2017

Year in Review Lecture

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Good morning! It is a pleasure to be here and share with you my thoughts on the topic of "Year in Review." As opposed to boring you with facts, graphs, statistics, and numbers, I have decided to focus on three of the most significant themes or cases in international humanitarian law over the past year. These include the International Criminal Court (ICC) *Al Mahdi* case; the closing and legacy of the two ad hoc tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR); and the ongoing conundrum with the situation in Syria.

International Criminal Court *Al Mahdi* Case

Ahmad Al Faqi Al Mahdi, also known as Abou Tourab, was a member of the radical Islamic group Ansar Eddine, a Malian armed jihadist group linked to al-Qaeda in the Islamic Maghreb (AQIM). Al Mahdi served as head of the Islamic Police in Timbuktu and was one of the four commanders of Ansar Eddine during its brutal occupation of Timbuktu in 2012. During this time, Al Mahdi worked closely with the leaders of all the armed groups in the area, and, according to the allegations asserted against Al Mahdi, played an active role in the occupation of Timbuktu.

How did the *Al Mahdi* case wind up before the ICC? The Malian government itself referred the situation in Mali to the Court in 2012. The Office of the Prosecutor (OTP) then opened an official investigation into alleged crimes committed in Mali in January 2013, and in February 2013 the Malian government and the ICC signed a cooperation agreement in accordance with Section IX of the Rome Statute. On September 18, 2015, ICC Pre-Trial Chamber I issued an

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arrest warrant against Al Mahdi. At this particular point in time, Al Mahdi was detained in a prison in Niger, and on September 26, 2015, he was transferred to ICC authorities by the government of Niger.

On March 24, 2016, charges against Al Mahdi, consisting of war crimes constituted by attacks against religious and cultural sites, were confirmed by Pre-Trial Chamber I. The ICC indicted Al Mahdi on several charges of war crimes, specifically intentional attacks against ten religious and historic buildings and monuments. Article 8.2(e)(iv) of the Rome Statute of the ICC provides that war crimes include "intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives." All the buildings that Al Mahdi was charged with attacking had been under UNESCO protection, and most had been listed as world heritage sites.

In addition to the ICC's charges against Al Mahdi, human rights groups accused Al Mahdi of other crimes and have encouraged the OTP to consider credible allegations of Al Mahdi's involvement in crimes committed against civilians, including rape, sexual slavery, and forced marriage. Al Mahdi indicated that he would plead guilty on March 1, 2016; his trial opened on August 22, 2016, and concluded within a single week. The Court sentenced Al Mahdi to nine years of imprisonment on September 27, 2016.

In the most recent development on August 17, 2017, Trial Chamber VIII of the ICC issued a Reparations Order in the *Al Mahdi* case, concluding that Al Mahdi is liable for 2.7 million euros in expenses for individual and collective reparations for the community of Timbuktu for intentionally directing attacks against religious and historic buildings in that city. Noting that Al Mahdi is indigent, the Chamber encouraged the Trust Funds for Victims (TFV) to complement the reparations award and directed the TFV to submit a draft

implementation plan for February 16, 2018. The Chamber highlighted the importance of cultural heritage and stressed that, because of their purpose and symbolism, most cultural property and cultural heritage sites are unique and of sentimental value. Their destruction thus carries a message of terror and helplessness, destroys part of humanity's shared memory and collective consciousness, and renders humanity unable to transmit its values and knowledge to future generations.

While some have applauded the ICC prosecution of Al Mahdi as a victory for the institution and as a ground breaking legal precedent, others have criticized the court's decision to go after a relatively little-known defendant, for a relatively insignificant crime.

Commentators have applauded the *Al Mahdi* case and called it a big victory for the ICC. Let me briefly summarize some of the main arguments in favor of the *Al Mahdi* case as a victory for the ICC.

First, Al-Mahdi's trial was short and efficient, which is important for a Court that has been hobbled by inexcusably long proceedings. The ICC has a small budget, and completing an efficient trial without expending many resources represents an important legal accomplishment for the Court and will arguably free up the ICC to pursue other cases and alleged criminals. Al Mahdi is the first ever defendant in the ICC to plead guilty. From the start of his case, he promised to cooperate with the ICC—in exchange, perhaps, for a lenient sentence. Thus, prosecuting Al Mahdi, while knowing in advance that the defendant would plead guilty and cooperate with prosecutors, and also perhaps provide information about other future cases, would appear to have been a particularly efficient use of the ICC's limited resources.

Second, the ICC has been perceived as a largely inefficient institution as cases against other alleged criminals have languished. Sudanese President Omar al-Bashir has been free since becoming the first person charged by the ICC for genocide. Joseph Kony, the notorious

leader of the Lord's Resistance Army, continues to wreak havoc in Central Africa, ten years after being indicted. The trials of Kenyan President Uhuru Kenyatta and Deputy President William Ruto collapsed as a result of a lethal combination of shoddy case construction by ICC prosecutors and Kenyan political interference. According to some, securing a conviction against an Islamic terrorist such as Al Mahdi will send the right message that the ICC is efficient and capable of arresting individuals and successfully completing trials within a reasonable time period.

Third, Al Mahdi's surrender to the ICC was accomplished through the cooperation of both Niger and Mali, two African states. This cooperation may help the ICC to counter criticism of bias against the African continent and the perception that African states are somehow against the institution.

Fourth, Al Mahdi's evidence and testimony could be of use during future prosecutions; as I already mentioned, he has proven to be more than willing to cooperate with ICC investigators and prosecutors. Al Mahdi may have been targeted by the ICC because of this promise, as the ICC may have believed that Al Mahdi's cooperation and eventual testimony would potentially help in bringing other perpetrators in Mali to account. As one commentator observed, "If al-Mahdi provides solid testimony and evidence of other crimes, he could emerge as an extremely useful resource not only for the ICC but for accountability in Mali more generally." This possibility may also help to alleviate the skeptics' concern that the ICC should not be focusing on the destruction of property, but should instead focus on violence committed against populations and individuals.

Fifth, Al Mahdi's conviction may bolster the Court's image as a relevant institution seen as prosecuting crimes that shock the conscience of mankind, such as the destruction of UNESCO sites. Because of its limited jurisdictional reach, the ICC has been unable

to prosecute individuals responsible for the destruction of cultural sites in places such as Palmyra or Bamiyan. Securing a conviction against an individual accused of similar destruction in an ICC member state, where the court does have jurisdiction, signals that the destruction of cultural heritage is a war crime of legitimate concern to the international community.

In other words, the ICC showed that accountability for cultural crimes is possible. The Court's action also signaled other shifts. Most crucially, the Court tapped into global outrage about the destruction of cultural heritage sites. While the Court has no jurisdiction in Syria or Iraq, where Islamic State fighters have wantonly obliterated historic sites, it could do something about the destruction of Timbuktu shrines. In prosecuting Al Mahdi, the ICC joined with UNESCO to form a new front line against the violent destruction of culture.

While many have pointed out the limitations of the *Al Mahdi* precedent in terms of deterring future war criminals tempted to destroy other cultural sites, the *Al Mahdi* case does demonstrate that the international community cares about the protection of buildings and monuments and is willing to expend focus and energy on this issue.

Sixth, the *Al Mahdi* case is a "first" of many kinds. This case marks the first time that the destruction of cultural sites has been prosecuted as a war crime at the ICC. It is also the first time that an Islamic radical has been prosecuted at the ICC. Finally, it is the first time that an ICC defendant has pleaded guilty.

Critics have pointed out that the case may not be such a welcome development in international criminal law. For example, scholars have criticized the *Al Mahdi* case as stretching the limits of the ICC to a breaking point because the case fails to respect two core principles of the ICC: gravity and complementarity.

First, gravity.

The ICC was established to exercise its jurisdiction over persons for the most serious crimes of international concern. Article 17(1)(d) of the Rome Statute provides that a case is inadmissible before the ICC if the case is not of sufficient gravity to justify further action by the Court. The Prosecutor has stated in the context of the *Al Mahdi* case that "attacks against religious buildings are so grave that they warrant action by the international community." One has to wonder, however, whether the destruction of buildings should qualify as one of the most serious crimes of international concern. In another recent case, the so-called Flotilla incident, where Israeli special forces killed ten activists on board a vessel that had been about to breach the Israeli naval blockade of Gaza, the ICC OTP defined the principle of gravity as:

> (i) whether the individuals or groups of persons that are likely to be the object of an investigation, include those who may bear the greatest responsibility for the alleged crimes committed; and
>
> (ii) the gravity of the crimes committed within the incidents which are likely to be the focus of an investigation.

Subsequently, the OTP defined the elements that are to be taken into account when assessing the gravity of the crimes, namely, the "scale, nature, manner of commission of the crimes and their impact."

With this precedent in mind, it is important to address two questions: whether Al Mahdi bears the greatest responsibility for the alleged crimes, and whether the crimes themselves are of sufficient gravity.

First, it is unclear whether Al Mahdi is indeed the most responsible for the crimes. While it is likely that he had been involved in the destruction of the religious buildings, it is equally likely that other members of the Islamic groups were similarly involved in the

planning and commission of these crimes. It has been suggested that Al Mahdi is on trial because all of the other leaders of the various extremist militia groups that operated in the region have been killed or otherwise escaped. This suggestion would indicate that Al Mahdi was selected for prosecution for pragmatic reasons, which had little to do with the gravity principle.

Second, it is uncertain whether the war crime of destruction of cultural property is grave enough to warrant prosecution at the ICC. Despite the Rome Statute's prohibitions against the destruction of religious buildings, one must assume that the drafters envisaged that these crimes would only be prosecuted once committed in combination with other crimes that qualify as a war crime. For example, in the current trial of Bosco Ntaganda, the defendant is facing twelve war crimes charges and five charges of crimes against humanity, in addition to the destruction of cultural and religious property.

Thus, the *Ntaganda* case seems to pass the gravity threshold more easily than the *Al Mahdi* case. Although the destruction of cultural and religious buildings may constitute an attack on humanity as a whole, as recent ISIS-perpetrated attacks on the cultural heritage of Syria may demonstrate, this does not automatically lead to the conclusion that the ICC should prosecute the perpetrators. The gravity threshold imposes a limitation on the Court: in light of its limited resources, the Court should focus on the prosecution of those most responsible for serious crimes. It may be argued that Al Mahdi's alleged crimes are not grave enough.

Second, complementarity.

It is questionable whether the *Al Mahdi* prosecution satisfies the principle of complementarity. The ICC is not supposed to interfere with national prosecutions, and the Court should only prosecute suspects if a state is not able or willing to prosecute. According to

Article 17(1)(a) of the Rome Statute, a case is inadmissible when it is being investigated or prosecuted by a state that has jurisdiction over it, unless the state is genuinely unwilling or unable to carry out the investigation or prosecution. In other words, if a state is able and willing to prosecute an individual, that state should be given the opportunity to do so, and the ICC should step away.

Al Mahdi had already been indicted on terrorism charges in Niger before the ICC issued its arrest warrant. When Niger was informed that the ICC wanted to prosecute Al Mahdi, Nigerois authorities transferred Al Mahdi and relinquished jurisdiction over the case. Niger never stated that it was unwilling or unable to prosecute Al Mahdi, and the ICC authorities themselves never bothered with the complementarity issue. Thus, it seems that the ICC decision to prosecute al Mahdi is contrary to the complementarity principle, and, in light of the fact that the case may not pass the gravity threshold, one has to wonder whether Al Mahdi's prosecution should have remained in the hands of Niger authorities.

While the *Al Mahdi* case may be applauded as a precedent-setting victory for the ICC as an institution and for international criminal law in general, the case can also be criticized as an improper use of the Court and of its limited resources to prosecute a lesser-known defendant for relatively insignificant crimes. The case remains relevant, however, for another reason: it demonstrates that the ICC may function properly if cases are carefully selected and referring states actively cooperate in the defendant's arrest and prosecution. It may be better for the ICC to pursue lesser-known defendants if the OTP determines that a conviction can likely be secured with limited resources, than to issue arrest warrants against defendants who are unlikely to find their way to The Hague. Limited justice may be better than no justice at all.

Closing and Legacy of Ad Hoc International Criminal Tribunals

As all of you know, the Rwanda tribunal officially closed, having completed all of its trial and appellate-level work, at the end of 2015. The ad hoc international criminal tribunal for the former Yugoslavia is also coming to a close. The Yugoslavia Tribunal is currently finishing its last trial in the *Mladić* case (judgment is expected in November 2017). In the last appellate case, *Prlić et al.*, the appellate judgment is also expected in November 2017. Remaining proceedings in the cases of *Karadžić*, *Šešelj*, and *Stanišić & Simatović* are under the jurisdiction of the so-called Mechanism for International Criminal Tribunals.

The Mechanism has been mandated to perform a number of essential functions previously carried out by the ICTY and the ICTR and has assumed responsibility for, inter alia, the enforcement of sentences, administrative review, assignment of cases, review proceedings, appeal proceedings, contempt, requests for revocation of the referral of cases to national jurisdictions, the variation of witness protection measures, access to materials, disclosure, changes in classification of documents, and requests for compensation and assignment of counsel. In carrying out these multiple functions, the Mechanism maintains the legacies of these two pioneering ad hoc international criminal courts and strives to reflect best practices in the field of international criminal justice.

With the closing of these ad hoc tribunals, an important chapter in international criminal law has come to an end. The ICTY and the ICTR played crucial roles in the development of international criminal law four decades post-Nuremberg. They reignited the development of this field of law, and their case law contributed toward the fine-tuning of complex legal doctrines, such as genocide, superior or command responsibility, the definition of international armed conflict, the prosecution of crimes of sexual violence, and many others. What are the legacies of the Yugoslavia and Rwanda Tribunals?

In the context of international criminal tribunals, scholars have defined "legacy" to mean a lasting impact, most notably on bolstering the rule of law in a particular society by conducting effective trials while also strengthening domestic capacity to do so. Legacy, in this context, implies the extent to which a particular court has had a significant effect by modeling best practices in handling the individual cases and compiling a historical record of the conflict. Legacy also means laying the groundwork for future efforts to prevent a recurrence of crimes by offering precedents for legal reform, building faith in judicial processes, and promoting greater civic engagement on issues of accountability and justice. This type of legacy is supposed to be long lasting and continue to have an impact even after the work of the tribunal is completed.

A 2008 United Nations High Commissioner's Report on maximizing the legacy of hybrid courts asserted that the need for such tribunals to leave a legacy is firmly accepted as part of United Nations' policy. In addition to the above view of legal legacy and impact, tribunals can have other types of roles that can meaningfully affect the pursuit of justice and human rights. Professors Kimi King and James Meernik have described the core missions of the ICTY's mandate (to bring to justice those responsible for serious violations of international humanitarian law) as follows: (1) developing the Tribunals' functional and institutional capacities; (2) interpreting, applying, and developing international humanitarian and criminal law; (3) attending to and interacting with the various stakeholders who have vested interests; and (4) promoting deterrence and fostering peace-building to prevent future aggression and conflict.

This framework is also applicable to the ICTR, as this Tribunal was charged with the same mandate as the ICTY, with the addition of promoting national reconciliation in Rwanda. In light of the above, "legacy" can be defined more broadly as the enduring influence of the Tribunals' work and processes on the ideals,

conceptions, and instrumentalities of international criminal law, justice, and human rights.

Thus, while the Tribunals' legacy is equally important in the development of domestic justice and human rights more broadly, the focus of my remarks today is on the field of international criminal law (ICL) and international humanitarian law (IHL). What is the significance, impact, and legacy of the ad hoc tribunals through this particular lens? It is my hope that the legacy of ad hoc tribunals in the fields of ICL and IHL will be of particular assistance to those who work with the International Criminal Court (ICC), as much of the ad hoc tribunals' case law has served and will serve as important precedent within the ICC, and as the ICC will most likely continue to enhance the same IHL principles and doctrines that the ad hoc tribunals have developed.

First, the ad hoc tribunals have contributed to the development of ICL by successfully charging and convicting defendants of genocidal offenses.

The Rwanda Tribunal in the *Akayesu* case became the first international tribunal to enter a judgment for genocide, as well as the first to interpret the definition of genocide set forth in the 1948 Geneva Conventions. In the *Kambanda* case, also before the Rwanda Tribunal, the defendant pled guilty to genocide, marking the first time in the history of ICL that an accused person admitted responsibility for genocide and conspiracy to commit genocide. By accepting this guilty plea in the *Kambanda* case, the Rwanda Tribunal became the first international tribunal since Nuremberg to issue a judgment against a former head of state. In another case (*Nahimana, Barayagwiza, and Ngeze*), the Rwanda Tribunal convicted members of the Rwandan media by holding them responsible for broadcasts intended to inflame the public to commit acts of genocide.

The Yugoslavia Tribunal was the first international criminal tribunal to enter a genocide conviction in Europe. In April 2004, in the case against Radislav Krstić, the Appeals Chamber determined that genocide was committed in Srebrenica in 1995, through the execution of more than 7,000 Bosnian Muslim men and boys following the take-over of the town by Bosnian Serb forces. Several other completed ICTY cases relating to the Srebrenica events have ensured that the genocide has been well documented and, in the words of ICTY President Theodor Meron, "consigned to infamy."

According to the appellate judgment in the *Krstić* case, "Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide. This is a crime against all humankind, its harm being felt not only by the group targeted for destruction, but by all of humanity."

In sum, the ad hoc tribunals have significantly contributed to the prosecution of the crime of genocide and toward the notion that genocide is a crime against all that will never again be tolerated by the international community.

Second, the ad hoc tribunals have contributed to the development of ICL and IHL by developing case law on crimes of sexual violence and by focusing on specific gender issues. In the *Akayesu* case, the Rwanda Tribunal for the first time defined the crime of rape in international criminal law and recognized rape as a means of perpetrating genocide. The Rwanda Tribunal created a special unit for gender issues and assistance to victims of genocide, choosing to focus on gender issues and to provide support and care to the victims of genocide. In this manner, the tribunals have, in addition to developing case law on crimes of sexual violence, created a participatory legacy—the idea that victims of serious crimes have a voice within international criminal prosecutions of such crimes. This idea, for better or for worse, is squarely present within the Rome Statute of the ICC.

The Yugoslavia Tribunal has also played a historic role in the prosecution of wartime sexual violence in the former Yugoslavia and has paved the way for a more robust adjudication of such crimes worldwide. From the first days of the Tribunal's mandate, investigations were conducted into reports of systematic detention and rape of women, men, and children. More than a third of those convicted by the ICTY have been found guilty of crimes involving sexual violence. Such convictions are one of the Tribunal's pioneering achievements. They have ensured that treaties and conventions that have existed on paper throughout the 20th Century have finally been put in practice, and violations have been punished.

The ICTY took groundbreaking steps to respond to the imperative of prosecuting wartime sexual violence. Together with its sister tribunal for Rwanda, the Tribunal was among the first courts of its kind to bring explicit charges of wartime sexual violence, and to define gender crimes such as rape and sexual enslavement under customary law.

The ICTY was also the first international criminal tribunal to enter convictions for rape as a form of torture and for sexual enslavement as crime against humanity, as well as the first international tribunal based in Europe to pass convictions for rape as a crime against humanity, following a previous case adjudicated by the ICTR. The ICTY proved that effective prosecution of wartime sexual violence is feasible and provided a platform for the survivors to talk about their suffering. That ultimately helped to break the silence and the culture of impunity surrounding these terrible acts. In addition, the ICTY established a robust Victims and Witnesses Section (VWS), which provided the witnesses with assistance prior to, during and after their testimony, ranging from practical issues to psychological counseling during their stay in The Hague. In this manner, the Yugoslavia Tribunal, like the Rwanda Tribunal, has contributed significantly to the legacy of developing and prosecuting gender-specific crimes

and crimes of sexual violence, and to ensuring meaningful victim participation in the adjudication process.

Third, both ad hoc tribunals have contributed toward the development of the doctrine of superior responsibility by holding that superior responsibility applies to civilians in leadership positions and that it is not confined to purely military leaders. This contribution by the ad hoc tribunals is particularly relevant in light of modern-day warfare where conflicts are often fought outside of well-defined militaries and where orders and policies are often crafted by non-military leaders.

Fourth, the ad hoc tribunals have established a legacy of cooperation and impact on domestic jurisdictions between international tribunals and national authorities. Multiple countries have signed agreements on the enforcement of Rwanda Tribunal's sentences (Mali, Benin, France, Italy, Mali, Rwanda, Senegal, Swaziland, and Sweden). These agreements illustrate the important role national authorities play in ensuring that those convicted of serious violations of international law serve their sentences in compliance with international detention standards. In addition, the Rwanda Tribunal upheld the first referral of an international criminal indictment to Rwandan national authorities for trial, in the case against Jean-Bosco Uwinkindi. A total of eight ICTR cases have now been referred to Rwanda. Two additional cases have been referred to France for trial. Monitoring in all referred cases is presently being conducted by the Mechanism.

Throughout its existence, the ICTY OTP has worked closely with the new states and territories that emerged from the former Yugoslavia on their domestic prosecutions. In the aftermath of the war in Bosnia and Herzegovina (BiH), returning displaced persons and refugees voiced fears about arbitrary arrests on suspicion of war crimes. To protect against this, the OTP agreed to operate a "Rules of the Road" scheme under which local prosecutors were obliged to submit case files to The Hague for review. The Rules of the Road procedure,

established under the Rome Agreement of February 18, 1996, regulated the arrest and indictment of alleged perpetrators of war crimes by national authorities.

As part of the Tribunal's contribution to the reestablishment of peace and security in the region, the ICTY prosecutor agreed to provide an independent review of all local war crimes cases. If a person was already indicted by the OTP, he could be arrested by the national police. If the national police wished to make an arrest where there was no prior indictment, they had to send their evidence to the OTP. Under the Rome Agreement, decisions of the OTP became binding on local prosecutors.

To ensure as many persons as possible suspected of war crimes are brought to justice, the OTP has provided assistance to national bodies in the region by passing on evidence that may be of use in local investigations and by transferring whole cases for prosecution locally. A dedicated transition team within the OTP was tasked with handing over to national courts cases involving intermediate- and lower-ranking accused. Such cases have included case files of suspects investigated by the OTP but where no indictments were ever issued, resulting in the referral of some files with investigative material to authorities in Serbia, Croatia, and Bosnia, which have then pursued these cases. Secondly, despite indictments issued by the ICTY, a total of eight cases involving thirteen accused have been referred to courts in the former Yugoslavia, mostly to Bosnia and Herzegovina, pursuant to Rule 11bis of the Rules of Procedure and Evidence. On the basis of an ICTY indictment and the supporting evidence provided by the Tribunal's prosecution, these cases are then tried in accordance with the national laws of the state in question.

Finally, the OTP has promoted regional cooperation among national prosecutors. The ICTY prosecution strongly supports efforts to enhance cooperation in criminal matters between states of the former

Yugoslavia, as it is an essential step towards rebuilding trust and justice in the region. Successful trials before national courts require that prosecutors in neighboring countries can collaborate in the collection of evidence and securing witnesses. OTP officials have taken part in several regional meetings, facilitating the creation of good working relationships between the prosecutors in the different states.

Thus, the Rwanda and Yugoslavia Tribunals have created a significant legacy of cooperation with national authorities and have developed specific models of cooperation that have contributed toward the rebuilding of national justice systems.

Fifth, the ad hoc tribunals have created a significant legacy in the operational sense by establishing specific case management strategies for the prosecution of complex international crimes and by establishing particular evidentiary procedures resulting in the long-term preservation of evidence that will enable national jurisdictions to prosecute additional cases in the future. For example, the Rwanda Tribunal held special deposition proceedings in the case concerning Félicien Kabuga to preserve evidence for use at trial once he is arrested. Similar proceedings were later held in the cases of two other fugitives: Augustin Bizimana and Protais Mpiranya. By holding these proceedings, the ICTR is ensuring that the passage of time does not jeopardize the international community's ability to bring these suspects to trial when they are finally apprehended.

The ICTY has also established specific evidentiary standards regarding victims of crimes of sexual violence, by allowing them to testify anonymously—witnesses have been able to testify under a pseudonym, with face and voice distortion in video feeds, or in closed session. Through the development of its rules of procedure, the ICTY has also sought to protect the victims of sexual violence from abusive lines of questioning during testimony. The ad hoc tribunals have thus

left behind an operational legacy, which will undoubtedly serve as a model for future international criminal prosecutions.

The Ongoing Situation in Syria

The last theme of my remarks focuses on Syria—both in terms of the recent United States' use of force against the Assad leadership, as well as in terms of creating an accountability mechanism for crimes committed in Syria.

Back in 2013, President Obama drew a "red line" and threatened that the United States would use force against the Syrian regime in the wake of the latter's use of chemical weapons against Syrian civilians. Obama ultimately decided against using force in Syria, but President Trump reversed this decision and launched several air strikes against Syrian President Assad's forces in 2017. President Trump offered the following justification for the United States air strikes against Syria: (1) That it was in the vital national security interest of the United States to prevent and deter the spread and use of deadly chemical weapons; (2) that Syria used banned chemical weapons, violated its obligations under the Chemical Weapons Convention and ignored the urging of the UN Security Council; and (3) that the refugee crisis continued to deepen and the region continued to destabilize, threatening the United States and its allies.

Most international law experts would agree that the United States' use of force in Syria this year is illegal. As we all know, international law allows the use of force in two limited situations: pursuant to Security Council authorization and/or in self-defense. No particular Security Council resolution has authorized the use of force in Syria, and it is very difficult for the United States, located thousands of miles away, to claim that it has somehow been threatened by the Assad regime and that it must act in self-defense.

The United States' use of force in Syria is significant however for another reason: this intervention can be analyzed from a different standpoint—that it may be acceptable (while not legal) for states to act outside the framework of the UN Charter when deemed necessary or when pursuing a "legitimate aim." Many of you may remember that this was the argument used to justify the NATO air strikes against the Federal Republic of Yugoslavia in 1999. In 2013, the U.K. Prime Minister's Office argued, in the wake of the ongoing Syrian crisis, that a state could take exceptional measures in order to alleviate the scale of the overwhelming humanitarian catastrophe in Syria by deterring and disrupting the further use of chemical weapons by the Syrian regime.

According to this argument, such a legal basis is available, under the doctrine of humanitarian intervention, provided that a set of conditions is met. These conditions require that (1) there is "convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief"; (2) it is "objectively clear that there is no practicable alternative to the use of force if lives are to be save"; and (3) the force used is "necessary and proportionate to the aim of relief of humanitarian need."

The U.S. military action in Syria has resurrected debates regarding the humanitarian intervention exception to the general international law ban on the use of force. As of today, most of us would agree that humanitarian intervention has not become a norm of positive law. Moreover, in the Syrian context, it appears that American air strikes have not contributed toward a broader humanitarian mission and cannot be easily interpreted as constituting part of a larger humanitarian operation. Thus, the humanitarian intervention exception does not provide an easy legal basis for the American use of force against Syria.

The Syrian situation however underscores and highlights the limitations of international law. Many states in the international community have reacted to the U.S. actions in Syria with approval; such approval may reflect a political understanding for this course of action chosen by the Unites States in the face of the crimes committed, rather than legal acquiescence. The U.S. military action in Syria does not constitute the first time that the prohibition on the use of force has been violated and not sanctioned by the international community.

However, this should not necessarily mean that the legitimacy of the UN Charter is diminished. Instead, the U.S. military action in Syria highlights the limits of international law and its inherent tie to international relations and geopolitics: the UN Security Council, the only international law body authorized to officially "bless" the use of force against a sovereign state, is often blocked and unable to take legal action, thus resulting in a unilateral use of force by the United States in an illegal yet perhaps legitimate manner. The obvious risk that such unilateral military action creates is that although the attack may be seen as morally or ethically legitimate, it nonetheless results in acts committed outside the purview of international law. This dangerously opens the door to using force under possible false pretenses in the future. Of course, the same false pretenses could be pursued within the boundaries of the existing legal framework, but at least the law acts as a barrier in limiting the recourse to force in such situations. In sum, the U.S. intervention in Syria has sparked new debates regarding the limits of international law and regarding the utility and appropriateness of the humanitarian law exception.

Another important consequence of the U.S. military action in Syria relates to the law applicable to this conflict. Until recently, there was a conflict between ISIS and the Assad regime together with a conflict between the U.S. (and the international coalition) and ISIS, which both qualified as non-international armed conflicts (NIAC). The U.S. attack against Syria could transform the conflict into an

international armed conflict (IAC) between the United States and Syria, meaning that a different and more extensive set of rules will apply. Depending on the position adopted, this could lead to either the internationalization of the entire conflict in Syria, meaning that there would be an IAC between all the actors (including ISIS) or that there would be a situation of mixed conflicts, an IAC between the United States and Syria and an NIAC for all the other actors, which in turn would lead to different applicable rules.

Finally, the Syrian situation has resulted in an ongoing debate within our professional circles regarding the best accountability mechanism to address violations of ICL and IHL committed in Syria. While all agree that those responsible for such violations should face justice, many disagree as to which form of justice—international, hybrid, or domestic. The ICC, because of its jurisdictional limitations, is of limited use in Syria. A new Syria tribunal could be established either pursuant to a true international model, similar to the Yugoslavia and Rwanda tribunals, or pursuant to a hybrid model, similar to the Special Court for Sierra Leone or the Lebanese Tribunal. Or, accountability could be imposed through domestic justice, assuming that the Syrian leadership is reformed and able and willing to meet the demands of accountability. To conclude, Syria may, sadly, preoccupy our legal minds for years to come.

Other than the *Al Mahdi* conviction, the international law themes of the past year that I have addressed here today have not been happy. This conclusion, however, does not diminish the role of international law and, in particular, of international lawyers, in matters of international justice. I encourage all of us to continue our hard work in the field of international humanitarian law and to continue to contribute toward the development of this area of the law.