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Ruti Teitel
New York Law School

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HUMAN RIGHTS GENEALOGY

*Ruti Teitel**

INTRODUCTION

AS the century draws to an end, this Article explores the status and future directions of contemporary human rights theory. It begins with the puzzle that, despite its conceded normative force, contemporary human rights theory is said to be fundamentally flawed, lacking a center, organizing structure, or unifying value. The puzzle is varyingly attributed to incoherence in international human rights theory and to irreconcilable dualisms pervading the theory.[1] This Article critiques the prevailing understanding by elaborating on the implications of theorizing in these oppositional terms, proposing a genealogical perspective to human rights theory. Such a perspective explores international human rights theory's historical and political legacies, its founding structures and rhetoric, with an eye toward a better understanding of the contemporary international human rights movement, its place in history, and its future potential. International human rights theory is reconsidered in light of its historical and political engendering circumstances. This Article will use "genealogy"[2] in a number of senses: first, as the exploration of the organizing structures, logic, and language that comprehend the domain of contemporary human rights theory; second, as the historical and political circumstances of the international human rights movement; and third, as the connection between the relationship of international human rights theory and other philosophical, political, and legal rights theorizing.

The Article attempts to illuminate the status of prevailing international human rights theory by contributing a genealogical perspective to the contemporary theorizing. Part I examines the origins of the reigning theoretical framework by considering the historical and political circumstances that attended the development of the theory. Part

* Professor of Law, New York Law School; J.D., 1980, Cornell Law School. My gratitude to Camille Broussard, Brenda Davis-Lebron, and Sabrina Bagdasarian for their research and other assistance.

1. Thus, introductions to texts on human rights law often begin with caveats about the subject area's incoherence. *See* Louis Henkin, International Law: Politics and Values 184-85 (1995); Human Rights Law xiii (Philip Alston ed., 1996); *see also* Martti Koskenniemi, *The Pull of the Mainstream*, 88 Mich. L. Rev. 1946, 1961-62 (1990) (reviewing Theodor Meron, Human Rights and Humanitarian Norms as Customary Law (1989)) (observing that international lawyers have not succeeded in developing any compelling theory on the place of human rights within any grand design of international law and that "the justifying rhetoric" of mainstream international lawyers is in "disarray").

2. On the genealogical perspective, see Michel Foucault, Power/Knowledge: Selected Interviews and Other Writings, 1972-1977 (Colin Gordon ed. & Colin Gordon et al. trans., 1980).

II explains how a genealogical approach clarifies problems in the reigning paradigm. Part III explores further the dichotomies in the prevailing theory, thereby clarifying the puzzling status of contemporary human rights theory. Part IV examines the international human rights movement today, incorporating a genealogical perspective and clarifying the contemporary movement's intimate and uneasy relation to its original historical and political circumstances. This part also proposes a more coherent view of the existing international human rights normative apparatus.

I. RIGHTS GENESIS

Consider international human rights theory and its engendering circumstances. The founding is said to go like this: Genesis of the human rights movement, by its own description, begins in postwar Europe. This point of departure for contemporary human rights theory is definitional—the international human rights movement is birthed in the war and the postwar experience. Told this way, international human rights creation, like the war itself, gave rise to a new, paradigmatic view of rights as extraordinary and discontinuous from prior expectations.

As a paradigm supported and engendered by the immediate circumstances of the postwar period, international human rights implies an utterly transformed model regarding individual/state responsibility and relations. International human rights, as both a postwar and post-totalitarian movement, was a radical departure from the prevailing rights theorizing assumptions about the state. A creature of postwar circumstances, the new paradigm was said to mean new rights and a departure from the contractarian tradition associated with pre-existing rights theorizing. International human rights drew their normative force, at the time, not necessarily from social consensus, but rather from the exercise of judicial power. This alternative normative vision is instantiated by the Nuremberg Tribunal, the extraordinary Allied justice brought to bear against human rights abusers.

Later, these norms were ratified in various international charters and conventions as merely the institutionalization of preexisting universal norms. The human rights movement, which blossomed in the war's aftermath, was a phenomenon that largely developed within a newly created international legal system.[3] The postwar construction of international human rights appeared in transnational form: initially, in the Nuremberg Charter, then in the United Nations Charter and other United Nations instruments, and in multilateral treaties and conventions.[4] These alternative conceptions of human rights ulti-

3. For an excellent account, see Henkin, *supra* note 1.

4. On transnationalism, see Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 Yale L.J. 2599 (1997) (book review); *see also* Lawrence G. Helfer &

mately meant a new system of rights protection—inhering outside of social contract—vindicating a view of human rights within an adjudicatory model and an emerging international legal system. At Nuremberg, after the war, international human rights appeared to have ultimate normative power. Human rights seemingly were protectable, with or without the state, as the massive postwar codification projects made rights with normative force positive.

The postwar paradigm implied a reconceptualization of core rights concepts. First, rights were understood to be protected within a conception of rule of law which was largely conceived as legal accountability, indeed as criminal accountability. While this view of rule of law suffers from being *ex post*, it is best understood in its historical postwar context. After the grave atrocities of the war, the human rights project was largely the ascribing of individual responsibility. Next, and relatedly, the understanding of individual responsibility for rights protection under international law changed, particularly the balance between the individual and the state. These changed understandings implied changes in the content of human rights values. The postwar normative scheme that defined human rights in terms of political persecution was a response to the war and to totalitarianism. As such, postwar justice reflected its engendering circumstances.

The new arrangements forced a rethinking of the meaning of rights. This reconsideration included the extent to which these rights appertained to a corresponding system of duties. The change in the prior expectations, which were the legacy of social contract theory,[5] transformed the human rights paradigm entirely. Whereas in earlier rights theory, individuals were entitled to the contractual rights that the state agreed to protect, these assumptions fell away in the postwar paradigm. Individual rights bore no particular relation to the state's assumption of duties. Indeed, the previous formulation of rights appeared unavailable and the state instead a potential source of evil. Accordingly, rights protection moved to alternative sites and systems, to international human rights conventions, mechanics, and processes.

The human rights movement was nurtured by the concomitant development of a new international legal system, as well as by the parallel explosion of constitutionalism.[6] The notion of rights as judicial in nature is supported by the postwar explosion of constitutionalism and judicial review. As time passed, the postwar paradigm and its ad hoc blend of laws of war and the laws of peace become normalized, despite the absence of political circumstances similar to those that at-

Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 Yale L.J. 273 (1997).

5. *See generally* Ian Shapiro, The Evolution of Rights in Liberal Theory (1986).

6. *See generally* Louis Henkin, The Age of Rights (1990) (discussing the relation of constitutionalism and the international human rights movement).

tended its founding.[7] Born at a time of unparalleled international cooperation, the human rights movement's normative projects would later appear to have fostered unrealistic expectations about the human rights system's potential.

These historical and political developments and contingencies engendered the postwar understanding of human rights. Genesis at Nuremberg and at Auschwitz expresses the paradigm shift's sad paradoxical story of catastrophe and failure in the international order, which somehow nevertheless ends on a hopeful note. Through the international human rights movement and its lead in responding to wartime atrocities, justice becames a liberal means to a redemptive resolution.

II. Rights Generation

The passage of time increased the distance from the engendering historical and political circumstances of the human rights movement. The distance led to questions about the continued viability of international human rights theory. Nevertheless, the international human rights movement is said to be in vital development and rights genesis considered an event capable of repetition. Consider rights "generation" in at least three senses. First, the language represents rights creation as a natural process. The rhetoric of "genesis" at once evokes the language of science and of nature. Scientific rhetoric imbues international human rights theory with legitimacy by implying that the theory follows the natural laws of the universe—as if human rights are just out there, existing as an autonomous and objective reality. Second, generation also conveys rights in a genetic sense.[8] Put this way, rights generation casts the human rights story in terms of the broader human condition—of scientific, historical, and political generations. Third, the rhetoric of genesis and generation propounds the international human rights movement's distinctive account of natural rights made positive.

The passage of time and the accompanying changes in circumstances put pressure on the prevailing rights narrative and the attempt to theorize in terms of a unitary international human rights apparatus. Every aspect of the Nuremberg legacy appeared vulnerable to normative incoherence.

The dominant paradigm, drawing largely from American constitutionalism, suggested that the proper response to human rights viola-

7. *See generally* Immanuel Kant, Perpetual Peace (Lewis White Beck ed., Liberal Arts Press 1957) (1795) (proposing interstate stability as minimal standard); John Rawls, Political Liberalism (1993) (affirming stability standard); *see also* Theodor Meron, Human Rights and Humanitarian Norms as Customary Law (1989) (discussing the changes in the law of war and humanitarian law).

8. *See* Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, 14 Cardozo L. Rev. 533, 538-45 (1993).

tions was individual accountability. The postwar paradigm instantiated at Nuremberg represented a radical shift in the understanding of prevailing international legal norms. Absolute sovereignty had been violated, seemingly challenging the border between the international and the national, as well as the individual and the collective. While there have been occasional national trials, such as Argentina's military junta or those of unified Germany,[9] there has never been the same sort of adjudication of rights violations as at Nuremberg. The historical and political circumstances surrounding Nuremburg, including the predicates for international sovereignty, and the force of occupation law, were missing from the later trials.

Considering rights theory in concert with localized historical and political knowledge clarifies the postwar precedent and doctrine. The very understanding of human rights and justice is entwined in the postwar paradigm's engendering circumstances. International human rights' historical and political contexts elucidate the theory's putative incoherence. Acknowledging the extraordinary political circumstances of international human rights recognizes their parameters and their limits. As the postwar predicates of the international human rights model have not yet repeated themselves,[10] the question has become: What, if any, is the ongoing vitality of the reigning theory's generating structures and related norms?

This part has explored the human rights narrative that has long dominated our understanding. In addition, it contended that examining the reigning theory, in the light of its historical and political predicates, clarifies existing structures and perceived problems. The Article continues by explaining how a genealogically enriched perspective illuminates the problems said to pervade contemporary human rights theory.

III. RIGHTS-THEORETICAL DIVIDES

Consider the putative gap between human rights theory and practice: Prevailing human rights theory is generally conceded to lack full normative force because of a perceived gap between the theory and judicialized rights. These are commonly considered to signal incoherence in human rights theory. The absence of remedies is often considered fatal.[11] The juxtaposition of rights theory to rights enforcement

9. For a discussion of contemporary human rights trials relating to periods of political transition, see Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 Yale L.J. 2009, 2035-51 (1997).

10. Even the ad hoc International Criminal Tribunal for the former Yugoslavia does not reflect the same judicialized human rights model. For a comparative discussion of the Yugoslavia Tribunal in the light of Nuremburg, see Ruti Teitel, *Judgment at The Hague*, E. Eur. Const. Rev., Fall 1996, at 80.

11. *See* Jack Donnelly, *International Human Rights: A Regime Analysis*, 40 Int'l Org. 599, 633-36 (1986) (characterizing the weakness of the human rights system in terms of enforcement).

or rights practices also comprehends other theoretical dichotomies: international and national, universalism and particularism, positivism and natural law.[12]

The postwar story of Nuremberg justice inspires the reigning paradigmatic conception of international human rights as judicial. The post-war model of justice is the all powerful Military Tribunal and judicial rights. This historical legacy generates a view of human rights norms backed by legal sanctions and judicial enforcement. This conception of rights also derived from a largely unspoken analogue of international human rights to constitutional rights on the domestic plane and to rights protection in an age of constitutional democracy. The view construed international human rights as traditional rights at law where meaningful rights were norms backed by sanctions. Indeed, one might think of these as "American" rights,[13] a conception nurtured by the Allied initiative in the postwar judicialized rights response.[14] The prevailing notion that there is a "gap" in rights enforcement is intimately connected to the insistence that as a normative matter human rights ought be protected within a judicial system.[15] In this account, the problem does not derive from the theoretical framework itself, but rather from its lack of actualization.

Despite the animating force of international human rights theory, the twentieth century has been characterized by genocidal massacres and impunity.[16] How can we explain this course of events within the international human rights narrative? Perhaps the most glaring example is the apparent disjunction between the enormous political support for the Genocide Convention and the failure of judicial enforcement.[17] Despite the existence of the World Court, the international community has not enacted an international criminal code or created a permanent international criminal court.[18] Indeed, the first tribunals

12. The attempt here to contribute a genealogical perspective to the prevailing human rights analysis should not be taken as an instance of further juxtaposition of theory and practice.

13. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162-66 (1803); Martin Shapiro, Courts: A Comparative and Political Analysis (1981).

14. *See* Telford Taylor, The Anatomy of the Nuremberg Trials: A Personal Memoir (1992).

15. The view appears Hohfeldian in its understanding of rights as closely connected to duties. *See* Arthur J. Jacobson, *Hegel's Legal Plenum*, 10 Cardozo L. Rev. 877 (1989).

16. *See, e.g.*, *Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780*, at 12-13, U.N. Doc. S/1994/674/ Annex VI (1992).

17. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 282 (1951); *see generally* Beth Van Schaack, Note, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 Yale L.J. 2259 (1997).

18. *See generally* James Crawford, *The ILC Adopts a Statute for an International Criminal Court*, 89 Am. J. Int'l L. 404 (1995) (discussing the International Law Commission's draft statute to create an international criminal court).

in the half century since Nuremberg are the ad hoc international tribunals convened to prosecute violations arising out of the Balkans conflict, and expanded to include the Rwandan genocide.[19]

The perceived gap between human rights theory and its normative enforcement is often explained in terms of political realism. The theoretical apparatus is commonly characterized as unresponsive to political circumstances. A disjunction arises between international human rights theory and its realization. International human rights norms are viewed as somehow existing as autonomous realities spiraling away from other political structures. The characterization is one of internal incoherence, of a theory at war with itself.

Politics is deemed to explain the absence of the reigning normative model's actualization. The lack of enforcement is said to relate to the absence of consent. Without political consent, there is a "race to the bottom." Here is a rare and limited concession to the role of politics within the international legal system. Understanding the role of politics implies commencment of the analysis of the human rights system before the extraordinary story of occupation justice. It entails returning to the Treaty of Westphalia and the view that the subjects of international law were sovereign states,[20] where external sovereignty was bound by international law and its related legal principle of nonintervention. In this regard, the postwar human rights paradigm challenged pre-existing principles of sovereignty,[21] nonintervention, and respect for borders. The conflict is evinced in slippage of the concepts of: international and national, war and peace, private and public, rights and remedies.

Reification of the postwar proceedings has utterly distorted our understanding and derailed contemporary human rights theory. From the postwar perspective of human rights as judicial rights, the normative response to rights abuses is deemed to be adjudicatory and drawing upon the historical legacy with associated punishment. Accordingly, for some time now, the emphasis has been upon expansion of enforcement. The critical human rights question is characterized as one of execution, the problem largely of political will.

Yet, the postwar narrative is itself a substantially idealized version of the historical experience. The precedent is overstated because the statement of the norm exceeded its instantiation—even at the time. Thus, the postwar paradigm is deemed inherently paradoxical, pro-

19. *See* Statute of the International Tribunal for the Former Yugoslavia, *Report of the Secretary-General Pursuant to Paragraph 2 of S.C. Res. 808*, U.N. SCOR, 48th Sess., Annex, U.N. Doc. S/2504 (1993), *reprinted in* 32 I.L.M. 1159 (1993) [hereinafter International Tribunal]; *see also* Statute of the International Tribunal for Rwanda, S.C. Res. 995, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598 (1994).

20. *See* Stanley Hoffman, *Sovereignty and the Ethics of Intervention*, *in* The Ethics and Politics of Humanitarian Intervention (Stanley Hoffman ed., 1996).

21. *See* Charles R. Beitz, Political Theory and International Relations (1979).

ducing an antinomian tension in its structuring categories. Indeed, a very different story could be told about Nuremberg.

Reconsider the dominant theory incorporating its historical and political circumstances. This reconsideration means another understanding of the core rights paradigm categories: of the relation of individual and collective, of positivism and natural law, of the universal and the particular, and of the law of peace and the law of war. Thus, for example, postwar international human rights are commonly represented as an instance of natural law norms made positive. Nevertheless, reconsideration of the postwar paradigm in a historical light implies something for the debate about authority for the sources of international human rights law,[22] and a move away from strict positivism to a recognition of customary international law.[23] Relatedly, despite postwar claims to the forging of new normative ground in humanitarian law, adjudication of the crime against humanity—a violation at the norm's apex—was, even as applied at Nuremberg restricted to its abiding nexus with war.[24]

The same is true of other normative claims where the postwar precedent is similarly antinomial. Thus, a closer look at the postwar circumstances offers a more nuanced understanding of the categories of sovereignty and jurisdiction.[25] Although the postwar rights paradigm is commonly characterized in terms of universal norms and the norms ratified in the postwar codifying instruments,[26] the postwar proceedings also related to offenses occurring, at least in part, in particular locations, instantiating an alternative positivist normative point. Ultimately, the postwar paradigm incorporates within it the antinomial tension between those opposing normative concepts. While this tension is somewhat mitigated in the extraordinary postwar circumstances, in subsequent periods, it has only grown. Thus, a broader inquiry into the historical and political context of international human rights clarifies, and even reconciles, the purported gap between theory and practice in the contemporary movement.

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22. *See* Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 Fordham L. Rev. 319 (1997).

23. *See* Quincy Wright, *Legal Positivism and the Nuremberg Judgment*, 42 Am. J. Int'l L. 405 (1948).

24. Justifying crimes against humanity in terms of this nexus is still true to date. *See* International Tribunal, *supra* note 19, art. 5, at 1193 (granting the International Tribunal the power to prosecute crimes against humanity that were committed in armed conflict, whether international or national); International Criminal Tribunal for the Former Yugoslavia, Excerpts from Prosecutor v. Dusko Tadic, 36 I.L.M. 908, ¶¶ 79-85 (1997) (App. Chamber decision) [hereinafter *Tadic Decision*]. However, in the most recent developments toward a permanent international criminal court, the emerging consensus is a predicate of international armed conflict.

25. *See* W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 Am. J. Int'l L. 866 (1990).

26. *See* Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 (1945).

The international human rights founding story is one that is said to be *sua sponte*, a radical birthing, a discontinuous affair with only an ambivalent relation to preexisting rights theory. Nevertheless, consider the meaning of the idea of rights as being "born" in the mid-twentieth century, seemingly without preexisting rights forbears?[27] This representation as an immaculate conception preserves the natural law claims. Telling the story this way, as an extraordinary narrative that begins in the war's aftermath, represents international human rights in atomistic fashion, as somehow insulated from preexisting rights theory. The account also plays a role in distorting international human rights theory, generating tension and incoherence.

To some degree, the theoretical framework of international human rights rests awkwardly on preexisting theory. Historically, theories of consensus and the social contractarian tradition, predicated on assumptions about the relationship of the individual to the state, justified rights theory. Specifically, the political predicate of the state's role as protector and guarantor of individual rights provided justification for the theory. Indeed, this view drew from the social contract theory underlying the liberal state.[28]

Postwar revelations tragically challenged these theoretic bedrock assumptions, rendering them inappropriate for responding to the central Auschwitz problem of the twentieth century. The contractarian foundations of previous rights theory appeared inapt for comprehending the strange shift in recognition of the position of the modern state—from rights protector to rights violator. The shift could not help but have normative implications for understanding the political regime, as well as for related constitutional and other rights principles. With the move away from social contract as the source of rights authority, new questions arose regarding alternative sources of authority for international human rights and their constraints.

On these questions, the prevailing rights paradigm resolution is paradoxical. In the postwar "genesis" story, international human rights are represented in universal terms deemed of general applicability. Rights, however, are also cast as manifestly positivist creatures of convention. The paradigm is widely understood as having, at some level, moved from natural law ideas to those that are more positivist, for example, in the Nuremberg Charter and the many postwar conventions.[29] This shift raises a central tension that continues to be present

27. On this question, see Maurice Cranston, What are Human Rights? (1973); Louis Henkin, *International Human Rights as "Rights," in* Human Rights 257 (J. Roland Pennock & John W. Chapman eds., 1981); Rights (David Lyons ed., 1979).

28. *See* John Locke, *The Second Treatise of Government, in* Two Treatises of Government 283 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1967) (1714); Jean Jacques Rousseau, The Social Contract (Charles Frankel trans., Hafner Pub. Co. 1947) (1762).

29. *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 17.

in contemporary rights debates.[30] Indeed, the question of what should "count" as a right raises a broader methodological question.[31]

The move out of classical rights theory leads to a rethinking of the nature of the sources of and authority for human rights. The postwar paradigm leads away from views of authority as inhering in democratic consensus to other sources. A broader array of sources are available for the construction of human rights, such as customary law.[32] This is nowhere more true than in the gravest abuses of customary law, the so-called "jus cogens" norms, which include conduct considered to be universally condemned.[33] The sources undergirding grave rights abuses mediate both international and national conventions and jurisdictions.[34] Human rights norms mediate international and national law. Indeed, one norm often guides the other and becomes incorporated within governing documents.[35]

Although, historically, international human rights theory generally eschews hierarchizing rights, such hierarchies are implied by the extent of the theory's nexus with its postwar circumstances. Thus, the dominant view of rights adheres closely to those impinged upon during the war—political rights relating to persecution. It is also undeniable that this view of human rights, represented largely as "civil" and "political" rights, bore a close semblance to rights conceptions in preexisting political theory. Human rights, as civil and political, related closely to the core associated with the modern state in working democracies: norms associated with principles of the rule of law and equal protection.

Further, there was a constructive effect on the postwar rights model of political circumstances relating to the conflict with the Soviet Union and later Cold War developments. This historical and political contingency illuminates putative theoretical rights differentiation: for

30. *See* Neuman, *supra* note 22; *see generally*, Human Rights on the Eve of the Next Century Symposium, Panel entitled U.N. Human Rights Standards and U.S. Law (Feb. 28, 1997) (transcript on file with the *Fordham Law Review*).

31. On human rights generally, see Henkin, *supra* note 27. Exploring some differences between rights in the international and domestic contexts, see Henkin, *supra* note 1.

32. Regarding *jus cogens*, see Restatement (Third) of the Foreign Relations Law of the United States § 702 (1986) (listing, for example, slavery and genocide). *See also* Change and Stability in International Law-Making (Antonio Cassese & Joseph H.H. Weiler eds., 1988).

33. *See* Oscar Schachter, International Law in Theory and in Practice 333-42 (1991); *see also* Meron, *supra* note 7.

34. Indeed, the so-called "Alien-Tort" litigation is illustrative. The leading case is *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). For a clarifying article, see Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461 (1989).

35. One place this is seen is in the comparison of the language of international agreements with that characterizing domestic constitutional rights. *See* Constitutionalism and Rights: The Influence of the United States Constitution Abroad (Louis Henkin & Albert J. Rosenthal eds., 1990).

example, the distinction between "political" and "economic" rights. Another manifestation was the so-called "big compromise," the bifurcation of the post World War II, Cold War era codification of international human rights into the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. This rights differentiation can only be understood as resulting from the construction of human rights that was set in the context of the postwar conflict with the communist bloc.

Given the massive political changes since the war and those that have taken place since the Soviet collapse, the constitutive distinction between civil/political and economic rights of international human rights theory has fallen under attack. Indeed, the subsequent wave of political and economic transitions in the region invite rethinking of the received wisdom. To what extent should economic rights be recognized as positive rights—whether under constitutional schemes, or within the international human rights system? This question has emerged as a central point of debate in the post communist transitions.[36] The contemporary debate reconsidering the purported distinctions of these rights—just as the political circumstances change—underscores the historical and political contingencies embedded in the prevailing human rights apparatus. Similarly, other differences have appeared over time, signaling the growing chasm that has emerged between the postwar rights model and its generating circumstances. This widening divide is best seen in the tension in the normative scheme that was thought to define human rights. Indeed, the relevant question is whether that old framework would be apt for normative development.

Still, other features of postwar human rights theory have been criticized for their inability to comprehend prevailing phenomena. Consider, for example, the elusive distinction between the public and private spheres in international human rights theory, as well as the theory's related emphasis on state action. The public/private state action distinction is, once again, best explained within its historical and political circumstances, namely, the postwar focus on states persecution. The public/private distinction also inhered in the constitutionalism of the time, emphasizing the view of state action derived from traditional liberal political theory. Nevertheless, massive historical, political, and social change have outstripped the postwar normative apparatus. This reconception implies reconsidering contemporary

36. On the debate over whether economic rights should be constitutionalized, see Cass R. Sunstein, *Against Positive Rights*, *in* Western Rights? Post-Communist Application 225 (András Sajó ed., 1996) [hereinafter Western Rights?]; Ruti Teitel, *Constitutional Costs to Free Market Transitions*, *in* Western Rights?, *supra*, at 361; Ruti Teitel, *Post-Communist Constitutionalism: A Transitional Perspective*, 26 Colum. Hum. Rts. L. Rev. 167 (1994); Richard Falk, *Comparative Protection of Human Rights in Capitalist and Socialist Third World Countries*, Universal Hum. Rts., Apr.-June 1979, at 3.

human rights violations beyond the public domain.[37] Here, the feminist critique is particularly compelling in its reconceptualization and proposed reconstruction of the private and public spheres.[38]

The so-called "third" generation of rights comprehends the rights of groups, collectivity rights, ethnicity rights, rights of "peoples," and rights to self-determination. This generation of rights incorporates the critique of prevailing human rights theory from the communitarian perspective,[39] as well as the critique from cultural relativism.[40] Although reigning normative human rights concepts emphasize the universal, recent rights developments suggest there is little that is essential in these normative distinctions.

Finally, there is the critique of the prevailing rights model—from the vantagepoint of its arch ontological dichotomy—of the claim that human rights inhere in sources in terms of objectivity and reason. Here, the challenge to human rights theorizing reflects broader concurrent epistemological challenges in theorizing of knowledge.[41]

Movement away from the prevailing conception can be seen in contemporary philosophical theorizing.[42] This theorizing offers fresh directions and new paths to human rights—not necessarily in the terms of the prevailing paradigm's rational, objective, and universalizing approach—but instead, through the pathways of friendship and solidarity. Indeed, these approaches indicate the prevailing arch antinomial differences paradigm, offering both normative rights principle and rights practice—a way to relate to the "other." The exhortation is a call for a return to the "human" in human rights and the repair of pervasive dehumanization.

After half a century, the foundational concepts of the reigning postwar model reveal growing slippage. The passage of time and change, both in the relevant political circumstances and in theories of knowledge generally, have put increasing pressure on the paradigmatic rights model. The mounting claim of incoherence in the received international human rights account has had profound consequences for the theory's positive and normative force. Nevertheless, the claim to

37. *See* Andrew Clapham, Human Rights in the Private Sphere (1993).

38. *See, e.g.*, Catherine MacKinnon, *On Torture: A Feminist Perspective on Human Rights*, *in* Human Rights in the Twenty-First Century 21 (Kathleen Mahoney & P. Mahoney eds., 1993), *reprinted in* International Human Rights in Context: Law, Politics, Morals 951 (Henry J. Steiner & Philip Alston eds., 1996).

39. *See* The Rights of Minority Cultures (Will Kymlicka ed., 1995).

40. *See* Michael J. Perry, *Are Human Rights Universal? The Relativist Challenge and Related Matters*, 19 Hum. Rts. Q. 461 (1997).

41. For a critique on the basis of multiplicity and indeterminacy, see Steven Connor, Postmodernist Culture: An Introduction to Theories of the Contemporary (2d ed. 1997); David Harvey, The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change (1989).

42. *See* Annette C. Baier, Moral Prejudices: Essays on Ethics (1994); Richard Rorty, *Human Rights, Rationality, and Sentimentality*, *in* On Human Rights: The Oxford Amnesty Lectures 111 (Stephen Shute & Susan Hurley eds., 1993).

incoherence is best explained in terms of a growing chasm between a unitary human rights theory abstracted from its engendering circumstances, reified with perverse consequences.

IV. Constituting Contemporary Human Rights

What gives contemporary human rights law its force? I want to return to the question with which this Article began. Moving beyond the prevailing narrative enables the analysis of contemporary practices as the ongoing construction of human rights culture. Exploration of the practices, conventions, and discourses illuminates the contemporary meaning of human rights. These manifestations also invite a rethinking of the status and directions of contemporary human rights. Contemporary practices shed light on dynamic human rights norms, illuminating change in the postwar paradigm. Emergent practices lead us to recognize new human rights paradigms.

What is the significance of the contemporary human rights movement's discourse?[43] Practices here are an indication, not of theory gone awry, but rather as what comprises international human rights norms—as all there is.

The enormous expansion of the human rights domain is manifest. The attempt at normalization is seen in the generalizing and ambiguating of the postwar norms far beyond their animating circumstances. Whereas international human rights were previously characterized as largely discontinuous with other law practices, the notion of a bright line separation has disappeared. This melding can easily be seen in a number of areas where human rights law has merged with other established bodies of law, for example, human rights law and the humanitarian law of war, and human rights law and asylum law. Convergence of international human rights law and international humanitarian law can be seen in the normative slippage, whereby the laws of armed conflict have been extended to internal conflict and peacetime.[44] Such convergence in humanitarian and human rights law demarcates a broader domain for human rights. Further areas of convergence can be seen in the incorporation and protection of international and national rights protection in the various regional systems, for example, the European Court and the Inter-American systems.

The convergence in established areas of law relating to human rights challenges the theory's reigning conceptual oppositions. So it is, that in the slippage of the old dichotomies of war and peace, of inter-

43. On the human rights movement, see Jack Donnelly, Universal Human Rights in Theory and Practice (1989); Henkin, *supra* note 1, at 184-226; Henkin, *supra* note 6, at 16-41.

44. *See, e.g.*, Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 (1907); Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 75 U.N.T.S. 31 (1950); *see also supra* note 24.

national and national, that the law of war leads back to the law of peace. Slippage exists in other directions, as international law and its rights protections help to define the rights of citizens under domestic constitutional law. The rights of the foreigner, of the alien, give us those of the citizen.

Human rights practices emphasize the relationship between the international legal system and other legal domains. Despite the postwar momentum within the new international legal system—reflected in instantiated Nuremberg-style justice, as well as the attendant wave of constitutionalism that emphasized individual rights—the international legal system alone could not protect deracinated individual rights. Transitional periods of political crisis revealed the extent to which meaningful rights protection presumes a working state. Responses to rights abuses in periods of national political transformation characterized as "transitional," while affirming individual rights norms are also limited, and as such illuminate the political predicates to a viable human rights system.[45] Thus, half a century later, the postwar primacy of individual rights ultimately leads back to the recognition of the state's role in protecting human rights in a rule of law system. Vindication of individual rights under international law presumes a strong and functioning state with liberal rule of law institutions that are responsive to individual rights.

In the face of ongoing political horror, what is the point of the new direction in human rights law? Of the value to human rights normalization? The focus is on practices, particularly the contemporary responses to the extreme human rights violations of the atrocities in the Balkans, which produce grave charges of crimes against humanity and genocide. In the radical political climate following the collapse of the Soviet Union and the transitions away from military rule, the practices of successor regimes throughout Eastern and Central Europe, Latin America, and Africa appear to instantiate liberalizing political change.

According to the prevailing human rights paradigm, the normative response is to subsume treatment of grave violations within the judicial system. Although there may appear to be some movement in that direction, with the contemporary Ad Hoc International Tribunal convened regarding Yugoslavia and Rwanda, the Tribunal at the Hague responds to a conflict that itself defies facile characterization.[46] Further, Tribunal practices underscore historical and political differences from the postwar Tribunal's prevailing circumstances, such as an absence of custody over the defendants and the evidence. These distinctions ultimately indicate that the leading form of international criminal justice in the contemporary moment is procedural. The role of the law here is largely procedural and hence, seemingly preserva-

45. *See* Teitel, *supra* note 9.

46. *See, e.g., Tadic Decision*, *supra* note 24.

tive of other rights.[47] Procedural human rights emphasize the preparation and distillation of a record of rights abuses, whether through indictment or other processes, such as "truth commissions."[48]

This human rights function is part of a broader phenomenon: Human rights practices suggest that the most effective development of customary law could be characterized as procedural. Thus, for example, consider another area of emergent human rights practices: the response to the paradigmatic human rights violation of the late twentieth century—the disappearance. The responses to disappearances offer a way to understand contemporary human rights violations, their remedies, and ultimately the related conception of a human right. Rather than the reigning paradigmatic focus on criminal legal accountability rights violators, here emerges the move toward victim-centered remedies, for survivors, and the society at large. Hence, the newest human rights construction: the right "to truth" and the rights to an investigation, a record, and a hearing. The turn is toward an alternative understanding of human rights as threshold procedural rights. These understandings of human rights ultimately redefine the understanding of individual rights as well as the relationship of the individual and the state.

Responses to the worst human rights violations of this last half century—political executions and disappearances, totalitarian rule, apartheid, the national security state in Latin America, violations throughout Africa, and ethnic cleansing in the Balkans—reflect a broad phenomenology of international human rights responses that is a shift away from the paradigmatic judicial rights to more informal administrative sanctions and procedural rights.[49] To be sure, the law is highly normative and hortatory in nature.

There is a broader domain for human rights, one encompassing a culture that increasingly frames state behavior and decisionmaking in human rights terms. There is a movement away from an emphasis on the punishment of norm transgression to a broader representation of rights claims. Human rights practices of monitoring and reporting can tell us a lot about the changes in the conception of rights as well as the relation of states to their citizens regarding the protection of human rights. These new practices comprehend complex ideas of rights and ongoing obligations beyond the initial equal protection rights such as the duty to investigate. These ongoing rights obligations fall upon successor regimes temporizing the understanding of the relevant state action and inspiring rethinking of human rights and related obligations.

47. For a rights analogy, drawing from the domestic sphere, see John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980) (proposing the view of constititutional rights as procedural).

48. For a catalog of such Truth Commissions, see Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 Hum. Rts. Q. 597 (1994).

49. *See* Teitel, *supra* note 9.

Contemporary human rights come into the picture much earlier in the process. Whereas the prevailing paradigm conceives of human rights as ex post—of rights as "trumps"[50] or of rights that follow politics—contemporary practices suggest that human rights come into the picture much earlier. Human rights discourse occurs on an ongoing basis in the public sphere and the practices of documentation and reporting are normalized. Thus, reporting on the adherence to human rights takes place on two time lines—on an ordinary yearly basis, as well as on an extraordinary basis reactive to particular crises.[51]

What is also undeniable is that human rights practices are increasingly discursive. The significance given to deliberation in the international setting evidences this change. Such discursive practices are illustrated by the appeals to rights set forth in the Universal Declaration. The United Nations General Assembly is itself the site of regular and ongoing human rights deliberations. "Rights talk" is increasingly offered as performative, as remedy.[52] Rights themselves appear to be constructive in structuring political developments, in part because of the moral and social political force of the language of rights.

What is the point of these rights? Consider the purposes of human rights procedural discourse. These discursive practices are not mere signs of rights, not merely customary law. Adopting that view would be to persist in the received wisdom, in the prevailing insistence of measuring normative rights rhetoric against a putative autonomous rights reality. If the purpose is largely procedural—with an eye toward preserving other rights—one way to think about the value of these rights is as establishing a foundation for a prospective, more complete, international human rights justice. What kind of vision is this? Are these millennial rights? Is the point to ward off a repetition of the wartime events? Yet, a repetition of the Nuremberg circumstances is unlikely. Can we even imagine a similar international tribunal, divorced from its abiding historical and political circumstances?

Interestingly though, there is presently an attempt to reenact the Nuremberg trials with similar international tribunals. These transitional responses to contemporary human rights violations, however, fail to generate a comparable sense of the rule of law or security because they lack the background political conditions associated with the postwar judicialized rights model.[53] These transitional remedies exemplify the limits and ultimate temporizing of rights remedies in the

50. *See* Ronald Dworkin, *Rights as Trumps*, *in* Theories of Rights 153 (Jeremy Waldron ed., 1984).

51. Thus, for example, the U.S. State Department issues worldwide yearly reports and human rights organizations have emulated this. *See, e.g.*, Human Rights Watch, World Report 1997 (1996).

52. On increasing linguistification, see generally Judith Butler, Excitable Speech: A Politics of the Performative (1997).

53. For a broader elaboration of this point, see Teitel, *supra* note 9.

less than ideal circumstances presumed in the prevailing model. Although procedural rights may well comprise a virtue of justice, these ought not be mistaken for full justice. Record making in and of itself is not justice, although it enables preserving an idea of justice not presently realizable.

The above hints at clarifying the puzzle with which the Article commenced, regarding the elusive nature of international human rights' normative force. International human rights offer a widely shared language by which to represent abuses and violations of human dignity.[54] Demands cast in rights language become claims that cannot otherwise be rationalized away in the domestic scheme, such as in terms of war or national security. Indeed, just this role for rights discourse is evinced in the recent wave of liberalizing transformation. The language of international human rights not only captured the prior repression, but also offered a means to inspire and galvanize a liberal opposition as well as an image of hope. Here the language of rights shapes that of political discourse. The claim of right convergent with that of politic's demand promises mediating differences of culture,[55] and building such discourse promises solidarity among diverse peoples.[56] Ultimately, deliberations are thought to enable gradual consensus.[57] At the very least, the rights practices instantiate those of democracy.

CONCLUSION

This Article's goal has been to illuminate the genealogy, status, and directions of contemporary human rights theory. This alternative critical approach analyzes international human rights theory in terms of its relation to its abiding politics and from the perspective of its organizing language and structures. The approach advanced here seeks to contribute to a moving out of the problematic in present theorizing. Incorporating the genealogical should illuminate the received understanding of contemporary human rights theory. Incorporation of international human rights' engendering context illuminates a renewed coherence in contemporary human rights theory and appreciation of the sources of its normative force.

54. *See* Judith N. Shklar, The Faces of Injustice (1990) (describing the significance of representation in terms of injustice and rights violations as opposed to misfortune). For an example of the central role of rights construction in representations of "ethnic" as opposed to political conflict, see Human Rights Watch, Playing the "Communal Card:" Communal Violence and Human Rights (1995).

55. *See* Abdullahi Ahmed An-Na'im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives* A Preliminary Inquiry, 3 Harv. Hum. Rts. J. 13 (1990).

56. *See* Rorty, *supra* note 42.

57. *See* Rawls, *supra* note 7.