

Christof as Pan-African humanitarian lawyer

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Introduction

At his heart Professor Heyns was two things: a public international law giant, and a true pan-Africanist. He believed in the value of international law – especially international human rights law and international humanitarian law (IHL) – and in the potential that exists on the African continent. Given these two values, this essay endeavours to highlight some of the work that Professor Heyns did to develop and clarify IHL from an African perspective, and to pay tribute to this immense contribution.

This essay starts by affirming the relevance of IHL to Africa and then turns to highlight current efforts being undertaken to promote this body of law on the continent, notably those which Professor Heyns was actively involved in. In concluding the essay, I share some recommendations for the continuation of Professor Heyns' work in advancing IHL on the continent.

Relevance of international humanitarian law to Africa

As a legal advisor for an international humanitarian organisation, I have been privileged over the last 13 years to be responsible for engaging Southern African governments on the implementation of IHL. I have also had the opportunity to engage with governments in East Africa as well as the Indian Ocean Island states. Through this engagement, two main reflections have arisen: African states are largely convinced that IHL is important; but at the same time, not all African states are persuaded that IHL is 'African'.

* Regional Legal Advisor, International Committee of the Red Cross, Pretoria, South Africa. I have chosen to contribute this chapter as a way of thanking Professor Heyns for everything he taught me, including those lessons I learnt simply from interacting with him. The one characteristic that Professor Heyns never failed to demonstrate for me was humility. It has been a privilege to know him.

African states are largely convinced of the relevance of international humanitarian law

African states are largely convinced of the importance and relevance of IHL to the continent. There is much evidence to support this assertion. First, the level of African state support can be gauged from the rate of ratification by African states of instruments of IHL,¹ as well as the numerous decisions and Resolutions passed within the African Union (AU) system related to IHL.² Second, the 2009 AU Convention on the Protection and Assistance of Internally Displaced Persons in Africa is the first binding regional instrument in the world to regulate the treatment of internally displaced persons, and is thus evidence of the continent's willingness to play a leading role in codifying and adhering to principles of IHL and international human rights law related to displacement.³ Third, African states were instrumental in advancing the drafting and adoption of the Treaty on the Prohibition of Nuclear Weapons, as the first international instrument to ban nuclear weapons. South Africa and Nigeria, in particular, were influential during the negotiations. When it came to its adoption, in July 2017, 42 African states voted in favour.⁴ According to Van Wyk, Africa's normative commitment to the Ban Treaty is strong. She notes that the 'Africa Group has been involved in the promotion of the Ban Treaty and its ratification ... It has also continued to reiterate the continent's commitment to complete nuclear disarmament'.⁵

Fourth, 31 of 54 African states have created national IHL committees to follow-up on promotion and implementation of IHL at the domestic level.⁶ These inter-ministerial committees provide a platform for broad government engagement on a variety of issues related to the domestication of IHL. Fifth, a number of African governments meet regularly at regional IHL seminars across the continent, hosted by the ICRC together with partner governments and institutions, including the Department of International Relations and Cooperation of the government of South Africa, and the Economic Community of West

1 <https://ihl-databases.icrc.org/ihl> (accessed 28 October 2021).

2 See for example African Commission Resolution 467 on the need for Silencing the Guns in Africa based on human and peoples' rights; and its Resolution 7 on the Promotion and Respect of IHL and Human and Peoples' Rights - ACHPR/Res.7(XIV)93.

3 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, entered into force 6 December 2012.

4 2017 Treaty on the Prohibition of Nuclear Weapons, entered into force 22 January 2021. For more on the role of African states in adopting the Treaty, see African Support for the TPNW (icanw.org) (accessed 27 October 2021).

5 Policy-Insights-104-van-wyk-turianskyi.pdf (accessed 4 November 2021).

6 Table of National Committees and other national bodies on IHL/International Committee of the Red Cross (icrc.org) (accessed 28 October 2021).

African States. In these seminars, states have the opportunity to report on developments in the field of IHL at the national level. They also receive updates on the recent developments in IHL. The seminars also provide a platform for peer-to-peer exchanges between governments on the role that IHL plays in their region.⁷ And finally, African voices and perspectives on various IHL themes are increasingly being promoted at the regional and global level, for example through publication of articles by African authors in the *International Review of the Red Cross*.⁸ Inviting African speakers to participate in regional, continental and global events on IHL also serves to profile these perspectives. An example is the webinar, chaired by Professor Heyns in September 2020 and co-hosted by the International Committee of the Red Cross (ICRC) and Institute for Security Studies, on Africa's role in regulating autonomous weapons systems, which featured a South African researcher and a Nigerian Air Commodore (retired) as speakers on the panel.⁹

Not all African states are convinced of Africanness of international humanitarian law

While the recognition of the relevance of IHL to the continent is encouraging, the second observation is that despite accepting its relevance, not all African states are convinced of the 'Africanness' of IHL. Like much of international law, it is often referred to on the continent as a 'Western construct' – as 'Geneva law', or as a body of international law for which the expertise lies in First World states.¹⁰ This is an idea that may have developed from the fact that IHL was largely codified in the West. However, as is more fully elaborated below, principles of IHL historically existed in many traditional groups and cultures across the world, including in Africa.

My experience of Professor Heyns is that he fought to correct the misconception that public international law belonged to the West. The ICRC joined Professor Heyns in this crusade. In 2021, it released the ICRC

7 As an example, the Regional IHL Seminar in Pretoria is an annual Seminar, co-hosted by the ICRC and the Department of International Relations and Cooperation of the Government of South Africa, which brings together representatives from up to 18 governments from Southern Africa and the Indian Ocean Island States.

8 See for example the following contributions by African authors: SJ Swart 'An African contribution to the nuclear weapons debate' (2015) 97(899) 753-773 <https://international-review.icrc.org/articles/african-contribution-nuclear-weapons-debate> (accessed 31 December 2021); G Waschefort 'Africa and international humanitarian law: the more things change, the more they stay the same' (2016) 98(2) 593-624, https://international-review.icrc.org/sites/default/files/irc98_11.pdf (accessed 31 December 2021).

9 Joint ICRC/ISS webinar on 'Africa's role in regulating autonomous weapons systems', 23 September 2020.

10 Under the protection of the palm: wars of dignity in the Pacific (icrc.org) (accessed 4 November 2021).

Tool on African Customary International Humanitarian Law.¹¹ The Tool highlights the link between African traditions and customs and modern-day IHL, and is ‘the product of a number of years of research into the values underpinning African customs concerning warfare’.¹² According to one of the legal advisors who worked on the Tool, its purpose is ‘firstly to contribute to current debates on relevance of IHL to Africa; and secondly to increase understanding and acceptance of IHL rules on the African continent’.¹³ As a result of the research undertaken, the ICRC identified 11 African traditions that correlate with modern day IHL principles. These traditions are gathered from across the continent, encompassing the Sahel, Somalia and Kenya. They range from issues such as protection of women and children in times of armed conflict to measures for dealing with the bodies of dead soldiers. An example of such African-specific IHL is the tradition in Somalia that strictly forbids the desecration of the bodies of the enemy dead or taking of their possessions for personal gain. This tradition reflects the modern-day principles of IHL which state that each party to the armed conflict must take all possible measures to prevent the dead from being despoiled, and that mutilation of dead bodies is to be prohibited.¹⁴ Essentially, the value of the Tool on African Customary International Humanitarian Law lies in encouraging African states to take ownership of this important body of law.

Professor Heyns was aware of the importance of promoting the relevance of IHL to Africa, but also of the value in promoting African ownership of IHL.¹⁵ The next section addresses some of the efforts undertaken by Professor Heyns in this regard.

Promotion of IHL in Africa

One of the main strengths of Professor Heyns was his practical understanding of the law. As a true Pan-Africanist, he brought this strength to his work on IHL by focusing on practical ways in which to

11 ICRC ‘African Values in War: A Tool on Traditional Customs and IHL’ <https://www.icrc.org/en/document/african-customs-tool-traditional-customs-and-ihl> (accessed 27 October 2021)

12 Sarah Jean Mabeza, ‘Does IHL reflect African customs and traditions? A spotlight on the ICRC’s Tool on African values in war’ <https://aaihl-clinic.org/2021/09/06/does-international-humanitarian-law-reflect-african-customs-and-traditions-a-spotlight-on-the-icrcs-tool-on-african-values-in-war/> (accessed 15 October 2021).

13 Interview with Tamalin Bolus, Legal Advisor, Pretoria Delegation, International Committee of the Red Cross, 12 August 2021, Pretoria, South Africa.

14 See for example GC I Art. 15(1); GC II Art. 18(1); GC IV Art. 16(2); AP I Art. 34(1); AP II Art. 8 & CIHL Rule 113.

15 For example, Professor Heyns wrote on the impact of the African human rights system, which incorporates some aspects of IHL, and the value in reforming the system. See C Heyns ‘The African regional human rights system: in need of reform?’ (2001) 1 155-174.

achieve its promotion on the African continent. For example, Professor Heyns constantly pointed to the African perspective on issues that were not normally prioritised among African audiences, such as the issue of autonomous weapons systems (AWS).¹⁶ While supporting dialogue on the issue of AWS at the global level, Professor Heyns also participated in a number of discussions at the continental level addressing the question of the relevance of AWS for Africa. Another practical example of how he promoted IHL on the continent was his encouragement of African students to pursue post-graduate studies in IHL and international human rights law, so that strong African voices could be added to discussions on development of these bodies of law. This was particularly evident in recent years through his work with the Institute for International and Comparative Law in Africa (ICLA), where he developed a doctoral programme under the theme 'Freedom from Violence' that was designed to multiply the number of doctorates in IHL from African students.

Perhaps most importantly, and most practically, Professor Heyns stayed in Africa. He often travelled for meetings and fellowships, including to Harvard University as a Visiting Fellow, Oxford University as a teacher and Geneva on many occasions especially in his role as UN Special Rapporteur on extrajudicial, summary or arbitrary executions. Yet he always returned to South Africa, and to many, his intentional presence on the continent spoke loudest of all.

As many of his contributions to the development and clarification of IHL on the continent are elaborated on in various contributions to this book, this section focuses on only two specific areas through which Professor Heyns' clear passion for promoting IHL on the continent are evident in the annual All Africa Course on IHL and IHL research at ICLA.

Partnering on the annual 'All Africa Course on IHL'

The 'All Africa Course on IHL' is hosted annually in South Africa by the Pretoria Delegation of the ICRC and a local academic partner. This two-week course is always well-attended and attracts English-speaking African lecturers and teachers of IHL and post-graduate IHL students, as well as a number of practitioners in the field. The aim of the course is to provide participants with a comprehensive overview of the fundamentals of IHL and its impact on other bodies of international law, from an African perspective. One of the main objectives of the course is thus to equip participants to return to their home countries with a strong awareness of the need for increased African contribution to the global promotion of IHL. It is clear that the continental diversity

16 C Heyns 'Autonomous weapons in armed conflict and the right to a dignified life: an African perspective' (2017) 33 46-71.

represented in the course – both participants as well as lecturers – is where the value of the course lies.

Since 2020 the course has been co-hosted with the Institute for International and Comparative Law and the Centre for Human Rights at the University of Pretoria – both institutions in which Prof Heyns played a central role in establishing. This partnership was enabled through Professor Heyns' strong relationship with the ICRC and his constant willingness to engage in activities that could further the advancement of IHL in Africa. Since partnering with ICLA and the Centre for Human Rights, the number of applications for the course has increased exponentially, evidence of the reach and credibility that these institutions have on the African continent.¹⁷ In a demonstration of his support for the Course, Professor Heyns opened the 17th edition of the All Africa Course in January 2020. In his usual inspirational manner, he encouraged participants to take home what they learnt at the course. In the 2021 programme, Professor Heyns not only opened the 18th edition of the course, but also participated in a panel discussion on the topic of new technologies, which focused on AWS as well as cyber warfare. His support for the course was evident through his participation, as well as through his behind-the-scenes support.

It is hoped that the All Africa Course will continue to achieve its aim of advancing IHL on the continent, and that this will be supported through a continuing partnership between the ICRC, ICLA and Centre for Human Rights. In this way, the name of Professor Heyns will be associated with an excellent tool for promotion of IHL in Africa.

IHL research at the Institute for International and Comparative Law in Africa

During his tenure as Director of ICLA, Professor Heyns sought opportunities to engage with partners to advance the promotion of IHL in Africa, as well as to advance African voices on IHL. In that vein, he in 2018 agreed with the Pretoria Delegation of the ICRC to work towards broader academic engagement between ICLA and ICRC on relevant IHL issues. This engagement aimed to match the high research standards at the University of Pretoria with the ICRC's global research needs. As a result of this partnership, a research project on 'Counterterrorism, IHL, Disarmament, Demobilisation and Reintegration and Human Rights: A Classic Case of Fragmentation?' was undertaken in 2019. The research, facilitated by the ICLA, contributed to ongoing research by the ICRC Law and Policy Department into the impact that IHL has in the field. Under the auspices of this project, ICLA research contributed

17 In 2019 approximately 28 applications were received; in 2020 approximately 180 applications were received.

to showcasing the actual impact of IHL during armed conflict on various social, political and economic factors, such as human security, development and international relations.

Professor Heyns helped pave the way for a research partnership between the ICRC and University of Pretoria on issues related to IHL, and it is hoped that this engagement can continue in order to pay tribute to his efforts.

Summary and recommendations

Professor Heyns' passing has left a giant-sized hole on the continent. The work he did must be continued by like-minded IHL enthusiasts, although it will be a mammoth task for anyone to work with as much insight and impact as he was able to. Additionally, it is not only the substance of his work, but also the manner in which he undertook it, that must be mirrored. Professor Heyns advocated for principled law-making, encompassing moral perspectives during negotiations on development of the law. Despite the difficulty in living up to his name, Professor Heyns has paved the way and we must now walk in his footsteps. As a tribute to his work, we must continue to advocate for the advancement of IHL generally, and for African ownership and promotion of IHL specifically. The following recommendations can be made in this regard.

First, in the realm of academia. There are a number of African academics (some of whom are represented in this book as contributing authors) working in both African and international universities who are writing on IHL issues, providing an academic perspective. These voices need to be strengthened, multiplied and heard. This can be achieved through publications in academic journals and humanitarian blogs that typically host only European or American perspectives; through focusing on aspects of IHL that are a challenge specifically in the African context; and through encouraging and supporting post-graduate students to follow suit.

Second, at the level of regional and sub-regional African organisations. Professor Heyns worked closely with the African Commission on Human and Peoples' Rights (African Commission) on issues related to IHL, serving as an expert advisor to the Working Group on the Death Penalty, Extrajudicial, Summary and Arbitrary Killing and Enforced Disappearances in Africa. He also served as a resource person for the drafting of the African Commission's General Comment 3 on the African Charter on Human and Peoples' Rights on the right to life (article 4)¹⁸ and, at the time of his passing, he was working on supporting the

18 He is specifically mentioned in the preface to the General Comment, noting his

African Commission on the development of a study on the use of force in Africa.¹⁹ Institutions such as the African Commission need support from international law experts; support which Professor Heyns was always willing to give, and which will now need to be provided by new, trusted African voices.

Third, at the level of global organisations and institutions. Professor Heyns was a loud and prominent voice within the United Nations system, including on issues related to IHL. His was not a lone African voice at this level, as more and more Africans take leading roles in positions related to IHL.²⁰ This is commendable, and should continue.

Fourth, through engagement in existing platforms by African government representatives. Numerous avenues exist for African governments to participate in and advance IHL negotiations and discussions, and Professor Heyns was adept at facilitating such an African participation. He provided space for African governments to speak and, when necessary, was often a voice for these governments on more sensitive issues. The active participation of African governments on issues of IHL is crucial, and any role that can be played in supporting such participation should be welcomed.

And finally, by staying passionate about the continent. In a recent event hosted by the ICRC's Pretoria Delegation and the University of Pretoria's Future Africa Institute in honour of Professor Heyns, it was noted that he believed his margin of impact was more meaningful by his presence in Africa. Whether we find ourselves on the continent or elsewhere, we can follow his example by focusing on positive impact for the African continent.

particularly valuable contribution. See African Commission on Human and Peoples' Rights, General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), adopted during the 57th Ordinary Session of the African Commission on Human and Peoples' Rights, 2015.

19 African Commission on Human and Peoples Rights Statement on the Passing of Christof Heyns <https://www.achpr.org/pressrelease/detail?id=574> (accessed 28 October 2021).

20 An example is Dumisani Dladla from South Africa, who is currently the Head of the Arms Trade Treaty Secretariat.