Human Rights and Groups: Beyond the Particular/Universal Dichotomy

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James Loeffler's new book entitled *Rooted Cosmopolitans: Jews and Human Rights in the Twentieth Century* suggests that our contemporary understanding of international human rights as fundamentally opposed to national politics is based on the false dichotomies between particularism and universalism and between politics and law. By turning our attention to the history of the human-rights field—and particularly to the struggles of five Jewish founding fathers of international human rights—we find that from their perspectives, human rights were actually closely related to national-group politics; that specifically Zionism, as a national movement, was not contrary to international law or human-rights law or human-rights law but was rather a catalyst for legal creativity; and that human-rights law was not created out of indifference or hostility toward group politics but was rather integrated into attempts to protect and provide political maneuvering space for the group. In fact, the struggle for collective group recognition and protection was at the heart of the legal tools and institutions that they proposed, including the Genocide Convention, the Universal Declaration of Human Rights, the recognition of crimes against humanity, and others.

Could this historical understanding of the development of human rights through the biographies of its Jewish founders, who tried time and again to tie the particular with the universal and the political with the legal, shed light on the legalism that characterizes the field today? Is there indeed a necessary tension between human rights and national politics? And if not, what is the reason behind our collective amnesia of the different possibilities to integrate both? What could explain the contemporary limitation of our legal and political imagination in this regard? What is the force behind the anachronistic story we tell ourselves about this false dichotomy? And especially today, at a time when

human rights, international law, and globalization are portrayed by populist leaders as chief threats to the protection of national collectives and identities, could Loeffler's book provide new answers that do not reinforce the validity of this false dichotomy?

In my research, I have dealt extensively with a puzzle relating to a similar difficulty—that is, the difficulty of integrating law and politics in a manner compatible with the liberal conception of law, in order to account for the phenomenon of political trials, prevalent in transitional settings. This question is not new and has been studied by numerous jurists through the years, but since the mid-1990s, it has been redefined as the field of *transitional justice*, a term that has attempted to allow for political trials in times of transition from military or dictatorial regimes to democracy. Transitional-justice literature views the restoration of the rule of law (accountability, end of impunity) and the unveiling of the truth about the previous regime's crimes as essential and central components of the transition process and examines the unique legal and political tools that were developed to address such transitions, including truth and reconciliation commissions, international criminal law, restitution, and reparations.

Despite the strong links between the fields of transitional justice and human rights, they differ in their prevalent approaches to the relation between law and politics. While prominent transitional-justice scholars are willing to accept political action as an integral part of the legal field, the human-rights field is characterized by an apolitical legalism that is seen as necessary for its very legitimacy.[1] Here we can find an important contribution of Loeffler's book to contemporary legal debate. Today, the transitional-justice field is going through a transformation as it moves away from the earlier recognition of the necessity of accommodating politics and balancing strict legalism with the political needs of particular communities toward a return to a hegemony of criminal law over transitional-justice processes (under the struggle to end impunity and the transition from national to international law), and over the human-rights field more generally.[2] This flight from "politics" in order to strengthen the legitimacy of international law is questioned by Loeffler's historical narrative.

The political in Loeffler's book relates to national and group politics: the struggle for self-determination, the establishment of a nation-state, and the protection of minority groups against the sovereign state. In contrast, most contemporary critics of the apolitical character of human rights point to the disregard for root causes of human-rights violations and, in particular, to economic issues and questions of redistribution.[3] However, in both cases, the underlying assumption is that an inherent tension, or even a contradiction, exists between legal and political discourse, with the former relying on universal rights, principles, and legal precedents, and the latter requiring flexibility, discretion, and consideration for the particular, the new, and the changing. Loeffler's narrative of the birth of the human-rights field, with its Jewish founding fathers' integrated approach to law and politics and to nationalism and universalism, serves to challenge this assumption.

The book joins a growing literature that seeks to add historical perspective to the study of international law and international human rights, including Samuel Moyn's groundbreaking *The Last Utopia* and Philippe Sands' *East West Street*. This revisionist turn to legal history serves to shatter myths and overcome blind spots in contemporary understandings of the origins of human rights. (However, in contrast to Sands, who sees World War II and the Holocaust as a pivotal starting-point, and to Moyn, who moves the birth of human rights forward to American politics in 1977, Loeffler's sees World War I and the interwar years as crucial to our understanding of the field.) In this regard, the book examines the contribution of nonstate actors, by positing the group at the center of discussion. It does so in two ways. First, it examines the group dimensions of the rights proposed and their ability to provide recognition and protection to a minority group. Second, it gives group agency center stage, focusing on the way in which minority-group thinkers seek to harness international law from the margins—from the point of view of groups with no state or territory.

Loeffler challenges the false dichotomy between legal universalism and national-political particularism, as the title *Rooted Cosmopolitans* suggests, by revealing the rich theories and perspectives that Jewish

thinkers proposed for integrating both while regarding human rights and nationalism as complementary ideas. This is exemplified by Loeffler's account of Hersch Zvi Lauterpacht, a renowned international lawyer, a devout Zionist, and the drafter of an early version of the International Bill of Human Rights. According to this account, Lauterpacht's early writing in the interwar period on the restriction of the concept of sovereignty in international law was informed by his understanding of the experiences of Jews as a national minority in Europe—an understanding that led him and other Jewish lawyers to support both the minority protection regime under the auspices of the League of Nations and the creation of a Jewish national home in Palestine under the League's mandate regime. Lauterpacht viewed both as manifestations of international law's power to restrict sovereignty in protecting the rights of groups and individuals. Zionism was thus the chief exhibit in his argument on the power of international law.[4] He perceived a symbiotic relationship between Zionism and international law, seeing that Jews were on the way to "regaining their national home thanks to the power of law" and that Zionism would help secure Jewish rights and advance international law.[5]

In 1942, Lauterpacht accepted a commission from the American Jewish Congress to prepare an international bill of the rights of the individual "with special application to the Jewish question."[6] In his 1945 book, *An International Bill of the Rights of Man*, Lauterpacht enumerated rights belonging to two clusters: personal civil liberties and collective and political economic rights, with the former deemed more important than the latter. Interestingly, he included a minority's right to culture without using the term *minority rights*. This included the right of "ethnic, linguistic or religious minorities" to schools and cultural and religious institutions, and the right "to use their own language before the courts and other authorities and organs of the State."[7]

Such interplay between the universal and the particular is also found in the book's account of Jacob Robinson, a Zionist leader, jurist, and diplomat who helped design the UN Commission on Human Rights and the Nuremberg and Eichmann trials. Prior to the

Dumbarton Oaks Conference of 1944, Robinson and other leading Zionist intellectuals drafted an international bill of rights with the vision of safeguarding "the human rights of Jews on an equal basis with those of all other human beings." The text included "the inalienable right of all religious, ethnic and cultural groups to maintain and foster their respective group identities on the basis of equality."[8] Loeffler explains that this provision was the most significant for Robinson, who declared that any international bill of rights "should deal not only with the atomistic individual but also with ethnic and religious groups entitled not only to maintain their identity but also to foster it."[9]

As I noted, the book turns our attention to the national-political dimensions of the development of human rights by focusing on the agency of the minority-victim group. Such understanding contrasts with the prevalent conception of victims of mass atrocity crimes as a unitary entity that is a passive beneficiary of international law and international humanitarian bodies. Loeffler's narrative tells the story of the actions, divisions, and innovations of the Jewish minority-victim group in using international law to seek collective recognition and protection. Furthermore, the group worked to creatively modify an international law that was not suitable to them, as it recognized only sovereign states and not stateless nations, protected sovereignty, and limited its protection of civilians to wartime. An example of this is the Jewish attempt to receive collective recognition through their backstage participation in the Nuremberg trials. Loeffler's book joins a growing number of works that go beyond earlier criticism of the trials as privileging the paradigm of aggressive war and marginalizing the Holocaust to explore the attempts of Jewish organizations and individuals to participate and shape the trial.[10] This new interest in the agency of the victim groups demonstrates how the struggles of a marginalized and persecuted minority group can serve as the catalyzing engine in the struggle to change and reform international law.

Before concluding, we may ask why it so happened that the national-group dimensions of the story, the creative possibilities of tying universal human-rights law to particular national-group politics, had disappeared

from our collective memory. Along with some of the prevalent historical explanations, including disillusionment with the interwar minority-protection regime, the individual-rights bias of colonial powers, and Cold War politics, we may find in this book the basis for an additional explanation. The Jewish individuals who attempted to influence and shape international law were often engaged in the strategic concealment of their particular national identity and politics, speaking instead in a universal and individualistic language and/or giving up recognition in order to act anonymously. For example, according to Loeffler, in their attempts to advance Jewish recognition and participation in the Nuremberg trials, Lauterpacht wrote a memo that he anonymously submitted to the UN War Crimes Commission on which he sat, and Robinson "called for war crimes trials without reference to Jewish victimhood or future deterrence."[11] This strategy may have resulted in the opposite effect of what its actors anticipated by making it easier to cast human rights as universal and apolitical and by reinforcing the misleading dichotomy between universalism and particularism.

In conclusion, it could be argued that the most important contribution of the book's historical research lies in returning the collective dimension to the human-rights field and in challenging the misleading dichotomy between individualistic human-rights discourse and political-group struggles. It is also innovative in turning our attention to bottom-up law—that is, examining international law as it is imagined and promoted by a marginalized and persecuted group. The book overcomes the statist bias of international law by focusing on the biographies of individuals—thinkers and politicians who belonged to a minority group but were influential in the corridors of power in international law. However, notwithstanding this innovative perspective and methodology, the voices of women are almost absent from the story of the Jewish legal struggles to shape human-rights law (Hannah Arendt is touched upon in the epilogue). Could this be explained by the actual absence of Jewish women from the corridors of power in international law? Probably so. But it seems that it is also due to a reliance on a conservative delimitation of the field of international law and the sites of its

formation. The book misses an opportunity to broaden its perspective to examine the contribution of Jewish women who were not jurists or diplomats.

Take, for example, the Eichmann trial, which is examined in the book through the story of Jacob Robinson's involvement in it. New research points to the contribution of historian, writer, and journalist Rachel Auerbach to the formation of a new conception of an atrocity trial with the victim's testimony at its center. Auerbach was influenced by her prior participation in the Oneg Shabbat underground archive in the Warsaw Ghetto, which was founded by the historian Emanuel Ringelblum; and in the historical committees established by Jews after the war to document the Nazi crimes and the Jewish struggle; and later in the department for the collection of witness testimony that she directed at Yad Vashem. Auerbach's disappearance from the legal memory of the trial is probably related to the fact that attorney general Gideon Hausner chose to afford her only a few lines in his memoir, reducing her contribution to forming the list of potential witnesses. In a deeper sense, her absence from legal memory is related to the pervasive assumptions about the international-law field—what it includes and who are the actors relevant to its development.

The absence of women's voices from the Jewish story is all the more significant in light of later developments in international law. Today, as the international criminal-law field examines the contributions of feminist organizations to the development of victim-centered justice in the 1990s during the international tribunals in the former Yugoslavia and Rwanda, Loeffler's book invites a comparison between the strategies of Jewish and feminist organizations. Such a comparison may shed light on the factors of success and, more importantly, on the price of success. Particularly, a question that arises is whether the concealment of the political-group dimensions of rights struggles is inherent to the human-rights field or whether it is a false dichotomy reinforced by the concealment strategies of Jewish organizations in the past and of feminist organizations today.

NOTES

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1. For an example of early transitional-justice writing, see Shklar, *Legalism*. For contemporary writing on the difficulty of recognizing and the necessity of accepting political action as an integral part of the legal field, see Teitel, *Transitional Justice*; Leebaw, *Judging State-Sponsored Violence*; Bilsky, *Transformative Justice*; and Nouwen and Werner, "Doing Justice."
2. On the former, see Teitel, "Transitional Justice Genealogy"; and Roht-Arriaza, "New Landscape." On the latter, see Engle, "Genealogy."
3. For such criticism, see Miller, "Effects of Invisibility"; and Marks, "Human Rights."
4. Loeffler, *Rooted Cosmopolitans*, 24.
5. Loeffler, *Rooted Cosmopolitans*, 26, 29.
6. Loeffler, *Rooted Cosmopolitans*, 98.
7. Loeffler, *Rooted Cosmopolitans*, 101.
8. Loeffler, *Rooted Cosmopolitans*, 105.
9. Loeffler, *Rooted Cosmopolitans*, 105.
10. See Jockusch, "Justice at Nuremberg?"; and Lewis, *New Justice*, 150–80.
11. Loeffler, *Rooted Cosmopolitans*, 129.

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