

On Struggle and Contextualised History

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While we talked about new histories of social rights in [Part I](#) of our interview, the second part of the interview with Steven Jensen is about political history and the role of context in the interdisciplinary encounter between law and history.

In your recent text [Writing Political Histories of International Human Rights Law](#), you quote the South African jurist Christoph Heyns as saying: ‘History – and in particular the history of sustained human struggle – constitutes the true foundation and validation of human rights’. What fascinates you about Heyns’ struggle approach to human rights?

Firstly, it is an open invitation from the field of law to the field of history for constructive engagement based on the recognition of a deep connection. I also find Heyns’ take on history rich and stimulating. In his understanding, history was both a forward-moving force that shapes the future – he talked about ‘the history we allow to unfold’ – and a retrospective site of experience, learning and understanding. I can work with that because history is not just about the past. It is the study of change, about narratives, a baseline upon which we make assumptions, and it is also about the present and the future (while also being able to serve as an antidote to presentism). His emphasis on struggle opens up how we study human rights history methodologically, temporally and substantively.

It is in these areas that the recent human rights historiography – alongside a shift in emphasis regarding the historical actors – has made the greatest inroads. Furthermore, the struggle approach also contains an element of theory development from the Global South. It took a while but opening up to voices and actors from the Global South and shifting how we access the sources and evidence that informs our stories has been perhaps the most enriching contribution that human rights historiography has made to the whole human rights field – both research and practice.

Why was the historical context for Heyns’ notion of the struggle approach so important?

It featured in an article from 2001 which was the early Post-Apartheid era where the hopes and aspirations for a transformation of South African society was still very much alive. At the same time, it contained a reflection back on a violent and oppressive century although without detailing this. It is interesting how much the 20th century South African story shaped or mirrored the international human rights story over the same time span. What unfolded in South Africa regularly served as critical

factors behind important developments in international human rights law and politics (see e.g. [here](#) and [here](#)). This was distilled in Heyns' framing because he was so aware of this history.

This significance has manifested itself again very recently in South Africa bringing its genocide case against Israel before the International Court of Justice. There are so many layers of history involved in that case – including that of the Court itself when you e.g. think of the ICJs 1966 South West Africa ruling and its enduring impact on our contemporary international human rights legal frameworks. It may seem like a peculiar point but when I look at South Africa's front bench of lawyers at The Hague, I could not help but think to myself there sits the author of the excellent scholarly work [The Land is Ours. Black Lawyers and the Birth of Constitutionalism in South Africa](#) (by Tembeka Ngcukaitobi). It is of course a very different case and context but then we are not compartmentalized human beings. I felt there was something enduring in Heyns' articulation of the relationship between human rights (law) and history that I wanted to pay homage to and the context in which it emerged did not reduce its wider global applicability.

The History of International Law as an academic discipline has long focussed on legal doctrine. You argue in favour of a political history of human rights, which you do not want to be understood as 'politicised' but rather as 'contextualised history'. Can you explain what that means?

I work – part of the time at least – as a human rights historian in a work environment where the emphasis on legal doctrine is crucial to the work we do. I get the reason for this. I then look at the type of histories that this approach produces which typically take the form of Travaux Préparatoires or legal commentaries. Again, I get this. They serve a purpose. But they also leave us wanting because of the type of legal history that they often represent. This is one starting point where human rights history produces something beneficial, namely richer contextualized histories of human rights law. This is what I try to explain in my article which you referred to. Political history as it is practiced today can easily encompass diplomatic history, legal history, social history, gender history, transnational history, cultural history, economic history and more and shape these into a larger whole.

Speaking from my human rights perspective, I think political history can help address interpretive shortcomings in international legal understanding. It is a matter how it is done and how well it is done. As I also illustrate in my article, political history is embedded in international human rights diplomacy and practice, including through the ongoing interpretative work of the UN human rights mechanisms.

This does not necessarily mean that these histories are politicised histories. They can be but they do not have to be. Political history is written in very different ways. At times, the UN human rights mechanisms write mini political histories in the way they draft recommendations to states. That starts with a legal interpretation drawing on history but that can of course become politicised dependent on the responses to this. When the Jamaican Prime Minister paraphrased my book *The Making of International Human Rights* in a speech to the UN General Assembly a few years ago that can be labelled a politicization of this history. It certainly opened a window

for some domestic human rights advocacy, but I do not think it changed the nature of my book which remained a political, diplomatic and legal history of the evolution of human rights after 1945 based on extensive archival work in 10 different countries.

In the debate on the ‘turn to history in international law’, Anne Orford criticised a ‘fetishisation of historical context’. Also in an interview with Sué González Hauck and me, Anne has pleaded ‘that we should resist the turn to history as neoformalism’, since ‘international lawyers cannot look to historians (or anyone else for that matter) to save the day with impartial and verifiable evidence-based interpretations of what international law really is, means, or stands for.’ You are quite critical of Anne Orford’s assessment. Why?

For me, there is a fundamental problem with Anne Orford’s book “[International Law and the Politics of History](#).” It intends to address interactions between the discipline of law and the discipline of history. However, it only really addresses intellectual history which is a sub-field within the historical discipline. That is a basic category error. It surprises me that this has allowed to pass. It certainly reveals a certain blindness from the international law side about what history is and how legal histories are written from within the latter discipline.

When Anne Orford engages with human rights historiography, she essentially engages with one book, namely Samuel Moyn’s [Last Utopia. Human Rights in History](#) from 2010. That is a very reductive approach to a body of scholarship that over the last 10–15 years has been one of the most dynamic fields of study within the historical discipline and which has had things to say about international law as well. It becomes more problematic in light of the following: I would argue that Moyn’s *Last Utopia* book has not had a very big influence on the human rights historiography of the recent decade and a bit. The historical scholarship was already heading in a different direction to his before his book came out in 2010 (it was just not so visible at the time). Where *The Last Utopia* has had a tremendous impact is in shaping what scholars from other disciplines think human rights history is about. We are dealing with a sizeable chasm here. Orford fell into that. It leads to what feels like caricature.

In addition, the intellectual history approach to human rights history has proven to be too narrow and self-contained to be helpful to the larger historiographical field which is invariably much richer in its methodological, temporal, substantive and actor-oriented approaches and engagements. Intellectual history has proved not so capable of confronting its own conformities, but this is a rather different critique than Orford’s because it comes from such a different place.

To me, a meta-theme of the debate seemed to be when historiography is political or apolitical. How do you see it: can historiography be apolitical at all?

That is an interesting question in this context. I think the blind spots that we witnessed in how the human rights field – and here I am referring to both research and practice – until recently approached its own history illustrates the political consequences of a flawed approach. This refers to “historiography” in a very broad understanding of the term. It is only in very recent times that we started taking the mid-20th century decolonization process serious in our human rights histories. It

is only recently that we really started taking Global South agency in the post-1945 international human rights history serious. Those earlier blind spots were not apolitical in nature or consequence and has left us with a significant amount of repair work where the historical record and contemporary realities connect. That is some interesting baggage to carry into the ongoing debates about the future of human rights.

To give another example, I would argue that the massive gap in US human rights historiography regarding the years ca. 1955 to 1970 and the unwillingness to grapple with the multilateral domain concerning the United States and human rights in this time period is a sizeable failure that makes me question if we really know the US human rights story – despite plenty of works on the 1940s and the 1970s. I think what we have is a retouched history. I am surprised it is not regarded as more of a problem. The gap may not be intentional, but the unwillingness to address this reflects a failure of imagination in a US historiographical tradition. It may also have political consequences for how the United States sees the international human rights project and its own role in this. There has – from the 1970s onwards – been a lot of co-opting going on of what other actors to a large extent built. The historiographical omissions here are so glaring – and we are talking about a field of scholarship that has otherwise been quite privileged in terms of attention received. There is a lot to unpack in your question.

How do you see the future of writing histories of international human rights (law)? Which topics are particularly urgent?

I have already explained why I think writing the history of social and economic human rights remains particularly urgent. Following on from this, I think studies on human rights and “the social question” in history is highly relevant and urgent. The way we grapple with “the social” and “the economic” in human rights history represents in my view a full research agenda there for the taking.

There is also a lot more work to do in terms of diversifying the geographies of human rights history. Significant inroads have been made on this (e.g. with the [Decolonization, Self-Determination and the Birth of Global Human Rights Politics](#) volume) but more remains to be done.

I think there is a real potential in working on [the history of the relationship between human rights and technology](#) which stretches back longer than we think. There are topics such as [human rights and inequality](#) that deserves detailed study over a longer time span. I could also imagine histories of human rights and the environment and human rights and science providing us with interesting insights.

We have also seen some interesting research on [disability history](#) which has challenged the human rights chronology. I would also like to see historical studies on the relationship between indigenous peoples’ rights and human rights.

A broader study on the historical relationship between human rights and war over a longer time span – not limited to a focus on a specific conflict or a specific decade – would also be most welcome. There is a richness now in the human rights

historiography that can enable a larger reflection on this theme while grounding it with the nuance required to do this well.

Finally, I would also argue for more of a domestic turn in human rights history. This implies shifting away from treating it mainly as an international history. We have already seen examples of the richness that comes through grounding this research in domestic contexts (see [here](#), [here](#) and [here](#)) but there is a lot more to do here that will enrich the whole field. That is my wish-list for you. There is still plenty of work to do and plenty to learn about the nature of human rights in law, politics and society from a temporal perspective.

