Horwitz, "Rights" (1988) 23 Harv. C.R. - C.L.L. Rev. 393 at 406.


participation, which does not find explicit entrenchment in either
Covenant in relation to economic and cultural decision-making and
institutions.\textsuperscript{61} are the rights to freedom of association,\textsuperscript{62} to peaceful
assembly,\textsuperscript{63} to take part in the conduct of public affairs,\textsuperscript{64} and to
freedom of expression, including the freedom to seek, receive and
impert information and ideas of all kinds.\textsuperscript{65} It is noteworthy that at
least one member of the new Committee on Economic, Social and
Cultural Rights, at the March 1987 inaugural session, asserted (in
the examination of the Federal Republic of Germany's state report)
that the notion of interdependence confers authority on the
Committee to ask questions about freedom of speech, to the extent
that that freedom affects economic rights.\textsuperscript{66}

\textsuperscript{61} Although, see ICCPR 25, supra, note 3: "Every citizen shall have the right and the
opportunity ... (a) to take part in the conduct of public affairs, directly or through freely
chosen representatives...." This article could be interpreted broadly to include economic
decision-making.

\textsuperscript{62} Ibid., ICCPR 22(1).

\textsuperscript{63} Ibid., ICCPR 21.

\textsuperscript{64} Ibid., ICCPR 25(a).

\textsuperscript{65} Ibid., ICCPR 19(2). The instrumental linkage is made clear in the following statement:
[P]erhaps the strongest influence in preventing the occurrence of famine in India has
come from a relatively free press.... A number of threatened famines have failed to
materialise precisely because of this "political early warning system".... If ... it is correct
to think that information is both politically and morally extremely important, then the
need to give publicity to less dramatic but more widespread misery must be seen as
crucial. The politicisation of the issue may be essential for a rapid solution and may
well be deeply dependent on the media.


\textsuperscript{66} See CESCR: Report on the First Session, supra, note 4 at para. 227. There were
several other examples of questions which overlapped with the ICCPR articles at the new
Committee's first session. For example, questions about family reunification were asked under
ICESCR 10 (on protection of the family), which clearly raises freedom-of-movement issues
found in ICCPR 12 as well as a direct overlap with ICCPR 17 and 23. Questions were put
to state representatives about popular participation. Consent, or choice, elements that are
explicitly part of certain ICESCR articles, like Art. 6(1) on the right to work or Art. 10(1)
on the right to marry, were carried over to articles where the choice element is not explicit:
for example, Art. 11(1) and the right to housing. One member of the new Committee
suggested that it should address whether it or the Committee for the Elimination of All Forms
of Discrimination Against Women should focus on the question of discrimination against
women as regards rights in the ICESCR. The above account is from my observation of the
session.
B. Interdependence and the Two Covenants: Did Separation Imply Separability?

This section examines why there are two Covenants rather than one, and evaluates the significance of this division for the role of interdependence as the linchpin of the permeability presumption. The division of the Covenants was accompanied by a strong endorsement both of the interdependence of the human rights distributed between them, and of the unity of purpose of the treaties. Since the decision to draft two Covenants, the concept of interdependence has been gaining strength. It will be argued that the way has been cleared for a legal principle that derives from the idea of interdependence, and that also respects the reasons for the separation of the Covenants to the extent that those reasons remain valid.

1. The reasons for separate instruments

The formal history of how there came to be two Covenants has been dealt with in some detail elsewhere, and will only be briefly recounted here in order to set the scene for an analysis of the substantive debates.\(^6\) It was decided early on, at the second (1947) session of the Commission on Human Rights, that three working groups would simultaneously draft a declaration, a single treaty, and measures of implementation for that treaty, all of which would constitute an International Bill of Human Rights.\(^7\) The Universal Declaration of Human Rights was drafted and adopted by 1948, and contained essentially the entire range of human rights being championed at the time. At its sixth (1950) session, the Commission decided that the Draft Covenant that they had been working on, which contained only so-called civil and political rights,


\(^7\) Annotations, ibid. at 2.
would be the first in a series, and that the so-called economic, social and cultural rights would therefore not be included. 69 But despite the fact that in Resolution 303 C (XI) the Economic and Social Council (ECOSOC) had just approved the Commission's decision not to include economic rights, 70 ECOSOC also, in Resolution 303 I (XI), requested the General Assembly to make "policy decisions" regarding, among other matters, the desirability of including economic rights in the Draft Covenant. 71 This was apparently the result of a push by the Soviet bloc and some developing states. The General Assembly then adopted Resolution 421 E (V) (1950), which provided that the Covenant would include economic rights. 72

However, in the following year some Western states, along with some developing states, went on the offensive. At the Commission's seventh (1951) session, India proposed that the Assembly be asked to reconsider the Unity Resolution because "economic, social and cultural rights, though equally fundamental and therefore important, formed a separate category of rights from that of civil and political rights, in that they were not justiciable rights, and that the method of their implementation was, therefore, different." 73 This was voted down and the Commission went on to draft fourteen articles on economic rights, but left the decision hanging as to which measures of implementation would apply to which parts of the Covenant. 74 Subsequently, in ECOSOC, the United States, the United Kingdom, Belgium, India and Uruguay seized on this implementation quandary and succeeded in having Resolution 384 C (XIII) adopted. That Resolution requested the Assembly to reconsider the Unity Resolution because of the problems of placing

69 Ibid. at 3.
70 Ibid.; ECOSOC Res. 303 C (XI) (9 August 1950).
71 Annotations, ibid. at 6; ECOSOC Res. 303 I (XI) (9 August 1950).
72 Res. 421 E (V), supra, note 26 [hereinafter the Unity Resolution].
74 See Jhabvala, ibid. at 155.
rights and obligations of "different kinds" in a single instrument.\textsuperscript{75} In the Assembly, despite a pre-emptive attempt by Chile to have the Unity Resolution reaffirmed, Resolution 543 (VI) (1951) was adopted stating that two Covenants, for the two supposed categories of human rights, would be drawn up.\textsuperscript{76}

The subsequent treaties, which opened for signature in 1966 and went into force in 1976, contained differently worded obligations and different implementation machinery. The \textit{ICESCR} provides in Article 2(1) for an obligation based on a principle of progressive realization.\textsuperscript{77} Part IV lays down provisions for \textit{ECOSOC} to supervise state reports, a function only recently taken on by the new Committee on Economic, Social and Cultural Rights.\textsuperscript{78} On the other hand, the \textit{ICCPR} provides for a so-called immediate obligation in Article 2(1) "to respect and to ensure" the rights in that Covenant.\textsuperscript{79} A report procedure is also laid down in its Part IV and a special treaty body, the Human Rights Committee, is charged with supervision of that procedure. Of central importance, however, is the vesting of jurisdiction in the Committee, under the Optional Protocol, to consider communications from individuals.\textsuperscript{80} Ultimately, it is the lack of a similar petition procedure in the \textit{ICESCR} that is the concern of this study.

\textsuperscript{75} \textit{Ibid.}

\textsuperscript{76} \textit{Annotations, supra, note 67 at 5; Res. 543 (VI), supra, note 26 [hereinafter the Separation Resolution].}

\textsuperscript{77} \textit{ICESCR} 2(1), \textit{supra}, note 3, reads:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present covenant by all appropriate means, including particularly the adoption of legislative measures.

\textsuperscript{78} \textit{ICESCR} 16-22, \textit{supra}, note 3. See \textit{supra}, note 4 and Ss.IV.A and B for a discussion of the new Committee on Economic, Social and Cultural Rights.

\textsuperscript{79} \textit{ICCPR} 2(1), \textit{supra}, note 3, reads:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

\textsuperscript{80} See Optional Protocol 5(1) and 5(4), \textit{supra}, note 3.
A survey of various UN debates leading up to the decision of the General Assembly to allocate human rights between two instruments reveals three broad categories of reasons for the separation.81

(1) Implementation-based reasons:

Human rights, it was consistently contended, could be classified into two categories according to their different natures. It was carefully stated that no hierarchy of importance or priority of attention resulted from this division. But the series of differentiating features or dichotomies82 which were said to flow from these different natures was argued to render one category (those rights that appear in the ICRC) non-justiciable, and therefore susceptible to different procedures of implementation from those rights which appear in the ICCPR.83

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82 For a discussion of these dichotomies, see S.IV.A.

(2) **Ideological or political reasons:**
It is significant that the period following the Second World War saw international politics and ideology join hands as never before, and that the Cold War, as well as the Korean conflict, were well under way at the time of the separation debates. One writer refers to the "conventional wisdom" that the division of the Covenants occurred because of the East-West split in international politics and the accompanying ideological disagreement over the value of economic rights. While delegations did not expressly invoke such political grounds as an explanation for their own positions for or against a single covenant, they often asserted that such reasons were behind the positions of other states. A survey of the pattern of these attacks suggests a general East-West axis (mostly East to West), although some developing countries' representatives targeted either East or West as pursuing scarcely veiled ideological agendas.

(3) **Pragmatic reasons:**
A rather eclectic collection of arguments was advanced, amounting to practical considerations in favour of two covenants. Sometimes the caveat was added that "in principle" the delegation in question would be in favour of including all human rights in a single treaty.

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84 FCO (UK), supra, note 81 at 29; Pechota, supra, note 81 at 42.


87 See A/C.3/SR.299 (1950) (Saudi Arabia against "colonial powers") 187/28; A/C.3/SR.299 (1950) (Syria against "colonial powers") 55/6; A/C.3/SR.312 (1950) (Lebanon against Soviet bloc) 255/62; A/PV.374 (1952) (Chile against "industrial countries") 502/58; A/PV.374 (1952) (Philippines against political motives in general) 511/151.

88 For example, A/C.3/SR.297 (1950) (Brazil) 171/5.
Some of the main arguments were:

(i) the concern that the world community was expecting quick results and that devoting the requisite attention to economic rights would produce too great a delay;superscript 89

(ii) the related concern that the articles on economic rights drafted to that point needed considerable reworking, whereas the political rights were, for the most part, already expressed satisfactorily;superscript 90

(iii) the reminder that any covenant had to be generally acceptable to the large majority of UN members, so that it could be ratified and enter into force;superscript 91

(iv) the concern that the work of specialized agencies, notably the International Labour Organisation, might be overlapped and duplicated if economic rights were included;superscript 92 and

(v) the view that two instruments were desirable because virtually all states would be willing to sign at least one.\superscript{93}

It should be noted that the practical concern with delay was also invoked by proponents of a single covenant, to express concern


\superscript{90} See A/C.3/SR.297 (1950) (New Zealand) 172/12; A/C.3/SR.298 (1950) (France) 177/2; E/SR.523 (1951) (Belgium) 399/21.


\superscript{93} See A/C.3/SR.393 (1952) (Philippines) 274/31-33; A/C.3/SR.396 (1952) (Sweden) 294/17.
that separation could result in the postponement or even the cancellation of plans for a second instrument on economic rights.\textsuperscript{94}

One notable feature of the three categories of reasons for separation\textsuperscript{95} is that they are not watertight.\textsuperscript{96} Political motives can easily be dressed up in different language and, in any case, are intimately related to other sincere stances. Debates on implementation measures belie ideological predispositions, for instance. The focal point of debate was the implementation question, but, as Farrokh Jhabvala puts it:

[It] is clear from the record that all Soviet-bloc states backed the idea of one comprehensive covenant, while all Western-bloc states supported the separation of the sets of rights into different treaties, thus making clear the ideological and political importance the decision was perceived as having.\textsuperscript{97}

In addition, the acceptability concern is not necessarily pragmatic at all. It was linked to the idea that political rights were somehow more universal than economic rights.\textsuperscript{98} It was also transparently related to the warnings by some states, notably the United States, that they would not sign or ratify an instrument

\textsuperscript{94} See A/C.3/SR.298 (1950) (Mexico); E/SR.525 (1951) (USSR) 414/48 which was directly replied to at E/SR.525 (1951) (US) 417/41. Rejoinder at E/SR.525 (1951) 418/48 (USSR).

\textsuperscript{95} It should be said that the categories are compatible with those of Farrokh Jhabvala who has conducted the only other detailed analysis of the separation issue: Jhabvala, supra, note 67 at 157-58. My description of the implementation-based reasons for separation was deliberately cursory, as this will be discussed in detail in the section on the justiciability of economic rights: see S.IV.A. The only point to note at the moment is that state delegations at times treated the justiciable/non-justiciable distinction as simply one of several differences between the two sets of rights, but, in fact, justiciability is an umbrella concept that sums up the effect of the various dichotomies which are thought to differentiate the rights. Thus, justiciable/non-justiciable is an umbrella or meta-dichotomy which is directly tied to different systems of implementation. The above-quoted proposal by India in the Commission on Human Rights in 1951 clearly shows the link: see supra, note 73.

\textsuperscript{96} The best example of this is the fact that they were often invoked at the same time, as when Lebanon referred to all three at A/C.3/SR.312 (1950) 255/60-66.

\textsuperscript{97} Jhabvala, supra, note 67 at 159.

containing economic rights.\textsuperscript{99} The irony remains, of course, that the United States has yet to ratify either Covenant.

As well, language used by some states when linking the different natures of human rights to implementation called into question the relative value of economic rights, and even their status as human rights.\textsuperscript{100} Partly as a result, certain other states openly expressed a suspicion that some Western states were deliberately using separation to prevent the adoption of any covenant dealing with economic rights.\textsuperscript{101} On the other side of the coin, Soviet-bloc states took the position that no special treaty regime of implementation was doctrinally acceptable, least of all one involving individual petitions and a quasi-judicial role. As a result, the credibility of their arguments for a single covenant was seriously compromised.\textsuperscript{102}

2. The place of the principle of interdependence

I turn from the reasons for the separation to examine how the idea of interdependence emerged from the debates. There is no doubt that the concept was very frequently invoked across the spectrum. The proponents of a single covenant\textsuperscript{103} tended early on in the debate to emphasize one side of the equation: that political

\textsuperscript{99} See A/C.3/SR.393 (1952) (Philippines referring to India, Belgium, the US, and Lebanon serving notice that they would only sign a covenant with only civil and political rights) 274/32. See also FCO(UK), supra, note 81 at 29; Pechota, supra, note 81 at 41, 42; J. Humphrey, The United Nations and Human Rights (Toronto: Canadian Institute of International Affairs, 1963) at 10 (cited in FCO (UK), ibid.).

\textsuperscript{100} See A/C.3/SR.297 (1950) (Canada: economic rights were "advantages," "social aims," not "human rights in the narrow sense") 174/5/45-47; E/SR.524 (1951) (US: "objectives to be attained", "rights") 406/13-18; E/SR.524 (1951) (Canada) 409/55-57.

\textsuperscript{101} See supra, note 86.


\textsuperscript{103} Among the most forceful and eloquent of whom were Third World delegations such as Chile, and not only Soviet-bloc states.
rights were meaningless or ineffective without economic rights.\textsuperscript{104} This is not surprising, given the context of a concerted push to have economic rights included in a draft covenant that already assured the place of political rights. There were some very one-sided ripostes by proponents of two instruments, amounting to claims that economic rights would naturally follow respect for political rights.\textsuperscript{105}

When the separation debate intensified during the campaign to overturn the Unity Resolution, states favouring separation increasingly invoked a more balanced view of interdependence.\textsuperscript{106} States favouring a unified instrument exhibited a corresponding, if not greater, tendency to claim a less one-sided version of interdependence.\textsuperscript{107} Most crucially, there were some eloquent attempts to sever the link found in Unity Resolution 421 (V) between the interdependence of human rights and the requirement that there be a single covenant containing all those rights, in the


\textsuperscript{105} See A/C.3/SR.297 (1950) (Brazil) 171/9; A/C.3/SR.298 (1950) (Greece) 179/20. But see A/C.3/SR.297 (1950) (UK) 174/34 and A/C.3/SR.299 (1950) (Israel) 187/25 carefully asserting a two-way view of interdependence. However, the next year, the UK asserted a more one-dimensional view of interdependence, thus showing the vicissitudes of relying on \textit{travaux préparatoires}: A/C.3/SR.390 (1952) 251/3. Israel was notable for its consistently held views on the fluid divisions between the two sets of rights: see especially Memorandum submitted by Israel, 6 UN GAOR, Annexes (Agenda item 29), UN Doc.A/C.3/565 (1952).


\textsuperscript{107} See E/SR.523 (1951) (Pakistan) 403/45; E/SR.524 (1951) (USSR) 408/36; A/C.3/SR.388 (1952) (Burma) 244/36; A/C.3/SR.390 (1952) (Pakistan) 252/12, 16; A/C.3/SR.390 (1951) (Ethiopia) 54/25; A/C.3/SR.390 (1952) (Czech.) 254/32; A/C.3/SR.393 (1952) (Philippines) 273/31; A/C.3/SR.394 (1952) (Iraq) 281/25; A/C.3/SR.395 (1952) (Ecuador) 282/39; A/C.3/SR.394 (1952) (Afghan) 284/56; A/PV.375 (1952) (Yugoslav) 508/121; A/PV.375 (1952) (Saudi Arabia). Note a few lapses towards the very end of the debate in the General Assembly Third Committee and Plenary Session when delegations from the Soviet bloc were less careful to use the balanced formulation: see A/C.3/SR.393 (1952) (Byelorussia) 277/70 and A/PV.375 (1952) (USSR) 516/36, 37. When one compares the United States' incantation of interdependence at one point (supra, note 106) with its thinly veiled downgrading of economic rights at another point (supra, note 100), the superficiality of the commitment to interdependence of delegations on either side of the Cold War becomes apparent.
manner of the Universal Declaration.\textsuperscript{108} The terms of the Unity Resolution dictated that the concept of interdependence would be a battleground in the lead-up to Separation Resolution 543 (VI), which ended up asserting the notion of interdependence as forcefully as, and perhaps more prominently than, the Unity Resolution did.

In two preambular paragraphs of the Unity Resolution, the following assertions may be found:

\textit{Whereas} the enjoyment of civil and political freedoms and of economic, social and cultural rights are interconnected and interdependent

\textit{Whereas} when deprived of economic, social and cultural rights, man does not represent the human person whom the Universal Declaration regards as the ideal of the free man....\textsuperscript{109}

This preambular statement of principle provided the framework for Article 7 of the Unity Resolution, by which the General Assembly:

(a) Decides to include in the Covenant on Human Rights economic, social and cultural rights and an explicit recognition of equality of men and women in related rights as set forth in the Charter of the United Nations

(b) Calls upon the Economic and Social Council to request the Commission on Human Rights, in accordance with the spirit of the Universal Declaration, to include in the draft Covenant a clear expression of economic, social and cultural rights in a manner which relates them to the civil and political freedoms proclaimed by the draft Covenant....\textsuperscript{110}

The above two preambular paragraphs of the Unity Resolution are quoted verbatim in the second preambular paragraph of the Separation Resolution to which was added: "Whereas the General Assembly, after a thorough and all round discussion, confirmed in the aforementioned resolution the principle that economic, social and cultural rights should be included in the Covenant on Human Rights...."\textsuperscript{111} This reference to a "principle" appears to be the means by which the General Assembly distinguished its earlier Resolution, thereby dealing with the concern expressed by some delegations that overturning the Unity Resolution

\textsuperscript{108} A/C.3/SR.394 (1952) (Lebanon) 280/20; A/C.3/SR.394 (1952) (France) 286/6; A/PV.375 (1952) (Mexico) 514/19. See S.III.B.3 for discussion.

\textsuperscript{109} Res. 421 (V), Part E, \textit{supra}, note 26 at preambular paragraphs 3 and 4.

\textsuperscript{110} \textit{Ibid}.

\textsuperscript{111} Res. 543 (VI), \textit{supra}, note 26.
would set a bad precedent. At the same time, the General Assembly left scope for more practical concerns with implementation which would justify departure from the "principle." There would also seem to be a close relationship between the reference to a "principle" in Separation Resolution 543 (VI) and the earlier reference in Unity Resolution 421 (V) to "the spirit of the Universal Declaration." It was frequently argued in the debates that the principle of the Universal Declaration was that human rights were inseparable, and thus that separation into two covenants would breach this principle.

Article 1 of the Separation Resolution then went on to read:

The General Assembly

1. Requests the Economic and Social Council to ask the Commission on Human Rights to draft two Covenants on Human Rights to be submitted simultaneously for the consideration of the General Assembly at its seventh session, one to contain civil and political rights and the other to contain economic, social and cultural rights in order that the General Assembly may approve the two Covenants simultaneously and open them at the same time for signature, the two Covenants to contain, in order to emphasise the unity of the aim in view and to ensure respect for and observance of human rights, as many similar provisions as possible, particularly in so far as the reports to be submitted by States on the implementation of these rights are concerned.

So, in addition to repetition of the preambular statements, there was a clear attempt, constantly surfacing in the debates, to underscore the interdependence point by creating temporal and material linkages between the proposed Covenants. There was, first of all, the threefold simultaneity of General Assembly consideration, approval and opening for signature. Second, there was the call for the overlapping of provisions between the two Covenants. This explicit call for duplication, related to unity of purpose ("the aim in view") and the concern with "respect for and observance of human rights," is of considerable significance to the permeability thesis.

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112 See supra, note 109.

113 For example, see A/C.3/SR.298 (1950) (Yugo.) 178/16-17 and A/C.3/SR.299 (1950) (UNESCO) 188/38. Note, however, that one recent study of the UDHR concludes that economic rights did "not quite have the same status as the civil and political rights" within the UDHR's structure: J. Morsink, "The Philosophy of the Universal Declaration" (1984) 6 Hum. Rts. Q. 309 at 331.

114 Res. 543 (VI), supra, note 26.
While emphasis was placed in Article 1 of the Separation Resolution on the overlap of procedural provisions ("particularly in so far as ... reports ... are concerned"), considerable explicit overlap of substantive rights provisions exists between the Covenants.\(^{115}\)

This is crucial for several reasons. First, the reasons for the duplication directive can inform the purposes attributed to the ICCPR, if only to confirm them. Second, the strength with which the interdependence principle emerged from the decision to separate, combined with duplication as a concrete embodiment of that principle, augurs well for further arguments hinging on the competition between the principle of interdependence and the current validity of the implementation-based reasons for separation of the Covenants. Third, if it is clear that the separation decision expressly envisaged material overlap of provisions, any argument for a presumption to the contrary is weakened.\(^{116}\) One result is that the generation of overlap by means of interpretative implication becomes less problematic, and may even be enhanced.\(^{117}\)

\(^{115}\) Explicit overlaps, to varying degrees of formulation and scope, exist between the Preambles (see infra, note 131); Article 1 in each Covenant on the right to self-determination; ICESCR 2(2) and 3 and ICCPR 26 on the rights to non-discrimination and equal protection of the law, respectively; ICESCR 8 and ICCPR 22 on trade union rights; ICESCR 2(3) and ICCPR 27 on the rights of vulnerable groups; and ICESCR 10 and ICCPR 24(1) and (2) on protection of the family, the mother and children (all supra, note 3). See "List of articles dealing with related rights under the five human rights conventions containing reporting obligations" in General Assembly, Report of the Secretary-General, Reporting obligations of States parties to United Nations conventions on human rights, UN Doc.A/40/600 (1985) at 16 (Annex).


\(^{117}\) See L. Henkin, "Introduction" in Henkin, ed., The International Bill of Rights, supra, note 81 at 27:

Historically, spiritually, and conceptually the Covenant – like its sibling the Covenant on Economic, Social, and Cultural Rights – is a child of the [Universal] Declaration and that ancestry is not irrelevant to the Covenant's meaning.... The transformation of the Declaration into two covenants has significance for the meaning of both of them. While each Covenant rests on its own bottom, the existence of an obligation in one Covenant may suggest that it was not intended to be implied also in the other.

Contrast this to Pechota, supra, note 81 at 43, who draws a completely opposite conclusion, stating simply that questions of interpretation raised by overlaps are not problematic because
Apart from the repeated reference to the enjoyment of the two categories of human rights as "interconnected and interdependent," the Separation Resolution also insists that economic rights are required if the human person is to be the Universal Declaration's "ideal of the free man." This suggests a fruitful path towards understanding fully the foundations of the idea of interdependence. I have already warned against reifying rights themselves as interdependent, and suggested that the focus should be on nurturing the capacity to be human.

The mention of the Declaration's ideal of the free person may be directed in part at the second preambular paragraph of the Declaration, stating: "the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people."\footnote{UDHR, Basic Texts, supra, note 3 at preambular paragraph 2.} However, it is also tied to articles 1, 22 and 29:

(Art. 1) All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

(Art. 22) Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of the State, of the economic rights indispensable for his dignity and the free development of his personality.

(Art. 29) Everyone has duties to the community in which alone the free and full development of his personality is possible.

Johannes Morsink has suggested that Articles 1 and 22 are indicative of a "double status theory of rights" for the Declaration, each article being a "lead" or "covering" article for a subsequent list of human rights of a particular type.\footnote{Morsink, supra, note 113 at 331, 332.} In broad terms, the political rights in Articles 1 to 21 and the economic rights in Articles 22 to 27 are said to be based on two different philosophical
anthropologies: humans as rational or natural agents, and humans as social beings. The Declaration's "ideal of the free man," referred to in both of the Resolutions, must therefore be taken to stem from a full conception of human freedom and a full and integrated conception of the self.

The Declaration juxtaposes two primary views of human nature, human freedom and human rights. It tells us that we are both natural and social beings, who value both natural (or negative) freedom and social (or positive) freedom. The rights labels that we attach to these values — civil and political rights, on the one hand, and economic, social and cultural rights, on the other — follow the same lines. Yet this is hardly an integrated, much less a universally experienced, vision: if one takes note of the essentially political compromise that ensured room for two rival primary views in the Declaration.\footnote{A "primary view" will be taken to mean the dominant human rights conception in a given culture or ideology.}

Still, it could be said that the texts of Articles 1, 22 and 29 contain the kernel of a more integrated vision, an "ideal" that the Separation Resolution's preamble tried to rescue despite the separation of the Covenants.\footnote{Indeed, UDHR 29 is the only article to have explicitly given any credence to a third, more traditional conception of rights and the person, although it is compatible with some socialist views. Further, UDHR 28 foretells the recent wave of new human rights claims, such as the right to development: "Everyone is entitled to a social and economic order in which the rights and freedoms set forth in this Declaration can be fully realized." Basic Texts, supra, note 3.} First of all, it is an over-
However, this is an overly restrictive version of philosophical coherence, as Alston recognizes in his appeal to the idea of a pluralistic set of justifications for international human rights law (at 32) and to John Rawls's recent invocation of the notion of an "overlapping consensus" capable of being affirmed by opposing philosophical doctrines (see J. Rawls, "The Idea Of An Overlapping Consensus" (1987) 7 Oxford J. Leg. Studies 1). It is possible to understand coherence as requiring a structure of mutually supporting claims which do not have to flow logically from a common foundation. While the Universal Declaration was indisputably a hodge-podge document when viewed historically and from the perspective of its implied claim to represent a universal value consensus, there is nothing in the text to suggest that the values embodied in the Declaration rights are innately incompatible, as long as all the rights are not treated as absolute and as long as the idea of mutual adjustment and accommodation is accepted. It becomes possible to conceive of a kind of dialectical and hermeneutical coherence that does not interpret the text divorced from the context to which it is supposed to apply (the global community), but uses the text as a starting point for a broad international human rights discourse out of which more universally rooted agreement as to the importance and compatibility of the entire spectrum of rights emerges.

If one views the global community as a dialogical community of the sort envisaged in various views on the progressive deepening and widening of social-moral understanding, it is possible that the notion of the interdependence of human rights is (if only marginally) a more forceful and universal idea now than it was in 1952. See C. Taylor, "Understanding and Ethnocentricity" in Human Agency and Language: Philosophical Papers, vol. 1 (New York: Cambridge University Press, 1985) at 116 and esp. at 130; and R. Bernstein, Beyond Objectivism and Relativism: Science, Hermeneutics and Praxis (Philadelphia: University of Pennsylvania Press, 1983). See also C. Tomuschat, "Human Rights in a World-Wide Framework: Some Current Ideas," supra, note 19 at 567-68 in which he notes the increased emphasis on the whole spectrum of human rights in Western Europe which has "generally become an area of social democracy" with the US "de facto at least ... also ... moving in that direction." The latter claim is rather optimistic, to say the least. For musings on the Human Rights Committee as a forum of discourse, see B.G. Ramcharan, "The Emerging Jurisprudence of the Human Rights Committee" (1980) 6 Dal. L.J. 7 at 39 ("[T]he East-West encounter of ideas in the Committee could lead to cross-fertilization and enrichment of the human rights concept") and M. Nowak, "The Effectiveness of the International Covenant on Civil and Political Rights – Stocktaking After the First Eleven Sessions of the UN-Human Rights Committee" (1980) 1 Hum. Rts. L.J. 136 at 165 ("Perhaps the Committee is, thanks to its conciliatory attitude, on the way to developing new East-West approaches of [sic] an integrative understanding of human rights" [emphasis in original]).

This is not meant to endorse over-dichotomization of the dialogue. In the first place, there are various shades and middle grounds even within the two schematized competing conceptions that we are concerned with. Second, in recent years new dimensions have been injected into international human rights discourse in the form of collectivist rights notions, organized around both the modern sovereign state or the notion of peoples (see the discussion of the right to development in S.III.C.2) and more traditional (for example, aboriginal and customary) societies. Such notions find their historical precursors in the post-World War I minorities treaties and in the right to self-determination that is found in Article 1 of each Covenant. See John Vincent's discussion of the function of human rights discourse in East-West and North-South relations: J. Vincent, Human Rights and International Relations (Cambridge: Cambridge University Press, 1986) at 50-53, 66, 74-75, 101. The only point being made is that the evolution of human rights discourse can be partially understood through the notion of interdependence. It is likely that interdependence, related as it is to a more holistic conception of the individual, is compatible with and can be enriched by the newer collectivist notions mentioned above.
simplification to say that economic rights derive solely from our membership as citizens in a particular society. It is true that community membership provides one very powerful justification for economic rights. If we can freely develop our personality only in community with others, then economic rights serve to ensure that we are not socially marginalized, and that we can instead participate and grow as persons in the mainstream of community life. Economic rights create a framework of conditions enabling pursuit of the good life in a given society.\(^{123}\)

However, the same kinds of arguments that derive political rights from ideas of abstract individual dignity or worth have also been used to justify economic rights.\(^{124}\) I have already provided one justificatory argument for economic rights in the notion of making political rights effective by laying a foundation of economic rights. And some of the more convincing analytical arguments for positive freedom directly relate its value to the value of negative freedom by showing that to value one without valuing the other would be inconsistent.\(^{125}\) Indeed, Article 22 relates economic rights not only to the "free development of [the] personality," which is connected to Article 29's reference to community, but also to "dignity," which is a term that appears in Article 1. Economic rights are said to be "indispensable" for dignity; the connotation may be that of an effectivist conception of organic interdependence.

Second, Article 1 itself cannot be said to totally or even primarily relate civil and political rights to a natural-rights

\(^{123}\) This formulation owes much to the communitarian vision of rights advanced in D. Harris, *Justifying State Welfare* (New York: Basil Blackwell, 1987).

\(^{124}\) See for example G. Vlastos, "Justice and Equality" and A. Gewirth, "Are There Any Absolute Rights?" both in J. Waldron, ed., *Theories of Rights* (New York: Oxford University Press, 1984) at 41 and 91, respectively.

\(^{125}\) In particular, I refer the reader to two leading articles in political and moral philosophy: A. Sen, "Rights and Capabilities" in T. Honderich, ed., *Morality and Objectivity* (London: Routledge and Kegan Paul, 1985); and C. Taylor, "What's Wrong with Negative Liberty?" in C. Taylor, ed., *Philosophy and the Human Sciences: Philosophical Papers 2* (New York: Cambridge University Press, 1985). Each makes a powerful analytical argument that if we attribute value to negative freedom, we cannot consistently deny value to positive freedom. In Sen's formulation, we must not merely be concerned with negative constraints on functioning (negative freedoms), but also with the capability to function (that is, positive freedoms).
conception of agents as rational, unsituated beings. It contains a very prominent reference to action "towards one another in a spirit of brotherhood," which is perhaps an idealistic reference to the broadest kind of community: that of humankind. Perhaps the most obvious, but least appreciated, obstacle to a truly universal corpus of human rights is the embryonic state of the global community. Consider the following thoughts of Michael Ignatieff:

[Who has ever met a pure and natural human being? We are always social beings, clothed in our skin, our class, income, our history, and as such, our obligations to each other are always based on difference.\textsuperscript{126}

To bring justice to the heath, to protect the Tom O'Bedlams hurled into no-man's-land by war and persecution, there has arisen the doctrine of universal human rights and the struggle to make murderers and torturers respect the inviolability of human subjects. If we all have the same needs, we all have the same rights. Yet... there is no identity we can recognize in our universality.... These abstract subjects created by our century of tyranny and terror cannot be protected by abstract doctrines of universal human needs and universal human rights, and not merely because these doctrines are words, and whips are things. The problem is not to defend universality, but to give these abstract individuals the chance to become real, historical individuals again, with the social relations and the power to protect themselves.... Woe betide any man who depends on the abstract humanity of another for his food and protection.\textsuperscript{127}

[But a] century of total war has taught us where belonging can take us when its object is the nation. Out of that experience, it is just possible that our need is taking a new form, finding a new object: the fragile green and blue earth itself, the floating disk we are the first generation to see from space. No generation has ever understood the common nature of our fate more deeply, and out of that understanding may be born a real identification, not with this country or that, but with the earth itself.... Modernity is changing the locus of belonging: our language of attachment limps suspiciously behind, doubting that our needs could ever find larger attachments.... Political languages which appeal to us only as citizens of a nation, and never as common inhabitants of the earth, may find themselves abandoned by those in search of a truer expression of their ultimate attachments.... We need words to keep us human. Being human is an accomplishment like playing an instrument. It takes practice.\textsuperscript{128}

The reason for this extensive quotation is to try to convey how ideas of the natural must be rooted in the social in order to have human meaning, and to suggest how the natural and the social may


\textsuperscript{127} Ibid. at 52-53.

\textsuperscript{128} Ibid. at 139-41.
gradually coalesce. Indeed, elements of the competing conceptions within the Declaration may have assumed or be assuming a greater universality as, by means of international intercourse and discourse, their appeal becomes rooted in a larger community, thus nurturing the link between the natural and the social.  

Thus, we can see the rich potential for interaction between the initially dichotomous but progressively more integrated conceptions of the self embedded in the Universal Declaration. We may therefore be inclined to found interdependence on a full conception of personhood. Discourse may take place at the level of rights, but the rights are stand-ins for competing conceptions of what it means to be fully human. This interpretation of the reference in the Separation Resolution to the Universal Declaration's "ideal of the free man" is confirmed by the presence of the following acknowledgement in the ICCPR's preamble:

"Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights."

This vision of the ideal of free humans, and the link that has been argued to exist between this ideal and interdependence, cannot be

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129 See the speculative excursion on international human rights discourse, supra, note 98.

130 See E/SR.523 (1951) 403/45 where the Pakistani delegate said: "If there were two ... covenants, there would be two bases and two edifices, and consequently ... no unity in regard to human rights. Such unity was essential. Man's personality could not be divided...." See also A/C.3/592 (1950) 178, 16-17 where the Yugoslavian delegate said: "The (UDHR) ... did not merely list economic and social rights; it included those because it conceived of man as an integrated personality.... It would be absurd if ... those two documents [the Covenants] should present diametrically opposed conceptions of the human being and his rights." T. Van Boven, supra, note 26 at 49, suggests that "indivisibility" should be founded on "the unity of the human person."

131 ICCPR, supra, note 3 at preambular para. 3. The parallel paragraph in ICESCR, supra, note 3, is subtly but importantly different: "Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights." See the discussion of the relevance of this difference at note 140, infra.
ignored for purposes of interpreting the ICCPR, given that the preamble of a treaty forms part of its interpretative context.\textsuperscript{132}

It is commonly accepted that a human rights treaty is different from a traditional treaty because the former's purpose is not "to accomplish the reciprocal exchange of rights for the mutual benefit of ... contracting states" but rather "to make binding unilateral commitments not to violate the human rights of individuals within their jurisdiction."\textsuperscript{133} This produces at least two differences in interpretative emphasis. One is that the subjective or interstate element is played down in favour of attention to what the text "objectively" means, particularly in light of the purposes of the treaty.\textsuperscript{134} The other is that the general purpose of human rights treaties generates a presumption that the treaty be interpreted in favour of the individual.\textsuperscript{135}

The Inter-American and European Courts of Human Rights seem to have adopted such a teleological approach. The central lesson to draw from the \textit{Golder Case}, heard by the European Court, is its vigorous use of the Preamble of the European Convention to determine the Convention's object and purpose.\textsuperscript{136} This use was notable on two grounds. First, the Court selected a reference to the rule of law in the Preamble as "the most significant passage in the Preamble," more by way of judicial fiat than by way of any

\footnotesize{\begin{itemize}
  \item[\textsuperscript{132}] Article 31 in the Vienna Convention on the Law of Treaties [hereinafter VCLT] in I. Brownlie, ed., \textit{Basic Documents in International Law}, 3rd ed. (Oxford: Clarendon Press, n.d.) at 349. VCLT 31(1) reads: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."

  \item[\textsuperscript{133}] VCLT 31(2) states that the context in VCLT 31(1) includes the treaty's preamble.

  \item[\textsuperscript{134}] Inter-American Court of Human Rights, \"Other Treaties\" Subject to the Advisory Jurisdiction (Art.64 ACHR), Advisory Opinion OC-1/82 of 24 Sept. 1982, Series A: Judgements and Opinions, No. 1 (1982).

  \item[\textsuperscript{135}] The Court in \textit{Golder, supra}, note 31, declined to even look at the travaux préparatoires.


  \item[\textsuperscript{136}] See \textit{Golder, supra}, note 31 at para. 34.
\end{itemize}}
justificatory argument.\textsuperscript{137} Second, the Court had the following to say:

The Court ... considers, like the Commission, that it would be a mistake to see in this reference a merely "more or less rhetorical reference," devoid of relevance for those interpreting the Convention.... It seems both natural and in conformity with the principle of good faith to bear in mind this widely proclaimed consideration when interpreting the terms of Article 6(1) according to their context and in the light of the object and purpose of the Convention.\textsuperscript{138}

This is an exceedingly important passage, for it provides some authority for the notion of \textit{binding rhetoric} which we will come to later.\textsuperscript{139} It is also the leading authority on the active invocation of a treaty's preamble in support of a broad interpretation of a human rights norm.

In deciding what the purpose of the \textit{ICCPR} is, one must consider deeper views of the purpose of both the human rights concept and international human rights law. The arguments until now therefore justify focusing on the above-quoted preambular paragraph from the \textit{ICCPR}. The underlying purpose of the \textit{ICCPR} is to contribute to the realization of "the ideal of free human beings," which is recognized in the Preamble to depend upon enjoyment of the whole spectrum of human rights. This choice is reinforced by the fact that the \textit{ICESCR} virtually duplicates the entire \textit{ICCPR} Preamble, with the passage in question appearing only in slightly altered form. This duplication is evidence of the emphasis placed in the Separation Resolution on the Covenants' unity of purpose, and of that Resolution's linkage of the creation of explicit overlap between the Covenants to the concern to "ensure respect for and observance of human rights." Thus, the promotion of the \textit{ICESCR} rights must be interpreted in the light of the \textit{ICCPR}'s and \textit{ICESCR}'s shared purpose. The rights in the \textit{ICCPR} should therefore be rendered as effective as possible, out of recognition of the principle of interdependence that underlies and informs this unity of

\textsuperscript{137} Ibid.

\textsuperscript{138} Ibid.

\textsuperscript{139} See S.III.C.3.
purpose. In line with the *Golder Case*, the reference to "the ideal of free human beings" cannot be ignored as mere rhetoric, especially in view of the drafting history leading to the separation of the Covenants. It becomes impossible to maintain that the Covenants can both have a unified purpose and have their provisions kept scrupulously separate when an interdependence-based interpretation of a given article suggests otherwise.

3. The balance between centrifugal and centripetal forces

To recapitulate, the three main reasons for separation can be categorized under the rubrics of implementation concerns, politics and ideology, and pragmatism or expediency. I have examined how intertwined these reasons are and, in particular, how politics has played a fundamental, if masked, role. The pragmatic considerations can be factored out because, for the most part, those reasons were subordinated to the implementation argument and were coloured by politics. I shall take the debate at face value and focus on the implementation reason which, in any case, largely coincided with ideological posturing, as has been seen. This is not to say that the discussion of political motivations up to this point has now been rendered superfluous. On the contrary, it provides part of the conceptual framework and the historical starting point for understanding the development and growing salience of the interdependence notion. As for the continuing relevance of ideological tensions, political polarization may, in rough terms, be

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*140* Of course, it is the rights in the ICCPR which are the vehicles to promote this wider purpose. This broad purpose is not licence to enforce the ICESCR as such. In this regard, the reverse order in the listing of the rights in preambular paragraph 3 of the ICESCR, as compared to preambular paragraph 3 of the ICCPR, suggests that the specific focus must be on the rights in the instrument to which the preamble is attached. In *Annotations, supra*, note 67, Ch. III at para. 8, a different conclusion is drawn from the fact that "in the third paragraph of the two preambles ... a difference in emphasis and hence in wording exists.... These paragraphs were intended to underline the unity of the two covenants while at the same time maintaining the distinctive character of each." See the citations in support of this view in M. Bossuyt, *Guide to the "Travaux Preparatoires" of the International Covenant on Civil and Political Rights* (Boston: Martinus Nijhoff, 1987) at 9. The only point to be made in response is that unity and distinctiveness can only be mediated by means of an elaboration of the principle of interdependence. Thus this article argues for a *partial* fusion of the Covenants.
inversely related to the strength of the interdependence concept. Hence, I can also factor out the ideological reasons for separation and concentrate on the interplay between the implementation-based reason for separation and the principle of interdependence.

The immediate purpose is not to examine the reasons for which it was assumed that implementation procedures necessarily had to be different for the two sets of rights, except to say that the key concept is that of justiciability. The commonly held view was that political rights could be invoked in judicial or related proceedings while economic rights could not. By and large, the separation proponents viewed this distinction as inherent, with only France and Israel occasionally questioning it.\textsuperscript{141} But this is an unsubtle approach generated by overly monolithic views of each category and an overly dichotomized notion of the differences between the categories of rights.\textsuperscript{142}

I will look briefly at the arguments mounted by the advocates of two covenants, which explain their perspective on the relationship between interdependence and legal implementation. I will then contend that, to the extent that the implementation-based reason fails in a given context for a given right, the philosophical and historical grounding for the principle of interdependence yields a permeability presumption. The precise strength of that presumption will depend on the current status of the interdependence principle in international human rights discourse.\textsuperscript{143}

The contention of the separation proponents was that all human rights were interdependent as a matter of philosophical principle, but were separable in practice for purposes of their legal enforcement. The most forceful and cogent expression of this view came from the Lebanese delegate, Mr. Azkoul, in the Third Committee:

\textsuperscript{141} A/PV.375 (1951) (France) 514/19.

\textsuperscript{142} As stated earlier, only Israel saw justiciable (legal)/non-justiciable (programmatic) as relative to time and place. Note, however, that Israel did not view programmatic obligations as justiciable: see S.I.V.A.

\textsuperscript{143} See Ss.III.C.2 and 3.
Some delegations had confused the unity of the rights themselves with uniform enforcement.... There was ... a distinction between the unity of human rights in principle and their separability in practice.... As regards implementation they are not inseparable. If the concept of unity in principle were followed to its logical conclusion, the violation of one right would be tantamount to the violation of all, and respect for one would be tantamount to respect for all. Certainly, the civic and political freedoms and economic, social and cultural rights were interconnected and interdependent, as stated in the preamble to section E of General Assembly resolution 421 (V); but they were only partially interdependent, and one of those types of rights could be enjoyed without enjoying the other.... The principle (of resolution 421 (V)) remained valid as that underlying the Universal Declaration of Human Rights. It simply implied that the United Nations, conscious that both categories of rights were interconnected, should promulgate them simultaneously, but, for practical reasons, embody them in separate instruments.\textsuperscript{144}

Other delegations also emphasized that the Universal Declaration could not simply be used as a direct analogy because it was legally non-binding and devoid of implementation machinery. Mr. Cassin of France took the following view in the Plenary of the General Assembly:

My country would have been more favourable to a single covenant if that had been shown to be more practical.... It was found that there are two different forms of obligation in the single covenant, namely, immediate juridical obligations and others which require the preparation and adoption of long-term programmes. We could undoubtedly have both kinds of obligation in each of the two covenants in question, but no one can deny that in general, there are more economic and cultural rights in the second category than in the first.... I must say to my colleagues who are in perfect good faith about the question of the single covenant that they would have been right if there had been any intention of splitting up and drafting piecemeal a document called a declaration. But it is not the Declaration we are dealing with, but the enforcement of the Declaration. In each of your national Constitutions you have a single document, but the laws enforcing the Constitution are always different laws enacted successively, even if they converge.\textsuperscript{145}

Cassin's initial gesture to the complexity of the obligation question (the third sentence) was echoed by Israel alone. But his subsequent analogy to national laws would appear to be flawed. First, constitutional rights provisions are, paradigmatically, legally enforceable—a fact that the Universal Declaration analogy obscures. Second, it was the Covenant itself that deserved the "constitutional" label, as a binding treaty and as hierarchically superior to municipal law, given its status as public international law. The analogy to the

\textsuperscript{144} A/C.3/SR.354 (1952) (Lebanon) 280/20.

\textsuperscript{145} A/Pv.375(1952) (France) 514/19, 21.
Declaration plays down the importance of the decision being taken on allocation of the Covenant rights, akin to a constitutional entrenchment that would be nearly impossible to strengthen by subsequent amendment, unlike with statutory laws. Indeed, the proper analogy (that of the Covenants as a constitution) suggests that the strong unlikelihood of a constitution being amended helps to justify and reinforce the purposive interpretation of the ICCPR being advocated in this article.

It is, in effect, the role of the Human Rights Committee through the permeability process to unravel — if only partially — this state of affairs in order to enhance the protection of economic rights and, thereby, the protection of political rights. The actual separation of the Covenants does not preclude this. On the one hand, separation clearly did not mean that human rights norms were separable as a matter of principle. On the other hand, it did mean that legal norms were separable to the extent that their means of enforcement diverged. If that rationale for separation ceases to be valid over time (or was never completely valid in the first place) and inseparability as a principle continues to be valid or even increases in strength, then any borrowing of economic rights norms by means of interpretation must not only be possible but must also be positively desirable. In this sense, separation of the Covenants did mean legal normative separability, but only contingently so. Interdependence was left as a principle: a vibrant one with considerable potential for practical effect. Such practical effect through the permeability presumption can be conceptualized as a vector which emerges from the contest between two forces: interdependence as a centripetal force drawing the Covenants together; and divergent methods, procedures and organs of implementation, forming a centrifugal force tending to keep the Covenants apart.

C. The Recent History and Present Context of the Principle of Interdependence

The purpose of this section is to evaluate the current place of the interdependence principle in international human rights discourse. This evaluation is the final step in establishing the
strength of the centripetal force between the Covenants before I examine the centrifugal forces at work, in Part IV.

1. The 1968 *Proclamation of Tehran* and Resolution 32/130 of 1977

Following the simultaneous consideration, approval and opening for signature of the two Covenants in 1966\(^{146}\) — a concrete manifestation of interdependence — the next significant event was the 1968 *Proclamation of Tehran*.\(^{147}\) The *Proclamation* emerged from a wide-ranging UN conference on the state of the art in the human rights field. Article 13 is of present interest:

Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights, is impossible. The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development....\(^{148}\)

Taken in isolation, Article 13 seems to express a unidirectional notion of interdependence of the sort previously encountered during the early separation debates. I will argue that this is a misreading, but first, the significance of Article 13 should be put into perspective. The almost verbatim transcription of Article 13 in Article 1(b) of General Assembly Resolution 32/130 of 16 December 1977\(^{149}\) has produced considerable controversy.\(^{150}\) Article 1(b) of Resolution 32/130 was preceded by Article 1(a), reading:

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\(^{146}\) UNGA Res.2200A(XXI) of 16 December 1966.

\(^{147}\) *Proclamation of Tehran, 1968, supra*, note 26.

\(^{148}\) Ibid.

\(^{149}\) Res.32/130, *supra*, note 25. The phrase "almost verbatim" is important because Article 1(b) of Res.32/130 drops the first clause of Article 13 of the *Proclamation of Tehran, 1968, supra*, note 26 ("Since human rights and fundamental freedoms are indivisible...") and begins directly with "The full realization...."

\(^{150}\) This refers to both academic and internal UN controversy: see J. Donnelly, "Recent trends in UN human rights activity: description and polemic" (1981) 35 Int. Org. 633; P. Alston, "The alleged demise of political rights at the UN: a reply to Donnelly" (1983) 37 Int. Org. 537; and J. Donnelly, "The human rights priorities of the UN: a rejoinder to Alston" (1983) 37 Int. Org. 547. Note Alston's point that Donnelly's article has been considerably influential: Alston, *ibid.* at 537.
All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights.

Little would be served by rehearsing the interpretations and counter-interpretations placed on Article 1(b) of Resolution 32/130. However, one key contention is relevant. Jack Donnelly goes to great lengths to argue that:

With few exceptions, the phrase "interdependence of human rights" in the UN will be followed by a statement of the importance of economic and social rights. Only the dependence of civil and political rights on economic and social rights receives attention. In Resolution 32/130, the statement of the interdependence, indivisibility, and equality of all human rights is immediately followed by subparagraph b's reference to the Proclamation of Tehran and the dependence of civil and political rights on economic, social and cultural rights. This amounts to the authoritative interpretation of the key term "interdependence."\(^{151}\)

Two general replies can be made to this view, the ultimate aim being to suggest that Donnelly's still influential position is ill-founded, and to argue that the principle of interdependence emerges intact from Resolution 32/130 for purposes of interpretative utility.

The first and most important reply is that Donnelly tends to ignore the text of both the 1968 Proclamation and the 1977 Resolution. He briefly relates Article 1(b) of Resolution 32/130 to Article 1(a) and then abandons the text in order to discuss the preponderance of state delegations' support for unidirectional interdependence, as if that debate were the text itself.\(^{152}\) The text is, in fact, much more balanced, perhaps reflecting a more subtle political process than any travaux préparatoires can reveal. This is not to say that the texts necessarily represent a consensus, but at least they constitute textual rhetoric with which to justify legal

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\(^{151}\) Donnelly, "Recent trends," ibid. at 643 [emphasis added]. The meaning of Res.32/130 is not a marginal issue because it is generally seen as perhaps the most important single statement of UN human rights doctrine (there were 8 principles in all listed in Article 1) in the past decade and because of the above-mentioned backlash.

\(^{152}\) The central downfall of Donnelly's approach is that he conducts an incomplete political analysis of trends in the UN, gives the impression that these trends are directly replicated in Resolution 32/130 and then, in his reply two years after the original article, suggests that all he was doing was making an observation that civil and political rights were being played down by most states: see Donnelly, "Rejoinder to Alston," supra, note 150 at 550.
interpretations and political stances truly based on inter-
dependence.\textsuperscript{153}

If one considers the text of Resolution 32/130 more carefully,
the picture is not nearly so bleak. To begin with, Article 1(b) on its
own refers to the "full" realization of political rights and to "lasting
progress" in the implementation of human rights. It does not say
that economic rights are required for \emph{any} realization or \emph{any}
progress or even \emph{much} realization or \emph{much} progress.

Furthermore, as already mentioned, Article 1(b) is a direct
quotation of Article 13 of the \textit{Proclamation of Tehran}. Article 1(b)
should therefore reflect the textual context of Article 13. An
appraisal of the context would reveal numerous indications
elsewhere in the \textit{Proclamation} of concern with political rights.\textsuperscript{154}

Attention should also be paid to the linkage between
subparagraphs 1(a) and 1(b) of Resolution 32/130. There are two
central points. First, 1(b) can easily be interpreted as premised on
the truth of 1(a)'s assertion of a balanced concept of
interdependence, rather than being a refutation of it. On the one
hand, Donnelly would argue that 1(b) means 1(a). If this is so,
what is the purpose of 1(a)? On the other hand, he would argue
that 1(b) means something that a plain reading of 1(a) would
suggest is only one side of the coin. If that is so, why not view the
partial dependence of political rights on economic rights as premised
on the interdependence of these rights; in other words, why not
view 1(b) as premised on 1(a)'s truth?

It will be recalled that Resolution 32/130 subparagraph 1(b)
dropped the first subordinate clause of Article 13 of the
\textit{Proclamation}.\textsuperscript{155} The structure of the first sentence of Article 13
suggests that dependence \emph{follows from} interdependence, not that
dependence \emph{is} interdependence. What is the significance of
dropping this clause? If the clause had been left, there would have

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\textsuperscript{153} See the notion of "binding rhetoric" advanced in S.III.C.3.

\textsuperscript{154} Notably in Articles 5, 7, 8, 10, 11, 15 and 16 of the \textit{Proclamation of Tehran}, supra, note 26. Furthermore, read in context, Article 13 would also be seen not as an isolated interpretation of interdependence, but as related to the preceding Article 12 dealing with the widening North-South gap and failure of the UN Development Decade.

\textsuperscript{155} See \textit{supra}, note 149.
been an overlap with 1(a), rendering it partially redundant. If the principal clause of Article 13 is cited with approval in 1(b), can it so easily be divorced from its justifying subordinate clause? To view 1(a) as fulfilling this subordinate clause's role would be more consistent with the preceding arguments.

A second point about the linkage between 1(a) and 1(b) is that, in 1977, as in 1968, 1(b) was a particularly pressing aspect of 1(a), not its authoritative interpretation. This observation leads directly to a second general reply to Donnelly, which is that he misperceives the broader context. He feels that political rights are under pressure in the UN and that somehow the legitimate concern in 1968 with the other side of the interdependence coin had lost its legitimacy by 1977.156 As Alston aptly demonstrated, Donnelly's assertion (retracted two years later157) that the UN gives little attention to any rights other than economic ones "is hopelessly at odds with the reality."158

The concern should have been that the pendulum might have begun to swing too far to one side, not that it had already done so. However, the fact is that up to then the relationship between political and economic rights had rarely been considered.159 Even so, delegates who used economic rights to camouflage totally statist concerns with a New International Economic Order (NIEO),160 with no 'new internal economic order' complement, must be reminded that the text of Resolution 32/130 does not sanction this exclusive agenda; rather, it includes a concern with economic human

156 Donnelly, "Recent trends," supra, note 150 at 645.
157 Donnelly, "Rejoinder to Alston," supra, note 150 at 547.
158 Alston, "Reply to Donnelly," supra, note 150 at 543.
159 Donnelly perhaps falls prey to the (Western) complacency to which Res. 32/130 is partly a response. In "Recent trends," supra, note 150 at 639, he asserts that "the implementation of civil and political rights does not depend on a country's level of development.... Rather, it is a matter of political will." Apart from obvious objections, see Jhabvala, supra, note 67; and F. Jhabvala, "The Practice of the Covenant's Human Rights Committee, 1976-82: Review of State Party Reports" (1984) 6 Hum. Rts. Q. 81 for a cogent argument on the progressive nature of some obligations stemming from political rights.
160 See Article 1(f) of Res. 32/130, supra, note 25, for mention of the NIEO.
rights (in 1(b)) and with their interdependent relationship to political rights (in 1(a)).

2. The current context: 1986 and 1987

In the decade since 1977 and the passing of Resolution 32/130, the revisionist concern in that Resolution with matters of social and economic development, in both their individual and their collective dimensions, has begun to bear fruit; but the interdependence idea has not suffered. In fact, the interdependence principle may have been defensively invoked by states wishing to forestall an over-swing of the pendulum away from concern with political rights. It may also have been offensively invoked by states who see it as legitimizing a focus on economic rights. Whatever the middle-ground political support may be for a balanced notion of interdependence, the crucial point here is the principle's continuing presence and increased salience in UN resolutions, as well as its greater correspondence to current UN human rights programmes. Three pieces of evidence for this thesis will be briefly noted: the establishment of the new Committee on Economic, Social and Cultural Rights, the current focus on and formulation of the principle of interdependence, and the 1986 General Assembly Declaration on the Right to Development.

First, in May 1985 ECOSOC decided to take seriously its supervisory responsibilities under the ICESCR by replacing its ineffectual Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights with a Committee on Economic, Social and Cultural Rights, to consist of eighteen experts serving in their

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161 See Alston, "Out of the Abyss," supra, note 4 at 17 for a description of the increased attention to economic rights.

162 A fourth piece of evidence would be the contributions of NGOs to UN debates as well as their behind-the-scenes lobbying: see the discussion in S.III.A.2 above, esp. at note 53.
personal capacities. Thus, the Human Rights Committee now has a parallel organ under its sibling Covenant which could potentially make a major contribution to the elucidation of obligations under the much neglected Economic Covenant. The point is not that the formation of the new Committee constitutes support for balanced interdependence as such, but that it is an essential enabling factor because it seeks to rectify the imbalance in institutional supervisory arrangements between the two Covenants. As long as such an imbalance remained, interdependence as a textual doctrine would continue to fall between two realities: the reality of a skewed institutional focus in the UN on political rights, and the reality of intense polemic pushing for greater attention to economic rights.

Early on in the debates prior to the Unity Resolution of 1950, one-sided notions of interdependence were frequently voiced precisely because economic rights were felt to have been marginalized at the Sixth Session of the Commission on Human Rights. Resolution 32/130's debates indicate that the two separate Covenants certainly had not banished concerns about the marginalization of economic rights.

Two points should be emphasized. On the one hand, superficial equality and interdependence between the Covenants belied the poor-cousin status of the ICESCR. On the other hand,


165 See the discussion on Res. 32/130 in S.III.C.1.

166 See S.III.B.1.

167 See Alston, "Out of the Abyss," supra, note 4 at 17.
whatever elements of equal attention and normative and jurisdictional unity are created between the Covenants, blinkered focus on them alone constitutes a certain legalistic reductionism. It must be recognized that greater balance within the Covenant system is only one element, and perhaps a minor one, in a broader response to competing concerns.\textsuperscript{168} However, one must not underestimate the practical importance of the Covenants. If both the Human Rights Committee and the Committee on Economic, Social and Cultural Rights give practical effect to the principle of interdependence through the device of permeability, and thereby work in tandem to transcend the current compartmentalized conceptions of human rights, this might provide a point of purchase for building practical and conceptual bridges in the broader human rights arena.\textsuperscript{169}

The second piece of evidence on the status of the interdependence principle is the current attention being paid to interdependence in its own right. In this regard, attention should be drawn to General Assembly Resolution 41/117 of 4 December 1986 entitled "Indivisibility and interdependence of economic, social and cultural, civil and political rights."\textsuperscript{170} Without dwelling for the moment on questions of legal status, this Resolution can be said to constitute an important statement that provides an undiluted formulation of the interdependence principle, and makes the principle central to current UN thinking on human rights.

As regards formulation, the fifth and sixth preambular paragraphs of Resolution 41/117 read as follows:

\begin{verbatim}
Reaffirming the provisions of its resolution 32/130 of 16 December 1977 that all human rights and fundamental freedoms are indivisible and interdependent and that the promotion and protection of one category of rights can never exempt or excuse States from the promotion and protection of the other rights, Convinced that equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political and economic, social and cultural rights....
\end{verbatim}

\textsuperscript{168} This appears to be the central point in M. Moskowitz, "Implementing Human Rights: Present Status and Future Prospects" in B.G. Ramcharan, ed., Human Rights: Thirty Years After the Universal Declaration (The Hague: Martinus Nijhoff, 1979).

\textsuperscript{169} The new Committee at its first session has already invoked interdependence in examining state reports: supra, note 66.

\textsuperscript{170} Res.41/117, supra, note 1.
These passages need only be read to reveal that, in 1986, the essence of Resolution 32/130 is understood to be (at least formally) its subparagraph 1(a) and not 1(b). A balanced interdependence is unreservedly asserted.\(^{171}\)

The third piece of evidence is the right to development as a "synthesis" human right: that is, a synthesis that goes beyond a mere aggregation of existing human rights. This is not the occasion to answer in any detail the controversial question of the coherence, value, and utility of giving human-right status to the collective good of development.\(^{172}\) Rather, my purpose is to exploit the potential of what is close to a \textit{fait accompli}\(^{173}\) in international human rights discourse. At a time when the right to development was often suspiciously perceived as cloaking a collective, totally state-oriented push for a New International Economic Order, Philip Alston proposed that the inevitable formal elaboration of the right to development be channelled so as to make the existing catalogue of human rights the justification for the right or, at least, a constant point of reference.\(^{174}\) In this respect, it is worth quoting part of his arguments on the value of the notion of synthesis:

\(^{171}\) In the context of the previous discussion about institutional imbalance, it is worth noting the twelfth preambular paragraph: "Recalling Commission on Human Rights resolutions 1985/42 of 14 March 1985 and 1986/15 of 10 March 1986, in which the Commission stated that the implementation, promotion and protection of economic, social and cultural rights have not received sufficient attention within the framework of the United Nations system."

Article 4 of Resolution 41/117 (\textit{supra}, note 1) welcomes the establishment of the new Committee. There are three other aspects of the resolution that are significant for the interdependence principle. First, preambular paragraph 3 recalls the statement in the preambles of both Covenants about "the ideal of free human beings" enjoying the whole spectrum of human rights. Second, the final article of the Resolution, Article 7, decides that the topic of "indivisibility and interdependence" will be a specific topic of discussion at the General Assembly's forty-second (1987) session under the agenda item "International Covenants on Human Rights." Third, the eleventh preambular paragraph states: "Recognizing that the realization of the right to development could help to promote the enjoyment of economic, social and cultural rights." (On this third point, see note 176, \textit{infra}).

\(^{172}\) An excellent inquiry into these questions can be found in J. Waldron, "Can communal goods be human rights?" (1987) 28 Eur. J. Sociology 296.

\(^{173}\) See Alston, "Prevention versus Cure," \textit{supra}, note 60 at 106. With the Declaration on the Right to Development, the \textit{fait accompli} is almost complete.

\(^{174}\) \textit{Ibid.} at 104, 106-08. He was writing just after the Commission on Human Rights had established its Working Group on the Right to Development. For the Working Group's most recent report, see UN Doc. E/CN.4/1987/10.
It has been argued that the demonstration of a "synthesis" right adds nothing to that which is already contained in existing human rights instruments. However, this objection overlooks three factors. The third factor is that a synthesis of rights, such as the right to development, assumes dimensions which are greater than the mere sum of its constituent parts. Through a process of cross-fertilization the sum of the various component parts forms a holistic entity.\textsuperscript{175}

Alston convincingly argued that the idea of development permits a focus on the entire spectrum of human rights as an integrated, interdependent whole; the idea transcends the tendency to compartmentalize human rights at the conceptual and practical levels.\textsuperscript{176} To say that this only replicates the principle of interdependence is no objection, precisely because of this compartmentalization. In light of the fact that the generation of claims to "new" human rights proceeds largely from perceived gaps in the existing approaches,\textsuperscript{177} to co-opt the right to development is justifiable in order not only to enhance the conceptual salience of the principle of interdependence, but also to generate practical implementation of that concept. Thus, to the extent that the right to development is an intensified claim to take interdependence seriously (generated in part by increasing awareness of poverty and oppression as the comprehensive deprivation of the means to be human), the centripetal force of the interdependence principle is strengthened.\textsuperscript{178}


\textsuperscript{176} It is for this reason that Res.41/117's focus on the right to development as "helping" to promote economic rights, with no mention of political rights, is unfortunate and ignores the balance in the text of the Declaration, adopted on the same day. Indeed, a more recent Commission on Human Rights resolution states that the right to development will help promote both categories of rights: see Commission Res. 1987/19 (10 March 1987) in UN Doc.E/CN.4/1987/L.11/Add.5 (1987).

\textsuperscript{177} For instance, see Alston's threefold list of why the right to development has arisen in P. Alston, "The Shortcomings of a 'Garfield the Cat' Approach to the Right to Development" (1985) 15 Cal. W. Int. L.J. 510.

\textsuperscript{178} See Alston's diagram of a similar idea in P. Alston, "Peace as a Human Right" (1980) 11 Bull. Peace Proposals 319 at 323.
The General Assembly's 1986 Declaration on the Right to Development\textsuperscript{179} places considerable importance upon these synthetic dimensions.\textsuperscript{180} In the Declaration, the two standard categories of human rights are treated as equal and interdependent. They are also treated as central to the very concept of development, blurred and largely undefined as that concept remains in the Declaration. The individual dimension is emphasized, as can be seen, for example, in Article 2(1). Further, the conception is of the individual as an active participant, not as a passive beneficiary. Participation, which entails the active exercise of a whole cluster of civil and political rights, is practically a leitmotif of the Declaration.

It is clearly common ground to view the right to development as, at least in part, a synthetic right premised on the interdependence of existing human rights, if only because the text makes this patently clear. Even the Federal Republic of Germany (FRG), one of eight states to abstain in the vote, stated before the Commission on Human Rights:

[The Federal Republic of Germany] has abstained from voting in the General Assembly on the Declaration..., not because it rejected the right but because it believed that the right to development was a comprehensive concept of the individual rights contained in the [Covenants].... The Declaration did not define

\textsuperscript{179} Declaration on the Right to Development, \textit{supra}, note 25. Note that it was drafted by the Working Group on the Right to Development. There was only one vote against (the United States) and eight abstentions.

\textsuperscript{180} Some of the more important provisions are as follows:

\textbf{Article 1}

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized....

\textbf{Article 2}

1. The human person is the central subject of development and should be the active participant and beneficiary of the right to development....

\textbf{Article 6}

2. All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.

3. States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights as well as economic, social and cultural rights....

See also preambular paragraphs 2, 4, 10, 13, 14 and 17, and articles 2(3), 8 and 9.
sufficiently the fact that the right to development could only be a right of the individual pursuant to the general interpretation of human rights as specified in the Universal Declaration of Human Rights and the two Covenants. 181

Italy, on the other hand, was able to vote in favour despite the same misgivings as the FRG about the collective or NIEO dimensions of the right and the resultant obligations on developed states:

One school was in favour of assigning the essential role to the individual as beneficiary of the right to development; the other was in favour of linking the right to development of the individual to that of the State, thereby stressing the abolition of economic inequalities among the various countries. [The Government of Italy] reaffirmed [its] view that the concept of the right to development was centred on the individual, either alone or in association.... 182

The Yugoslavian delegation to the Commission defended the right as a human right:

Any interpretation should proceed from the fundamental premise that the right to development was a human right and that one of its basic purposes was a comprehensive realization of all human rights. The indivisibility and interdependence of all human rights was underscored in that context. 183

These statements, selective as they must be, suggest a minimalist interpretation of the right to development as a synthetic right, having as its "fundamental feature" the interdependence of existing human rights in the individual's relationship with the state. Northern states wary of NIEO obligations and Southern states fundamentally and legitimately concerned that such obligations be acted on all have an interest in converging on this minimalist common ground. The former states will want to invoke it either as the only valid interpretation, or as a precondition for NIEO claims, in order to forestall the maximalist interpretation. The latter states must pay homage to it if they hope to attain their maximalist goal, for the moral force of the right to development must derive from its claim to be a human right. Both sides may also be interested in taking concrete steps to show that they take interdependence seriously, to the extent that credibility becomes useful or even

183 E/CN.4/1987/SR.26 (1987) at 5. Article 5 does not refer to interdependence, directly or indirectly.
essential in the future debate on the Declaration. The principle of interdependence seems destined to develop an even higher profile in international human rights discourse.  

The above schematization is crude. It is not meant to deny that there are governments on either side of the divide that are dedicated, to varying degrees, to the whole spectrum of human rights. Nor is it meant to imply that the principle of interdependence is only grounded in cynicism or reciprocal state interest. Rather, the suggestion is that even within a bad-faith scenario, the principle will be sustained by considerable rhetoric, textual and otherwise. This may even lead to a bandwagon effect. Apart from General Assembly Resolution 41/117, which was passed on the same day as the Declaration (4 December 1986), two resolutions were passed at the last session of the Commission on Human Rights where the principle was invoked in a balanced fashion.  

3. The interpretative relevance of the extra-covenant context

Article 31(3)(c) of the Vienna Convention on the Law of Treaties (vCLT) provides that "[t]here shall be taken into account, together with the context ... any relevant rules of international law applicable in the relations between the parties." My present purpose is to enquire whether the Human Rights Committee must, or at least may, take into account the principle of interdependence as part of an extrinsic legal context. In particular, are the recent resolutions and declarations, in both the General Assembly and the Commission on Human Rights, a source of legal obligations on

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184 Other invocations of the principle at the latest (43rd) session of the Commission on Human Rights were: E/CN.4/1987/SR.25 (1987) 10 (Mr. Herndl, Under Secretary-General for Human Rights in opening address): SR.25 at 6 (USSR); SR.25 at 19 (Australia); SR.26 at 6 (Algeria); SR.26 at 8-9 (Ireland); SR.26 at 11 (Iraq); SR.28 Add.1 at 9 (Byel.SSR); SR.28 Add.1 at 10 (Rwanda); SR.30 at 5 (Obs'r for Hungary); SR.31 at 3 (Obs'r for Poland); SR.31 at 5 (Obs'r for Czech.); SR.31 at 6 (Obs'r for Afghan.).


186 vCLT 31(3) (in I. Brownlie, supra, note 132) also refers to the effect of subsequent explicit agreement and any subsequent practice showing agreement of the parties on the interpretation or application of the treaty.
states, authorizing the Committee to give the principle of interdependence practical legal effect? Simply to pose the question is to invite caution: the issue goes to the heart of much that is controversial in the present theory and practice of international law.

Denying some degree of legal weight to the principle of interdependence would ignore the inextricability of and interaction between law and social process. I have shown how the difference between human rights treaties and traditional treaties justifies a focus on the purposive aspects of interpretation. The differences in the nature of the beast should extend as well to perceptions of what the relevant social process is in the human rights context.

Even in traditional areas, conceptions of international law as a purely legal system regulating interstate relations ultimately obscure the underlying human relations, both domestic and transnational. This is especially the case in the area of human rights. The interpretative arguments I will make are based on the following three premises.

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It is interesting to note that Theodor Meron makes the following observation:

[T]he UN General Assembly and the UN Commission on Human Rights have stressed the principle that human rights are indivisible and interdependent and have emphasized that civil and political rights should receive the same level of attention as economic, social and cultural rights. This guidance should be legally significant, despite its generality, not only to States but also to control organs which in the course of their work must often balance the different normative provisions and the community values underlying them [emphasis added].


The permeability presumption is precisely such an attempt to make the general principle of interdependence legally significant.


See S.III.B.2.


The following arguments will be broadly consonant with some insights of the New Haven interpretative approach to human rights treaties. See M. McDougal, "Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General
First, final authority in law is not positivistically hierarchical but "comes from the members of a community and with demands for the wide sharing of power." A Community is a notoriously elusive concept, but in international law it tends to be perceived as a community of nation-states or perhaps of the established elites controlling those states and the conduct of foreign affairs. But a more democratic notion of community must be adhered to when discussing human rights if international human rights law is to have any real meaning and legitimacy for its beneficiaries.

Second, and directly related to the preceding premise, the interpretation of legal documents must appeal to shared expectations if the documents are to be effective. The relevant expectations for human rights treaties are the "working expectations of the peoples of the world." Expectations based on interstate perceptions and calculations of interest ignore my earlier observations that people collectively constitute human rights through intersubjective experience.

Third, in the best of all possible worlds, the interpreter would strive to make herself or himself "as conscious as possible of all the different communities, from global to local, of which he [or she] is a member and upon which his [or her] choices must have unavoidable impacts." This observational and interpretative standpoint would try to approximate some kind of objective view from nowhere by means of a view from everywhere. Laudable as this may seem, one may be forgiven for wondering whether it is humanly possible, or merely an unrealistic Herculean approach to interpretation. I do not believe we can avoid taking incomplete and

Community Policies" (1974) 14 Virg. J. Int. L. 387. However, I cannot accept the advocacy by that school of a scientific sociological jurisprudence approach. For a powerful criticism of "the ambition to model the study of man [humankind] on the natural sciences," see C. Taylor, "Introduction" in Philosophical Papers, supra, note 125 at 1-13.

192 McDougal, ibid. at 354.
193 Ibid. at 390.
194 See S.II and S.III.A.2; see also Gabel, supra, note 55 at 1576.
195 McDougal, supra, note 191 at 396.
somewhat impressionistic stabs at viewing human rights questions from the perspective of those upon whom the impact of choices is most immediately and intensely felt. Thus I earlier proposed that the Human Rights Committee should attempt to view interdependence from the perspective of the poorest and most oppressed members of global society.

With these premises in mind, two arguments may be pressed upon the Committee. The first is that the Committee may legitimately integrate the wider social context into their view of "ordinary meaning" in VCLT 31(1), for there can be no real meaning divorced from such a context. In essence, this approach is similar to that adopted by the European Court of Human Rights in Tyrer v. United Kingdom, in which it was stated that the Convention must be viewed "as a living instrument which ... must be interpreted in the light of present-day conditions." If the totality of evidence suggests that interdependence is a more meaningful concept now than it was in the early 1950s, the Committee may take this into account. To do otherwise would be to treat the ICCPR as a fossilized, not a living, instrument. It would also solidify a dichotomy between rights categories and a separation of Covenants that one writer has termed "a purely unfortunate historical phenomenon." There would be a danger of severing the link between legal interpretation, and prevailing social understandings and discourse.

The second, less orthodox argument is that the textual rhetoric of the UN resolutions and declarations invoking the concept of interdependence must be taken at face value. A notion of binding rhetoric or rhetorical law may be a particularly appropriate response, on several levels, to the peculiarities of international human rights law. It would recognize an important feature of that branch of international law: the tension between theory and practice, and the need to exploit the former in order to influence the latter. Where state reciprocity is a minimal consideration,


199 For a discussion of such tensions in international law generally, see S. Sur, "Système juridique international et utopie" (1987) 32 Arch. Phil. Dr. 35.
human rights talk can be hypocritical and cynical. The process of customary international law formulation in this area must pay significantly more attention to what states say than to what they do.\footnote{200}

If legitimate expectations among states can crystallize UN resolutions into customary law\footnote{201} or general principles of law,\footnote{202} then the relevant expectations in this context are not merely interstate expectations but also, if not primarily, the working expectations of states' citizens. One may reasonably presume that the network of textual rhetoric that emerges from the UN is sensitive to and plays to domestic populations — directly, or indirectly through NGOs — as well as partly to the elites of other state delegations. Thus, \textit{VCLT} 31(3)(c), applying as it does to rules "between parties," is most relevant to us as an analogy. If the "parties" in question are in fact individuals and states, a rhetorical law may be analogous to traditional customary international law as envisaged by \textit{VCLT} 31(3)(c).\footnote{203} The term \textit{rhetoric} is appropriate because it helps capture the idea of law feeding into parallel social, political and ethical discourse. At the very least, the Human Rights Committee would be justified in taking the textual rhetoric seriously as part of the broader social context.

The \textit{Golder Case} lends some support to this approach. Albeit dealing with a preamble and not extrinsic texts, the European Court essentially said that a state is precluded from pleading mere rhetoric, and the principle of good faith found in \textit{VCLT} 31(1) was specifically cited as one reason.\footnote{204} In \textit{Golder}, the court also found

\footnote{200} For some support for this position, see Schachter, \textit{supra}, note 190 at 334-36.

\footnote{201} See the discussion of the effect of majority resolutions on non-concurring states in Schachter, \textit{ibid} at 118-23.


\footnote{203} See Schachter, \textit{supra}, note 190 at 333 for a discussion of what human rights may be said to be customary law and therefore to fall squarely within \textit{VCLT} 31(3)(c). For one view that the Universal Declaration has become customary law, see J. Humphrey, "The International Bill of Rights: Scope and Implementation" (1976) 17 Wm. & Mary L. Rev. 527. See also T. Meron, "On a Hierarchy of International Human Rights" (1986) 80 Am. J. Int. L. 1.

\footnote{204} \textit{Supra}, notes 136-39.
it significant that the "rule of law" reference was widely proclaimed by states. Surely states could not in good faith plead mere rhetoric if the Human Rights Committee invoked the widely proclaimed principle of interdependence to justify either a general presumption for permeability or a particular result? It is important to note that good faith is thought to be one reason that UN resolutions have some degree of legal force.205

Finally, the notion of binding rhetoric taps into the democratic potential of international human rights supervision. Courts should move away from the tendency to follow the opinion of established elites and try to approximate a more democratic consensus. Adjudication should self-consciously introduce "the adjustment of the laws to the values of those persons to whom they apply."206 The Commission on Human Rights, out of which General Assembly human rights resolutions emerge, is a forum with considerable popular input, if only through the medium of NGOs. The Human Rights Committee could consciously be sensitive to that input, as well as to the unofficial NGO input into their own deliberations and to the NGO input that will, in all probability, go into the new Committee on Economic, Social and Cultural Rights.207

IV. BARRIERS TO PERMEABILITY

I have already alluded to some of the potential barriers to permeability. In this part, I first look at the argument that the norms in question cannot permeate the ICCPR because they are not justiciable (that is, susceptible to judicial determination). I secondly examine the argument that there are normative and jurisdictional conflicts keeping the two treaty regimes at arm's length. I will conclude that neither barrier is insurmountable.

205 Higgins, "Contending Systems," supra, note 188.


A. The Justiciability Misconception

In this section, I return to the reasons for separation of the Covenants, to argue that the blanket categorization of ICESCR rights as non-justiciable is misconceived. The centrifugal force of the implementation-based reason for separation is much weaker now that it was in 1951. The points at which it is at its weakest are the potential points of permeability into the ICCPR. The following discussion must, regrettably, be limited to indicating some general considerations about the justiciability of economic rights; a more in-depth study is necessary in order to make permeability a significant process. This, of course, will be part of the function of the new Committee on Economic, Social and Cultural Rights.

Perhaps the best-known indication that economic rights are no longer considered to be as inherently non-justiciable as the proponents of separation contended is the ongoing study by the Council of Europe into whether to add an economic rights protocol to the European Convention on Human Rights. Francis Jacobs succinctly goes to the heart of the issue of justiciability:

[The distinction between the two categories of rights is not as clear-cut as it may at first sight appear. Some rights of an economic, social and cultural character are already guaranteed by the Convention system: see for example Article 11 of the Convention (which includes the right to form and join trade unions), Article 1 of the First Protocol (the right to peaceful enjoyment of one's possessions) and Article 2 of the First Protocol (the right to education). The crucial test in this respect for the inclusion of a particular right in the Convention system does not lie in the subject-matter of that right, but rather in whether it is capable of protection by the Convention machinery, that is by the system of adjudication.]

He later gives what may be referred to as a working definition of justiciable: "[1] whether it would be suited to determination in judicial proceedings; [2] whether it vests an enforceable right in the

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individual; \[3\] and whether it lends itself to sufficiently specific obligations on the part of States.\(^{210}\)

This analysis may be a convenient place to start, but it does not fully capture what is at issue in determining whether a right is justiciable or not. The word *justiciable* is often either the conclusion of an argument or series of arguments, or a self-evident conclusion with no real preceding argument. In discussing the implementation-based reason for separation, I argued that the justiciability/non-justiciability dichotomy was in fact an umbrella dichotomy.\(^{211}\) By this, I meant that the various distinctions taken for granted between the two categories of human rights flowed into a general conclusion: that economic rights were not justiciable, while political rights were. However, this relationship is rarely, if ever, remarked upon. Instead, both proponents and opponents of the distinctions tend to recite the distinctions as if they were of the same order of significance. An undifferentiated list might look like this.\(^{212}\)

<table>
<thead>
<tr>
<th>Economic, Social and Cultural Rights</th>
<th>Civil and Political Rights</th>
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</thead>
<tbody>
<tr>
<td>1. Positive</td>
<td>vs. Negative</td>
</tr>
<tr>
<td>2. Resource-Intensive</td>
<td>vs. Cost-Free</td>
</tr>
<tr>
<td>3. Progressive</td>
<td>vs. Immediate</td>
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<tr>
<td>4. Vague</td>
<td>vs. Precise</td>
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<tr>
<td>5. Unmanageably Complex</td>
<td>vs. Manageable</td>
</tr>
<tr>
<td>6. Ideologically Divisive/Political</td>
<td>vs. Non-Ideological/Non-Political</td>
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<tr>
<td>7. Non-Justiciable</td>
<td>vs. Justiciable</td>
</tr>
<tr>
<td>8. Aspirations or Goals</td>
<td>vs. &quot;Real&quot; or &quot;Legal&quot; Rights</td>
</tr>
</tbody>
</table>

\(^{210}\) *Ibid.* at 172.

\(^{211}\) See *supra*, note 95.

\(^{212}\) See *Annotations, supra*, note 67 at 8; Alston, "Prevention Versus Cure," *supra*, note 60 at 47-54; Alston & Quinn, *supra*, note 164 at 159-60.
Yet category 7 (justiciability) says nothing on its own. Rather, the relationship might be stated as follows: if ESC rights are 1 through 6, then they are 7 (and, possibly, 8). To some extent, category 5 and category 6 may each be sub-conclusions drawn from any or all of categories 1 through 4. As well, category 8 may be a further conclusion based on category 7, especially for those who tie legal status to traditional forms of enforcement.\textsuperscript{213}

It is almost trite of late to acknowledge the oversimplification of these blanket dichotomies,\textsuperscript{214} and it is not my intention to discuss standard examples\textsuperscript{215} of where they break down. Instead, my goal is briefly to draw the reader's attention to some of the factors that indicate how economic rights falling outside the standard concessions to justiciability are now, or potentially could be, open to judicial protection.

It has been found that focusing on the obligations side of economic rights is a more fruitful way to render those rights justiciable. One framework now being used to study the right to food is made up of the following four duties, which attach to any human right: (1) the obligation to respect; (2) the obligation to protect; (3) the obligation to ensure; and (4) the obligation to promote.\textsuperscript{216} The obligation to respect is the classic negative obligation of non-interference, forbidding a state to directly encroach upon a right. The other three require varying degrees of positive action or state policy. The obligation to protect means a state must prohibit non-state third parties, whether through enforced legislation or otherwise, from encroaching on a right. The obligations to

\textsuperscript{213} See, for example, E.W. Vierdag, "The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights" (1978) 9 Neth. Y.B. Int. L. 69.


\textsuperscript{215} For example, due process is costly; positive action is required to protect persons (for example, a police force); the right to strike may be recognized immediately, \textit{et cetera}.

\textsuperscript{216} See van Hoof, supra, note 214 at 106. This fourfold structure of analysis is based on, and largely compatible with, that evolved by Henry Shue: see H. Shue, "The Interdependence of Duties" in Alston & Tomasevski, The Right to Food, supra, note 13 at 83.
ensure and promote correspond to positive obligations commonly referred to as "programmatic."217

The focus on obligations reveals the following possible argument: in relation to an economic right such as the right to food, states can violate obligations to respect and protect that are traditionally associated with political rights. Once one crosses the conceptual threshold of maintaining that for every human right there is only one correlative obligation218 and sees instead that all human rights entail a complex, multilayered obligations structure,219 the differences between the categories of human rights appear less stark. It becomes possible to consider a judicial function in cases such as G.J.H. van Hoof describes:

[T]he obligation to respect and protect the right to adequate housing, as laid down in Article 11 of the [ICESCR], would in my view be violated, if the government's policy, even in the least developed countries, allowed the hovels of poor people to be torn down and replaced by luxury housing which the original inhabitants could not afford and without providing them with access to alternative housing on reasonable terms.220

The obligation to respect can be viewed as a negative, immediate obligation that is relatively easy to adjudicate.221 However, it must not be assumed that the so-called programmatic obligations are inherently non-justiciable. While one philosopher, Henry Shue, first advanced the obligation structure outlined above, a philosopher-economist, Amartya Sen, has fashioned a conceptual

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217 Van Hoof, ibid. at 106. "Programmatic" can be seen as composed of a positive (action) element and a progressive (temporal) element.

218 See Raz, supra, note 27, for the view that a right is a ground for different duties and also that a right is dynamic in that the duties that it generates may change over time.

219 Van Hoof, supra, note 214 at 106. Note Jhabvala, supra, note 67, on the progressive side to the obligations attaching to political rights.

220 Van Hoof, ibid. at 107.

221 On this, see Alston's argument that in equal protection or due process cases, courts often act on the basis of "knowing an abuse when they see it." This could no less be the case with the right to food, for instance: P. Alston, "International Law and the Human Right to Food" in Alston & Tomasevski, The Right to Food, supra, note 13 at 57. Judicial interpretations of vaguely worded rights need to be seen as practical ethical choices made in light of the judges' engagement with the social context.
framework for the relationship between a right and programmatic obligations. He has this to say:

*A metaright* to something $x$ can be defined as the right to have policies $p(x)$ that genuinely pursue the objective of making the right to $x$ realisable. As an example, consider the following "Directive Principle of State Policy" inserted in the Constitution of India when it was adopted in 1950: "The state shall, in particular, direct its policy toward securing ... that the citizens, men and women equally, have the right to an adequate means of livelihood." ... There are, of course, ambiguities as to ways of checking whether the measures taken by the government amount to a policy $p(x)$ aimed at securing a right $x$ ... But such ambiguities of specification are not unusual in dealing with rights in general.... Indeed, sometimes it is patently clear that the policies are *not* thus directed.... There is ... no difficulty in conceiving of the same right being made institutional and concrete, permitting any individual to sue the government for not pursuing, with the required amount of urgency, a policy that is genuinely aimed at achieving the right to adequate means.222

The work of the Committee of Independent Experts (CIE) overseeing the European Social Charter demonstrates that it is indeed possible to evaluate whether a progressive obligation is being met at a given point in time.223 In the recently enunciated Limburg Principles, a similar capability seems to be envisaged in relation to the ICESCR, and the new Committee may conceivably be able to determine whether a State's policy, practice or legislation reveals a breach of a "metaright."224 In particular, the emphasis in the Limburg Principles on states making a priority commitment "to improve the standard of living of the poor and disadvantaged groups"225 and being "obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all"226 suggests that potential institutional linkages between the two Committees could eventually lead to permeability claims challenging the adequacy

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222 A. Sen, "The Right Not to Be Hungry" in Alston & Tomasevski, *ibid.* at 70-71.


225 Principle 14, *ibid*.

226 Principle 25, *ibid*.
of government measures taken on behalf of the most marginalized in society.\footnote{227} 

Philip Alston, one member of the new Committee, has indicated that one of that body’s priorities must be to begin identifying "the minimum core entitlement" that flows from a given right.\footnote{228} Once the new Committee begins to evolve a jurisprudence based on state reports and studies of \textsc{icescr} articles, a close working relationship with the Human Rights Committee could enable the latter to hear communications under a permeable \textsc{iccpr} article that would complement prior evaluations of a state’s laws on a given \textsc{icescr} right. The Human Rights Committee could even evaluate a law for the first time in the light of the facts of a particular case. 

An example might be in order. Under \textsc{iccpr} 23(1), "[t]he family ... is entitled to protection by society ... and the State" while under \textsc{iccpr} 24(1), "every child shall have ... the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State." Under \textsc{icescr} 10(1), "[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children." A state provides lump-sum benefits to families under a certain income level, but fails to adjust the quantum according to the number of children in the family. A child of a large family petitions the Human Rights Committee, claiming breaches of \textsc{iccpr} 23(1) and 24(1). The Human Rights Committee refers to general recommendations of the new Committee under \textsc{icescr} 21 on the subject of \textsc{icescr} 10(1), and finds that protection of the family requires adequate benefits for \textit{each} child and that this requirement has a particularly high priority. The Committee finds that state benefits are the only present means of income for the family and (with the collaboration of the new Committee) determines that the state has sufficient resources to be under a current obligation under \textsc{icescr} 10(1). The state is found

\footnote{227} Note that Jacobs recommends that any new \textsc{echr} Protocol include rights of everyone to an adequate standard of living and to social and medical assistance (or, alternatively, a social security scheme which provides the same guarantees): Jacobs, \textit{supra}, note 209 at 165.

\footnote{228} Alston, "Out of the Abyss," \textit{supra}, note 4 at 24-26.
to have breached ICCPR 23(1) and 24(1), and the Committee recommends that the state pay appropriate benefits to the petitioner. A presumption for permeability is relied on. The state complies and, after domestic political pressure and some domestic litigation, it changes its legislation.

It cannot be objected that such indirect challenging of legislation is impossible under a petition procedure designed to protect individual rights. First, such an objection ignores the fundamental fact that the "true effectiveness" of the European Convention on Human Rights, to take the best case, "has been to remedy defects in national laws and practices rather than to provide the individual with a cure for his particular complaint." 229

Second, the objection raises the locus standi question of whether individuals can be given rights enforceable by petition. In his study of the European Social Charter, David Harris cogently argues that the necessary focus in the Charter, or in the ICESCR for that matter, on the obligations aspect of the issue yields "no overriding reason why individuals should not be given the locus standi to call attention to the possible breach of these obligations in circumstances in which they are directly and specifically affected." 230 The Human Rights Committee would simply have to make its notion of victim sensitive to the kinds of obligations a state has with regard to rights found in the ICESCR that also permeate the ICCPR.

Third, the objection is probably based on scepticism that a supervisory organ could pin-point what is required under a programmatic obligation at any point in time; Sen's suggestion that it could do so would be dismissed as the naive supposition of a non-lawyer. As already stated, Harris's excellent survey of the European Social Charter jurisprudence belies this fear. 231 Instead, he makes

229 Jacobs, supra, note 209 at 177-78; Harris, ESC, supra, note 223 at 270, n. 315.

230 Ibid. at 270.

231 A finding of a breach of the Charter under its report system, which is juridically no different from any such finding as might result from the operation of a system of petitions, has presented no inherent difficulties. In particular, it has proved possible to set appropriate levels of achievement for states and to take sufficient account where necessary of the economic circumstances of individual states or of states generally at a given time when doing so.

Ibid. at 269.
an extremely persuasive case for the benefits of a system of petitions leading to adjudication of economic and social rights. In particular, he emphasizes the role that petitions play in prompting discovery of how a law or practice actually works. Both the particular facts of an individual's case and the sharpness of adversarial exchange (even if only in written form, as for the Human Rights Committee) encourage a focus that examination of legislation in the abstract does not permit. Further advantages of a petition system include clarifications of laws and remedies, which emerge through the process of seeking local remedies; greater impact on public opinion than abstract rulings would have; and the direct availability of remedies to individuals.

Harris is correct in the following observation on the justiciability of economic rights: "It seems likely that the argument that obligations concerning economic and social rights cannot by their nature be properly made the subject of a system of petitions stems more from tradition than from a thorough assessment of the practical situation."

Thus, the above survey suggests that justiciability is a fluid concept. Indeed, the experience of modern public law (whether it be administrative law or complex European Economic Community law) appears to be one of constantly expanding justiciability. I suggest that there are two essential elements in the determination of whether a right or rule is justiciable: the value or normative component, and the expertise or empirical component. By the former, it is argued that a matter should not be subjected to adjudication and, by the latter, that it cannot be.

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232 See his excellent discussion: ibid. at 226-32.

233 Ibid. at 267. Harris adds:
In a report system, a lot turns upon the way in which an answer to a questionnaire is put and whether the expertise of the supervisory organ is such to allow it to know when and how to probe further. The national reports that have been presented so far under the Charter system contain, for example, many short, comprehensive statements which, in some cases, have been questioned further as the result of the presence on the CIE of a member with specialist knowledge.

Ibid. at n. 303.

234 Ibid. at 267-68.

235 Ibid. at 271.
Prevailing judicial dispositions and political ideologies (the former often factoring in the latter) may be hostile to viewing a political or economic matter as justiciable. Often, this attitude stems from particular conceptions of the judicial function and the nature of law and the state, but it may also be influenced by the expertise component and by views of the limited competence of the courts. Yet expertise is not a constant. If a full conception of human rights makes permeability desirable in the Covenant context, the Human Rights Committee should tap into the expertise of the new Committee just as domestic courts rely on outside experts, and should seek to improve its own capabilities.

This study does not advocate de facto or de jure replacement of the report system for economic rights, or wholesale promotion of the ICESCR via the ICCPR. Rather, it advocates a limited complementary relationship. While ideally it would be the new

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236 See category 6 in the list of dichotomies earlier in this section. See Jhabvala, supra, note 67 at 150 for the view that the Covenants' separation "is based on classical Western liberal philosophy with its separation of politics and economics...." And see R. Higgins, "Policy Considerations and the International Judicial Process" (1968) 17 I.C.L.Q. 58 at 76, 80, 82 for the view that "policy" being intrinsic to law, courts must develop expertise to deal with policy issues, rather than seeking to skirt those issues.


It will have become obvious that my primary concern in this discussion is to surmount the institutional incapacity hurdle. The question of normative justiciability has been implicitly dealt with in terms of the strength of the principle of interdependence and will be touched upon again in the upcoming discussion of whether normative and jurisdictional barriers constitute barriers to permeability: see S.IV.B.

237 See Higgins, ibid., for a similar view against using lack of expertise as a perpetual barrier to justiciability.

238 Harris's book bears witness to the considerable potential of a report system. For the advantages of reports over petitions and for the view that combining petitions and reports together is desirable, see Harris, ESC, supra, note 223 at 268.

It must further be emphasized that the focus in this article on adjudicatory dimensions of protecting economic rights is meant to be complementary to other avenues of activity, such as international co-operation and reform of the international economic order.
Committee that would bring its expertise to bear on individual petitions, the likelihood of a treaty amendment empowering it do so is small. Thus, the Human Rights Committee must fulfil that role to the extent allowed by permeability. In so doing, it should pay particular (and perhaps exclusive) attention both to the obligations to respect and protect, and to the basic programmatic obligations of rights in the ICESCR that are central to the lives of the most vulnerable and which, in addition, permeate the ICCPR.

B. Normative and Jurisdictional Overlaps and Conflicts

I have defined permeability as the openness of a treaty to the supervision of human rights norms from a different category of rights found in another treaty.\footnote{239} As such, the term describes either a general feature of a norm or treaty\footnote{240} or a result in a particular situation. Questions of normative and jurisdictional relations\footnote{241} between the two treaties (involving overlaps as well as conflicts of norms and jurisdictional competence) must be resolved in determining the extent to which one treaty is permeable in relation to another and the role of a permeability presumption in interpreting a given treaty.

C. Wilfred Jenks, in a classic study, views the conflict of treaty provisions "in the strict sense" as arising where "a party to ... two treaties cannot simultaneously comply with its obligations under both treaties." Only a "divergence," on the other hand, occurs where two instruments treat the same subject matter from divergent angles.

Permeability is but one element of a necessarily multifaceted approach, the utility of which will vary according to the level of affluence and the role of the courts in the constitutional structure of particular states.

\footnote{239} See S.I.

\footnote{240} This article's title could equally refer to the permeability of human rights treaties, as opposed to norms.

\footnote{241} See Meron, \textit{HR} \textit{supra}, note 187, especially Ch. IV, "Normative Relations Between Human Rights Instruments" at 131, and Ch. V, "Jurisdictional Relations Between Human Rights Instruments and Organs" at 214; see also T. Meron, "Norm Making and Supervision in International Human Rights: Reflections on Institutional Order" (1982) 76 Am. J. Int. L. 754 [hereinafter Meron, "Norm Making"].
but where the obligations which arise are not strictly incompatible, even if one obligation is more onerous than the other.\textsuperscript{242} Theodor Meron cogently argues that this conflict/divergence distinction is of limited utility, because it is next to impossible to determine in the abstract whether a difference in obligations constitutes one or the other.\textsuperscript{243} A more important point is that even divergences are of concern, simply because uniformity of obligations and a relatively coherent base for the generation of customary international law are crucial goals in international human rights law.\textsuperscript{244} For these reasons, I will use the term conflict in a looser sense than Jenks does, to apply to all differences flowing from the treatment of the same right under both Covenants.

From the definition and preceding discussion of permeability, it will be recalled that normative overlap is central to organic or direct permeability and relevant to some instances of related or indirect permeability, as between ICCPR 26 and ICESCR 2(2).\textsuperscript{245} Conflicts of norms must not be equated with overlap of norms, because the obligations generated by an overlap may in principle be not only compatible but also identical.\textsuperscript{246} But in practice, overlap carries with it the potential for conflict, in the broad sense, for several reasons. As Meron points out, it is UN policy for each normative instrument to create its own system of supervision.\textsuperscript{247}

\textsuperscript{242} W. Jenks, "The Conflict of Law-Making Treaties" (1953) 30 B.Y.B.I.L. 401 at 426; see 425-53 for the essence of the article. See the discussion of Jenks's views in Meron, HR, supra, note 187 at 142-52.

\textsuperscript{243} Meron, HR, \textit{ibid.} at 143.

\textsuperscript{244} \textit{Ibid.}

\textsuperscript{245} For text, see \textit{infra}, note 299.

\textsuperscript{246} Meron does not explicitly distinguish overlap and conflict. In "Norm Making," \textit{supra}, note 241 at 758, he seems to use them interchangeably: "Problems of overlap or conflict of norms can be avoided..." But in \textit{HR, supra}, note 187 at 131, he implicitly distinguishes them by referring to instruments which may be "inconsistent or mutually incompatible" and, separately, to instruments "which may overlap."

There is an accompanying lack of specific attention by treaty organs to the interpretations placed on rights in other treaties whose formulations are broadly similar.\textsuperscript{248} Compounding the problem is the fact that, though similar, the definition of rights and the limitation provisions are usually not exactly the same in separated instruments.\textsuperscript{249} This may provide justification for not taking an openly comparative approach, particularly if there is an underlying tendency to emphasize the autonomy of the treaty from other treaties.\textsuperscript{250} Finally, the value-laden nature of interpretation inevitably leads to conflicts in interpretation, not only between organs but also within an organ over time.\textsuperscript{251}

Thus, overlaps of norms can be seen as \textit{prima facie} conflicts of norms. A permeability presumption increases the risk of conflict, because the permeability thesis encourages overlap that flows from a sustainable reading of an ICCPR article. However, the theoretical distinction between overlap and conflict now assumes importance: it suggests the possibility of co-ordinating the promotion of overlap and the minimization of conflict, each desirable for different reasons. The remainder of this section seeks to show how this co-ordination can be accomplished.

Directly related to these notions of normative overlap and conflict are duplication (or overlap) and conflict of supervisory jurisdiction. Meron notes that "[i]nternational human rights law does not incorporate conflict of laws rules, and in a typical situation each organ tends to act in isolation."\textsuperscript{252} Because a permeability

\textsuperscript{248} See J. McBride, "Widening Case Law Horizons" (1986) 1 Interights Bull. 8.

\textsuperscript{249} Meron, "Norm Making," \textit{supra}, note 241 at 761.

\textsuperscript{250} We will see in the discussion of recent Human Rights Committee case law that the Committee views the ICCPR as having "a life of its own": S.V.A.

\textsuperscript{251} By way of illustration, see A. Hutchinson, "The Rise and Ruse of Administrative Law and Scholarship" (1985) 48 Mod. L. Rev. 293 for a discussion of such temporal contradictions in English public law.

\textsuperscript{252} Meron, \textit{HR, supra}, note 187 at 139.
presumption increases the risk of normative and jurisdictional conflicts by generating normative and jurisdictional overlaps, the proponent of permeability must address the issue of inter-Covenant conflicts. Should a permeability presumption be defeated by jurisdictional conflict? Conflict of jurisdiction may be understood in at least three senses, each of which will be dealt with in turn.

First, there may be a conflict in the straightforward sense of two organs claiming jurisdiction over the same matter. Treaties contain provisions that attempt to resolve this sort of conflict. The fact that treaty standards differ shows the fine distinction between (undesirable) conflict and (desirable) duplication. However, the Human Rights Committee has held that the "same matter" requirement of Optional Protocol 5(2)(a) refers to the examination of individual cases, not of general situations such as would be the case under the reporting system of the ICESCR.

The second type of jurisdictional conflict can arise if one organ assumes competence over a matter falling outside its own mandate, and in the process encroaches on another organ's area of competence. Incompatibility ratione materiae can occur without one body necessarily stepping into another body's jurisdiction. But a claim may create this jurisdictional overlap because governments in permeability cases have linked the presence of a right in a treaty dealing with economic rights to the incompatibility ratione materiae with a treaty on political rights. This kind of conflict is directly related to the objection that a state should not be bound by ICESCR provisions in the name of interpretation unless it has ratified the ICESCR. Maurice Mendelson, in a study of the uses of ECHR norms

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253 Optional Protocol 5(2), supra, note 3, states: "The Committee shall not consider any communication from an individual unless it is ascertained that: ...(a) the same matter is not being examined under another procedure of international investigation or settlement." [Emphasis added.] ECHR 27(1), supra, note 3, states: "The Commission shall not deal with any petition submitted under article 25 which: ...(b) has already been submitted to another procedure of international investigation or settlement and if it contains no relevant new information." [Emphasis added.]

254 See S.V.A. on the Dutch triad of ICCPR 26 cases.

255 See Meron, HR, supra, note 187 at 215.

256 See the government's arguments in the ICCPR equal protection cases, S.V.A.
by the European Court of Justice in that court's interpretation of the EEC's Treaty of Rome, comments:

It is often overlooked that the European Convention on Human Rights is not a homogenous body of law uniformly binding on all the Member States of the Communities.... If this lack of uniformity of obligation is glossed over, there is a danger that these reservations, declarations and failures to ratify will be swept out by the back door of EEC membership.257

In addition, Meron discusses the *Case of Baby Boy*,258 in which petitioners brought the United States before the Inter-American Commission on Human Rights. The petitioners argued that the right-to-life provision in the American Declaration on Human Rights259 should be interpreted to include the notion that life begins at the moment of conception—a notion found in the American Convention on Human Rights, which the United States has not ratified.260 The Commission refused to accept this interpretation, saying: "[T]he United States Government ... by means of 'interpretation,' an international obligation based upon a treaty that such State has not duly accepted or ratified."261

These examples from systems where the borrowing of norms has been at issue must be taken seriously. But in the latter example, it is not clear that a treaty interpretation can be tailored to a state's subjective obligations, unless those obligations have been expressly entered as reservations to the particular treaty. The issue would also arise in interpreting a treaty in the light of a customary international law norm, where a state invokes its status as a persistent objector as

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258 Meron, *HR*, supra, note 187 at 138. See the *Case of "Baby Boy,"* Res. No. 23/81, Case No. 2141, 1 *Inter-American Commission of Human Rights Annual Report 1980-81*, 6 (OEA/SER.L.V/II 54, Doc. 9, rev. 1 (1981)).


260 Article 4(1) of the American Convention on Human Rights in *Basic Texts, supra*, note 3 at 176.

261 *Case of Baby Boy, supra*, note 258 at 24, quoted in Meron, *HR, supra*, note 187 at 138.
reason not to be bound by the interpretation. The better view would seem to be that a treaty must be interpreted as objectively as possible, especially in the area of human rights.\textsuperscript{262} Regarding the EEC Treaty of Rome, Mendelson seems to be giving a general policy warning about the appropriateness of the European Court of Justice's reliance on the ECHR, rather than suggesting that the Treaty of Rome should be differentially interpreted according to states' reservations to and failures to ratify the ECHR.

In the Covenant context, the objective interpretation argument is at least as strong. Because of interdependence, it is perfectly consistent to imply a norm found in the ICESCR into the ICCPR, and simultaneously enforce a right in the ICCPR. As a matter of formal analysis, this must be the approach given the presence of ICCPR 2(1) by which states undertake "to respect and to ensure ... the rights recognised in the present Covenant," and of Optional Protocol 2, by which individuals claiming that any "rights enumerated" in the ICCPR have been violated can submit communications to the Human Rights Committee.\textsuperscript{263} It seems commonsensical that "recognised" and "enumerated" rights must include their implications, if the ICCPR is not to be fossilized. Therefore, to argue that an interpretation would be incompatible ratione materiae, the argument for permeability based on interdependence must be tackled head-on.

The third type of jurisdictional conflict is analogous to the forum non conveniens doctrine in private international law. An organ may decline to take jurisdiction over a matter when it technically could.\textsuperscript{264} Now that there is a new Committee to monitor the ICESCR, one might be inclined to argue for a greatest-technical-competence (or expertise) principle, so that the Human Rights Committee should defer matters in the largely undeveloped area of

\textsuperscript{262} See discussion on treaty interpretation in S.III.B.2.

\textsuperscript{263} Supra, note 3 [emphasis added]. Note also the reference to "rights set forth in the Covenant" in Article 1 of the Optional Protocol.

\textsuperscript{264} Meron gives an example of such "judicial restraint," citing an occasion when the European Commission of Human Rights declined to examine a claimed breach of ECHR 5 regarding certain P.O.W.s because the State Party in question, Turkey, was party to the Geneva Convention No. III, which was also applicable and over which the International Committee of the Red Cross had jurisdiction: Meron, HR, supra, note 187 at 217.
economic rights to the new Committee.\textsuperscript{265} This argument assumes: that the former Committee is less expert than the latter; that if it is less expert, it should defer; and that if it does not defer, there will be normative conflict. However, these assumptions are not necessarily valid.

The Human Rights Committee will be dealing with those obligations attaching to economic rights that are justiciable,\textsuperscript{266} and is thus better situated than the new Committee to develop an expertise based on practical adjudicative experience. Hence, both normative and jurisdictional overlap between the Covenants and Committees are more apparent than real. The Human Rights Committee would not, by and large, duplicate the new Committee’s function, but would complement and supplement it. Similarly, I have demonstrated\textsuperscript{267} that when human rights are approached from the obligations perspective, all of them, including economic rights, may be said to have immediate and negative obligations components. These are the two factors most commonly thought to make political rights justiciable. If the Human Rights Committee focused on some of these obligations through the permeability process (as well as on core positive obligations for the most basic rights to life), economic rights would be subjected to the scrutiny of an individual petition procedure. This would give them a dimension that abstract examination by the new Committee could not hope to accomplish. Normative overlap would thus also be minimized.

However, there is room for a residual area of overlap and potential conflict. In time, the new Committee’s collective expertise will grow as academic interest in economic rights throws more light upon them,\textsuperscript{268} and as the Committee profits from domestic examples and its own studies arising out of state reports. It is too early to tell what form the new Committee’s evaluations will take, but they may conceivably include statements akin to the Human Rights

\textsuperscript{265} See Meron, HR, \textit{ibid.} at 214: "Supervision of compliance should be entrusted to those organizations with the greatest technical competence in the field."

\textsuperscript{266} Recall S.IV.A.

\textsuperscript{267} \textit{Ibid.}

Committee's General Comments\textsuperscript{269} as well as actual evaluations of states' levels of compliance in the manner of the Committee of Independent Experts under the European Social Charter.\textsuperscript{270} On this optimistic scenario, the new Committee's views may have direct relevance both to mainstream areas of overlap like freedom of association\textsuperscript{271} and equal protection\textsuperscript{272} and to pioneer areas such as the incorporation of the right to an adequate standard of living into the right to life.\textsuperscript{273} Likewise, the Human Rights Committee's materials, not to mention the personal experience of its members, would be of use to the new Committee, especially if the latter body also takes an activist approach to the interdependence of human rights.

Thus, it is clear that institutional\textsuperscript{274} and informal personal linkages\textsuperscript{275} between the Committees and their members are desirable, if not imperative. This is due not merely to the negatively cast goal of avoiding normative conflict, but also to the more positive goal of fostering creative co-operation based on the interdependence of human rights and on the unity of purpose of the Covenants themselves. The new Committee should remember this when drafting its rules of procedure,\textsuperscript{276} and the Human Rights Committee

\begin{footnotesize}
\textsuperscript{269} The Human Rights Committee's authority for preparing "general comments" stems from ICCPR 40(4). ICESCR 21 makes reference to ECOSOC (that is, the new Committee) preparing reports that include "recommendations of a general nature": \textit{supra}, note 3.

\textsuperscript{270} See Harris, \textit{ESC, supra}, note 223 at 304 for "Table of Compliance with the Charter as Determined by the CIE [Committee of Independent Experts] During the First Six Cycles."

\textsuperscript{271} ICCPR 22 and ICESCR 8, \textit{supra}, note 3.

\textsuperscript{272} ICCPR 26 and ICESCR 2(2), \textit{ibid.}

\textsuperscript{273} ICCPR 6(1) and ICESCR 11(1), \textit{ibid.}

\textsuperscript{274} See Meron, \textit{HR, supra}, note 187 at 142, 241-42.

\textsuperscript{275} Note that the NGO Rights and Humanity held a seminar on the new Committee, March 23, 1987, during the overlap of the two bodies' meetings. Members from both Committees participated. This was repeated in 1988.

\textsuperscript{276} At present the ECOSOC Rules of Procedure apply to the new Committee: see UN Doc.E/5715/Rev. 1. These rules are unsuited to the needs of a specialist body like the new Committee. The new Committee did not reach agreement at its first session on requesting authority from ECOSOC to adopt its own rules.
\end{footnotesize}
should scrutinize its own Provisional Rules of Procedure with such inter-Committee co-ordination in mind. This has already been foreseen, as is evident from the 1986 Limburg Principles. Principle 98 reads:

> The Covenant on Economic, Social and Cultural Rights is related to the Covenant on Civil and Political Rights. Although most rights can clearly be delineated as falling within the framework of one or the other Covenant, there are several rights and provisions referred to in both instruments which are not susceptible to clear differentiation. Both Covenants moreover share common provisions and articles. It is important that consultative arrangements be established between the Economic, Social and Cultural Rights Committee and the Human Rights Committee.

Inter-Committee "cross-fertilization" may help create a symbiotic relationship between the Covenants, and may foster subtler, more sophisticated and more creative understandings of human rights and their interrelationships.

In the end, the guiding principle must be to follow the course most likely to provide the most effective protection for the individual. Meron has convincingly come down on the side of a multiplicity of norms and procedures. He sees such multiplicity as desirable because it allows individuals to benefit from the most

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277 See the Committee's (Provisional) Rules of Procedure, UN Doc.CCPR/C/3/Rev.1 (3 December 1979).

278 Four members of the new Committee were at the conference which drafted the Limburg Principles.

279 Principle 98, "The Limburg Principles," supra, note 164. Authority for such consultative arrangements might be found in ICESCR 22, supra, note 3, which reads:

> The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.


280 Meron, HR, supra, note 187 at 242.

281 Ibid. at 62.
favourable norms and procedures at the present, underdeveloped stage of international human rights law. He adds:

The prevailing wisdom has been that it is important to improve co-ordination, to avoid conflict, and to avoid different interpretations. Nevertheless, over-zealous efforts to rationalize the existing multiplicity of procedures might cause the most favourable procedures to be brought into line with the less far-reaching ones. As an important study by the government of the Netherlands has suggested, there may be good reason "to allow the new procedures a certain amount of time to develop and consolidate themselves in practice. In the long run it may then prove possible to rationalize the numerous procedures, adapting the less effective to bring them into line with the better ones."282

Nothing could be more to the point in the context of the relationship between the Covenants. It is crucial that the use of an international petition procedure for economic rights be permitted to show enough promise to indicate the way forward in this largely unexplored area.283 Hopefully this will occur in a climate of cooperation between the Committees.

The Meron quotation looks to the day when international human rights supervision will be rationalized. The proponent of permeability is concerned that when that day arrives, we may still be compartmentalizing the traditionally conceived sets of human rights. Practical inroads have to be made soon in order to dislodge our orthodox conceptions and to ensure a truly comprehensive and effective normative restructuring, along with a jurisdictional realignment. Otherwise, we risk passing on to future generations a truncated legal approach at considerable variance with the growing consensus on the interdependence of human rights. To insist on maintaining the separation of the Covenants will only encourage such a result.

V. PERMEABILITY UNDER THE ICCPR

In this part I will examine views on the merits and admissibility decisions adopted by the Human Rights Committee

282 Ibid. at 243, quoting Ministry of Foreign Affairs of the Netherlands, Human Rights and Foreign Policy 80 (1979).

283 See discussion on justiciability of economic rights in S.IVA.
under the Optional Protocol's individual communications procedure. I will also examine one General Comment. The treatment will be limited to the four provisions under which permeability has been directly at issue so far: Article 26 on the right to equal protection, Article 14 (1) on the right to a fair hearing, Article 22(1) on the right to freedom of association, and Article 6(1) on the right to life.

A. Article 26: Equal Protection of the Law

Article 26 is one of the more complex and badly drafted articles in the ICCPR. There are perhaps three central issues. First, what does equal protection of the law mean in broad terms? Can it be confined to equality before the law and equal protection in the application of the law, as several commentators contend? Or does

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284 The analysis is current up to, but not including, the March-April 1988 session (32nd session) of the Human Rights Committee. It should be noted that no views are directly relevant on ICCPR 6(1), but an important General Comment by the Committee under ICCPR 40(4) is directly on point: see General Comment 6(16)d, Official Records of the General Assembly, Thirty-Seven Session Supplement, No. 40, (A37/40(1982)) at 93. Therefore, ICCPR 6(1) will be briefly discussed as regards its potential for permeability under the communications procedure.

Note that the annual reports of the Human Rights Committee have appeared as Supplement No. 40 to the General Assembly's Official Records every year from 1979 (A34/40(1979)) to 1986 (A41/40(1986)) and are formally cited as above. These reports will hereafter be cited as: HRC year (for example 1979 to 1986) Report. Decisions appearing in the HRC 1987 Report will be cited as documents in a special UN document series dealing with the ICCPR.

285 This section should not be taken as an analysis of all facets of each of the articles and even where it is argued that a presumption for permeability could have been or could be invoked, the decisiveness of such invocation can only be postulated in the absence of a thorough analysis of the article, either in the abstract or in a concrete case.

286 Article 26, supra, note 3, reads as follows:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

it go beyond this to mean also that the substantive provisions of the law must not discriminate, that is, that ICCPR 26 includes equality of or in law? Second, if ICCPR 26 means the latter, does it apply only to rights in the ICCPR, to civil and political rights in general, or to all legislation, including legislation dealing with rights found in the ICESCR? Third, whatever the answers to the first two questions may be, what constitutes discrimination? The first question may be considered resolved given that, in the cases I will look at, the Committee has clearly taken the broad view. I will not be concerned with the third question.

It appears that the second question is also now resolved; in a recent session, the Committee applied ICCPR 26 to legislation dealing with social security, the subject of a right found in ICESCR. There were three cases involved: S.W.M. Broeks v. the Netherlands, L.G. Danning v. the Netherlands, and F.H. Zwaan-de

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288 For this broad view, see B.G. Ramcharan, "Equality and Non-discrimination" in Henkin, The International Bill of Rights, supra, note 81 at 246.

289 It must be recognized that in some ways questions one and two cannot be disentangled if one takes the view that a broad interpretation of what kind of equality ICCPR 26 deals with necessarily means economic rights fall within its scope. However, it would be possible to give ICCPR 26 a broad meaning but in relation to a limited range of rights and, therefore, legislation. In the cases which follow, this is exactly the approach urged upon the Human Rights Committee by the Netherlands government.

There is a fourth issue with which I will not be concerned, but which is probably of as much, if not more, significance to marginalized members of society. That is the question of the meaning of certain enumerated grounds of discrimination in ICCPR 26, such as "social origin," "property," and "birth," as well as the scope of the grounds which would fall within the words "or other status." The Canadian reader may wish to use the grounds in ICCPR 26 to assist the interpretation of the scope of the analogous grounds in s. 15(1) of the Canadian Charter of Rights and Freedoms. I would note that this fourth issue cannot be divorced from the third question mentioned above, that of the meaning of "discrimination"; in this regard, the Human Rights Committee should be urged to focus on remedying disadvantage and powerlessness rather than formalistically focusing on ensuring the same treatment for "similarly situated" persons.

290 Its 29th Session was held in March and April of 1987.

291 Article 9 of the ICESCR, supra, note 3, reads: "The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance."
The arguments by the Government were virtually identical in each case, as were the holdings of the Committee. However, there were some important differences in the arguments made by the petitioners or "authors" of the communications. I will therefore deal with the Committee's views collectively, but make references to individual cases where appropriate.


293 In particular, the arguments of the author in Broeks, ibid., included in the text of the Committee's decision, were more extensive than in Zwaan-de Vries, ibid. The author's arguments were threadbare in Danning, ibid. It must be noted that all three cases came before the Committee at approximately the same time (Broeks, 1 June 1984; Danning, 19 July 1984; Zwaan-de Vries, 28 September 1984). As the general issue raised was identical in each, it may reasonably be assumed that the Committee did not treat each case in isolation. For this reason, the Broeks arguments (and the manner in which the Committee integrated those arguments into the text of its decision) will be focused on.

294 The Dutch cases were the first to decide that ICCPR 26 can apply to rights in the ICESCR, but there had been five previous communications, all held to be inadmissible, which raised the issue to one degree or another. A detailed examination is not justified for the simple reason that the ICCPR 26 issue was never explicitly addressed by the Committee. These cases are I.M. v. Norway (Communication No. 129/1582), HRC 1983 Report at 241; A Group of Associations for the Defense of the Rights of Disabled and Handicapped Persons in Italy and Others v. Italy (Communication No. 163/1984), HRC 1984 Report at 197; J.H. v. Canada (Communication No. 187/1985), HRC 1985 Report at 230; J.D.B. v. the Netherlands (Communication No. 178/1984), HRC 1985 Report at 226; and H.S. v. France (Communication No. 184/1984), HRC 1986 Report at 169.

Two of the cases, I.M. v. Norway and H.S. v. France, do call for brief comment. H.S., a thoroughly confusing case, was partly disposed of on grounds of non-exhaustion of local remedies. H.S. alleged arbitrary deprivation of his French nationality. Both the Government and the Committee seemed to think this claim raised fair trial issues under ICCPR 14(1) (pars. 8.4 and 9.3, respectively), an article that H.S. never explicitly pleaded. He did claim discrimination regarding social security allowances for his family, education for his children, and his own work prospects. The Committee said (at para. 9.6): "H.S. has introduced other issues in the case.... These issues are either unsubstantiated or fall outside the scope of the International Covenant on Civil and Political Rights and will, therefore, not be examined by the Committee."

In the absence of fuller specification by the Committee and given the rather incoherent allegations by H.S. of ICCPR violations, there is little reason to think that the Committee was referring directly to ICCPR 26 with its latter point.

I.M. v. Norway is not a model of clarity either. A medical doctor claimed racial discrimination with respect to assistance in filling out tax forms and low-income housing allocation. The Committee found the communication to be "incompatible with the provisions
The relevant facts are fairly straightforward. In the cases of Broeks and Zwaan-de Vries, Broeks (a nurse) and Zwaan-de Vries (a computer operator) had their unemployment benefits terminated on the basis of Article 13(1) of the Dutch Unemployment Benefits Act (www). www 13(1) stipulated that www benefits could not be claimed by married women who were neither "breadwinners" nor permanently separated from their husbands. No similar provision applied to married men; so, in separate communications, each woman claimed a violation of ICCPR 26. In Danning, the applicant was disabled after an automobile accident and was in receipt of social insurance benefits. The relevant legislation provided for higher payments to married beneficiaries than to single persons; common-law marriages were excluded from the higher payments. Danning claimed that he was being discriminated against within the terms of ICCPR 26 because he lived in a common-law marriage. In all three cases, the Committee disposed of the threshold issue by of the Covenant" (at para. 5), but had earlier said only that tax and housing allocations are not governed by the ICCPR and that there was no evidence of racial discrimination. The Committee could have been referring to tax and housing as distinct rights, or, conceivably, to the claim of discrimination regarding those matters. The total ambiguity leads me to discount the case's significance.

The two cases disposed of on grounds of lack of standing, A Group of Associations v. Italy and J.H. v. Canada, raised potentially interesting questions. In J.H., an English-speaking Canadian Armed Forces member claimed that promotion policies discriminated against English-speaking Canadians. J.H.'s claim was that ICCPR 2(1) had been violated, but, on the facts, the claim should have been that ICCPR 26 had been infringed. ICCPR 2(1) guarantees non-discrimination, but only in relation to the enjoyment of other ICCPR rights. J.H. was alleging language-based discrimination in relation to the opportunity for job promotion (found in ICESCR 7(C)) or, more generally, the right to work (ICESCR 6(1)). Such discrimination would therefore fall to be dealt with under ICCPR 26. In Group of Associations, it was claimed that revocation of a legislative provision dealing with the compulsory hiring of the disabled would violate ICCPR 26 in relation to the right of the disabled to work.

Since the Dutch triad, one case — F.G.G. v. the Netherlands (Communication No. 209/1986), U.N. Doc. CCPR/C/29/D/209/1986, Annex at 1-5 — was held inadmissible for failure to exhaust local remedies. That case dealt with the dismissal of Spanish seamen by a Dutch company, with the approval of the Dutch government. ICESCR 6 and 7 on the right to work and on just conditions of work were involved in the seamen's claim of discrimination on the basis of nationality. The Netherlands advanced similar arguments in F.G.G. to those that failed in the Dutch triad.

295 The Netherlands explained that whether or not a married woman was deemed to be a breadwinner depended, in part, on the absolute amount of the family's total income and on what proportion of it was contributed by the wife: see Zwaan-de Vries, supra, note 292 at para. 8.2.
deciding that ICCPR 26 did indeed apply. In both Broeks and Zwaan-de Vries, a violation was found on the facts; in Danning the differential treatment was found to be based on objective and reasonable criteria. In Broeks and Zwaan-de Vries, the Committee recommended that the Netherlands offer "an appropriate remedy," a point to which I will return.

The Committee's opinion may usefully be divided into its admissibility and merits components. On the question of admissibility, the Committee first noted that the report procedure under the ICESCR does not constitute the "same matter" for purposes of Optional Protocol 5(2)(a). More importantly, however, the Committee dismissed arguments that would have found the claims inadmissible *ratione materiae* because of overlap with the ICESCR. A claim of an alleged breach of the ICCPR is "not necessarily incompatible ... because the facts also relate to a right protected" by the ICESCR or any other international instrument. This approach is important, for it should allow future permeability claims to be decided on the merits, rather than being swept under the carpet as inadmissible. In essence, the Committee's approach nullifies any presumption that no overlap is dispositive in an across-the-board manner.

At the merits stage, the Committee enunciated two very important principles when rebutting the Netherlands' argument that the existence of the non-discrimination provision in ICESCR 2(2)
should detract from the full application of ICCPR 26. The first principle was as follows:

The Committee is of the view that the [ICCPR] would still apply even if a particular subject matter is referred to or covered in other international instruments, e.g. the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, or, as in the present case, the [ICESCR].

Second, it advanced the principle that: "[n]otwithstanding the interrelated drafting history of the two Covenants, it remains necessary for the Committee to apply fully the terms of the [ICCPR]."

Perhaps the most obvious point about the approach of the Committee is that it legitimizes permeability as a result, without treating permeability as a desirable phenomenon. The phrasing seems deliberately non-committal, leaving the door open for more innovative developments but offering no guarantee that the door will stay open. However, at the very least, states will not be able to argue that the simple fact of overlap is dispositive.

Several features suggest that the Committee played down the implications of its interpretation. First, there was emphasis placed on the Committee "fully applying ICCPR rights. The Committee did not rely at all on an analysis based on objects and purposes or broad context. In fact, it implicitly treated the Dutch Government's position as requiring a restrictive interpretation of the clear and ordinary meaning of ICCPR 26, simply in order to avoid overlap. Second, after stating the two general principles mentioned above, the Committee pointed out that "article 26 does not merely duplicate the

300 See para. 12.1 in each of the three Dutch cases, supra, note 292 [emphasis added].

301 Ibid.

302 In particular, the use of "referred to" and "covered in" can be read to apply to both indirect (related) and direct (organic) permeability, respectively.

303 See text accompanying note 301.

304 Note the Netherlands' phrasing of the issue: "... whether the way in which the Netherlands is fulfilling its obligations under article 9 in conjunction with articles 2 and 3 of the [ICESCR] can become, by way of article 26 of the [ICCPR], the object of an examination by the Human Rights Committee." See para. 4.2 in each of the three Dutch cases, supra, note 292. [Emphasis in the original.]
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guarantees already provided for in article 2 [of the ICCPR]," and by implication ICESCR 2(2). Third, the Committee said: "[W]hat is at issue is not whether or not social security should be progressively established in the Netherlands but whether the legislation providing for social security violates the prohibition against discrimination." Thus, Article 26 only involves indirect protection of economic rights. This could be read in the future either as a simple description of Article 26 or as an implicit restraint on the Committee straying further into ICESCR terrain. As stated earlier, one goal of this study is to argue that this latter approach is unwarranted and that the Committee must keep the door open for a more dynamic interaction between the Covenants. Fourth, the Committee recommended "an appropriate remedy," conspicuously avoiding any explicit suggestion that Broeks and Zwaan-de Vries be compensated for their shortfall in benefits. This must be seen as implicit recognition of the inroads that their interpretation had made and of the perceived need to move cautiously in order to keep states on-board. Fifth, there is the phrase in the second principle: "[n]otwithstanding the interrelated drafting history of the two Covenants." This formulation is unnecessarily defensive, given the foregoing analysis which concluded that separation did not mean separability. It is, however, to be welcomed on its own terms for it gives no weight to the mere historical fact of separation.

The Committee seems to have taken a deliberately low-key approach in phrasing its decision, almost certainly (and wisely) in order to present a consensus decision as well as to maintain its authority among states parties to the ICCPR. It has deliberately

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305 See para. 12.3 in each of the three Dutch cases, ibid. The suggestion in the next two sentences is that Article 26 is much more extensive in its guarantees than either ICCPR 2(1) or ICESCR 2(2).

306 See para. 12.5 in each Dutch case, ibid.

307 Para. 16 in Broeks and Zwaan-de Vries, ibid.

308 Para. 12.1 in each Dutch case, ibid.

309 See S.III.B.

310 It is significant that there was no minority opinion in the case.
understated the step that it has taken\textsuperscript{311} and obscured the broader considerations that allowed it to come down on one side of the line rather than the other. Of possible significance in this regard is the fact that the Committee extensively reproduced the arguments of both the Government\textsuperscript{312} and the applicants.\textsuperscript{313} Not only do these arguments reveal that a very contentious point of law was at stake, but they may also reveal some of the arguments the Committee implicitly accepted and rejected. At the very least, reproducing the authors' written arguments might be considered an invitation for others to develop some of their points further.

It is therefore of considerable interest that Broeks emphasized the interdependence of human rights. She first drew attention to the preambles of both Covenants and argued: "An explicit connection is made between an individual's exercise of his civil and political rights and his economic, social and cultural rights. The fact that these different kinds of rights have been incorporated into different covenants does not detract from their interdependence."\textsuperscript{314} Later, she pointed out that although there are two instruments for "technical reasons," the rights in the two Covenants "are highly interdependent,"\textsuperscript{315} a fact said to emerge not only from the preambles but also from Separation Resolution 543

\textsuperscript{311} Suffice it to say that the equal protection tool is a major weapon in making welfare systems less arbitrary and, in individual cases, of securing benefits that legislation does not provide for. For an introduction to the experience in the United States, illustrating the potential and (so far) the limits of equal protection analysis, see G. A. Christenson, "Using Human Rights Law To Inform Due Process and Equal Protection Analyses" (1983) 52 U. Cin. L. Rev. 3; M.H. Good, "Freedom from Want: The Failure of United States Courts to Protect Subsistence Rights" (1984) 6 Hum. Rts. Q. 335; E. Sparer, "The Right to Welfare," \textit{supra}, note 11; S. Krislov, "The OEO Lawyers Fail to Constitutionalize a Right to Welfare: A Study in the Uses and Limits of the Judicial Process" (1973) 58 Minn. L. Rev. 211; J. Tussman & J. tenBroek, "The Equal Protection of the Laws" (1949) 37 Cal. L. Rev. 341. A central problem with equal protection rights is that governments often \textit{equalize down} rather than \textit{equalize up} in response to a finding of a violation, especially in the welfare benefits field. Some sort of ratchet effect is needed, either within the equal protection right itself or as part of the remedy or by means of independent protection of the economic right elsewhere in the document, thereby establishing a floor below which provisions cannot fall.

\textsuperscript{312} See paras. 4.1 and 8.3-8.5 in each Dutch case, \textit{supra}, note 292.

\textsuperscript{313} See, in particular, paras. 5.3-5.10 in \textit{Broeks, ibid}.

\textsuperscript{314} \textit{Ibid.} at para. 5.2.

\textsuperscript{315} \textit{Ibid.} at para. 5.9.
(VI) which affirmed the principle of interdependence. Further, she argued: "If the State party is intending to imply that the subject-matter which is covered by one covenant does not come under that of the other, this is demonstrably incorrect: even a summary comparison of the opening articles of the two covenants bears witness to the contrary."  

The arguments made so far for an interpretative presumption for permeability will bolster and supplement these arguments of Broeks, which were not developed very far. The arguments in Broeks amounted to the kind of presumption which may well have tipped the balance in favour of the Committee's interpretation. However, those arguments should be seen not as the end of the story but as its beginning. In particular, too much was conceded in Broeks's statement that "[t]he level of social security does not come within the scope of the ICCPR." A thorough analysis of the concept of interdependence would suggest that this, in fact, is an open question dependent on how the interpretation of various ICCPR provisions evolves. Broeks, Zwaan-de Vries and Danning provide a good, but still weak, foundation for inter-Covenant permeability.

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316 Ibid. I have referred earlier to Res. 543 (VI) as the Separation Resolution. See S.III.B.1.

317 Broeks, ibid. at para. 5.9.

318 Ibid. at para. 5.7. See as well the arguments by the Government based on (1) the implementation systems of the Covenants, and the fact of the historical choice of the contracting parties not to allow a petition procedure under the ICESCR (para. 8.3 in each case as well as paras. 8.5 in Broeks and Zwaan-de Vries); (2) the view that individual complaints dealing with discrimination with respect to ICESCR 9 would be "incompatible with the aims of both ICESCR and ICCPR" (para. 8.3 in each case); and (3) the view that the obligation under ICCPR 26 could only be that of a "periodic examination" of legislation (para. 8.3 in each case). All supra, note 292.

319 For instance, see the hypothetical example on child welfare benefits in relation to ICCPR 23 and 24 in S.IV.A.
B. Article 14(1): The Right to a Fair Hearing

There are two main questions arising under ICCPR 14(1) that are of interest from the permeability perspective. First of all, what is meant by "rights ... in a suit at law," and can economic rights benefit from Article 14(1) guarantees? Second, does ICCPR 14(1) contain a right of access to courts or tribunals and, if it does, to what extent must that access be effective?

The first issue cannot be adequately addressed without a brief digression into the situation under the European Convention. To trigger ECHR 6(1), an applicant must show that the "determination of his civil rights and obligations" is at stake. By focusing on the word "determination" in ECHR 6(1), which also appears in ICCPR 14(1), the ECHR organs take the approach that the article is triggered

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320 The relevant section of Article 14(1), supra, note 3, reads in part: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law...."

321 The French phrase reads: "... ses droits et obligations de caractère civil." See C. Newman, "Natural Justice, Due Process and the New International Covenants on Human Rights: Prospectus" [1967] Pub. L. 274, for a comparative table of the UDHR, ECHR and ICCPR. Newman's piece shows how strong the arguments are for giving "suit at law" a broad meaning. To the extent that the rival arguments are similarly strong, a presumption for permeability, appealing to the indirect protection of economic rights by ICCPR 14(1), would perhaps make the difference.


323 The relevant part of ECHR 6(1), Basic Texts, supra, note 3, reads: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...."
if proceedings are "decisive" for civil rights and obligations.\textsuperscript{324} Thus, the nature of the forum is not determinative and administrative law proceedings can be covered by \textit{ECHR} 6(1). However, the Court has also narrowly interpreted "civil rights and obligations," all the while avoiding a comprehensive abstract definition.\textsuperscript{325}

The phrase "civil rights and obligations" has been interpreted to have an autonomous Convention meaning and no direct \textit{renvoi} to the characterization of a right in a national legal system.\textsuperscript{326} By and large this phrase has been contrasted to \textit{public law}, not \textit{criminal law}. If contrasted to the latter body of law, the phrase would mean "all rights or obligations enforceable at law."\textsuperscript{327} Instead, by the gradual evolution of the case law, the phrase has come to connote "private law rights;" administrative law proceedings have been covered by \textit{ECHR} 6(1) only when found to be decisive for traditional private law categories of legal rights, such as in tort, contract or land law.\textsuperscript{328} However, in two 1986 landmark decisions drawing vigorous dissents, the European Court for the first time held that \textit{ECHR} 6(1) was triggered by statutory social welfare rights.\textsuperscript{329} The Court balanced what it called the private law features of the claimed entitlements with the public law features, and found the former to predominate.\textsuperscript{330} In reality, the Court strayed outside its private law approach, and was motivated by the opportunity to provide \textit{ECHR}...
protection to economic rights having a major impact on the lives of the people in question. The key statement in each case was that "the right in question was a personal, economic and individual right, a factor that brought it close to the civil sphere."

iccpr 14(1) has been invoked in relation to economic rights in three cases. In all three, the communication was held inadmissible but not on ratio materiae grounds. F.G.G. v. Netherlands and C.A. v. Italy left the issue open. Y.L. v. Canada is a complicated case that leaves the matter technically open, while at the same time laying down some guidelines for the meaning of "suit at law" and implying that the pension proceedings at issue do trigger ICCPR 14(1).

F.G.G. v. Netherlands, it will be recalled, dealt with the dismissal of Spanish seamen from work. One ground of complaint was that the granting of a dismissal permit by the Government violated F.G.G.'s "right to have full information and the opportunity to defend himself." The Dutch Government argued that this claim was incompatible ratio materiae because a right in a suit at law was not at issue. The communication was inadmissible on grounds

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331 This is made clear by the dissent of the minority: Feldbrugge, ibid. at 21-29; and Deumeland, ibid. at 33-41.

For the minority, even though entitlement to social security benefits was of extreme importance to many people, "the economic importance for Mrs. Feldbrugge's livelihood of the allowance claimed is insufficient, on its own, to bring into play the applicability of Article 6 §1 and its judicial guarantees." Feldbrugge, ibid. at 25; Deumeland, ibid. at 37. This constitutes a strong hint that the minority felt that the first "private law" feature, the right's importance, constituted the real ground for the decision of the majority.

332 Feldbrugge, ibid. at 15; Deumeland, ibid. at 24.


334 Note that the Committee, in General Comment 13(21)d, HRC 1984 Report at 143, did not offer any elucidation of "rights and obligations in a suit at law," but instead requested States Parties to explain in their state reports how the concept is interpreted in relation to their respective legal systems.

335 See supra, note 294.

336 F.G.G., supra, note 294 at para. 3.2.

337 Ibid. at para. 3.4.
of non-exhaustion of domestic remedies and the Committee never addressed the compatibility question.

In CA v. Italy, CA, who was qualified to teach "naval mechanical engineering", was authorized by an education authority to teach "mechanical technology" only. When an initial appeal failed, he appealed twice by an exceptional administrative recourse procedure to the President of Italy, who rejected the appeal by decree each time. CA claimed that this Presidential appeal procedure failed to conform to Article 14(1) requirements. The Committee noted that CA could have pursued his case against the decision of the education authority before domestic courts, the implication being that the courts would have provided a fair hearing. The Committee found:

In these circumstances, the author cannot validly claim to have been deprived of the right guaranteed under article 14(1) of the Covenant to have the determination of "rights ... in a suit at law" made by a competent, independent and impartial tribunal. Without having to determine whether article 14(1) is at all applicable to a dispute of the present nature, the Human Rights Committee therefore decides: ... [t]hat the communication is inadmissible.

The Committee did not decide the case on non-exhaustion grounds. Rather, this finding really amounts to a substantive finding that the communication was "manifestly ill-founded", a heading of inadmissibility found in Article 27(2) of the European Convention but not explicitly in Article 3 of the Optional Protocol. In other words, the case was decided on the basis that even if ICCPR 14(1) were applicable (without deciding that it was), its requirements were not satisfied. Assuming the legitimacy of the Committee importing a "manifestly ill-founded" requirement into the ICCPR, it is still odd to apply this ground of inadmissibility without existing jurisprudence

338 CA v. Italy, supra, note 333 at para. 4.1.
339 Ibid. at para. 6.
340 Article 27(2) of the ECHR, Basic Texts, supra, note 3, reads: "The Commission shall consider inadmissible any petition submitted under article 25 which it considers incompatible with the provisions of the present Convention, manifestly ill-founded, or an abuse of the right of petition."

Article 3 of the Optional Protocol, supra, note 3, reads: "The Committee shall consider inadmissible any communication under the present Protocol which is anonymous, or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the Covenant."
on whether the particular kind of claim is compatible *ratione materiae* with the *ICCPR*. It may have been that the Committee did not feel prepared to address the scope of *ICCPR* 14(1) at that point in time.

The majority of the Committee in *Y.L. v. Canada* followed a similar route in finding *Y.L.*'s claim inadmissible. This time, however, the majority combined the finding with some dicta on the interpretation of *ICCPR* 14(1). The minority felt that the majority had sidestepped what should have been a finding of incompatibility *ratione materiae*.341

*Y.L.* had been discharged from the Canadian Armed Forces on grounds of mental disorder. His request for a disability pension was rejected by the Canadian Pension Commission because *Y.L.*'s disability was found to neither arise out of nor have any direct connection to his military service, as required by the 1952 *Pension Act*. His final appeal to the Pension Board in 1979 failed. The Board's decision was forwarded not to *Y.L.* but to his lawyer, with the indication that it was up to the lawyer to decide whether to show the full text to his client. In the event, *Y.L.* did not see the full text until 1983. *Y.L.* claimed that the Board's procedure had violated *ICCPR* 14(1).342

The Canadian Government objected primarily on two grounds. First, there was a failure to exhaust local remedies because *Y.L.* still had a right of appeal to the Federal Court of Appeal. Second, the claim was incompatible *ratione materiae* because the proceedings did not count as a "suit at law."343 The Committee requested detailed information from both parties on whether, in Canadian law, the proceedings related to public law or civil (private)

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342 There were essentially four heads of claim: (1) he should have been informed of the exact nature of the mental disease he was alleged to be suffering; (2) he was not allowed to attend the hearings; (3) his lawyer, appointed and paid by the Government, refused to discuss fully with *Y.L.* the medical aspects of his case; and (4) the Board was not independent and impartial since it was composed of civil servants from the executive branch of government. *Y.L. v. Canada*, ibid. at para. 3.1.

343 *Y.L. v. Canada*, ibid. at para. 4. There is no elaboration of the Government's argument on "suit at law" in the text of the Committee's decision.
Both sides responded that the facts fell under a public law statutory regime.

The way in which the Committee majority then dealt with the case was ambiguous, and was calculated, it would seem, to avoid addressing the *ratione materiae* question head-on. The Committee's decision proceeded in two stages. First, it only briefly looked at the meaning of "suit at law," but managed to set some parameters for future cases without explicitly stating whether pension proceedings would be covered:

... In the view of the Committee the concept of a "suit at law" or its equivalent in the other language texts is based on the nature of the right in question rather than on the status of one of the parties (governmental, parastatal or autonomous statutory entities), or else on the particular forum in which individual legal systems may provide that the right in question is to be adjudicated upon, especially in common law systems where there is no inherent difference between public law and private law and where the courts normally exercise control over the proceedings either at first instance or on appeal specifically provided by statute or else by way of judicial review. *In this regard, each communication must be examined in the light of its particular features....* In the present communication, the right to a fair hearing in relation to the claim for a pension by the author must be looked at globally, irrespective of the different steps which the author had to take in order to have his claim for a pension finally adjudicated.

Second, the Committee immediately went on from the above passage to find that:

In the view of the Committee ... it would appear that the Canadian legal system does contain provisions in the *Federal Court Act* to ensure to the author the right to a fair hearing in the situation. Consequently, his basic allegations do not reveal the possibility of any breach of the Covenant.

Some brief comments may be made. The Committee appears to have started down the winding road travelled by the European Convention organs, taking a case-by-case approach and avoiding a clear definition of "rights ... in a suit at law." The enigmatic final

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344 Ibid. at para. 6.
345 Ibid. at paras. 6.1-6.3, 7.3.
346 Ibid. at paras. 9.2 and 9.3 [emphasis added].
347 Ibid. at para. 9.5.
348 The Committee appears to treat "suit at law" as an autonomous treaty concept, but does not explicitly say so.
clause in the first quotation above does little to explain "the nature of the right[s]" which will trigger ICCPR 14(1), or what the Committee means by a "global" treatment of a pension claim, beyond indicating the fact that the fora in which rights are to be determined are not determinative. However, the fact that the Committee avoided going further into this question (by shifting gears to discuss what the Canadian system does provide in relation to such claims) suggests that it might indeed entertain future claims that social welfare rights trigger ICCPR 14(1). The Committee based inadmissibility on the substantive ground that the right to a fair hearing is, in fact, protected (again, as in CA v. Italy, akin to "manifestly ill-founded"); this implies that the pension proceedings did amount to a "suit at law." The implication is supported by the fact that the Committee provided general guidelines on the meaning of "suit at law."

Support for this inference may also be found in the minority decision, which strongly suggests that the minority perceived the implications of the majority’s approach. The minority felt that the availability of an appeal to the Federal Court of Appeal could not be held against Y.L. because the Board had not directly advised Y.L. of this: "Under these circumstances, Canada is estopped from asserting that either, procedurally, the author has failed to exhaust local remedies or that, substantively, the requisite guarantees under article 14, paragraph 1, of the Covenant have been complied with." This characterization shows quite clearly that the Committee majority may have deliberately chosen the "manifestly ill-founded" approach over the non-exhaustion claim pleaded by Canada, in order to smuggle in, so to speak, a favourable ratione materiae determination without directly addressing the issue — perhaps to give the Committee time to examine the question in more detail or to do some internal consensus-building. The minority opinion went on to say that the claim was incompatible ratione materiae because Y.L.’s relationship to the Crown "differed essentially from a labour contract under Canadian law" and because the Board was "an administrative body ... lacking the quality of a court."

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349 Supra, note 346.
350 Appendix to Y.L. v. Canada, supra, note 9 at para. 2.
them, these two criteria "would appear to determine conjunctively the scope" of ICCPR 14(1).351

In YL v. Canada, both the majority and the minority apparently wanted to avoid an admissibility determination that would prevent them from discussing to some extent the meaning of "suit at law."352 The majority succeeded in opening the door for the indirect protection of economic rights under ICCPR 14(1) on a case-by-case basis in the future. The Committee could conceivably condition their case-by-case determination on a general principle linking ICCPR 14(1)'s scope to the importance of the right in question for the individual, as well as to the consequences for that person if the right is denied or restricted — irrespective of whether the right is deemed economic or political, or is found in the ICESCR or in the ICCPR.353

However, there is a real danger that the Committee might be tempted to distinguish between private law and public law rights, a distinction that is irrelevant to the purpose of human rights. The Committee would not be well advised to adopt a distinction that the European Court has recently strained so far as to have all but abandoned.354 To give certain social welfare rights procedural protection because private law features somehow predominate over public law features, instead of frankly acknowledging that it is their fundamental importance for the individuals in question that justifies the protection, would simply lack credibility. Given the morass of European Convention jurisprudence, and in light of the permeability presumption, it will be desirable for the Human Rights Committee

351 Ibid, at para. 3.

352 It should be noted that this analysis of Y.L. v. Canada is not in accord with the only other treatment of the case, in A. de Zayas, J. Moller & T. Opsahl, "Application of the International Covenant on Civil and Political Rights under the Optional Protocol by the Human Rights Committee" (1985) 28 German Y.B. Int'l L. 9. The authors state with no supporting analysis (at 45): "[T]he Committee found that the guarantees of Article 14(1) did not apply because a 'suit at law' was not involved. The Communication was declared inadmissible." As the above treatment suggests, this would not seem to be correct.

353 For arguments that "civil rights," as well as the French counterpart, should be given a broad interpretation because of the crucial importance of social welfare rights in the modern state, see Harris, supra, note 322 at 185-88, 199; Boyle, supra, note 322 at 108-11; and G. Sperduti, "Le Raccord Entre La Charte Sociale Européenne et la Convention Européenne des Droits de l'Homme" (1979) Cah. de Dr. Eur. 360-64.

354 See Feldbrugge and Deumeland, supra, note 329.
to state in the future that ICCPR 14(1) can cover public law economic rights such as are found in the ICESCR.

The second possible point of permeability, it will be recalled, is that dealing with access to the courts. There are as yet no ICCPR views on this, but again, the ECHR experience is instructive. The Airey Case\textsuperscript{355} is one of those rare cases that threaten to open up vast new jurisprudential frontiers. It has yet to do so in the ECHR system but its principles are transferrable to the ICCPR context. In Airey, the European Court stepped through the door opened in the Golder Case\textsuperscript{356} (which held that the right of access to a court was implied by ECHR 6(1)) to find that there had been a breach of a right of effective access. There was a violation, on the facts of the case, because a woman of modest means could not obtain legal aid to cover the high costs of an application to the Irish High Court for a judicial separation from her husband, and was thereby unable to bring an action.\textsuperscript{357} Under Irish law, Mrs. Airey was free to represent herself, and thus had formal access; but such access had little value because of the complexity of the proceedings and of the substantive points of law.\textsuperscript{358}

The Court took the view that "personal circumstances," as the Irish Government characterized Mrs. Airey's situation, could vitiate a right, and that hindrances to exercising a right in fact can breach the ECHR just like a formal legal impediment.\textsuperscript{359} With this established, the Court then dealt with the argument that they could not import economic rights, even on a case-by-case basis, into the ECHR:

\begin{quote}
The Court is aware that the further realisation of social and economic rights is largely dependent on the situation — notably financial — reigning in the State in question. On the other hand, the Convention must be interpreted in the light of
\end{quote}


\textsuperscript{356} \textit{Golder, supra}, note 31.

\textsuperscript{357} \textit{Airey, supra}, note 355 at 12-14. The Court also found that this amounted to a breach of the ECHR 8 right to family life.

\textsuperscript{358} \textit{Airey, ibid.} at 13.

\textsuperscript{359} \textit{Ibid.} at 14.
present-day conditions ... and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals.... Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.360

The italicized words seem to constitute a negative formulation of a permeability presumption, saying that the interpretation of ECHR articles as permeable should not necessarily be excluded. This is not unlike the Human Rights Committee's formulation in the triad of ICCPR 26 cases. It is still not a positive formulation according to which such an overlap with economic rights would count in favour of an interpretation. However, the difference may be more apparent than real and the Human Rights Committee could invoke the Airey principle in its future elaboration of ICCPR 14(1).

C. Article 22(1): Freedom of Association361

... the only case so far dealing with ICCPR 22(1), raised a permeability issue almost identical to that raised a decade earlier by a triad of trade union cases under the European Convention.363 The result does not favour permeability, although a vigorous five-member minority opinion may perhaps be invoked at

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360 Ibid., at 14-15 [emphasis added]. This may be called "the Airey principle."

361 ICCPR 22(1) and (2), supra, note 3, read:
1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

362 Supra, note 9. See de Zayas, Moller & Opsahl, supra, note 352 at 578.

some future date. In J.B., six members of the Alberta Union of Public Employees claimed that the prohibition on striking that applied to provincial civil servants in Alberta constituted a breach by Canada of ICCPR 22(1). A majority of the Committee found the communication to be incompatible ratione materiae, because the right to strike (found in ICESCR 8(1)(d)) could "not be considered an implicit component of the right to form and join trade unions" that is found in ICCPR 22(1).

The arguments of the Canadian Government were significantly similar to the pleadings of Belgium and Sweden in the European trade union cases, and to crucial aspects of the European Court's judgments in those cases. According to Canada, the claim was incompatible ratione materiae: "No mention of the right to strike is made in article 22, paragraph 1, of the [ICCPR]. The Government of Canada considers that this silence is of import, especially in light of article 8, paragraph 1(d), of the [ICESCR] which does recognise the right to strike." This statement conveys the same message as Sweden conveyed to the European Court: that the

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365 J.B. v. Canada, ibid. at paras. 6.5, 7 and 8. ICESCR 8(1) and (2) read:

1. The States Parties to the present Covenant undertake to ensure:
   (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
   (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
   (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
   (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

366 J.B. v. Canada, ibid. at para. 4.2. [emphasis added].
presence of a right in one Covenant should detract from, and perhaps even categorically prevent, the implication of that right into the other Covenant. 367 I have already disposed of this non-permeability presumption. The Committee did not rely on this argument, but, to the extent that it was an underlying motivation, it should be recalled that the Committee's language in the more recent ICCPR 26 cases rejected such an approach.

The Committee majority saw the issue as being "whether the right to freedom of association necessarily implies the right to strike." 368 After observing that the ICCPR has a life of its own 369 and referring rather ritualistically to VCLT 31(1), the majority relied entirely on two methods of interpreting Article 22(1) that paid little attention to the ICCPR's object and purpose.

The Committee majority first relied on the drafting history of ICESCR 8(1)(d) and ICCPR 22(1). It found it significant that, prior to the Separation Resolution, neither of the draft articles which corresponded to what later became ICESCR 8 and ICCPR 22 contained a right-to-strike provision. 370 After the separation, however, what became ICESCR 8 was amended to include a right to strike, but no such amendment was even proposed as regards what is now ICCPR

367 Swedish Engine Drivers, supra, note 116 at 163-65.

368 J.B. v. Canada, supra, note 9 at para. 6.2 [emphasis added].

369 Ibid. This observation was by way of countering the claim by J.B. that the Committee should rely on the findings of the ILO Committee on Freedom of Association which were favourable to the implication of a right to strike. See Arts. 3 and 10 of ILO Convention No. 87, 67 U.N.T.S. 18 (1948). For the unanimous treatment by the Freedom of Association Committee of the prohibitions of public sector strike activity by Alberta statutes, see Case No. 1247 (launched by the Canadian Labour Congress on behalf of the Alberta Union of Public Employees), ILO Official Bulletin, vol. 68, Series B, No. 3, 1985, at 34-35. For the general ILO view that the right to strike forms part of freedom of association, see Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts on the Applications of Conventions and Recommendations, Report III (Part 4(B)), International Labour Conference, 69th Session, (Geneva: International Labour Office, 1983) 66 and see Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 3rd ed. (Geneva: International Labour Office, 1985). A more accessible discussion of the above can be found in the judgment of Chief Justice Dickson in The Alberta Reference, supra, note 8 at 352-58.

370 More particularly, a motion to include a right to strike in ICCPR 22's pre-separation versions was rejected.
The majority then "corroborated" this *travaux* analysis by examining *ICESCR* 8. In its opinion, because the right to form and join trade unions and the right to strike were separate rights in *ICESCR* 8, the latter could not be implied into the former in *ICCPR* 22(1). The minority of five took a diametrically opposite interpretative approach: "We believe that the question that the Committee is required to answer at this [admissibility] stage is whether article 22 alone or in conjunction with other provisions of the Covenant *necessarily excludes*, in the relevant circumstances, an entitlement to strike." It went on to conclude that *ICCPR* 22 could be interpreted to include protection of the right to strike.

The minority first disposed of the majority's *travaux*-based arguments. The minority felt its textual analysis had already established that *ICCPR* 22(1) guarantees a broad right to freedom of association. While the right to form and join trade unions is one example of that right, it would have been inappropriate to have mentioned more specific activities like strike action. On the basis of the arguments advanced earlier in this study, the minority could equally have pointed out that a broader, more extensive historical analysis of the relationship between the Covenants *would* also invalidate any firm conclusion drawn from the fact that a right explicitly appears in the *ICESCR* but not in the *ICCPR*.

In contrast to the majority's inter-textual comparison, the minority essentially relied on the *ICCPR*’s object and purpose to trump an overly textual approach. The object or purpose is "especially important in a treaty for the promotion of human rights, where limitation of the exercise of rights, or upon the competence of the Committee to review a prohibition by a State of a given activity, are not readily to be presumed." This approach was used to conclude that the enumeration of the right to strike and the right

371 J.B. v. Canada, supra, note 9 at para. 6.3.
372 Ibid. at para. 6.4.
373 Appendix to J.B. v. Canada, supra, note 9 at para. 2 [emphasis added].
374 Ibid. at para. 4.
375 Ibid. at para. 5.
to form and join trade unions in separate parts of ICESCR 8 did not necessarily preclude the right to strike being inferred as part of the right to form and join trade unions in ICCPR 22.\textsuperscript{376} The minority focused on the words "for the protection of his interests" in ICCPR 22(1) which required, in its view, that "some measure of concerted activities be allowed," this being an "inherent aspect" of ICCPR 22(1).\textsuperscript{377} It placed considerable weight on two facts: that the ILO Committee on Freedom of Association had interpreted Article 10 of the ILO Convention No. 87 so as to incorporate the right to strike into the right to freedom of association;\textsuperscript{378} and that the ILO Committee had based its findings on the "furtherance and defence of interests of trade-union members."\textsuperscript{379} The minority was not as clear as it might have been, but it apparently felt that the right to strike should be implied in a general manner into ICCPR 22(1), and the legitimacy of any curtailment of the right must then be determined on a case-by-case basis under ICCPR 22(2), the limitations provision. The minority said:

Which activities are essential to the exercise of this right cannot be listed \textit{a priori} and must be examined in their social context in the light of the other paragraphs of this article.... Whether the right to strike is a necessary element in the protection of the interests of the authors, and if so whether it has been unduly restricted, is a question on the merits, that is to say, whether the restrictions imposed in Canada are or are not justifiable under article 22, paragraph 2.\textsuperscript{380}

\textsuperscript{376} \textit{Ibid.} at para. 6. The reasoning here is not clear. The minority seems to suggest that the right to form and join trade unions in ICCPR 22(1) is dealt with as a "set of distinctive rights" in ICESCR 8(1)(a) to (d), but this ignores that ICESCR 8(1)(a) seems to directly correspond to the latter part of ICCPR 22(1). For this reason, I have said that the ICCPR's purpose trumped the text.

\textsuperscript{377} \textit{Ibid.} at para. 3.

\textsuperscript{378} Especially in view of ICCPR 22(3) which reads: Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize [Conv. No. 87] to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention. Interestingly, ICESCR 8(3) is identical to ICCPR 22(3).

\textsuperscript{379} Appendix to \textit{J.B. v. Canada}, supra, note 9 at para. 7.

\textsuperscript{380} \textit{Ibid.} at paras. 3 and 10.
This approach parallels the approach taken by the minority in the recent freedom-of-association cases handed down by the Supreme Court of Canada, $^{381}$ ICCPR 22(2) and section 1 of the Canadian Charter of Rights and Freedoms fulfilling similar functions. The Committee minority did not indicate whether it would have upheld Alberta’s restrictions on the right to strike or found them to be unjustified, in whole or in part, under ICCPR 22(2). The important point here is that the minority did not see location of the right to strike in the ICESCR as a bar to its incorporation into the ICCPR. Aided by the explicit reference to trade union members’ interests in ICCPR 22(1) itself, the minority gave what might be called an effectivist interpretation to that article, in order to render it more meaningful to those who rely on trade unions to better their position in society. While the right could be cut back under ICCPR 22(2), the onus would be placed on the state to justify any limitations, $^{382}$ as is the case under section 1 of the Charter, $^{383}$ and the standard of proof would seem to be at least as strict as that for section 1. $^{384}$

J.B. v. Canada is thus a setback from the perspective of the permeability thesis. However, more detailed consideration of the relationship between the Covenants might lead future interpretations of ICCPR 22 to accord more closely with the views of the minority. For instance, the new Committee’s interpretations of ICESCR 8 on matters such as collective bargaining rights might find their way into the ICCPR. At some point, the decision in J.B. might itself be reversed.

$^{381}$ On the right to strike, see the Alberta Reference, supra, note 8.

$^{382}$ "The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR" (June 1986) 36 ICJ Rev. 47-57. Principle 12 reads: "The burden of justifying a limitation upon a right guaranteed under the Covenant lies with the state." The Principles are not legally binding, but, like the Limburg Principles, are the result of the collaboration of highly respected international lawyers, including members of the Human Rights Committee.


$^{384}$ See Siracusa Principles 3 ("All limitation clauses shall be interpreted strictly and in favour of the rights at issue") and 5 ("All limitations on a right recognized by the Covenant shall be provided for by law and be compatible with the objects and purposes of the Covenant"), supra, note 382.
D. Article 6(1): The Right to Life

Equal protection, fair hearing and trade union rights are important means of protecting economic rights, apart from their value as independent rights. Yet, the ultimate test of interdependence is the interpretation placed on the right to life in ICCPR 6(1). Does it remain a classic negative right or is there a more modern conception to appeal to? Can the Human Rights Committee foster an evolution of the concept to include the right to live with basic human dignity, as the Supreme Court of India has? Can such rights as the right to health, the right to food, or the right to shelter be interpreted into the ICCPR?

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385 For the text of ICCPR 6(1), see supra, note 28.

386 For the argument that the right to life should be interpreted to include "the right to the satisfaction of survival requirements," see Ramcharan, "The Concept and Dimensions of the Right to Life" and F. Mengistu, "The Satisfaction of Survival Requirements" in Ramcharan, supra, note 198 at 1 and 63, respectively; for opposing views see F. Przetacznik, "Right to Life as a Basic Human Right" (1976) 9 Rev. du Dr. de l'Homme 385; and Y. Dinstein, "The Right to Life, Physical Integrity and Liberty" in Henkin, ed., The International Bill of Rights, supra, note 81 at 114.

387 See, for example, Frances Coralie Mullin v. Union Territory of Delhi (1981) 2 S.C.R. 516; Olga Telis v. Bombay Municipal Corporation [sub nom. Bombay Pavement Dwellers Case] (1986) A.I.R. (SC) 180; and the Bandhua Mukti Morcha Case (1984) 2 S.C.R. 67. In Frances Mullin, the Indian Supreme Court said (at 529): "[T]he right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter." In the Bombay Pavement Dwellers Case, the Court found that pavement dwellers chose sidewalk space close to their place of work and that to evict them would consequently deprive them of their means of living. It took the view (at 194) that "it would be sheer pedantry to exclude the right to livelihood from the content of the right to life." In Bandhua Mukti Marcha, the Court held that the right to life includes the right to live with basic human dignity, which included just and humane work conditions, maternity relief, and other guarantees found in the Directive Principles portion of the Indian Constitution; moribund laws on these matters could be ordered enforced by the judiciary on the basis of the constitutional right to life. A complete study of permeability would encompass the relationship between the Indian Constitution's justiciable Fundamental Rights and non-justiciable Directive Principles of State Policy (see supra, note 5), which provide an almost exact domestic law parallel to the ICCPR and ICESCR. It is significant that the Indian Constitution was being drafted at the same time as the Covenants and that the Indian delegation to the UN actively supported the separation: recall the quotation supra, note 73 and accompanying text. In each of the above cases, the Indian Supreme Court used the explicitly non-justiciable Directive Principles to justify its broad interpretation of the right to life.
The Committee has taken some tentative but significant steps in this direction, not in any views adopted under the Optional Protocol but in General Comment 6(16)d.\textsuperscript{388} The next step will be for the Committee to act on its General Comment and welcome permeability under its Optional Protocol, taking into account, among other things, the earlier arguments on justiciability and inter-Committee linkages.

General Comment 6(16)d proclaimed that the right to life was "the supreme right"\textsuperscript{389} and then went on to give the following opinion:

\begin{quote}
[The Committee has noted that the right to life has been too often narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.\textsuperscript{390}]
\end{quote}

A survey of the summary records of the Committee's meetings at which this paragraph was debated reveals that the concept of interdependence and inchoate notions of permeability lay at its heart. Mr. Opsahl stated:

\begin{quote}
There was ... some value in viewing the Covenant in its full context without drawing a rigid line between the various instruments on human rights. Due weight should be given to the view which prevailed, both in the United Nations and in scholarly opinion that international instruments on human rights formed an indivisible system and that the two Covenants were necessarily to some extent interactive. Matters such as the right to life were relevant to both Covenants.... The door should be left open for the inclusion of cross-references in general comments, since they explained the meaning of the articles under consideration in their full context and highlighted essential points for their application.\textsuperscript{391}
\end{quote}

\textsuperscript{388} General Comment 6(16)d, supra, note 284.


\textsuperscript{390} General Comment 6(16)d, supra, note 284 at para 5.

\textsuperscript{391} Human Rights Committee, Summary Record of the 370th Meeting, CCPR/C/SR.370 (21 July 1982), at 2-3 [emphasis added].
Mr. Graefrath took the view that:

[O]verlapping between international instruments on human rights was unavoidable in the present day... In the case of the right to life it was impossible to complain that in a given year three men had been arbitrarily killed by the police and at the same time ignore the fact that in the same country during the same period 10,000 children under the age of five had died of malnutrition or lack of medical care. A State Party which had the means to reduce infant mortality or to prevent epidemics and which did not do so was not complying with its obligations under article 6 of the Covenant.392

While Mssrs Opsahl and Graefrath represented the pro-permeability wing in the discussions, Committee members who were outspoken in their initial opposition to the above-cited passage eventually modified their views. Mr. Tomuschat noted: "There had been valid reasons for adopting the two instruments separately, but at the same time the demarcation line between them must not be too rigid. They did overlap, particularly in regard to protection of the right to life."393 And Mr. Dieye took the view:

[I]n connection with the distinction to be made between the two Covenants, that ideally there should have been only one and that exceptional circumstances had made it necessary to have two.... In the circumstances, it was necessary to bear in mind the interdependence of the two instruments, and he himself thought it wholly acceptable that some of the concepts of the [ICESCR] should be reflected in the comment on article 6 of the [ICCPR], provided the borrowing was clearly marked.394

Thus, I conclude by observing that the Committee has taken a major conceptual step, motivated at least in part by the interdependence of human rights. I have sought to create a general framework in which such theoretical interdependence can generate

392 Ibid. at p. 5. Mr. Movchan took a historical view of the overlapping question. He referred to the separation of the Covenants as the result of modification of the Unity Resolution at the behest of Western States, but the General Assembly had "clearly recognized" the link between the Covenants. He pointed to the simultaneity of adoption and the identical Article 1 on self-determination and concluded: "It was important to bear that historical and legal background in mind when considering proposals to separate the Covenants completely." Ibid. at 10.

393 CCPR/C/SR.371 at 2. See Tomuschat's arguments for keeping the Covenants separate and not "diluting" the ICCPR and "encroaching" on the ICESCR only the day before: CCPR/C/SR.369 at 9.

394 CCPR/C/SR. 371 at 3. See Dieye's contrary view the day before: CCPR/C/SR.369 at 7.
the practical permeability of human rights via the Optional Protocol petition procedure. The crucial question that is raised by General Comment 6(16)d is whether the Committee will entertain individual communications based on its broad interpretation of the right to life as open or organically permeable to at least some rights found in the ICESCR. To the extent that the Committee's interdependence-based interpretation is sincere, this study suggests that a presumption for permeability should operate in future ICCPR 6(1) cases with respect to those norms in the ICESCR — for instance Articles 9, 11 and 12 — that are justiciable or that become justiciable at some point in the future."}395

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395 Note that de Zayas, Moller & Opsahl, supra, note 352, in discussing the positive measures referred to in General Comment 6(16)d (and General Comment 14(23)d on nuclear weapons), take the view (at 31, note 60): "Some of these matters are not likely to be addressed under the Optional Protocol as they are not easily 'justiciable' at the request or on behalf of individual alleged victims..." That economic rights may not easily be justiciable does not mean that they cannot be made justiciable, as was argued in Sec. IV. A.