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Christof Heyns and the ‘War against Terror’

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Some time ago, the University of Pretoria made frontline news because of the standing of three of its faculty members in institutions of the United Nations Organization. What made it quite unique was the fact that the persons concerned did not only come from the same university, but actually served in the same faculty. Those dignitaries were (a) Professor Dire Tladi (1975-), professor of international law at the University of Pretoria who serves as a member (currently Vice-Chair) of the International Law Commission that was established by the General Assembly of the United Nations Organization in 1947 under article 13(1) of the Charter of the United Nations to ‘initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification’; (b) Professor Ann Skelton (1961-), at the time Professor of Law and head of the Centre for Child Law of the University of Pretoria, who was appointed as a member of the United Nations Committee on the Rights of the Child; and (c) Professor Christof Heyns (1959-2021), who had been Director of the Centre for Human Rights (1999-2006) and Dean of the Law Faculty (2007-2010) of the University of Pretoria.

In 2006, the Centre for Human Rights received the UNESCO Prize for Human Rights Education in recognition of the LLM degree in Human Rights and Democatisation in Africa, and the Human Rights Moot Court Competition, orchestrated by the Centre under the leadership of Christof Heyns. Christof stemmed from a highly prestigious family with a strong commitment to human rights. His father, Professor Johan Heyns (1928-1994), was a professor in theology at the University of Pretoria and Moderator of the Dutch Reformed Church (*Nederduitse Gereformeerde Kerk*) in South Africa (1986-1990). In 1980, Professor Johan Heyns voiced publicly, for the very first time, critique against the government policy of apartheid and the pro-apartheid stance of the Dutch Reformed Church.

Within the United Nation structures, Christof served as the Special Rapporteur on extrajudicial, summary or arbitrary executions (2010-2016) and as a member of the Human Rights Committee (2017-2020), the body that oversees implementation of the *International Convention*

of Human Rights, 1966. His commitment to extra-judicial executions is the main focus of this contribution in his memory.

Extra-judicial executions

The terrorist attacks of 11 September 2001 executed by the revolutionary Islamic group al-Qaeda and which destroyed the World Trade Center in New York, caused excessive damage to the Pentagon premises in Washington DC, and caused the death of close to 3000 people (2977 victims and 19 hijackers), sparked the American 'War on Terror'. It included an intensive manhunt (2001-2011) to find Osama bin Laden (1957-2011) responsible for planning the attack, which reached a dramatic climax on 2 May 2011, when American armed forces in the early hours of the morning attacked a dwelling in Abbottabad in Pakistan where Osama Bin Laden had been in hiding. Bin Laden was shot and killed in the attack.

The legality of the killing has been questioned by some analysts. For example, on 6 May 2011, Christof Heyns, in his capacity as the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, and Martin Scheinin, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, issued the following joint statement:

> Acts of terrorism are the antithesis of human rights, in particular the right to life. In certain exceptional cases, use of deadly force may be permissible as a measure of last resort in accordance with international standards on the use of force, in order to protect life, including in operations against terrorism. However, the norm should be that terrorists be dealt with as criminals, through legal processes of arrest, trial and judicially decided punishment.
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> Actions taken by States in combating terrorism, especially in high profile cases, set precedents for the way in which the right to life will be treated in future instances.
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> In respect of the recent use of deadly force against Osama bin Laden, the United States of America should disclose the supporting facts to allow an assessment in terms of international human rights law standards. For instance, it will be particularly important to know if the planning of the mission allowed an effort to capture Bin Laden.
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> It may well be that the questions that are being asked about the operation could be answered, but it is important to get this into the open.[1]

In his report of 30 March 2012 to the Human Rights Council, Special Rapporteur Christof Heyns, referring to the killing of Osama bin Laden, stated:

> Human Rights law dictates that every effort must be made to arrest a suspect, in accordance with the principles of necessity and proportionality on the use of force. In cases where international humanitarian law may apply,

> the situation in each country should be assessed on a case-by-case basis in order to determine the existence or not of an armed conflict.[2]

In a subsequent report, Professor Heyns lamented the fact that 'some information' provided by the United States that related to the killing of Osama Bin Laden 'did not provide adequate clarification of the exact circumstances insofar as issues of the use of lethal force are concerned'.[3]

The supposition that the killing of Osama bin Laden amounted to 'extrajudicial killing without due process of law' was also shared by some academics, such as Professor Nick Grief of Kent University.[4]

Harold Hongju Koh, at the time Legal Advisor to the US Department of State, in an address at the Annual Meeting of the American Society of International Law delivered on 25 March 2010 in New York gave assurances that '[i]n ... all our operations involving the use of force, including those in the armed conflict with al-Qaeda, the Taliban and associated forces, the Obama Administration is committed by word and deed to conducting ourselves in accordance with all applicable law'.[5] In a subsequent statement, Harold Koh stated that Osama bin Laden was legitimately killed within the confines of international humanitarian law:

> Given bin Laden's unquestionable leadership position within al Qaeda and his clear continuing operational role, there can be no question that he was the leader of an enemy force and a legitimate target in our armed conflict with al Qaeda. In addition, bin Laden continued to pose an imminent threat to the United States that engaged our right to use force ... Under these circumstances, there is no question that he presented a lawful target for the use of lethal force ... Finally, consistent with the laws of armed conflict and U.S. military doctrine, the U.S. forces were prepared to capture bin Laden if he had surrendered in a way that they could safely accept. The laws of armed conflict require acceptance of a genuine offer of surrender that is clearly communicated by the surrendering party and received by the opposing force, under circumstances where it is feasible for the opposing forces to accept that offer of surrender. But where that is not the case, those laws authorize use of lethal force against the belligerent, under the circumstances presented here.[6]

A fundamental distinction between the point of departure of American spokespersons such as Harold Koh on the one hand and Christof Heyns on the other hand was whether the killing of Bin Laden occurred in the course of an armed conflict (Harold Koh's assumption), or whether on the contrary it was an instance of extra-judicial execution (Christof Heyns' assumption). If Bin Laden was killed within the confines of an armed conflict and was a legitimate target, the only circumstance under which the killing could have been censurable is if it could be shown that he had surrendered or was at the time *hors de combat* through sickness, having been wounded, or in virtue of any other cause. This was most likely not the case and his killing was therefore fully justified under

the prevailing rules of international humanitarian law; that is, if one can assume that the American 'war against terror' is indeed an armed conflict within the confines of international humanitarian law.

The position taken by Christof Heyns in this regard subsequently derived support from refinement of the concept of 'armed conflict' in international law. Traditionally, 'armed conflict' was said to exist 'whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.'[7] The major focus was on distinguishing an armed conflict from violent acts that are no more than 'banditry, unorganized and short-lived insurrections, or terrorist activities,'[8] or as stated in the Statute of the International Criminal Court, 'situations of internal disturbances, and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.'[9] The key components that qualified acts of violence to become an armed conflict were (i) the intensity of the conflict, and (ii) the organisation of the parties to the conflict.[10]

In recent years another constituent element of the concept of 'armed conflict' has come to be emphasised, namely certain territorial confines, such as a war zone or battlefield as the precinct of combat. Emphasis on the territorial dimension of 'armed conflict' became a critical issue in the ongoing debate whether or not the 'Global War on Terror' ignited by the terrorist attacks of 11 September and intensified by the ISIS crises[11] is indeed an 'armed conflict'. Can the United States apply the rules of international humanitarian law to distant targeting of, and drones strikes against, suspected terrorists wherever they might be found, in which event the dictates of international human rights law must be observed, or is the targeting of suspected terrorists beyond the confines of a territorially defined war zone and therefore merely a matter of law enforcement (arresting suspected criminals)?

It might be noted that American courts have often used words and phrases denoting the territorial confines of armed conflicts. It has thus been decided that the President of the United States does not have the power to detain as an enemy combatant an American citizen arrested on American soil 'distant from the zones of combat.'[12] In another matter, Kennedy, J, delivering the opinion of the Court, referred to 'an active theater of war';[13] Hudson, J (dissenting) referred to the 'zone of battle';[14] while Sentelle, J, delivering the opinion of the Court in another case, had occasion to note that 'Afghanistan remains a theater of active military combat'.[15]

It is therefore safe to say that the 'Global War on Terror' is not an armed conflict since the American armed forces launched attacks through distant targeting of suspected terrorists wherever they could be found and did not confine their attacks to a defined battlefield or

war zone. Christof Heyns, therefore, had it quite right in his assessment that those perpetrators must not be killed but had to be arrested and brought to trial.

Homage to Mahatma Gandhi

Christof Heyns was awarded the Doctor of Laws degree of the University of the Witwatersrand, Johannesburg in 1991 based on a dissertation entitled *A jurisprudential analysis of civil disobedience*. It was a great honour in my own academic career that I was selected by Christof to serve as the supervisor of his dissertation, which included what can be evaluated as a homage to the Indian tycoon, Mahatma Gandhi (1869-1948).

Gandhi came to South Africa in 1893 and stayed in the country, practicing law, until 1915. His involvement in civil disobedience was sparked when during the night of 7 June 1893 he was thrown off a train in Pietermaritzburg for sitting in the first-class coach of the train reserved for whites. Gandhi defended his right to sit in that section of the train based on the Indian caste system that distinguished between the rights of an upper class and a lower class within the Indian community. He claimed that he had the right to travel in the first-class section of the train because he was not a 'coolie' (the working class) but belonged to the upper class. His philosophy on civil disobedience came to be depicted as 'passive resistance' – or as he preferred to call it, satyagraha (from satya, meaning truth, and grapha, meaning grasping, that is, grasping the truth, or holding on to truth). One must clearly demonstrate one's objections to injustices but without obstructing the daily livelihood of others. I remember as a child growing up in Durban seeing Indians holding banners at the side of the road but without interrupting the flow of traffic or the movement of pedestrians on the adjoining sidewalk.

Based on the caste system, Gandhi believed that 'the white race in South Africa should be the predominant race'.[16] However, civil disobedience executed on basis of passive resistance (*satyagraha*) became the main focus of his political directives in South Africa. When he returned to India, the caste system reminded him of apartheid practices in South Africa and he spent much of his time in India to abolish that system. In the closing chapter of his dissertation, Christof Heyns attributed as a unique contribution of Gandhi the fact that 'he was the first to perceive and to use the newly emerging opportunity to rally people under the banner of non-violent resistance',[17] but that the history of Gandhi in South Africa illustrates that 'some measure of human suffering appears to be unavoidable in the quest for a new and better world'.[18]

It is perhaps worth noting that the Secretary-General of the United Nations, Ban Ki-Moon on occasion of the International Day of Peace on 2 October 2008 in an address to the General Assembly proclaimed that Gandhi's legacy is more important today than ever; and that Chief Albert Luthuli (1899-1967), leader of the African National Congress, in 1958 became the first South African to receive the Nobel Peace Prize, which was based on his policy of bringing about peace and reconciliation in South Africa by peaceful means.

Concluding observations

Christof Heyns and I have come together ever so often as friends and colleagues, including during my annual stay at the University of Pretoria as an extraordinary professor in the Department of Private Law. We could also arrange his participation in a conference of the Center for the Study of Law and Religion of Emory University that was held in Franschhoek in South Africa in March 1997 on *The problem of proselytism in Southern Africa: legal and theological dimensions*. Christof Heyns and Danie Brand delivered a joint paper at the conference entitled 'The constitutional protection of religious human rights in Southern Africa'.[19] It contains an elaborate exposition of constitutional regulations of religion in countries such as Angola, Botswana, the Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe. They argued that religious liberty is the fundamental basis for the general development of human rights law, and since religious rights are well protected in African constitutional systems the recognition of rights as basic human rights 'must surely enjoy a high level of probability'.

As a proponent of human rights in Africa and a voice calling for peaceful means of political change Christof Heyns has made his mark that will remain on the forefront of our thinking for many generations to come.

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1 Press Release, UN Office of the High Commissioner for Human Rights, Osama bin Laden: Statement by the UN Special Rapporteur on summary executions and on human rights and counter-terrorism (6 May 2011), http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10987&LangID=E; and see also Arabella Thorp, 'Killing Osama bin Laden: Has Justice been Done?' House of Commons Library, Standard Note SN/IA/5967, at 6 (16 May 2011); C Heyns & S Knuckey 'The long-term international law implications of targeted killing practices' (2013) 54 *Harvard International Law Jourbal* 101, at 106.

2 Human Rights Council, 12th Sess, Agenda Item 3, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns', para 77, UN Doc A/HRC/20/22/Add.3 (30 March 2012).

3 Human Rights Council, 12th Sess, Agenda Item 3, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Addendum: Observations on Communications Transmitted to Governments and Replies Received', para 82, UN Doc A/HRC/20/22/Add.4 (18 June 2012).

4 See Osama bin Laden: US Response to Questions about Killing's Legality, *The Guardian* (3 May 2011).

5 Harold Hongju Koh, The Obama Administration and International Law, http://www.state.gov/s/1/releases/remarks/139119.htm.

6 Harold Hongju Koh, The Lawfulness of the U.S. Operation against Osama bin Laden, http://www.state.gov/s/l/releases/remarks/139119.htm.

7 See, for example, *Prosecutor v Duško Tadić* aka 'Dule' (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction), Case IT-94-1-A, para 70 (2 October 1995).

8 *Prosecutor v Duško Tadić* (Judgment), Case IT- 94-1-T, para. 562 (7 May 1997); and see also *Prosecutor v George Rutaganda* (Judgment and Sentence), Case No. ICTR-96-3-T, para. 92 (6 December 1999); *Prosecutor v Fatmir Limaj, Haradin Bala & Isak Muskliu* (Judgment), Case No. IT-03-66-T, para 84 (30 November 2005).

9 Statute of the International Criminal Court, art 8(2)(d). UN Doc A/Conf.183/9 (17 July 1998), reprinted in 37 ILM 1002 (1998) (ICC Statute).

10 *Prosecutor v Tadić* (n 8), at para 562; and see also see *Prosecutor v Slobodan Milošović* (Decision on Motion for Judgement of Acquittal), Case IT-02-54-T, para 17 (16 June 2004); *Prosecutor v Milošović* (n 2), at para 17; *Prosecutor v Limaj, Bala & Muskliu* (n 8) para 84.

11 See Johan D van der Vyver, 'The ISIS crisis and the development of international humanitarian law' (2016) 30 *Emory International Law Review* 531-563.

12 *Padilla v Rumsfeld*, 352 F.3d 695, 698 (2nd Cir. 2003); and see also *Padilla v Hanft*, 547 US 1062, 1064 (2006) (Ginsberg, J., dissenting, posing the question whether or not the President has authority to imprison indefinitely a United States citizen arrested on United States soil 'distant from the zone of combat').

13 *Boumediene v Bush*, 553 US 723, 770 (2008).

14 *Al-Marri v Wright*, 487 F.3d 160, 196 (4th Cir. 2007).

15 *Al Maqaleh v Gates*, 605 F.3d 84, 88 (DC Cir. 2010); and see also *Al Maqaleh v Gates*, 604 F. Supp. 2d 205, 220 (DDC 2009) (referring to battlefield as 'a theater of war'); Ex parte Quirin, 317 US 1, 38 (1942) (Stone, CJ, delivering the opinion of the Court, referring to 'the theater or zone of active military operations').

16 Cited by Heyns in his dissertation at 98.

17 At 721

18 At 726.

19 The paper was published in (2000) 14 *Emory International Law Review* 699-777.