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INTERNATIONAL LAW, THE UNITED NATIONS AND THE USE OF CHEMICAL WEAPONS IN THE SYRIAN CONFLICT

ASSESSMENT OF CAPABILITIES AND LIMITATIONS

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A mio padre,
a mia madre,
a mio fratello.

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TABLE OF ABBREVIATIONS

CSP	Conference of the States Parties
CWC	Chemical Weapons Convention
CWPFs	Chemical weapons production facilities
DAT	Declaration Assessment Team
EC	Executive Council
FFM	Fact-Finding Mission
FSA	Free Syrian Army
GDP	Gross Domestic Product
HTS	Hay’at Tahrir al-Sham
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IIIM	International Impartial and Independent Mechanism
ILC	International Law Commission
JIM	Joint Investigative Mechanism
JMIS	Joint Mission in Syria
LFP	Labor force participation
MENA	Middle East and North Africa
OCW	Old chemical weapons
OPCW	Organization for the Prohibition of Chemical Weapons
PKK	Kurdistan Workers' Party
PSI	Proliferation Security Initiative
R2P	Responsibility to Protect
RN2V	Responsibility Not To Veto
SNC	Syrian National Council
TASS	Russian News Agency
TS	Technical Secretariat
UAR	United Arab Republic
UN	United Nations
WMD	Weapons of Mass Destruction

INTRODUCTION

The Syrian civil war is now at its eighth year and the absence of any serious internal disorder experienced for 30 years under the autocratic regime built by Hafez al-Assad is by now a memory of the past. The political fragility of a state hidden behind the said autocratic regime, in addition to sectarian, regional and tribal division and the influence of external actors, have further contributed to lead Syrians into the civil war disorder. The Syrian civil war has led towards the gravest humanitarian disaster of the new century and the complete damage to the economy as well as towards the country's destruction and damage to a number of cultural heritage locations, including several which belonged to UNESCO World Cultural Heritage sites (the figure is up to five)[1].

Today the country is the battleground of regional and international powers which, for different interests, want to maintain their sphere of influence in the Middle East. Although the international dimension has influenced in different aspects the tide of the war, creating a new favorable environment for the shift towards a civil war, it was the contribution given by few states in the proliferation of chemical weapons, namely Russia and Egypt, that led towards one of the main concerns of the international community as a whole: the repeated use of chemical weapons in the Syrian civil war. In this regard, the focus of the present dissertation concerns a deep analysis of the international consequences deriving from the use of chemical weapons by the Assad regime and the opposition forces. Given the seriousness of the crisis, the mediation of the United Nations, acting through the Security Council, was required, with the strict collaboration of the Organization for the Prohibition of Chemical Weapons (OPCW).

The Syrian population has been exposed to several chemical attacks, but only three of them will be object of analysis since they have been the most serious in terms of death toll and legal implications: Ghouta attack in 2013, Khan Shaykhun and Douma, in 2017 and 2018 respectively. After the first attack, the Syrian chemical weapons elimination program did concretely take root, led by the agreement reached by U.S. and Russia known as "*Framework for Elimination of Syrian Chemical Weapons*". The outcome was the adoption of the Security Council Resolution 2118 which strengthened the prohibition of chemical weapons use under international law, one of the few relevant results obtained by the Security Council in the struggle against chemical weapons, in addition to the ratification of the Chemical Weapons Convention by the Syrian authority. Syria's engagement in chemical weapons elimination process, in addition to the Security Council Resolution 2118 and the OPCW decision EC-M-33/DEC.1 suggested a positive turning point in the Syrian crisis, but evidences leads to a different conclusion. The following chemical attacks, in Khan Shaykhun and Douma, with the consequence of military strikes by the U.S. with its Western allies, clearly underline not only the failure of the Security Council, but even of the international community as a whole. As a matter of

[1] PHILLIPS Christopher, *The battle for Syria. International rivalry in the new Middle East*, Yale University Press, New Haven and London, 2016, p. 1.

fact, no concrete solutions have been found to put an end to the employment and proliferation of chemical weapons, as well as to challenge the humanitarian catastrophe which is still affecting the Syrian population.

In light of the forgoing, the present dissertation will give a legal perspective and analysis of the chemical weapons use in the Syrian civil war. Thus, it has been considered not only appropriate but even useful discussing the main principles related to the law and related jurisdiction over chemical weapons proliferation and use. To this end, it will be taken into account the relevant treaties and the existing customary law which prohibit the use of chemical weapons in the armed conflicts, as well as the United Nations and state practice. Since there is a war going on and the chemical attacks have led towards the use of force, it is worth for the analysis to consider even the relevant law of the armed conflict, in order to have a framework as much comprehensive as possible. Moreover, the application of international law to the actors involved will be taken into account, as well as the parties' rights and obligations.

There is no question that the employment of chemical weapons in the Syrian conflict represents another case of United Nations failure to properly face a serious crisis. Everyone is well aware of the political constraints which affect the Security Council, unfortunately well-known for the lack of actions undertaken in timely and decisive manner in more than one international crisis. Starting from this assumption, it is worth analyzing the matter from another point of view. Focusing only on the impasse created at international level due to the veto of the permanent members does not confirm anything new and does not give any additional value to the analysis. In this regard, the analysis will not address the actions that the Security Council was not able to undertake, but will investigate, among the actions carried out, what are the shortcoming and contradictions which have underlined once again the controversial role of such body to concretely intervene in the Syrian crisis. As things stand, in addition to analyze the legal effectiveness of the actions performed by the United Nations and of international law in the chemical weapons field, the humanitarian aspect will be examined. Being well-known the high number of death toll as well as the number of displaced persons and refugees, particular regard will be given to the Responsibility to Protect (R2P) doctrine, specifically its failure in the Syrian crisis. In this regard, my question is whether alternative paths could have been taken to overcome the impasse of the Security Council and to curtail the grave violation of human rights.

At the end of the Introduction, the dissertation will proceed with an analysis that will be divided into six Chapters.

The thesis opens, in Chapter One, with a general overview of the history, geopolitics and identity of the Syrian State, starting from the period immediately after the First World War, with the 1916 Sykes-Picot agreement, through which France and Britain divided up the territory of the Greater Syria. The aim of this Chapter is to point out the internal and external factors which have contributed to the outbreak of the Syrian civil war. To this hand, the political, economic and socio-religious aspects of the Syrian State will be deepened, as well as the external actors which are playing an active role in the Syrian civil war, where several local and foreign actors still compete. At the end of the Chapter, it will be described the first attempt of the international community to deal with the crisis through diplomatic tools, such as the Annan's Six-

Point Plan, which reached its complete failure with the first serious chemical attack in Ghouta, confirmed by the United Nations Mission, even though without any mention over the responsible.

Chapters Two considers the international legal framework concerning the prohibition of chemical weapons use in war. To this end, the relevant treaties and the norms of customary law will be taken into account. With regard to the former, early international endeavour to ban the use of chemical weapons in war will be analysed, but particular attention will be given to the Chemical Weapons Convention (CWC), considered a landmark agreement for international disarmament and for the development of law on arms control. The application of the CWC in time of armed conflict as well as its application to non-state actors is also considered. With regard to the latter, i.e. the prohibition of chemical weapons in internal armed conflict under customary law, two relevant cases will be taken into account. The former concerning the use of chemical agents in 1988 in Iraq and the consequent international response on the case, the latter concerning the Rome Statute of the International Criminal Court and its amendment to Article 8 at 2010 Kampala Conference.

Chapter Three discusses the concrete application in the international regime of the international norms of chemical weapons as well as the possibility to use force under international law. More in details, after a brief historical overview over the development of the chemical weapons in the Middle East and, particularly, in Syria, the international response after the first chemical attack will be examined. Indeed, it was the first time the U.S. concretely menaced the Syrian state to use military force, since the Ghouta attack has been labelled as a war crime and a grave violation of customary international law. Even though it seemed to be all the ethical conditions to military intervene in a state which caused more than one thousand deaths for the use of chemical agents, these conditions do not satisfy the provisions set forth in the UN Charter to allow the use of military. For this reason, the interpretation of the UN Charter will be provided and two cases in which the use of military force is allowed will be highlighted: the authorization of the Security Council acting under Chapter VII of the Charter and the case of self-defence as provided for Article 51 of the Charter. One last case will be discussed: the military assistance on request.

Chapter Four explores how the United Nations, namely the Security Council, and the OPCW dealt with the chemical weapons elimination process in Syria. Security Council Resolution 2118, which signed the most significant step forward in the Syrian disarmament, will be deeply analysed. Said resolution will be analysed in all its aspects, starting from the general provisions to the weakness of the resolution itself. Resolution 2118 marks the central role assumed by the Security Council in the Syrian crisis, but, at the same time, it shows even the beginning of its decline, since no other so relevant actions have been taken by the Security Council after that. Indeed, the cooperation among all the actors involved in the crises was required, particularly UN-OPCW, member states and the Syrian state itself. Nevertheless, several legal shortcoming and contradictions come up from Resolution 2118: above all, the lack of any accountability mechanism for those responsible of the crimes committed in Syria, namely the use of chemical weapons. Indeed, the issue of criminal justice is still in place in Syria. Moreover, particular regard will be given to the OPCW decision

EC-M-33/DEC.1, which provides all the technical details over the Syrian disarmament process. In this case as well, some legal issues arise; especially some disarmament obligations set by Resolution 2118 and decision EC-M-33/DEC.1 seem to be in conflict with the provisions set by the Chemical Weapons Convention. Finally, a general discussion over all the verification mechanisms set to supervise the compliance of the international norms by the Syrian authorities will be included.

A clear evidence of the UN and OPCW failure in the attempt to eliminate all the chemical weapons and production facilities in Syria is given by the use of chemical weapons in Khan Shaykhun attack, in 2017, and in Douma attack, in 2018. These two attacks and the international consequences they brought will be the subject of Chapter Five. In particular, military airstrikes carried out by U.S. and Western allies were the consequences of the said attacks. As things stand, since Syria has violated the Chemical Weapons Convention and Resolution 2118, the possibility to military intervene without the Security Council authorization will be taken into account. Since the international community serious concern over the use of Weapons of Mass Destruction (WMD), the *counterproliferation* policy which deals with the possibility to use pre-emptive force against actual or potential possessor of WMD, will be examined. Nevertheless, the use of pre-emptive force is still controversial under international law, since it is not provided in the UN Charter. As a consequence thereof, a brief discussion over the possible amendment of Article 51 will be provided.

Finally, the dissertation will end with Chapter Six concerning the analysis of humanitarian intervention and Responsibility to Protect in Syria. After having underlined the controversial approach of states over the doctrine of humanitarian intervention, a focus on the NATO intervention in Kosovo will be provided. The decision to discuss the said case born by the assumption that NATO intervention has influenced the view on human rights, which, starting from that event, have become one of the main concern of the international community as a whole. In addition it has changed the view that many states had on humanitarian intervention. Generally speaking, the idea that humanitarian intervention could justify the use of force without Security Council authorization started to take root. In this regard, a new methodological approach, the balancing of values argument, in support of the legality of humanitarian intervention will be discussed. The analysis will further develop the shift from humanitarian intervention towards the Responsibility to Protect, a more recent doctrine formally embraced in 2005, which gives strict guiding lines to the Security Council in the field of humanitarian intervention. The dissertation will end with the assessment of the failure of the Responsibility to Protect in Syria and with the reasons behind its missed application.

A conclusion will then be drawn to emphasize the main aspects of the analysis.

CHAPTER ONE

The Syrian Civil War and its Implications

1.1 Syria. History, geopolitics and identity

The Syrian state, as we know it today, is the result of a long history and geo-political transformation that dates back the time of Greater Syria. This denomination was used until the collapse of the Ottoman Empire and it was referred to the territory which included the present-day Syria, Jordan, Lebanon Palestine and part of the modern southern Turkey[2].

Today the Syrian Arab Republic comprehends an area that is much smaller than the previous Greater Syria. The country is located in Western Asia and borders on Turkey to the North (899 km), Iraq to the East (599 km), Israel to the South-West (83 km), Jordan to the South (279 km) and finally Lebanon to the South-West (403 km)[3]. The central position and the lack of any natural boundaries have always exposed the State to threats, not only from the neighbouring countries, especially form Israel, but even from the Western powers. Indeed, the territory of Greater Syria has been divided by the Western colonial powers, just after the First World War. Actually, the representatives of the victorious states, Britain, France, U.S. and Italy, decided secretly among themselves the process of allocation of the Arab territories of the Ottoman Empire. With the 1916 Sykes-Picot agreement between France and Britain, the two States plot the boundaries of their sphere of influence, which included the southern frontiers of Syria and the present-day Lebanon[4]. The French control lasted until 1946 when Syria gained its independence. The struggle for independence started at the beginning of the 1940s, when Syria and Lebanon claimed for their independence. In 1943, the General Catroux, who was the representative of the Free French forces under De Gaulle, put out a statement for Syrian partial independence, but France still wanted control in different fields, namely armed forces, public services and economy[5]. However, under the British pressure, in 1943 Syrian elections were held and Shukrī al-Quwwaṭlī was elected as the new president of the Republic. Under the new elected president, the National Bloc returned to power, which continued the struggle against the French Mandate and claimed for Syria complete independence. In the meanwhile, France organized the *Troupes Spéciales* made up by the Syrian minority communities[6]. After several strikes and demonstrations, under the pressure of Syrian nationalist and British forces, France troops left Damascus in 1946[7].

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[2] VAN DAM Nikolaos, *Destroying a Nation. The Civil War in Syria*, I.B. Tauris & Co. Ldt, London (UK), 2017, p. 5.

[3] ANGHELONE Francesco, UNGARI Andrea (edited by), *Atlante Geopolitico del Mediterraneo: 2018*, Bordeaux Edizioni, Italia, 2018, p. 299.

[4] McHUGO John, *Syria: a recent history*, Saqi Books, London (UK), 2017, p. 53.

[5] *Ivi*, p. 108.

[6] *Ivi*, p. 109.

[7] *Ivi*, p. 110.

Notwithstanding the independence, the Syrian state was far from being a nation-state: it was a political entity, but without being a political community[8]. Nevertheless, although the Syrian identity took time to develop, the Arab Nationalism, which promotes the unity of the Arabs within one State, met a receptive audience, as well as the Political Islam within Sunni and the Kurdish nationalism as a consequence of the prohibition of cultural rights by the Syrians[9]. These components had led towards the emergence of an unstable and fragile Syrian state after the independence[10]. Sectarianism, regionalism and tribalism, in addition to socio-economic and ideological differences within the Syrian population, have always been a crucial issue for such state, strongly emphasized during the current Civil War. Indeed, still today Syria' ethnic and religious minorities exist within the population which is currently made up by 90,3% of Arabs, the remainder is made up by Curds, Armenians and other minorities: with regard to the religion, the greatest is Islam (practised by 87% of the population, whose 74% are Sunni and 13% are Alawites, Ismaili and Shiites), then there are Christian minorities and Druze[11]. With regard to the population's distribution within the Syrian borders, it is worth knowing that the Muslim Sunni live in the main Syrian towns, mostly in Damascus and Aleppo, but even in Homs, Hama, Dar'a and along the cost in the cities of Latakia, Baniyas and Tortosa; the orthodox Christian minorities occupy almost the same cities of the Sunni[12]. With regard to the heterodox Shiites, they occupy the northwest mountain area that border on Latakia region, moreover they occupy areas in the centre of Hama and in the southern area of Suwayda; moreover, Ismaili are located in the southern part of Hama, while the Druze in mountain regions of Jabal 'Arab which borders on the modern Jordan[13]. Finally, the Alawites are mostly in the internal mountain areas of Latakia[14].
In addition, the Syrian political scenario was precarious even after the independence, due internal and external factors, which helped the establishment of the Ba'th party at the beginning of the 1960s. Indeed, between 1949 and 1970 eight coups have been successful and in 1958 a political union between Syria and Egypt, the United Arab Republic (UAR), took shape, which allowed Egypt to introduce authoritarian framework that lasted until 1961 when Syria seceded from the UAR[15]. However, in the formation process of the present Syrian regime, another lead actor had played a crucial role: the Ba'th party[16]. The party was officially created in 1947 by two teacher in Damascus, but it has taken hold gradually in the country. However, during the union with Egypt, internal discussion within the group of the Syrian Ba'thist officers over the way through which the Ba'th party could take the power led to the formation of the Ba'thist

[8] VAN DAM N., *op. cit*., p. 5.
[9] PHILLIPS C., *op. cit.*, p. 11.
[10] *Ibidem*.
[11] ANGHELONE F., UNGARI A., *op. cit*., p. 299.
[12] TROMBETTA L., *Siria. Dagli ottomani agli Asad. E oltre*, Mondadori Università, Milano, 2013, pp. 61-62.
[13] *Ivi*, p. 62.
[14] *Ibidem*.
[15] PHILLIPS C., *op. cit.*, p. 11.
[16] The Baath Party took shape in 1947 and was founded by Michel Alfaq, a Syrian teacher, philosopher and sociologist who strongly supported radical Arab nationalism and received consensus across the region. The previous slogan of the party was based on the concept of "unity, freedom, socialism", with the aim to abolish the European government influence in the Middle East and to give shape to a modern industrial economy. See: BBC News, *Profile: Syria's ruling Baath Party*, 9 July, 2012.

Military Committee[17]. It was on March 1963 that the Ba'thist Military, chaired by the leadership of the new-born Military Committee, seized power in a coup, together with military of other groups, which included the Nasserists and Independent Unionist[18]. With the aim to establish a socialist model based on the Egyptian one, but protecting the Syria' interests, the Ba'thist and Nasserists officials arrested the President of the Republic Nazim al Qudsi, who fled to Jordan, and the Prime Minister Khalid al'Azm, who fled to Lebanon[19].

Nevertheless, it was under the new Syrian President, who took power of the Syrian state in a coup in 1970, that the Ba'th party consolidated its regime[20]. Hafez al-Assad was in power for 30 years, until 2000, when his son, the current President Bashar al-Assad, took the power after his father death. The Assad family members were part of the minority Alawite sect, coming from the Shiite Islam. The period when Hafez al-Assad ruled was characterized by several favourable events. Among them, it is important to recall: (i) the oil boom in late 1970s, which led towards shared increased wealth in the region, although Syria had no oil reserves; (ii) the Arab cooperation, after the defeat of Syria, Egypt and Jordan by Israel in the 1967 Six Day War, which implied not interfering in the political affairs of the other states; (iii) the dynamics of the Cold War balanced the power in the region and Syria started to be protected by the Soviet Union and there was no possibility for external powers to interfere in Syrian political affairs[21]. The influence of these external factors and the gradually consolidation of the Hafez al-Assad power influenced even the foreign policy of the Syrian state. Indeed, the Syrian President played a central role in the Lebanese civil war (1975-90); moreover, he supported non-state militias, namely the Turkish Kurdish separatist (PKK) ensuring them safe areas in Lebanon and Syria against the neighbouring state Turkey; finally, Syria supported the Revolutionary Iran since 1979 against common enemies Israel and Iraq[22].

It can be said that, over 30 years of Hafez al-Assad power, he created a strong and autocratic regime able to survive to military defeat in 1973, Muslim Brotherhood uprising and an attempted coup d'état by his brother[23].

It was on 11th of July, 2000, that Bashar al-Assad took formally the power, at the age of 34, after a referendum which gave him 97,2% of the population consent[24].

When Bashar took the power, during his inaugural address, he traced the guide lines of his new government based on the modernization of the Syrian state through economic, administrative and political reforms. Bashar al-Assad consolidation of power was not easy, since several facts occurred during the first years he was in power. First of all, in 2003 there was the invasion of Iraq which created a costly flow of refugee from

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[17] VAN DAM N., *op. cit.*, p. 12.

[18] *Ivi*, p. 25.

[19] TROMBETTA L., *op.cit.*, p. 94.

[20] HINNEBUSCH Raymond, *The Ba'th Party in Post-Ba'thist Syria: President, Party and the Struggle for 'Reform'*, Middle East Critique, Vol. 20, Issue 2, 2011, p. 110.

[21] PHILLIPS C., *op. cit.*, pp. 12-13.

[22] *Ivi*, p. 13.

[23] *Ibidem*.

[24] TROMBETTA L., *op. cit.*, p. 138.

that State to Syria that the new regime should face, in addition to several sanctions imposed to Syria by the U.S. in the same year[25]. Two years later, in 2005, it was signed by the withdrawal of the Syrian troops from Lebanon.

There is no question that there were high expectations on the new President, since his regime was probably influenced by the figure of the previous president.

1.2 The new century: towards the Syrian Civil War

Over the last eight years, Syria has become an international arena where local and foreign players are influencing the future of the Levant region. By the spring 2011, the outbreak of the armed conflict in Syria was around the corner. Actually, Syria was the last country that took part in the anti-government protests, known as “The Arab Spring”[26], which spread around the Middle East and North Africa at the end of 2010. After eight years, the Syrian conflict is still ongoing, causing “the greatest post-war humanitarian catastrophe”, as UN defined[27]. According to the World Bank estimates, the death toll is approximately 400.000 victims and more than 10millions are displaced persons or refugees in Syria neighbouring countries and in Europe[28].

However, although it might be argued that the conflict has its root in the Arab Sprig, it is not sufficient to suppose, without a deeper analysis, that “the Arab Spring caused the Syrian conflict”[29]. In order to understand this statement, one clear point should be highlighted: although the same wave of protests, riots and rebellions affected the majority of the Arab countries, among them, only Syria, Libya and the Republic of Yemen have experienced a “full-on conflicts”, which means that although all the republican governments involved in the Arab Spring dealt with popular demonstrations and riots, these protests did not develop into a conflict in all the countries, as similarly happened to the monarchies in the region[30]. Said circumstance does not mean that the other republican governments did not cope with protests and uprisings, but in their case, the outbreak of mass demonstrations did not lead to armed conflicts or civil wars. It means that there should have been domestic factors that help to understand the reasons behind the outbreak of the Syrian civil war and how the current situation has been reached. In this respect, three matters related to the Syrian case will be deepened, in political, economic and socio-religious terms that underline the fragility of the Syrian State and explain much of the causes which determined the outbreak of the well-known Syrian conflict.

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[25] HOKAYEM Emile, *Syria’s uprising and the fracturing of the Levant*, Routledge, London (UK), 2013, p. 27.

[26] The so called “Arab Spring” in 2011 emphasized, within the population, a sense of responsibility and awareness necessary to begin a new democratic transition. Many regimes experienced mass demonstrations with irreparable consequences, and many regimes, which seemed immovable, were put a strain on. See: CORRAO Francesca Maria, *Islam, religion and politics*, Luiss University Press, Roma, 2017, pp. 139ss.

[27] RONZITTI Natalino, SCISO Elena (edited by), *I conflitti in Siria e in Libia. Possibili equilibri e le sfide al diritto internazionale*, Giappichelli Editore, Torino, 2018, p. 129.

[28] *Ibidem.*

[29] WORLD BANK, *The Toll of War: The Economic and Social Consequences of the Conflict in Syria*, Report, Washington DC, 2017, p. 2.

[30] *Ibidem.*

1.2.1 The political perspective

Historically, the beginning of the Arab Spring is identified by the mass demonstrations started in Tunisia in December 2010. As a consequence thereof, the previous regime in Tunisia collapsed and the same fate was reserved in Egypt. Soon after, new unrests have spread in other states, reaching Libya, Bahrain and Yemen and there was a common belief according to which those disturbances would have spread further. Although all the countries involved in the Arab revolts are different from each other, the main purpose of the revolts had a common point for all of them. What people required, indeed, can be summarized in three main points: human rights, democracy and jobs that meant for them "dignity"[31].

Within this framework, the Arab revolts took place in Syria, even though later than the other countries. Before these uprisings, Syria was for decades apparently peaceful, especially due to a general fear, within the population, of repression by security and intelligence services. Since the time of Hafez al-Assad, such country was characterized by an internal struggle against high unemployment, high inflation, corruption and lack of political freedom within a system controlled by repressive security forces; in such context, a general discontent developed among the Syrian people towards the authoritarian government[32].

With regard to the political aspects, it is worth starting with the central role played by the Ba'th Party in the political life of the State. In particular, the Ba'th Party had become even more authoritative when it was considered "leader in state and society" as stated by the amended Syrian constitution in 1973[33]. For instance, children at school were educated following the party's ideology[34]; moreover, the Ba'th Party controlled also trade unions and the armed forces. The result was astonishing. If in 1981 around 375.000 people joined the vast organisation, the number strongly increased in 2010, when there were 1.2million of people who joined the Ba'th Party, approximately 10% of the entire population[35]. Notwithstanding the Ba'th Party was not, in theory, the only recognized legal party, (since the National Progressive Front took shape from the alliances between nationalist and left-wing allies of the government), in practice, it was what effectively happened because the left-wing allies supported the leading role of the Ba'th Party.

Bashar al-Assad's consolidation of power underlines the deep corruption within the Syrian authorities. Favourable circumstances allowed Bashar to get the presidency. First of all, an amendment to the constitution was made in order to consent him to run for the presidency, even though he was younger than the minimum age required. Moreover, the Ba'th Party recognized Bashar as the only effective candidate and finally, he was confirmed as a president by a sudden national referendum[36]. However, it is worth recalling that the Assad family controlled all the key institutions of the Syrian state. Indeed, since when Hafez al-Assad took the power, the power system chosen was based on formal and informal power and on visible

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[31] McHUGO J., *op. cit.*, pp. 219-220.

[32] SHARP Jeremy M., BLANCHARD Christopher M., *Armed Conflict in Syria: Background and U.S. Response*, CRS Report, September 6, 2013, p. 6.

[33] PHILLIPS C., *op. cit.*, p. 43.

[34] BBC News, *Profile: Syria's ruling Baath Party*, 9 July, 2012.

[35] *Ibidem*.

[36] HOKAYEM E., *op. cit.*, pp. 21-22.

power (*sulta zahira*) and hidden power (*sulta khafiyya*)[37]. Formally, it was the visible power that took the decisions, but practically the hidden power had the real control. Within this regime, the real and hidden power was shared among three institutions: the security apparatus, the main representatives of the Ba'th Party and few sections of the military apparatus[38]. Such system allowed the complete control of the society and the implementation of policies, but, above all, it contributed to create an internal stability which allowed Assad to rule for 30 years[39].

If this was the Syrian political framework at the eve of the Arab revolts, corrupted at the level of ruling authorities, one further note has to be stressed. As already mentioned, the Arab Spring reached Syria later than the other countries: such delay can be explained through two historical factors which contained Syrians to start any form of protest. The first was the ongoing normalisation of the relationship with Europe and America; the second came from the people' awareness of the years of destruction subsequent to the disorder in Iraq and in the civil war in Lebanon that lasted fifteen years, so that people wanted to avoid the same situation[40]. Nevertheless, the riots were not long in coming.

Peaceful demonstrations (which involved mainly merchants[41]) took shape since February, especially on 17 February when there was a spontaneous protest against the Minister of the Interior after his personal appeal in Damascus, as well as small protests took hold in Der'a[42]. Nevertheless, it was in spring 2011 that the instruments of control used by the state and the fear mentality within the population slowly began to weaken. On March 2011, on the wave of the other Arab revolts, teenagers of the southern town of Der'a started to draw on the walls of the school graffiti with messages aimed to the regime's fall or, in some cases, asking for freedom[43]. All said messages reiterated what was already spread in the countries which had experienced the Arab Spring. The fact that they were just teenagers did not stop the police. Indeed, the teenagers involved in the events of March were captured and taken to Damascus, where there was a high possibility that they have been tortured. The number of protests that called for the release of the children grew up significantly. The Syrian protests started to become more intense but the regime seemed to have no clear response. People still demanded to put an end to the uncontrolled used of force by the security state and the lack of freedom. Additionally, they asked for more policies able to create new job' opportunities and to reduce corruption.

The bloody revolts continued the following months. The government was unable and, most likely, unwilling to challenge this matter and the consequences thereof quickly became irreversible. The country went towards an irrevocable decline. In addition to the protests against the autocratic regime, another key factor, which will be deepened in the following section, played a crucial role in the Syrian civil war: the interference of foreign countries. There were countries like Turkey and Saudi Arabia, as well other organizations, for instance the Arab League, trying to put an end to the violence and to negotiate reform measures; however,

[37] TROMBETTA L., *op. cit*., p. 110.
[38] *Ivi*, p. 111.
[39] *Ivi*, pp. 110-112.
[40] McHUGO J., *op. cit.*, p. 221.
[41] TROMBETTA L., *op. cit*., pp. 181-182.
[42] PHILLIPS C., *op. cit.,* p. 49.
[43] McHUGO J., *op. cit.*, p. 221.

when it was clear that any kind of dialogue could be provided, the mentioned states started to support the opposition, with founds, weapons and other aids[44].

With regard to Syria, it is difficult to identify "when the point of no return was passed, after which Syria became predestined to descend into chaos and civil war"[45]. The Syrian uprising took less than one year to shift from an organic revolution to "a full-scale sectarian civil war"[46]. Nevertheless, it was only in June 2012 that Assad recognized that Syria was in a state of war[47]. It has been defined as a sectarian war, since several ethnic and religious groups, which shared common identity creating strong solidarity, became political player that tried to take the power[48]. Regional actors had the purpose to reach their own objectives in the region by dividing the country, while the external actors were trying to impose their influence in the Middle East area. However, in order to clarify the essential terms which led towards the Syrian uprising and the consequent civil war, it is important to go ahead with the socio-economic examination under Assad's presidency.

1.2.2 The economic perspective

As regards to the economic matter, on the eve of the Arab Spring, few would have predicted the imminent troubles with irreversible consequences that the region would have experienced. Indeed, although Syria was not a rich country, having a look at the economic data, the country was experiencing an economic growth in aggregate terms, in accordance to the trend of the other countries in that region. However, it does not mean that complications did not occur. Since the beginning of the new century economic and social issues came up, such as a lack of investment, strict control over the market by Syrian authorities, rigid regulation and currency controls determined an aversion to economic liberalisation. As consequence thereof, the new President's solution was the gradual shift towards a hybrid "social market economy", based on new administrative reforms and on the previous positions of the socialist system[49].

As reported by the World Bank in *"The Toll of War: The Economic and Social Consequences of the Conflict in Syria"*, new important economic initiatives and attempts to implement reforms were carried out by the new government. In 2001 Syria's purpose was to join the World Trade Organization, however, it was prevented by Western contrariness and internal dissent. But that is not all. In the following years, after the "Social Market Development" plan was adopted in 2005, the government allowed private banks to act in Syria and in 2009 the stock market was opened[50]. The impact of these new reforms led towards a general economic growth, even though the starting point was from a low level. In order to have a more clear picture regarding the economic status of Syria, the World Bank's comparison with the MENA countries (Middle

[44] VAN DAM N., *op. cit.*, p. 76.
[45] McHUGO J., *op.cit*, p. 225.
[46] HOKAYEM E., *op. cit.*, p. 39.
[47] *Ivi*, p. 52.
[48] BALANCHE F., *Sectarianism in Syria's Civil War*, The Washington Institute for Near East Policy, 2018, p. XI.
[49] HOKAYEM E., *op. cit.*, p. 26.
[50] WORLD BANK, *op. cit.*, p. 8.

East and North Africa) is useful. For instance, from 2000 to 2010 the Syrian Gross Domestic Product increased by 4.3% per year, in average terms; although the GDP pro capita rose, it was still lower than the one of the other neighboring countries (Iraq, Lebanon and Israel)[51]. Moreover, the decision to open up the trade to the rest of the world allowed Syrian trade value to reach 76.5% of the GDP before the financial crisis, considerably high if compared to the GDP of other MENA countries which was equal to 70.3%[52].

However, one aspect shall be highlighted. It may well wonder why Syrian people began large demonstrations against the government if the country was not experiencing an economic crisis. The point is that, in spite of a general positive growth, such growth was not followed by a "broad-based economic and political inclusion and further transparency and civil liberties"[53], as already mentioned above. In order to better understand this statement, some data can assist to clarify this circumstance. As stated by the World Bank Report, Syria's poverty rate and income inequality, 5.5% and 32.7% respectively, were in line with the other economies (those of MENA), but what stood out is the different level of the labor force participation (LFP)[54]. Except for the upper class, the majority of the population lived in poor conditions which started to worse some years before the uprising. Such circumstance led towards a growing income gap and it partially explained why the Syrian revolts were concentrated in poor areas like Der'a, Homs and Idlib[55]. Three reasons were considered the root causes of such gap. First, the drought which affected Syria in the new century determined Syrian agricultural failure and the displacement of around one million people; second, the rise of food prices, combined with a growing inflation due to foreign sanctions, and, finally, the high level of unemployment, since the current economy was not able to provide jobs for the increasing population[56]. All said factors, played a crucial role for the emerging gap between the upper class and the majority of the population. For instance, the LFP in Syria was among the lowest in the world, equal to 43.5%; in order to have a more precise idea, in the other Arabic countries, such as the Arab Republic of Egypt and Tunisia, the level of LFP was 49% and 47% respectively[57]. These figures can be partially explained if we look at the role of the women in the local economy: female unemployment rate was relatively high, equal to 25.2% and their role was decreasing constantly[58]. Therefore, despite the economic growth, the new policies were not pro-poor, but the general perception that there was an economic growth was due to the fact that there was a more equal expenditure distribution[59].

In addition, Syria occupied a backward position in terms of political inclusion and civil-liberties: although the President's attempt to implement new reforms, the level of governance and civil-liberties was lower in the new century, if compared with the other countries of MENA. As stated by the Word Bank Report, among

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[51] *Ibidem*.
[52] *Ibidem.*
[53] *Ivi*, p. IV.
[54] *Ibidem*.
[55] LANDIS Joshua, *The Syrian Uprising of 2011: Why the Assad Regime is likely to Survive to 2013*, Middle East Policy, 2012, p. 13.
[56] *Ivi*, pp. 13-14.
[57] WORLD BANK, *op. cit.*, p. IV.
[58] *Ibidem*.
[59] *Ivi*, p. 11.

the civil-liberties, the freedom of association and assembly and freedom of expression and belief were the mostly suppressed. In addition there was a general mistrust of the Syrian people towards the public institutions, above all the local police and the judicial system, considered both of them corrupted[60]. For instance, according to governance indicators, Syria experienced a deterioration during the 2000s, due to the lack of effective planned institutional reforms and progress on administrative reform measures; such deadlock was notably due to the nature of the Syrian governance system which has always been characterized by a concentration of power in the executive[61].

1.2.3 The socio-religious perspective

All the above factors contributed to the armed conflict onset, but, in order to have a vision as much comprehensive as possible, another internal aspect must be stressed. The presence of a hostile sectarianism in the country played, and is still playing, a relevant role in the Syrian war, which has contributed to transform the previous popular uprising of 2011, asking for democracy and civil-liberties, into the cruel sectarian conflict of today.

As previously mentioned, the Syrian population is particularly heterogeneous, as the others in the Middle East. Nevertheless, it is worth recalling the ethnic and religious differences within the population to better understand the sectarianism of the Syrian civil war. As reported by the Congressional Reserve Service Report (2012), at the time of the uprising, almost 90% of the Syrian population was ethnic Arabs. However it should not be underestimated the ethnic minorities, especially the Kurds[62]. What is even more remarkable was the presence of difference religious sectarian group. The majority of the population was made up by Sunni Muslims, which correspond to the 70% of the population; moreover, there are several religious sectarian minorities which comprise the Muslim sects, Alawites, Druze and Ismaili communities, and finally Christian minorities[63]. As already mentioned, the Assad family belongs to the Alawite group and there is a general belief according to which the President Bashar al-Assad allowed the Alawites to have special privileges which generated aversion, especially among Sunni and other minorities, against the Alawites[64]. The hostility remained in the minorities groups, but, among them, a deep sense of resentment occurred mostly within the Sunni who felt themselves deprived of their fundamental rights. Such sentiment was emphasized by the fact that the most influential personalities among the Sunni have been excluded from the

[60] *Ivi*, p. V.
[61] *Ivi*, p. 13.
[62] SHARP Jeremy M., BLANCHARD Christopher M., *Armed Conflict in Syria: U.S. and International Response*, CRS Report, July 12, 2012, p. 25.
[63] *Ibidem*.
[64] As reported by Emily Hokayem in *Syria's uprising and the fracturing of the Levant*, to what extent the Alawites community benefitted from the discriminatory policies of the Assad regime is not easy to evaluate due a lack of data on this group. However what it is possible to argue is that the way in which such community had access to jobs and the way in which their conditions improved over years suggest a significant contribution by the regime. For further details over this issue see: HOKAYEM E., *op. cit.*, pp. 31-33.

highest level of political power by the new regime, although they took part in relevant political decisions during the period of Hafiz al-Assad[65].

Under this condition, the conflict among different groups seemed inevitable in the long term. Since the 90s, the sectarian divisions in the country were evident, especially between the Alawites and the Sunni: the material benefit granted by Hafiz al-Assad for the former, in exchange of their political support, created frustration within the Sunni population. Such favoritism had led towards different protests by Sunni against the regime. Two protests should be mentioned which took place in 2011, at the beginning of the Syrian uprising. Whilst the former was in Baniyas, where Sunni asked the government to create 3000 jobs in order to tackle the high level of youth unemployment among the Sunni population, the latter was in Latakia, region with the majority of Alawites, where the Sunni complained about the fact that all the dominant positions of the local administration were filled by the Alawites[66]. Under such circumstance, the sectarian division and the fragmentation between the Alawites and Sunni was strongly reinforced, particularly during the conflict.

With regard to the other minorities, the scenario was less complicated. As regards to the Druze, they remained neutral at the beginning of the conflict, later organizing themselves into defense group to protect themselves by the rebel groups and by the Free Syrian Army, as a way to self-preservation; by contrast, Ismaili held anti-regime demonstrations and the government was forced to respond by using force but not brutally, due to the President's fear that such community could join the Sunni forces[67]. As regards to Christians, since the beginning they were allied with the Assad regime this was the reason why they could enjoy several privileges. Nevertheless, probably because Christians are just a small percentage of the population (less than 5%), generally they started to flee from the country to seek refuge in Lebanon and Armenia or in the Western countries, while those who remained in the region became supporters of the Assad regime[68]. The Twelver Shia, the other minority group, was a community which maintained generally a distance from the power, having less influence since their small size[69]. However, something has changed when they became the target of Sunni Jihadist, who started to attack said small community since 2012. This reason and the fact that the Twelver community came from the Iran proselytism in Syria since the past decade, had implied a sustain by the Assad regime with the support of the Lebanese Hezbollah which became an Assad ally with Iran[70].

Finally, the case of the Kurds is another matter which makes the framework of the current civil war more complex. Even before the Arab Revolts, Kurds community main purpose was to establish an autonomous Kurdish territory in the north part of Syria. As a matter of fact, the relationship with the Syrian leading government has never been easy. Since 1950s, the Kurdish attempt to gain the autonomy had led the local government to arrest Kurdish political leaders and to confiscate some lands inhabited by the Kurdish

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[65] CORRAO Francesca Maria (edited by), *Le rivoluzioni arabe. La transizione mediterranea*, Mondadori Università, Milano, 2011, p. 170.
[66] BALANCHE F., *op. cit.*, p. 8.
[67] *Ivi*, pp. 14-15.
[68] *Ivi*, pp. 15-16.
[69] *Ivi*, p. 15.
[70] *Ibidem*.

community which were given to the Syrian Arabs in order to "Arabize" Kurdish regions[71]. Having lost confidence in the Arab countrymen, considered supporters of the regime's repression, in 2012, rather than joining Sunni Arab rebel group, Kurds organized their own militias in order to defend their territories and to build up a state based on the Kurdistan Regional Government model, in the North part of Iraq[72]. In order to achieve this goal, the Kurds hoped that neither the regime nor the rebels could win the war, so that none could impose its own authority in the north and, therefore, they have the autonomy to create their own region[73].

What is coming up from this first analysis, is that the general disorder of 2011 was considered as an attempt for each group to pursue their own objectives and to defend their own territories from a possible regime's aggression. At the end, the areas of influence can be identified as follow: Sunni rebels with the Jihadist in the east and in the center of the countryside; Kurds control over the northern border area made up by the Kurdish-majority and, finally, the regime governing the Alawite coast, Damascus and other cities such as Aleppo, Latakia, Hama and Homs[74].

In the light of the above, it appears clear how ethnics and sectarian identity politics are significant in the current conflict.

1.3 Syria: from a regional to a global battlefield

In the previous section only the internal dynamics have been taken into consideration, without considering the alarming global implications of the conflict. However, it is difficult to understand the external dynamics of the conflict without having a partial view of the main strategic reasons behind the decisions made by the actors more directly involved in the region. The first issue that comes up is how the international community is dealing with the Syrian crisis. A general disagreement among the actors mostly engaged, especially among the members of the United Nations Security Council, had determined a worrying deadlock at the international level, which highlighted the limits of the Security Council to manage the Syrian conflict. Said disagreement was mainly due to the actors' different geo-political interests in the area, which divided, for strategic and historical reasons, the international community between supporters of the Assad regime, and, by contrast, opponents forces. Knowing the role of the actors involved is a central matter to better understand the dynamics of the war in Syria and why the war is still ongoing. Indeed, there is a common belief according to which at this point of the war, even though the regime fell, it would not mean the end of the conflict itself because the actors involved, internal and external, will continue to fight until when their objectives will be achieved.

[71] SHARP J.M., BLANCHARD C.M., *op. cit.*, p. 31.
[72] BALANCE F., *op. cit.*, pp. 16-17.
[73] *Ivi*, p. 17.
[74] *Ivi*, p. 3.

Following the years 2012, many resolutions of the Security Council, which condemned, among other things, the continuous use of force by the Syrian authorities on civilians were vetoed by Russia and China [75]. As a consequence thereof, the creation of the diplomatic collective "Group of Friends of Syria" took shape, out of the UN frame. Nevertheless, the political solution aimed to obtain the fall of the Assad regime was not consistent with the Russian and Chinese national interests[76].

With regard to Russia, the closer association between USSR and Syria dates back the time of the Cold War, based on strategic interdependence[77]. Indeed, the historical agreement between Syria and USSR was signed in 1955, with the mediation of Egypt led by Nasser, for the supply of arms to Syria[78]. In addition, in 1957 there were the first economic agreements between Damascus and Moscow[79]. The strategic relations between the two states went on even in the following years. Subsequently, Syria main aim was to take back the Golan Heights territories, occupied by Israeli during the Six-Day War in 1967. In order to achieve this goal, Syria's priority was to strengthen its armed forces and to militarize the Syrian society, jointly with the Egypt of Anwar Sadat[80]. In this regard, the need of armaments and technical support was crucial. Since U.S., France and Britain, were not able to provide such aid, due to the ongoing Cold War and the Arab-Israeli dispute, the USSR would have contributed to the cause, in exchange of political influence in the region[81]. Syria accepted the compromise. In spite of the economic and military support provided during the Cold War, Russia remained a stable Syrian ally over the years, but the current reasons behind the Assad support are by far more complex, involving geo-political interests.

Syria is the major buyer of the Russian arms and, moreover, there is in the region the "warm-water naval base" in the Syrian port of Tartus[82], the only place granting the Russian military influence in the Mediterranean area[83]. Indeed, the port of Tartus is used to dock nuclear submarines, "it is the receiving point for Russian weapons shipments to Syria and it is linked to a well-developed network of roads and railways"[84]. However, there is a common belief among the analysts according to which such naval facilities is more symbolic, without an active functional value for the Russian navy: it seems to represent Russian geopolitical influence and geostrategic scope since 1971, when the agreement was reached; losing such area

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[75] As reported by CRS Report "*Armed Conflict in Syria: Background and U.S. Response*" (2013), on October 4, 2011, the Security Council was not able to adopt the resolution which denounced "the continued grave and systematic human rights violations […] against civilians by the Syrian authorities", vetoed by Russia and China. On February 4, 2012 the Security Council was not able to adopt the resolution which would have endorsed the Arab League Plan with the aim to conduct Syria towards a democratic, plural political system and, to invoke the government to stop violence against the Syrian population, since such resolution was vetoed by Russia and China. The same happened for the resolution on July 19, 2012, through which the Security Council menaced the imposition of sanctions if Syria would have not stopped the violence. See: SHARP J.M., BLANCHARD C.M., *op. cit*., pp. 35-37.

[76] CARPENTER Ted Galen, *Tangled Web: The Syrian Civil War and Its Implications*, Mediterranean Quarterly, Volume 24, Issue 1, 2013, p. 9.

[77] ALLISON Roy, *Russia and Syria: explaining alignment with a regime in crisis*, International Affairs, Vol. 89, Issue 4, July 2013, p. 801.

[78] TROMBETTA L., *op. cit*., p. 90.

[79] *Ibidem*.

[80] McHUGO J., *op. cit.*, p. 156.

[81] *Ibidem*.

[82] The naval base of Tartus dates back to the Cold War, since it was built in 1971, when there was an agreement between the USSR and the Syrian Bath party, and until the uprising of the Civil War the naval base was managed by Russian personnel.

[83] JENKINS Brian Michael, *The Dynamics of Syria's Civil War*, RAND Corporation, 2014, p. 7.

[84] GARDNER Frank, *How vital is Syria's Tartus port to Russia?,* BBC News, 27 June, 2012.

would mean not only losing the influence in the Mediterranean Sea, but also the possibility of Russian naval presence in more distant oceans[85].

However, still on the matter of such strategic naval base, another relevant aspect should be mentioned. In more recent times, according to Russian News Agency (TASS) Report, on January 2017 Russia and Syria signed a new agreement with the aim to expand the use of such port for 49 year. Particularly, the document mentioned by TASS Reports, states that:

> "Russia and Syria have signed an agreement on expanding the territory of the Russian Navy's logistics facility in Tartus for 49 years. […] The maximum number of Russian warships allowed to stay simultaneously at the maintenance base is 11, including nuclear-powered combat ships, provided that nuclear and environmental safety is complied with"[86].

The above mentioned strategic reasons partially clarified why Russia is still providing support to the Assad regime by blocking several Security Council resolutions which condemned, among other things, the use of violence by the government authorities and the use of chemical weapons. In such circumstance, Russia has continued to provide to the Syrian government military supplies, such as helicopters, air-defense system and fuel and started to train the Syrian militias for the use of Russian weapons.

If these are the main reasons behind the Russian political support towards the Assad regime, the reasons that ties China with Assad are more limited, but not less important. What China and Syria have in common can be easily analyzed from an economic perspective. In 2011 China ranked the first place among the commercial partners of Syria and was the largest contributor to Syria's oil industry, playing a central role until the outbreak of the revolts[87].

However, two other actors have had a significant role as foreign supporters of the Assad' regime: Iran and the Hezbollah. With regard to Iran, the fall of the regime would mean the loss of an important ally in the region and the possibility that a Syrian domestic movement could rise with the aim to suppress the Islamic Republic; by contrast if the Assad regime remained in place, it would have contributed to strengthen Iran and, additionally, Hezbollah's influence in the region[88]. Moreover, Syria is the transit point for Iranian army delivery to the Hezbollah, considered by Syria and Iran a key group for the struggle against Israel[89]. This is the reason why Iran has contributed to sustain the Syrian government with financial means and training for Syrian military force. Iran goals can be summarized as follow: "to prevent the overthrow of the Assad regime and to balance against […] the United States, Israel and Saudi Arabia"[90].

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[85] ALLISON R. Allison, *op. cit*., p. 807.

[86] TASS, Russian News Agency, *Moscow cements deal with Damascus to keep 49-year presence at Syrian naval and air bases*, January 20, 2017.

[87] CARPENTER T.G., *op. cit*., p. 9.

[88] JENKINS B.M., *op. cit.*, p. 7.

[89] SHARP J.M., BLANCHARD C.M., *op. cit*., p. 15.

[90] JONES Seth G., *The Escalating Conflict with Hezbollah in Syria*, CSIS Report, June 20, 2018.

As far as Hezbollah[91] is concerned, the reasons behind its support to the Assad regime are mostly political and strategic, strictly linked to Iran national security goals. The Hezbollah goals in Syria can be identified in two linked objectives: political and military. The former aimed to contain Israel and U.S. influence in the region, to restrain the spread of Sunni Jihadist and to preserve the Shi'a communities; the latter intended to protect the integrity of the Syrian territory because, as stated above, such region was used to transport Iranian missile and other materials to Lebanon[92]. The Syrian state is the heart of the Islamic Resistance: if it should weaken, Israel would have more chances to control Lebanon.

Having analyzed the key role of Russia and China, it is necessary to take into account the role of another Security Council permanent member: the United States. Russia and China main concern about the U.S. was the fact that the purpose of such actor, and generally, of the Western allies involved in the Syrian war, was to pursue their strategic interests in the Middle East. It is a well-founded fear considering the fact that the Western presence in the Middle East dates back its involvement in the Balkans during the 1990s, in Iraq War with George W. Bush administration, and, more recently, in Libya. However, the United States and the other Western countries policy towards the Syrian civil war was completely different compared to that of Russia and China. Few months later the Syrian uprising, the U.S. with the support of other European countries, called for Bashar al-Assad resignation since he had failed in the Syrian democratic transaction, promised during the years of his government. Although the Obama Administration intensified the economic sanctions towards the regime since the beginning of the conflict, such approach did not change the attitude of the President, repeatedly accused to violently suppress the uprising and refusing to resign. However, what it is important to focus on is the U.S. policy toward Syria, especially analyzing how the American attitude had changed after the summer 2012 when there was the perception, from the Western side, of a chemical weapons production and, consequently, a possible use of them. But, let us proceed by order.

As indicated by the Congressional Research Service Report (2013), since March 2011 the Obama's administration policy was based on the unilateral and multilateral attempts to cease the violence against the actors involved, to call for the Assad resignation and finally to drive the country toward a more democratic government[93]. These were the three main objectives of the American President. Generally speaking, President Obama's purpose was to continue with non-military intervention action, believing that the crisis might have been solved through diplomatic channels. Unfortunately, this was not the case. The repeatedly use of repressive measures by the regime pushed Obama to rely on a possible multilateral work through the United Nations in order to achieve the three objectives mentioned above. Nevertheless, in 2012 Russia and China vetoed several Security Council resolutions that, among other things, were aimed to sanction the regime, reaching a cease-fire and supporting a democratic transition plan.

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[91] The Hezbollah, also known as the Party of God, it is a military organization with the majority of Shia Muslims which is based in Lebanon. It has its roots in the '80s, when the Iran financial backing allowed the rise of this movement. From its birth, Hezbollah struggled against the Israeli troops in Lebanon, which lasted until the new century when the Israeli troops were driven out from Lebanon. Israel is still considered a menace that is the reason why Hezbollah is supporting the Assad regime. For further details about the Hezbollah see: BBC News, *Who are the Hezbollah?*, 4 July, 2010.

[92] JONES S.G., *op. cit*.

[93] SHARP J.M., BLANCHARD C.M., *op. cit*., p. 15.

The turning point was on August 2012, when the Obama administration started to change its policy based only on humanitarian help for the rebels force to a possible "military help" for the rebels. Two significant events had led U.S. and the other European countries, especially France and Great Britain, to change their attitude towards Syria. The former is linked with the widespread abuses committed by both side involved in the civil war, the regime and the opposition forces. Indeed, as stated by the Report of the Independent International Commission of Inquiry on the Syrian Arab Republic:

> "The commission found reasonable grounds to believe that Government forces and the *Shabbiha*[94] had committed the crimes against humanity of murder and of torture, war crimes and gross violations of international human rights law and international humanitarian law [...].
>
> The commission found reasonable grounds to believe that war crimes, including murder, extrajudicial execution and torture, had been perpetrated by organized anti-Government armed groups. Although not a party to the Geneva Conventions, these groups must abide by the principles of international humanitarian law. [...] "[95]

However, although the alarming confirmation concerning war crimes and crimes against humanity committed by both parts (regime and opposition forces), the latter concern of the United States, followed by France and United Kingdom, was the possible use of chemical weapons[96]. According to the Obama Administration, the possible preparation of munitions of chemical weapons agents by the Syrian authorities constitutes the overcoming of the so called "red line". Since those facts, all three Western countries agreed upon the necessity to change their previous calculations, no more based on dialogue among parties but on the intention to adopt a forceful response, even including military intervention[97].

Before analyzing the role of another key international player, a short comment should be made on other opposition forces, at the internal level. There are different groups which organize national guerilla campaign in order to weaken the Assad regime. Among these groups, the most influential and well-structured was represented by the Muslim Brotherhood, recognized through the Syrian National Council (SNC); it was supported by Qatar, Libya, Tunisia and some Western countries and its aim was to abolish the Ba'hist regime using all necessary means, including military intervention[98]. Moreover, a relevant role is also assumed by the Free Syrian Army (FSA), made up by local volunteer fighting groups, with the aim to create their own organization, jointly with the national opposition movement but lacking of integrated commander

[94] Although the lack of information concerns the nature, composition and hierarchy of the Shabbiha, there are good reasons to consider them as supporters of the Government forces.

[95] UN, General Assembly, *Report of the independent international commission of inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/21/50, 16 August, 2012, *Summary*.

[96] BLAKE Jillian, MAHUMD Aqsa, *A Legal "Red Line"?: Syria and the Use of Chemical Weapons in Civil Conflict*, 61 UCLA L. Rev. Disc. 244, 2013, p. 248.

[97] *Ivi*, p. 249.

[98] JOYA Angela, *Syria and the Arab Spring: The Evolution of the Conflict and the Role of the Domestic and External Factors*, Middle Eastern Studies/Ortadogu Etüleri, Vol. 42, N. 1, July 2012, p. 32.

structure, logistic and intelligence[99]. Among these rebels, the majority was originally represented by Sunni, which opposed to the Alawites because of their privileged treatment ensured by the government. However, it should be also noted that in November 2012, a number of opposition groups gave rise to the National Coalition for Syrian Revolutionary and Opposition Forces (Syrian Opposition Coalition), which asserted to be the legitimate government of the Syrian states and received soon international recognition and support[100].
The last external player involved in the Syrian conflict is Turkey. Although its role is not as much decisive as the other members of the Security Council, such country had a key role among the international actors, due to the fact that there had always been a link between the two countries because of the Kurdish question, although their relationship was not always peaceful. However, nowadays the scenario is not easy to understand and there are different reasons behind Turkish policy's change towards Syria. One of the main reasons that comes up was Turkey different perception of the Assad policy over time, considered less cooperative than before, in terms of collaboration to cease the violence through political reforms[101].
Moreover, there are two interesting ethnic-religious questions which limited Turkey in supporting the Syrian government. The first issue regards Sunni. Turkey is a Sunni majority country, which hosts the leadership of Free Syrian Army (originally mostly Sunni). It is believed that the controversial approach of Turkey towards Syria is even due to the marginal role assumed by Sunni under the regime of Bashar Al-Assad; in other words, Turkey did not support the disproportionate treatment reserved to the Sunni compared to the Alawites[102].
The second issue is by far more complex and has historical roots. Turkish main concern was the possibility that the Syrian uprising could stimulate Kurdish nationalism[103], especially in the south part of Turkey and in the major urban centers where Kurds are 15%-20% of the population[104]. In this respect, over the years Erdogan government had made several efforts to curb separatist movements, tolerating, where possible, Kurdish cultural, political and economic requests, with the aim to give Kurdish a new national constitution[105]. This is the reason why Erdogan would not want to see all these efforts, made to contain any form of autonomous revolution, becoming vain because the Assad' interests could stir up Kurdish separatist sentiment in Turkey. Moreover, there is another matter linked to Kurds that is the PKK (Kurdistan Workers' Party) considered by Turkey, U.S. and European Union as a terrorist organization. At the time of the Syrian uprising, the relationship between PKK and Erdogan slowly deteriorated, since there was a reasonable belief according to which the Syrian authorities were allowing PKK to operate again in Syria. Turkey main

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[99] SHARP M., BLANCHARD C.M., *op. cit.*, p. 29.
[100] SCHMITT Michael N., *Legitimacy versus Legality Redux: Arming the Syrian Rebels*, Journal of National Security Law and Policy, Vol. 7, 2014, p. 153.
[101] SHARP J.M., BLANCHARD C.M., *op. cit.*, p. 14.
[102] *Ibidem*.
[103] Kurdish nationalism came from the fact that Kurds are the largest stateless nation worldwide and they are the third national-ethnic group of the Middle East. It is estimated that the Kurdish population is around 25 and 30milion, divided in 14milion in Turkey, 7milion in Iran, 5milion in Iraq, 1,1milion in Syria and the others around Europe, North America and Australia. Nowadays the term "Kurdistan" is referred to the region which covers southeastern Turkey, northern Iraq and Syria and northwestern Iran. For further details over Kurdish issue see: RONZITTI N., SCISO E., *op. cit.*, pp. 157-170.
[104] SHARP J.M., BLANCHARD C.M., *op. cit.*, p. 15.
[105] *Ibidem*.

concern was still the possibility that a more aggressive act by the Turkish government towards Syria, aimed to deal with this issue, would have caused a reaction by Assad consisting on hosting fighters of the PKK and providing them a safe area where they could eventually attack Turkey[106]. As the Turkish-Syrian relations got inclined, the former started to apply sanctions over Syria, as the other Western powers.

1.4 United Nations response until the year 2013

The conflict in Syria underlines the inability and the limits of the United Nations, especially those of the Security Council to deal with this crisis. As a matter of fact, since the beginning of the conflicts different Security Council resolutions have been vetoed by Russia and China, making even more difficult any form of material response and creating a deadlock at international level. Between the years 2011 and 2012, few relevant measures have been adopted by the Security Council with the aim to settle the conflict with diplomatic manners and political dialogue. In the year 2012, when the conflict was no longer considered just a revolt on the wave of the Arab Spring, but Syria conflict got the status of civil war, few progresses have been done by the United Nations.

After one year conflict, the international community was not able to get a required unity for intervening in favor of the Syrian population and pushing for a peace process, thorough free elections under the international community's control and aimed to return the sovereignty back to the people[107]. However, on February 2012 the government held a new national referendum aimed to draft a constitution that could create a new political system, opening the country to a new form of competitive scheme, since the parliamentary elections were no longer restricted only to the Baath Party. In addition, the President election was restricted: the President's tenure can be renewed only for a second time, but it is not the case for the President Assad since the amendment applied is not retroactive, so he can serve until 2028[108].

1.4.1 UN-Arab League Peace Plane and the Ghouta attack

However, since the United States, Arab League and NATO were reluctant to military intervene in Syria and all the attempts made to cease Assad's use of violence with diplomatic tools were useless, many countries have supported the Six-Point-Plan for Syria, negotiated by UN and the Arab League, highly recommended by the Special Envoy Kofi Annan. The primary aim of the international Envoy, after visited Damascus in the

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[106] *Ibidem*.
Historically, there is a common belief according to which Damascus has allowed the PKK to operate in Syria. This policy has changed in 1998 when the Syrian government begin to curb the PKK operation in its region due to the effective risk of a Turkish invasion. Since that time the relations between the two states improved gradually. However, Syria is the only region, outside Turkey, where PKK is able to recruit a great deal of Kurds. This was due to the fact that the Assad government has supported, over the years, Kurdish possibility to join the PKK, against Turkey. Moreover, among other things, the reason why PKK has received support from the Syrian Kurds is because there are blood ties with the Turkish Kurds who live across the border between the two countries. However, Damascus's policy has changed since the beginning of the uprising allowing the PKK to operate again in Syria. For further details see: CAGAPTAY Soner, *Syria and Turkey: The PKK Dimension*, The Washington Institute for Near East Policy, April 5, 2012.
[107] RONZITTI N., SCISO E., *op. cit.*, p. 22.
[108] SHARP J.M., BLANCHARD C.M., *op. cit.*, p. 26.

beginning of March 2012, was to implement a plan “to bring an end to all violence and human rights violations, secure humanitarian access and facilitate a Syrian-led political transition to a democratic, plural political system”[109]. Such action plan was suddenly supported by the previous Secretary-General Ban Ki-moon, who considered the plan as a concrete response of the international community.

After days of discussion, on 16 March 2012, the plan was submitted to the UN Security Council, adopted few days later on 21 March. In this respect, one aspect should be stressed. There is a common belief according to which the Syrian authorities seemed they wanted to cooperate with the peace proposal plan, as stated by *Al Jazeera*: “on March 27, the envoy's office said that the Syrian government had accepted the peace proposal, and would be working to implement it”[110]. However, as regards to the schedule and the terms of collaboration, there were different views among the international media. According to *The New York Times* “Syria agreed to immediately begin withdrawing its security forces and heavy weaponry from in and around major population centers, with a deadline of April 10 for a complete withdrawal. That step would be followed by a general cease-fire within 48 hours […]”[111]. The plan aimed at putting an end to the armed violence for all the parties involved in the conflict, not only for Syrian authorities. The Annan’s Six-Point Plan was based on the following points:

> (1) “Syrian-led political process to address the legitimate aspirations and concerns of the Syrian people [...];
> (2) commit to stop the fighting and achieve urgently an effective United Nations supervised cessation of armed violence in all its forms by all parties to protect civilians and stabilize the country; […]
> (3) ensure timely provision of humanitarian assistance to all areas affected by the fighting, […] to accept and implement a daily two hour humanitarian pause […];
> (4) intensify the pace and scale of release of arbitrarily detained persons […];
> (5) ensure freedom of movement throughout the country for journalists and […];
> (6) respect freedom of association and the right to demonstrate peacefully as legally guaranteed.”[112]

After the adoption of Annan’s Six-Point Plan, the United Nations needed to establish a mechanism able to control the real commitment by the Assad regime to cease the violence. In this respect, on April 2012, two Security Council resolutions were adopted unanimously, Resolution 2042 and Resolution 2043.

Resolution 2042 was adopted on April 14, without being vetoed by Russia and China and, among other things, it approved an advance team of 30 unarmed military observers in Syria with the responsibility to

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[109] UN News, *Security Council calls for implementation of six-point plan to end crisis in Syria*, 21 March, 2012.
[110] Al JAZEERA, *Kofi Annan’s six-point plan for Syria*, 27 March, 2012.
[111] BERNARD Anne, GLADSTONE Rick, *Syrian Leader Accused of Escalating Attack*, The New York Times, April 3, 2012.
[112] UN, Security Council, *Six-Point Proposal of the Joint Special Envoy of the United Nations and the League of Arab States*, UN Doc. S/RES/2042 (2012), 14 April, 2012, *Annex*.

report on the effective implementation of the Six Point Plan; moreover, the Security Council unanimously asked to the Syrian authorities the security forces' withdrawal from residential area and called upon a dialogue the Syrian government and opposition forces[113].

However, few days later, on April 21st, Resolution 2043[114] was adopted unanimously, by which the Security Council established a supervision mission. Said mission became known as UNSMIS (United Nation Supervision Mission in Syria), for an initial period of 90 days, which included a deployment of 300 unarmed military observers, under the command of a Chief Military Observer[115]. The purpose of such Resolution was really similar to the previous one, which consisted in ceasing violence by both parts and seeing the effective implementation of the Six-Point Plan.

Although the several attempts of the international community and United Nations to end the violence and the conflict, the situation did not get better. On June of the same year, the UNSMIS commander, the Norwegian Robert Mood, was forced to suspend the mission since the escalated violence in the territory. The mission was resumed only one month later with Resolution 2059 which extended the UNSMIS mission for an additional 30 days period. At the end of 2012, UN suspended the operations due to the dangerous conditions in the country.

At the eve of the new year, the war conditions worsened. It was clear that the Syrian authorities were still used violence against the civilians and the attempt to observe the Six-Point Plan was completely failed. In such circumstance, some foreign nations wanted to strengthen the Annan's Plan even using punitive measures under the chapter VII of the Charter[116]. However, the crucial point was reached on August 2013.

In the morning of August 21st, 2013, there was a chemical attack, later confirmed by UN investigation mission, in two different districts in Ghouta, area of Damascus, controlled by the opposition forces. As reported by Human Rights Watch Report (2013), the chemical attacks took place in Easter Ghouta, in the Zamalka neighborhood, between 2 and 3 a.m., while in Western Ghouta, Moadamiya, around 5 a.m. Both cities were struck by rockets. At the beginning, before any UN investigation, the belief that it might have been a chemical attack came from victims symptoms such as suffocation, irregular and frequent breathing, muscle spasm, nausea, convulsing and so on: according to the experts, the symptoms showed by the people made possible the exposure of the victims to a nerve agent, like Sarin[117].

Few days later, the UN Mission analyzed the Syrian areas where the attacks occurred. What is important to bear in mind is that the observation mission had neither the priority nor the purpose to establish who used the chemical weapons but only to verify if the chemical weapons have been used and which type has been used on the 21 August attacks. After the attacks, the Syrian government allowed the inspection by the United

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[113] UN, Security Council, *Resolution 2042 (2012)*, UN Doc. S/RES/2042 (2012), 14 April, 2012.

[114] For full text of the Resolution 2043 (2012) see: UN, Security Council, *Resolution 2043 (2012),* UN Doc. S/RES/2043 (2012), 21 April, 2012.

[115] UN, *Security Council Establishes UN Supervision Mission in Syria, with 300 Observers to Monitor Cessation of Violence, Implementation of Special Envoy's Plan*, UN Doc. SC/10618, 21 April, 2012.

[116] SHARP J.M., BLANCHARD C.M., *op. cit*., p. 12.

[117] HUMAN RIGHTS WATCH, *Attacks on Ghouta. Analysis of Alleged Use of Chemical Weapons in Syria*, September 2013.

Nation team on the effective use of chemical weapons. In the Report of the United Nation Mission (2013), the following conclusion has been reported:

> 27. "On the basis of the evidence obtained during our investigation of the Ghouta incident, the conclusion is that, on 21 August 2013, chemical weapons have been used in the ongoing conflict between the parties in the Syrian Arab Republic, also against civilians, including children, on a relatively large scale.
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> 28. In particular, the environmental, chemical and medical samples we have collected provide clear and convincing evidence that surface-to-surface rockets containing the nerve agent Sarin were used in Ein Tarma, Moadamiyah and Zamalka in the Ghouta area of Damascus"[118].

The United Nations Mission, with the assistance of experts from the World Health Organization and the Organization for the Prohibition of Chemical Weapons, confirmed the use of sarin in the above mentioned attacks, but there was no mention about which part involved in the conflict was responsible. However, one point should be highlighted. The General Assembly seemed to indirectly blame the Regime for the attack[119]. This view has been strongly supported by the British, French and U.S. governments. Indeed, even before the confirmation from the UN Mission, the Obama administration blamed the Syrian government behind the chemical attack in Damascus suburbs. The reasons of the White House over the regime responsibility can be explained through the investigation made by the American intelligence. Indeed, taking into account previous and post-attack investigations and the evidences which stated the different chemical capabilities between the regime and the opposition, there was a strong belief of the direct Syrian government involvement in the episode.

Ghouta attack is considered one of the gravest episodes for chemical weapons' use, since it has caused more than 1.400 victims and around 400 were children. After Ghouta's episode, the reaction of the international community was immediate. The rules of the game changed. In fact the Security Council assumed a central role since a general agreement among its members was reached with the aim to start a program over the Syria chemical disarmament and to avoid a possible military intervention, initially envisaged by the United States. Such collaboration among the permanent members allowed the adoption of the Security Council Resolution 2118, which constituted an important legal step for the disarmament process of the country.

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[118] UN, General Assembly, Security Council, *Report of the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic on the alleged use of chemical weapons in the Ghouta area of Damascus on 21 August 2013*, UN Doc. A/67/997–S/2013/553, 16 September, 2013, para. 27 and 28.

[119] UN, General Assembly, *Resolution adopted by the General Assembly on 18 December 2013,* UN Doc. A/RES/68/182, 30 January, 2014. The General Assembly in the first paragraph states that " […] the report of 16 September 2013 prepared by the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic, which provides clear evidence that surface-to-surface rockets were fired on 21 August from Government-held territory into opposition areas […]".

CHAPTER TWO

The International Legal Framework of the Chemical Weapons Use in War

2.1 The prohibition of chemical weapons under international law

Since the end of the past decade the increment of WMD employment by states and non-state actors, especially chemical weapons in armed conflicts, determined major concerns about the role of international law in this field. As a consequence thereof, international law has made several efforts to manage the use of WMD, with several treaties aimed to forbid the use of poisonous gas in warfare[120]. In more recent time, the use of chemical agents in the Syrian war has arisen such issue. In this regard, the use of chemical weapons under international law will be examined, notably taking into account their use in internal armed conflict. Two different bodies of international law deal with such matter. The former refers to the arms control treaties which have the purpose to "prohibit or limit the development, possession, and use of nuclear, chemical, and biological weapons by states"[121] and that set up the most relevant and direct use of international law related to WMD. For the present case only treaties regarding CW's use will be examined. The second one concerns the customary international law, which has developed over the years a general consensus among states to ban CW use, even in internal armed conflict.

However, although international law is not always clear on such matter, all these attempts are considered the latest efforts made by the international community before the adoption of Resolution 2118, which prohibits the use of these unconventional weapons as a tool of war. Indeed, the Security Council Resolution 2118, adopted unanimously by the States after Ghouta episode in 2013, declares that the use of CW is considered a violation of international law.

2.2 International Treaties

The development of international treaties which started to focus on the prohibition of unconventional agents dates back the end of XIX century, even before the beginning of the proliferation of chemical weapons in the Middle East. The previous international efforts to restrict the use of such weapons can be found in the Hague Declaration (IV,2) concerning Asphyxiating Gases of 1899, followed by the Geneva Protocol in 1925, as a reaction of chemical agents' use in the First World War. However, as it will be seen, in the following years of their implementation what came up was the agreements' inefficiency to deal with the arms' control prohibition and proliferation. As a consequence thereof, in the second half of XX century, one significant

[120] Declaration Concerning the Prohibition of the Use of Projectiles Diffusing Asphyxiating Gases, July 29, 1899, quoted by FIDLER David P., *International Law and Weapons of Mass Destruction: End of the Arms Control Approach?,* Maurer Faculty, 2004, pp. 40- 41.

[121] Geneva Protocol, 1925. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, quoted by FIDLER D.P., *op. cit.*, p. 41.

step to ban the CW proliferation took shape with the Chemical Weapons Convention, which entered into force in 1997 that, compared to the other agreements, is the most sophisticated in the field of chemical weapons.

Starting from the first attempt made by the international community, the prohibition of CW use was made by the Hague Declaration concerning Asphyxiating Gases in 1899. The main purpose of the Hague Declaration was as follow: "The Contracting Powers agree to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases; the present Declaration is only binding on the Contracting Powers in the case of a war between two or more of them"[122]. Two weakness points come up from these statements which created several debates within the international community concerning the interpretation of the Hague Declaration. The former regards the lack of a more detailed wording on the agents that must be banned during armed conflicts. The latter case concerns the fact that the Hague Convention included what is known as "general participation clause", which means that it could be applied only to parties in conflicts in which all the parties involved are contracting states[123]. Although the Hague Declaration can be considered the first attempted made to ban the use of chemical agents, its weaknesses could not be underestimated, so that the international community decided to developed a more comprehensive convention on the prohibition of gases, which culminated in the 1925 Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare.

The 1925 Geneva Protocol was a direct consequence of the First World War, especially of the widespread use of unconventional weapons during the War. As the Hague Declaration, the Geneva Protocol condemns "the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices"[124]. This statement includes a bit broader wording compared to the previous one above mentioned; however, even the Geneva Protocol seems to have weaknesses on its content, which, to some extent, restricted its application. Three main deficiencies come up.

The first concern, as in the case of the Hague Declaration, is an interpretative dispute over the prohibited weapons. Several doubts had arisen among states on the interpretation of the "poisonous or other gases", particularly if such statements took into account both riot control agents (RCA) and herbicides[125]. The second case concerning the fact that the restriction on the use of these agents can be applied only in the cases in which states were contracting parties, since "the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition, […] and to be bound as between themselves according to the terms of this declaration"[126]. However, what is even more interesting is that it seemed to permit to the signatory states to make reservations which allowed not to be bound by the prohibition of the

[122] Declaration (IV,2) concerning Asphyxiating Gases. The Hague, July 1899.
[123] ASADA Masahiko, *A path to a Comprehensive Prohibition of the Use of Chemical Weapons under International Law: From The Hague to Damascus*, Journal of Conflict and Security Law, Vol. 21, Issue 2, 2016, p. 156.
[124] Geneva Protocol, 1925.
[125] ASADA M., *op. cit.*, pp. 157-160.
[126] Geneva Protocol, 1925.

Protocol in case another state party did the same during an armed conflict[127]. Finally, the last controversial point concerns the prohibition of such agents in "war". Although there is a general consensus on considering even wars as "armed conflicts", the main issue was whether they covered both international conflicts as well as internal conflicts, as civil wars, like the Syrian case.
However, despite the fact that the Geneva Protocol, for sure, is more specific on the matter related to the ban of unconventional gases in armed conflict, it still has lacunas. This is the reason why the Hague Declaration and the Geneva Protocol still were limited armed control agreements, although they were crucial steps to arrive at the most complete convention on the CW's prohibition, the Chemical Weapons Convention.

2.2.1 The Chemical Weapons Convention

The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, commonly known as Chemical Weapons Convention (CWC), nowadays can be considered a landmark agreement for international disarmament and for the development of law on arms control. The peculiarities of the CWC, which makes it more comprehensive compared to the previous ones, can be summarized as follow: it is considered the first treaty that prohibits, with the support of a verification system, an entire category of WMD and, above all, it has implemented an organization, the Organization for the Prohibition of Chemical Weapons (OPCW), which has broad powers and uses methods of compliance management based on cooperation instead of an adversarial approach.[128] Such Convention reflects all the efforts made by the international community to prohibit the use of poison gases in war. Indeed, the provisions contained in the treaty are the result of customary norms evolved during the past centuries and of those norms consolidated in other treaties, including the Hague Declaration and the Geneva Protocol. Nowadays, the ban of chemical weapons is considered even a part of customary international law[129]. What is now important to stress is the peculiarity of the CWC, in conjunction with the work of the OPCW and their relevance in the field of CW.
First of all, it is important to know that the Geneva Convention was the fundamental treaty for the prohibition of poison gases until the beginning of the 1990s, since it was only on 3 September 1992 that the Conference on Disarmament drafted the text of the Convention, after a long period of exploratory discussion started in 1984, but on 13 January 1993 the text was signed, even though it entered into force only on 29 April 1997.
In order to understand why the Chemical Weapons Convention is the most well-structured treaty in terms of disarmament, the basic obligations are the first aspect to analyzed since they underline the main purposes of the Convention. Generally speaking, although toxic and precursor chemical agents are present in the modern life and their use cannot be prohibited, the Convention is focused on the prohibition of chemical weapons.

[127] ROBERTS Adam, RICHARD Guelff, *Documents on the Laws of War*, eds., 2ed.rev. 1989, quoted by FIDLER D.P., *op. cit.*, p. 50; ASADA M., *op. cit.*, pp. 160-163.
[128] KRUTZSCH Walter, MYJER Eric, TRAPP Ralf (edited by), *The Chemical Weapons Convention. A Commentary*, Oxford University Press, Oxford (UK), 2014, p. 3.
[129] *Ibidem.*

Before entering into the details of some Articles of the Convention, it is important to have a general overview about the structure and content of the CWC.

The general principles of the Convention are contained in the General Purpose Criterion and their aim can be summarized as follow: "*all* toxic chemicals and their precursors are prohibited chemical weapons, *except where intended for purposes not prohibited*"[130]. The scope of the CWC is set forth in Article I and Article II, respectively. The former is in line with the comprehensive prohibition and general obligations, while the latter gives a more detailed description about what chemical weapons means. With respect to the other provisions, Article III, IV and V deal with Chemical Weapons Disarmament; Article VII National implementation; Article VIII set forth the main purposes and structure of the OPCW and, finally, those articles which set forth the Verification System.

Entering into more details of the General Purpose Criteria, Article I, para. 1, provides as follow:

> 1. "Each State Party to this Convention undertakes never under any circumstances:
> (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;"[131]

If it is the general obligation of the Convention, one more aspect ought to be mentioned. One crucial issue is to determine what, specifically, cannot be, *under any circumstances*, possessed by states. In this respect, Article II of the Convention gives a complete definition of "chemical weapons", but, among all the aspects provided, two paragraphs deserve to be mentioned, para. 1(a) and 2, respectively:

> 1. "Chemical Weapons means the following, together or separately:
> (a) Toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes;
>
> 2. Toxic Chemical means:
> Any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere."[132]

If compared to the previous Conventions, the first important difference to notice is the more detailed explanation of what chemical weapons means. In the former treaties, the definition dealt only with the unconventional use of gases and it was too vague for the subject, creating disputed interpretation. By

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[130] *Ivi*, p.6.
[131] CWC, Article I (1)(a).
[132] CWC, Article II (1)(a), (2).

contrast, the CWC provides a clearer overview of the matter. However, it does not mean that there is no discussion on the Convention interpretation, since the two articles above mentioned cover several aspects and they contain specific prohibition for few agents' use, but the concrete application is considered, to some extent very difficult, although the definitions provided in these articles seem to be clear and undisputable[133].

However, what is even more important and that can be considered a completely new aspect in term of monitoring the proliferation and use of chemical weapons is the verification system. Unlike the definitions of chemical weapons, the articles that provide the verification activities are really well-defined and mostly of them are set in the Verification and Implementation *Annex*. The verification system is a core issue in the evaluation of the CWC; this is mainly due to the difficulties to find in other treaties a so sophisticated verification mechanism, aimed at ensuring compliance. Since the fact that the Convention main purpose is to address a critical security issue, in such case compliance is a more crucial matter compared to other agreements. In this regard, compliance is ensured through three mechanisms: (i) the verification process, (ii) the dispute settlement and (iii) the measures which push to ensure compliances, such as sanctions.

With reference to the verification process, it includes two components: the former is regular or routine verification (ordinary procedures), while, the latter, occurs in case of suspected or alleged non-compliance (extraordinary procedures)[134]. The ordinary procedures are strictly defined and constrained. They are based on the information obtained by national authorities' declarations and by subsequent, on-site inspections, which, however, are limited to the facilities declared by said authorities. According to the ordinary procedures, among the CW that ought to be declared, the existing stocks of CW and abandoned CW are included. After the declaration, the verification mechanism shall ensure "the correctness of the declaration, safety of storage and actual destruction" and detailed information collection over the administration of specific chemicals has to be gathered by the government from industry information[135]. However, to what extent the declarations made by states are reliable remains questionable and if we refer to the Syrian case even more than questionable. In fact, considering that CW have been used even after the government declarations, there are high possibilities that not all the sites and stockpile have been correctly declared. Finally, the extraordinary procedures are implemented when cases of questionable compliance or actual non-compliance occur. In such case, three procedures can be applied: "request for clarification"; "challenge inspection" and "investigation"[136].

However, one delicate matter arises when the verification system is applied: the issue of state sovereignty. It may happen that states are not always willing to submit themselves to international control, especially when the most invasive form of verification shall be put in place. However, it is not easy to define to what extent states have the possibility to avoid controls using the sovereignty argument. This is so because if verification system cannot be applied it would lose its credibility and utility. However, in such circumstance, two

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[133] BOTHE Michael, RONZITTI Natalino, ROSAS Allan (edited by), *The New Chemical Weapons Convention - Implementation and Prospects*, Kluwer Law International, Zuidpoolsingel (NL), 1998, pp. 3-4.
[134] *Ivi*, p. 7.
[135] *Ivi*, p. 9.
[136] *Ivi*, pp. 10-11.

observations need to be made. On the one hand, as stated by Raija Hanski in "*The New Chemical Weapons Convention - Implementation and Prospects"* the argument of state sovereignty seems to be meaningless since the fact that if one state decides to ratify the Convention it means that it should accept even the assumptions of the treaty as a whole and, in such specific case, it should accept the verification and inspections provisions contained in the CWC. It is also true that even though a state ratifies an arms control agreement and, consequently, the verification system, it does not imply that a state would accept in any case inspection on its territory and would renounce to any right of refusal[137]. On the other hand, what may happen is that if the provisions about verification and inspections are too broad and specific restrictions concerning the inspections are not mentioned, the possibility to refuse inspections are left to the State Parties which can decide, for instance, to postpone controls to a period more suitable for them[138]. However, in the specific case of the CWC, guiding principles of the Verification system have been laid down. Among the general rules set in the *Verification Annex*, each State Party "shall inform the Technical Secretariat in writing of its acceptance of each inspector and inspection assistant"[139] within 30 days and moreover, in case of the State Party refused the inspection, it shall give the reasons why. It means that in the said Convention there seems to be the possibility of non-acceptance, but with reasonable grounds. In conclusion, the issue related to state sovereignty creates the need to find a difficult balance between the security interests of the contracting States and the credibility of the verification system itself.

In addition to the Verification System of the Convention, the last relevant aspect to take into consideration is the establishment of the supervisory organization, which has the duty to supervise provisions' compliance within the contracting States. The OPCW is an independent international supervisory organization within the framework of the UN system, but it is not a specialized Agency. As already mentioned, Article VIII, paragraph 1, delineates the purpose of such organization, while paragraph 4 describes how the OPCW is structured. Article VIII, paragraph 1, of the Convention reads as follow:

> 1."The States Parties to this Convention hereby establish the Organization for the Prohibition of Chemical Weapons to achieve the object and purpose of this Convention, to ensure the implementation of its provisions, including those for international verification of compliance with it, and to provide a forum for consultation and cooperation among States Parties."[140]

With regards to the body of the Organization, it is made up by three organs: the Conference of the States Parties (CSP), the Executive Council (EC) and the Technical Secretariat (TC). Without entering into details of each organ, what is important to know is the relevance of the CSP, especially for the future initiatives

[137] *Ivi*, p.43.
[138] *Ivi*, pp. 42-44.
[139] CWC *Verification Annex*, Part II, Article 2.
[140] CWC, Article VIII(1).

taken within the CSP[141]. According to the rules set forth by the CWC, "The Conference shall be the principal organ of the Organization"[142], whilst the function of the other organs have mainly the function to assist the CSP. Indeed, it is made up by all the States Parties of the CWC and the veto of each member is equal. Within the decision making-system, decisions are divided in matters of procedure and matters of substance. In the former case, relevant decisions are taken by simple majority, considering the member present and voting; in the latter case, the decisions are taken by consensus[143].

Applying all these acquired notions to the present case-study, it would be wise to bear in mind that Syria, for many decades, decided not to join the CWC. However, after the Ghouta episode, when the United Nations Investigation Mission declared the use of chemical agents, Assad decided to ratify the Convention and, therefore, to declare all production facilities and chemical weapons stockpiles. Many doubts arose in the following years over the credibility of the regime' declarations, since, as it will be seen thereafter, chemical weapons will be used again.

2.3 Customary International Law

As stated in the Statute of the International Court of Justice, as well as in several ICJ judgments on customary international law, international custom can be defined "as evidence of a general practice accepted as law"[144], circumstance that is generally determined by two aspects: *diuturnitas* and *opinio juris* of States. As a consequence thereof, the preferable analysis to evaluate how customary international law dealt with CW is by evaluating the past state practice which employed chemical weapons in armed conflicts and the consequent international community response. In this regard, two important episodes will be quoted. The former concerns the use of chemical agents in the Iran-Iraq war, with particular attention to Halabja attack, while, the latter, concerns the Amendment of Article 8 of the Rome Statute of the International Criminal Court (ICC), in 2010.

With regards to the Iran-Iraq war 1980-1988, what is relevant for the analysis are the gas attacks which occurred in the Iraqi region Halabja, against the Kurdish population, which killed around 5000 people and wounded around 10.000[145]. However, the UN faced several problems to deal with that attack, in terms of investigation, since the fact that although the UN Secretary General requested for a direct investigation where the attacks occurred, Iraq and Turkey denied the access[146].

Nevertheless, what is particularly interesting is that the above mentioned case has been discussed with the decision of the International Criminal Tribunal for the former Yugoslavia concerning the *Tadić Case* in 1995, which examined the Halabja episode. What shall be underlined in the ICTY decision, is that "[…]

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[141] Within the CPS several decisions have been adopted, but, one of the most relevant was the Decision taken in The Fourth Special Session of the Conference of the States Parties to the CWC with the aim of "Addressing the Threat from Chemical Weapons Use", on 27 June 2018.

[142] CWC, Article VIII (19).

[143] CWC, Article VIII (18).

[144] Statute of the International Court of Justice, 1945. Article 38 (b).

[145] ASADA M., *op. cit.*, p. 188.

[146] *Ibidem*.

States have stated that the use of chemical weapons by the central authorities of a State against its own population is contrary to international law"[147]; it seems that there was a general consensus among the international community to condemn the use of chemical weapons by Iraq in the Halabja attack[148]. Nevertheless, in the *Tadić* decision what is even more significant for our analysis are the paragraphs 124 and 125 of the Judgment, which read as follow:

> 124. "It is therefore clear that, whether or not Iraq really used chemical weapons against its own Kurdish nationals […] there undisputedly emerged a general consensus in the international community on the principle that the use of those weapons is also prohibited in internal armed conflicts.
>
> 125. State practice shows that general principles of customary international law have evolved with regard to internal armed conflict also in areas relating to methods of warfare. In addition to what has been stated above, with regard to the ban on attacks on civilians in the theatre of hostilities, mention can be made of the prohibition of perfidy […]."[149]

What is relevant in such Judgment is the development of a general agreement about the prohibition of chemical weapons in the armed conflict that is one of the main aspect that determines an international custom, creating a common consensus among the states on this practice, which finally consists in the prohibition of CW in internal armed conflict. In other words, these statements seem to create general accepted rules over the use of these specific weapons in conflicts, as the *Tadić Case* shows.

Having analyzed the first matter, it is now interesting to deepen the question of the Rome Statute of ICC of 1998. The reason behind the analysis of the Rome Statute, which has the jurisdiction over international crimes, "the most serious crimes", is to understand whether CW use in internal armed conflict becomes a subject of the ICC jurisdiction[150].

Turning to the details of this aspect, the ICC Statute includes a series of specific weapons whose employment comes under its jurisdiction since identified as war crimes. Indeed, according to Article 8 para. 2(b) of the Rome Statute, it is considered a violation of laws and customs of international armed conflict:

> "(xvii) Employing poison or poisoned weapons;
> (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices"[151].

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[147] ICTY, Appeal Chamber, *Prosecutor v. Dusko Tadić*, *Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction*, 2 October,1995, para. 120.
[148] *Ivi*, para. 120-123.
[149] *Ivi*, para. 124 and 125.
[150] ASADA M., *op. cit.*, p. 194.
[151] Rome Statute of the ICC, Article 8 para. 2 (b).

From the article above mentioned, it appears evident that the definition of CW, as contained in the CWC, has not been utilized (although it was already in force) but seems to duplicate the 1925 Geneva Protocol. The decision not to mention CW is linked to the fact that, at the time of negotiation of the Rome Statute, there was not a general agreement on including even nuclear weapons under ICC jurisdiction. Although the general idea was not to include any WMD in the Statute, since the fact that an agreement was not reached on such matter, the final compromise was to comprehend the use of CW under the article above mentioned, even if it was not clear if all the states agreed on such point[152].

The latest development in terms of chemical weapons prohibition is based on the amendment of such Article during the Review Conference in Kampala, 2010. A part from the general amendments made to the Statute, what is significant for the present analysis was the decision, supported by Belgium and accepted by a general consensus of the other contracting parties, to find a way to address individual criminal accountability for the use of CW, not only under international armed conflict but even in internal armed conflict. In this regard, the state parties decided to include under the jurisdiction of the ICC a more ample range of war crimes in internal armed conflict, especially in the field of chemical weapons. As a consequence thereof, the contracting parties adopted Resolution RC/res.5 which amended Article 8 and added to said article para. 2(e) provisions (xiii), (xiv) and (xv), considering the crimes related to such article as "serious violations of the laws and customs applicable in armed conflict not of an international character, as reflected in customary international law"[153], as written in the Preamble of the Resolution. Among the several provisions added, the violation of "employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices"[154] was included even in non-international armed conflict.

However, one important aspect shall be underlined. In Article 8 of the ICC Statute, which deals with war crimes, the use of CW is not explicitly mentioned; therefore, the matter debated is whether the jurisdiction of the ICC comprises also the employment of these unconventional weapons. Nevertheless, the new provisions set forth by the amendment of Article 8 could be viewed as a means to include in the ICC jurisdiction even chemical weapons. It means that the 84 contracting states, which took part at the Kampala Conference, agreed that the use of CW must be considered a violation of customary international law in internal armed conflicts, as clearly indicated in the above mentioned Resolution which adopted the new Article 8 para. 2 (e)(xiv)[155].

Having analyzed the last development before the adoption of Resolution 2118, one relevant point should be mentioned. Although all the efforts made to prosecute the use of these weapons, the Syrian situation cannot be referred before the ICC. In fact, Syria did not ratify the Rome Statute and the Court has only jurisdiction on those States that are parties of the Statute or those that accept its Jurisdiction, or in case of Security

[152] ASADA M., *op. cit.*, pp. 195-196.
[153] ICC Resolution RC/es.5*, *Preamble*.
[154] Rome Statute of the ICC, Article 8 para. 2 (e)(xiv).
[155] ASADA M., *op. cit.*, p. 198.

Council referral[156]. To conclude, Article 8, para. 2(b) and Article 8 para. 2(e) classify the use of CW as a serious violation "of laws and customs" in both international and non-international armed conflict, including the employment of these unconventional weapons in the list of war crimes. Except for these two examples mentioned above, there are other several statements and practice by states which have the common feature to consider the employment of chemical weapons as a prohibition under customary international law[157].

2.4 The application of the CWC in non-international armed conflict

The application of the CWC originated several issues in terms of international law compliance, as it will be seen in the following chapters. However, one of the most debated issue concerns the applicability of such Convention during an armed conflict of non-international nature, as in the present case because of the civil war status of the Syrian conflict. Since the CWC is generally perceived as disarmament or arms control treaty, it will be interesting to analyze if it can be applied only in peacetime or if it is still in force even when a conflict arises.

It is worth mentioning that, generally speaking, the law of the treaties is regulated by the Vienna Convention on the Law of Treaties of 1969, which is a multilateral treaty on treaty law with the aim to delineate the concept of treaty for its own purpose and to determine its own area of application[158]. Nevertheless, the analysis of the Vienna Convention will not be the subject of the present work, but it is a helpful starting point in order to have a view of this matter as much comprehensive as possible.

In spite of the importance of the Vienna Convention, it does not take into account two important circumstances which can lead towards the suspension or the termination of treaties: international armed conflict and State succession. Indeed, according to Article 73 of the 1969 Vienna Convention on the Law of Treaties "the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of states or from the international responsibility of a State or from the outbreak of hostilities between States"[159]. Without taking into account the matter of State succession, the reason why the Vienna Convention does not deal with the matter of treaty during armed conflict has historical past reasons. First of all, it could happen that many treaties were revisited at the end of the conflicts, in order to decide whether they could still be applied or they should be definitively dropped[160]. Second, according to past experiences, it was more likely that treaties ended with armed conflict, since the war was seen as a classic field of *rebus sic stantibus* application[161] (legal doctrine that justifies the inapplicability of a treaty due to a substantial change of circumstances compared to the period when the treaty was ratified). This practice was due to the fact that the idea of armed conflict in the past was strictly linked to the First and Second World War, so it was

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[156] Rome Statute of the ICC, Articles 12 and 13.
[157] HENCKAERTS Jean-Marie, DOSWALD-BECK Louise, *Customary International Humanitarian Law*, Cambridge University Press, Cambridge (UK), 2005, p. 260, note 7.
[158] KOLB Robert, *The Law of Treaties. An Introduction*, Edward Elgar Publishing, Cheltenham (UK), 2016, p. 21.
[159] Vienna Convention on the Law of Treaties of 1969, Article 73.
[160] KOLB R., *op. cit.*, p. 242.
[161] *Ibidem*.

understandable that, in case of an armed conflict of this magnitude, the condition of *rebus sic stantibus* could occur.

However, in more recent times, the stability of the treaty seems to have made progress. In other words, the inapplicability of treaties in times of armed conflict seems to be reduced. This is because the concept of conflict has changed over time. If at the time of Vienna Convention a conflict was strictly linked with the idea of "war" which means "a legal status flowing from an expressed act of will to enter into a state of war, normally by a formal declaration of war"[162], in more recent times, the armed conflict is defined as "a situation in which there is resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups"[163]. It means that the extent and the intensity of the current conflict cannot be compared to those that took place in the past.

As mentioned above, the armed conflicts are divided in two types: international armed conflict and non-international armed conflict. Although the nature of the conflicts is different between the two types, for the purpose of this analysis it is worth mentioning that the source of law of non-international armed conflict is not complete and it is still in progress, because, until recent times, dealing with non-international armed conflict, as civil wars for instance, was a matter of the state itself[164]. Generally speaking, it might be said that the law of non-international armed conflict partially reflects the public international law, it means that the sources of law for non-international armed conflict consist with the source of the general international law which include treaties, custom and general principles[165].

However, as reported by the International Law Commission (ILC), in more recent times the distinction between the two types of armed conflicts is blurred, indeed the definition given by ILC of "armed conflict" does not include any specific reference to one or another type of conflict[166]. Moreover, according to William H. Boothby, in his analysis on *Non-International Armed Conflict*, he concludes that "there is a general tendency towards convergence between the law of weaponry as it applies in international, and, respectively, in non-international armed conflict"[167]. This first analysis is to say that there is a common belief according to which treaty law on weaponry is applicable not only in time of international armed conflict, but even in time of non-international armed conflict, as happened in the case of the CWC.

Having said that, since there are not clear norms that regulate the application of the CWC in time of armed conflict, it is helpful starting with the states practice in internal conflict, even before such Convention entered into force in 1997. For instance, the use of poison gas, at that time prohibited by the 1925 Geneva Convention, was employed in the Yemeni civil war in 1960, but such use was condemned by several states. In the same manner, the use of chemical weapons by the Portuguese force in Angola and Mozambique,

[162] *Ivi*, p. 243.
[163] ILC, *Draft articles on the effects of armed conflicts on treaties,* 2011, Article 2 (b).
[164] RONZITTI Natalino, *Diritto Internazionale nei Conflitti Armati*, VI Ed., Giappichelli Editore, Torino, 2017, p. 365.
[165] SIVAKUMARAN Sandesh, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford (UK), 2012, p. 101.
[166] ILC, *op. cit.,* Commentary on Article 2.
[167] BOOTHBY William H., *Weapons and the Law of Armed Conflict*, Oxford University Press, Oxford (UK), 2016, p. 333.

during the second half of the past century, was generally condemned[168]. Although these episodes had not led yet towards the creation of customary international law over the use of chemical weapons in non-international armed conflict, one important step forward was represented by the international community reaction to the use of gas and chemical weapons by the Iraqi authorities against the Kurdish civilians in Halabja, in 1988; since that time, the rule of customary international law which forbids the use of chemical weapons had taken shape[169].

Having seen that the use of chemical agents and other poison gas against civilians can be considered contrary to customary law even for internal conflict, it is now time to discuss the case of CWC application in internal armed conflict.

Generally speaking, it can be said that there is a common belief in the doctrine according to which the CWC is binding even in time of internal armed conflict. According to a common theory, said assertion is justified by the General Obligations of the Convention which declares that States Parties "undertakes never under any circumstances" the use of chemical weapons, which means even in time of non-international armed conflict, as S. Sivakumaran said[170]. It came to the same conclusion even W.H. Boothby which remarked that the statement "never under any circumstance" means that the treaty is applied both to international and non-international armed conflict and, in addition, the prohibition of chemical weapons in non-international conflict is a matter of customary law[171].

Along the same line of thought, a detailed explanation was given by A. Gioia in *The Chemical Weapons Convention and its application in time of armed conflict*. First of all, he started with the analysis of the provisions set forth in the Convention. The provisions set forth in the *Preamble* of the Convention determine that the CWC has the aim "to exclude completely the possibility of the use of chemical weapons" and then, recalling the 1925 Geneva Protocol, the Convention has also the aim to exclude the possibility to use certain gases in War[172]. Moreover, A. Gioia recalls that State Party "undertakes never under any circumstances" the use of chemical weapons and other activities. From these provisions, therefore, it seems unreasonable that the CWC could not be applied in time of armed conflict[173]. In addition, there are two other effective arguments which are proposed by the author. Above all, if it may be argued that the prohibition set in Article I(a) "to develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons" may suggest the application in peacetime (even though it is not the case) the clear prohibition of the use of chemical weapons has the aim to outlaw such weapons as a *means of warfare*[174]. As things stand, there should be no doubts over the application of these provisions in time of armed conflict. The latter, and last argument, takes into account the doctrine of *rebus sic stantibus*. Since the CWC is a multilateral treaty, unless a situation of a general war occurs, as in the case of the two World

[168] SIVAKUMARAN S., *op. cit.*, p. 394.
[169] *Ibidem*.
[170] SIVAKUMARAN S., *op. cit.*, p. 395.
[171] BOOTHBY W. H., *op. cit.*, p. 324.
[172] CWC, *Preamble*; BOTHE M., RONZITTI N., ROSAS A., *op. cit.*, p. 381.
[173]CWC, Article I(a); BOTHE M., RONZITTI N., ROSAS A., *op. cit.*, p. 382.
[174] *Ibidem*.

Wars, it is unlikely that the outbreak of an armed conflict, in the way it is currently defined, could be invoked as a legal ground to terminate or suspend a treaty[175]. Indeed, the CWC, as others disarmament or arms control agreements, provides the possibility to withdraw from the treaty, if "extraordinary events" have threatened the interests of the states[176].

In light of the above, according to A. Gioia the application of the CWC in time of armed conflict can be considered as a matter of principle. However, even though A. Gioia does not explicitly mention non-international armed conflict in his analysis, as above mentioned the distinction between the two types of armed conflict is not so clear-cut, so it is possible to apply this last examination even to the case of an internal armed conflict.

Nevertheless, before ending such analysis, two last considerations, confirming the applicability of the CWC in time of non-international armed conflict, shall be made.

The first consideration has been widely discussed in the section of international customary law which deals with chemical weapons use. It was already mentioned that, as a result of the amendment of the Rome Statute at the Kampala Conference, the ICC prohibits the use of chemical agents and other gases "in armed conflicts not of an international character", which indirectly confirms that the application of the CWC is valid even during non-international armed conflict.

Until now only the non-international character of the Syrian civil war has been taken into account; however, one consideration should be pointed out before drawing the conclusion. Since the status of "civil war", the conflict in Syria is generally described as an internal armed conflict. Nevertheless, the role played by Russia, Hezbollah and Iran confirms even the international character of the conflict itself. For the end of such analysis, this assumption will not change the fact that the provisions set by the CWC will bind even the actors involved in a conflict of international character, for the reasons above mentioned. In addition, under customary law is the same: the ICC prohibits the use of CW under Article 8(b) for conflict of international character.

However, to put an end to all the doubts concerning the applicability of said Convention, it is worth mentioning the last statement of the ILC, during the 2011 session. According to Article 3 of the ILC, *Draft articles on the effects of armed conflicts on treaties*, the General Principle states that:

> "The existence of an armed conflict does not ipso facto terminate or suspend the operation of treaties:
> (a) as between States parties to the conflict;
> (b) as between a State Party to the conflict and a State that is not."[177]

In light of the above, it is clear that the ILC confirms that the CWC must be applied to conflict of

[175] *Ivi*, pp. 382-383.
[176] *Ivi*, p. 383; CWC, Article XVI (2).
[177] ILC, *op. cit.*, Article 3.

international and non-international character. For the purpose of the present analysis it means that the CWC must be applied to all the parties involved in the Syrian conflict.

2.4.1 The application of the CWC to non-state actors

Finally, since we are talking about non-international armed conflict, a comment about the possible application of the CWC to non-state actors shall be made. However, few considerations over the legal status of the non-state actors are firstly required. More in details, the question is whether the CWC is also binding for insurgents and rebels, since, with high confidence, chemical agents have been used even by them.
Generally speaking, the legal status and legitimacy of these groups is still controversial. There is a common belief within the international community according to which for non-state armed groups any legitimacy or legal status is provided, including any legal status which can deal with the application of international humanitarian law[178]. Nevertheless, it cannot be denied that, in the event an insurrectionary movement occurs and the rebels are capable to create a government organization able to effectively control territories within a state, as in the Syrian civil war, international legal subjectivity should be recognized, even for an interim period[179]. Having said that, it is believed that such legal subjectivity is restricted only to the international law of war, which means that the rebels shall respect those rules that prescribe limitations of wartime for the protection of civilians; whilst, in other cases, their legal subjectivity should be recognized by third states[180].
Nevertheless, there is no question that the application of international weaponry law to rebel or insurgents will varies from rule to rule. In case of the application of a treaty, for instance, the fact that an organized armed group is binding by treaty rules or customary rules that coming from treaty provisions is due to the language of the treaty itself[181]. It means that the treaty can explicitly include in its scope even the application to non-international armed conflicts and in addition, addressing its provisions to states or parties involved in the conflict. However, even though there would seem to be no legal rules dealing with non-state armed group in the CWC, specific customary principles and customary rules, especially concerning the prohibition of chemical weapons, shall bind even rebels and insurgents[182].
Nevertheless, in order to clear up any doubts about such matter, it is worth recalling the 1907 Hague Convention (IV) Respecting the Laws and Customs of War. Indeed, according to the *Martens Clause*, set in the *Preamble* of the 1907 Hague Convention, it is provided that:

> "Until a more complete code of the laws of war has been issued, […] the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity,

[178] SIVAKUMARAN S., *op. cit*., p. 205.
[179] CONFORTI Benedetto, *Diritto Internazionale*, Editoriale Scientifica, Napoli, 10th Ed., 2014, p. 22.
[180] *Ibidem*.
[181] BOOTHBY W.H., *op. cit*., p. 320.
[182] *Ibidem*.

and the dictates of the public conscience"[183].

It is not all. According to Article 1, Section 1, which deals with the category of Belligerents, it is stated that "the laws, rights, and duties of war apply not only to armies, but also to militia and volunteer crops […]"[184]. In the light of the forgoing, it is clear that even non-state actors are subjected not only to the provisions set forth by the CWC, but even by Resolution 2118, which condemns the use of chemical weapons, considered a violation of international law. Although Article 2 of 1907 Hague Convention (IV) provides that the provisions of the said Convention shall be applied only to contracting parties, today the norms set in both Hague Conventions are considered rules of customary international law. It means that international treaty and customary law which prohibit the use of CW are binding even for non-state parties involved in the Syrian civil war.

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[183] Hague Convention (IV) Respecting the Laws and Customs of War, 1907, *Preamble*.
[184] *Ivi*, Section 1, Article 1.

CHAPTER THREE

The Application of the International Regime on Chemical Weapons

3.1 Middle East chemical weapons development

According to a great deal of studies, Syrian chemical weapons program has its roots in the past century, on the wave of other Middle East countries, including Egypt, Iran, Iraq, Israel and Libya, which started to develop their chemical warfare programs in the second half of the XX century. However, knowing the precise extent of chemical weapons in the world is never easy. The development, the possession, and even the use of these war devices are publicly not available, so it is almost impossible to obtain accurate and complete information concerning the proliferation of such weapons. Moreover, it is never easy to establish weather a country possesses chemical weapons, since there is a matter of definition. For instance, talking about countries that have the capacity to produce chemical weapons is not the same matter of talking about countries that have chemical weapons stockpile. There are a lot of states which have legitimate industrial sites for the production of agents and chemical weapons: "production is simple, possession is not easily detected, and latent capabilities exist almost everywhere"[185]. It is interesting to note that chemical weapons production was no longer restricted only to industrialized countries, but, by contrast, the technology required for such production was easy to get, even for lesser developed countries.

However, before entering into details of the Syrian chemical program, it is useful to have a general overview with respect to the development and the reasons behind the chemical weapons production promoted by several Middle East states. Strategic reasons partially explained the intention of some countries to develop weapons of mass destruction, particularly the chemical ones, and this is even the Syrian case.

Among the Arab states, the first country that started to develop its chemical capabilities was Egypt in the early 1960s, when the Egyptian government opened outside of Cairo (1963) the first Company for Chemicals and Insecticides, known as Abu Za'bal, partially supported by Soviet Union aids[186]. The chemical weapons as a tool of war were used mostly for the Egyptian intervention in the North Yemen war and such use was never condemned by the international community. However, what was more questionable was the United Nations' approach to such matter, aimed at not being involved in the issue, although Saudi Arabia made repeated complaints to the Secretary General[187].

Moreover, during the Arab-Israeli War, the Egyptian chemical arsenal grew considerably and in such circumstance, it is easy to interpret the Israeli development of its own chemical arsenal as a reaction to the

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[185] SCHUMEYER Gerard, *Chemical Weapons Proliferation in the Middle East*, 1 April, 1990, p. 25.

[186] QUILLEN Chris, *The use of Chemical Weapons by Arab States*, The Middle East Journal, Vol. 71, Issue 2, Spring 2017, p. 194.

[187] CARUS Seth, *Chemical Weapons in the Middle East*, The Washington Institute for Near East Policy, Number Nine, December 1988, pp. 2-3.

Egyptian previous development program. As stated in the article *"Chemical Weapons in the Middle East"* by Carus Seth, the failure of the international community to punish Egypt previous use of such tools of war has determined an unfavorable precedent which led towards another lack of response for the subsequent use of chemical weapons by Iraq during the period of the 1980s. Indeed, with regard to Iraq, the situation is more complex because it is not completely clear the period when the country started the development of its own arsenal. There is a general agreement on the fact that Iraq started its chemical program since the 1960s, probably influenced by what was happening between Egypt and Yemen and with the aim to contain Israel and Iran powers[188]. However, the formalization of its plan was set after the 1973 Yom Kippur war, due to the need to construct facilities [189].

After the Yemen war, evidences and reports about the chemical weapons use or suspected use among the states in the Middle East became even more frequent over the following twenty years. The fact that chemical agents, as war devices, were not employed in singular cases, but in frequent situations, means that the menace of using such weapons was becoming a common behavior in the region. In more recent times, one of the most dangerous and worrying incident subsequent to the use of such weapons was during the Iran-Iraq war. After United Nations investigations, there was the confirmation that Iraq (member of the Geneva Protocol since 1931) used chemical weapons against Iran in repeated attacks between 1980 and 1988. Nevertheless, the most awful attack occurred in March 1988, in the area of Halabja where thousands of Kurdish people died[190].

Having briefly analyzed the framework in which Syria began to promote its chemical program, before deepening such matter, it is interesting to stress which were the factors that led toward a prominence of these particular kinds of Weapons of Mass Destruction (WMD)[191] in the Middle East area, despite the presence of many treaties and customary law which denied their use. Although it is difficult to have reliable information on the chemical development among these states, several reasons behind such decision came up. The fact that conflicts are still ongoing in some areas means that the possession of these weapons cannot simply be explained in terms of "national prestige" or "strategic reasons", but, more specifically, in terms of "military balances" and "warfighting"[192]. There have been a lot of studies on the increased use of these weapons, but one interesting interpretation has been given in the article "*Chemical Weapons Proliferation in the Middle East*" (1990) where the author tried to explain the reasons behind the extensive chemical weapons modernization program that the above mentioned countries started to follow. In this regard four elements seems to clarify these reasons and can be summarized as follow: (i) *self-preservation* and *deterrence*, (ii) *effectiveness* and *military utility*, (iii) *technology transfer* and (iv) *worldwide complacency*[193].

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188 QUILLEN C., *op. cit.*, p. 195.
189 *Ivi*, p. 196.
190 SCHUMEYER G., *op. cit.*, p. 5.
191 Weapons of Mass Destruction (WMD) include not only chemical weapons but even nuclear, radiological and biological. However, in the present work only the matter related to chemical weapons will be discussed.
192 BENSAHEL Nora, BYMAN Daniel L., *The Future Security Environment in the Middle Est. Conflict, Stability, and Political Change*, RAND Corporation, Santa Monica, 2004, p. 255.
193 SCHUMEYER G., *op. cit.*, p. 5.

The first factor regarding *self-preservation* and *deterrence* shows that several Eastern countries had developed their own chemical arsenal because their neighboring enemies already had nuclear weapons. Moreover, arming a state with chemical weapons it is easier and cheaper than providing for nuclear ones, since chemical weapons require less technical support[194]. For instance, as it will be explained below, there is a general belief according to which Syria seems to have developed its chemical arsenal to offset the Israel nuclear threat. As regards to deterrence, historically, it is well known the fact that no state has ever used a WMD against another that has its same capabilities. Such way of thinking has influenced several countries to develop such tool of war that has deterrent effect.

The second point concerns the *effectiveness* and *military utility.* Generally speaking, chemical weapons is a kind of tool easy to produce, effective and cheap, that is why they are even known as "poor man's atomic bomb" in the Middle East[195]. Moreover, in military terms, states still continue to use chemical weapons since the fact that, all the things considered, the benefits in terms of using them outweigh any negatives: CW can have devastating effects with little costs[196].

Turning to the third point, *technology transfer*, the U.S. has recognized, since the time of the Cold War, that the Soviet Union played an essential role for providing to the Middle East countries, especially to Iraq and Egypt, military assistance, technology transfer and chemical protective equipment[197]. However, it was not the only nation that supported Middle East' chemical development. As stated in the U.S. document "*United States National Strategy and Defense Policy Objectives After Chemical Disarmament*" (1989) the West Germans supported Iraq and Syria for the construction of chemical weapons plant. Nevertheless, they were not the only countries supporting the chemical program of the Eastern countries because other European chemical companies, such as French, Dutch, Swiss and Italian, provided their assistance to Syria, Iraq, Iran and Libya, in order to develop their chemical arsenal[198].

Finally, the last point is strictly linked with military utility in the sense that there are more benefits by employing chemical weapons instead of not using them. The factor of *worldwide complacency* has been partially explained with the previous case of military utility. The main issue, that is confirmed even today because no effective challenges have been undertaken by the United Nations to deal with, is the complete failure of the international community to take effective actions against those states which violate the international laws. Let's take again Iran-Iraq war as an example. UN investigation mission determined that Iraq used chemical weapons several times against the Iranian front, reaching a pick in the use of unconventional weapons in the following years and killing thousands of Kurdish. Even if the Security Council condemned the use of unconventional weapons, the reaction of the international community was questionable: although the evidence on toxic chemical use, there was no attempt to bring Iraq before the

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[194] *Ivi*, p. 6.
[195] *Ivi*, p. 7.
[196] *Ivi*, pp. 7-8.
[197] *Ivi*, p. 9.
[198] HARRISON David, ROBERTS Jan, *United States National Strategy and Defense Policy Objectives After Chemical Disarmament*, 19 March, 1989, p. 16.

International Court of Justice[199], even considering the fact that such country ratified the Geneva Protocol in 1931. Indeed, it may be argued that, although there have been a lot of complications in the Iran-Iraq war and not only the United Nations can be blamed, the action of the Security Council cannot be considered faultless. Several reasons exist behind the Security Council failure to deal with that conflict. Among other things, some clear factors explain said inefficiency. First of all, it was due to a Security Council's conduct in favor of Iraq, a general unwillingness and reluctance to determine those considered accountable and there was not a complete collaboration among Security Council' members to support the peace process[200]. Moreover, the last point concerns the statement of Brian Urquhart, who was Under Secretary-General for Political Affairs from 1972 to 1985 and expressed its thought about one main limit of the Security Council:

> "the permanent members [of the Security Council] would rise above their national interests and respond to the challenge of being the guardians of world peace."[201]

Reading these words, it seems that such statement is awfully contemporary and can be even applied to the Syrian study. As the Iran-Iraq conflict demonstrated, the Security Council was unable to assure a collective security system required by the U.N. Charter, since the permanent members were acting according to their own purposes[202]. It does not mean that nothing has been done to put an end to the conflict. Notwithstanding several attempts of cease-fire, call for an end to peculiar fighting method, for instance banning the use of chemical weapons, has been implemented, even if with partial results. But the point is that even after 20 years from the Iran-Iraq conflict, the Security Council "primary responsibility for the maintenance of peace and security" seems to show a lack of a binding and legal oversight mechanism. The same deadlock is occurring in the case of the Syrian conflict.

3.1.1 The Syrian case

Having analyzed the development of the chemical weapons in the Middle East, let now focus on the beginning and development of Syrian chemical program. Although the Syrian government has never admitted the possession, there is a great deal of official statements which have confirmed the existence of CW or production facilities since the last century.

There is an overall agreement among the researches according to which the Syrian regime began its program between the 1970s and 1980s. Indeed, as reported by the Center for Strategic and International Studies in the report "*Weapons of Mass Destruction in the Middle East*" (2000), since the beginning of the 1970s Syria started to acquire small quantities of chemical weapons from Egypt, but, at the same time, USSR and Czechoslovakia supplied chemical warfare gear to the country. However, one cannot believe that all the

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[199] WEEKLY Terry M., *The Proliferation of Chemical Weapons: Putting the Genie Back in the Bottle*, 24 February, 1989, p. 21.
[200] FERRETTI Matthew J., *The Iran-Iraq War: United Nations Resolution of Armed Conflict*, Vol. 35, Issue 1, 1990, p. 241.
[201] *Ivi*, pp. 243-244.
[202] *Ivi*, p. 244.

Syrian chemical arsenal come from the aids of foreign states. Indeed, in order to support its program, the country encouraged the growth of pharmaceuticals industries in its own territory, as a means to hide the acquisition of substances related to the production of the chemical weapons[203]. For instance, the use of pharmaceuticals plants was focused on the production of poison gas that is considered a chemical agent. In this respect, there were two main European suppliers in the past century, which supported this plan: the German and the French companies.

With regard to the former, several German companies which dealt with pharmaceuticals or chemicals products and machine-building activities assisted Syria to set up its production sites[204]. As regards to the latter, French pharmaceutical industries seemed to be located in Syria since 1980. Many companies started to build their production sites in Syria in order to obtain the license for French pharmaceuticals selling. Some data can confirm how important the French aids for Syria were: after the construction of French facilities the Syria's pharmaceuticals imports increased their value from 13.11% in 1982 to 23% in 1986[205]. Among the other nations contributing to provide material for chemical weapons, even China seemed to supply Iran and Syria with CW.

However, if one may argue that in the past century Syria was building its chemical weapons facilities with the support of foreign aids, at the eve of the new century, it is possible to state that this country "is now believed capable of producing several hundred tons of CW agents per year"[206]. As reported by the studies "*Weapons of Mass Destruction in the Middle East*"(2000), the research made by FAS states that at the beginning of the new century, four production facilities, without considering a great deal of suspicious sites, have been identified. One site was located in the north part of Damascus; the second was close to the industrial area of the city of Homs, while the third and the last sites were located in Hama and in Cerin, aimed at the production of toxic chemical agents in addition to sarin and tabun and at the production of biological agents respectively [207].

Having seen how Syria had developed its chemical arsenal, in order to have a view as much complete as possible, the Syrian strategic reasons which led towards the development of a chemical arsenal must be taken into consideration. Among the incentives that lead Syria towards the growth of its CW capabilities, the first motivation that comes up was in terms of security, more than prestige, even because the Middle East has always been characterized by regional conflicts that created instabilities in the area. However, what is linked to the Syrian security was the possibility to military balance the growing power of Israel. Indeed, there is a common belief according to which "a strong relationship exists between Israel's nuclear capability and

[203] CRDESMAN Anthony H., *Weapons of Mass Destruction in the Middle East*, Center for Strategic and International Studies, September 2000, p. 38.
[204] *Ibidem*.
[205] *Ibidem.*
[206] *Ivi*, p. 39.
[207] *Ibidem*.
As evidence that these sites were actually dedicated to the production of chemical and biological agents it is worth recalling the 2018 missile strike carried out by the Western countries, involving U.S., France and United Kingdom, against Syria. Among the targets, there were a scientific research center in Damascus and a chemical weapons facility in Homes.

Syria's efforts to acquire a sizeable chemical arsenal"[208]. At the beginning of the 1970s, there were several evidences about the nuclear capabilities of the Israel state. There is a great possibility that the idea behind the Syrian CW program was to use it as a "countervailing deterrent" against the Israel nuclear power, although these two different WMD cannot be compared, having the latter a more destructive power.

The turning point for the Syrian chemical program when it effectively took shape was after the signature of the Egyptian-Israeli peace treaty in 1979, although chemical artillery from Egypt was obtained in 1973 but has never been used and Syria military motivations had become even stronger when Israel invaded Lebanon in 1982. In addition to the Israel nuclear threat, there were two other motivations behind the development of chemical arsenal. One of them was Turkey. Besides political and strategic reasons, it was already seen how the relationship between these two countries have been deteriorated due to the Syrian support towards PKK. For this reason, the deterrent explanation behind the chemical arsenal in Syria, considering the peculiar relations with Turkey, cannot be ignored. Syria second concern was Iraq. Nevertheless, a conflict between Iraq and Syria is unlike, since the two states have ethnic ad social ties and they have a common enemy which is Israel.[209].

Nevertheless, if in the past century the growth of Syrian chemical arsenal and its possible use by the regime was not the main concern of the international community, recently the situation has changed. The threat of the Syrian CW use took shape. Even before the first tragic chemical attack in 2013, at the eve of the Syrian uprising, the officials from France, Israel, United Kingdom and the U.S. supported the belief that there have been evidences of the sarin nerve agent use by the Syrian government against the opposition forces[210]. However, before the Ghouta attack, not only the President Assad stated in a newspaper interview that the Syrian government has never confirmed or denied the chemical weapons' possession[211], but also the Syrian foreign ministry spokesman's stated that "Syria confirms repeatedly it will never, under any circumstances, use chemical weapons against its own people, if such weapons exist"[212]. According to the Western countries and Israel, since 2012 there were no doubts that Syria owned a vast stockpile of chemical weapons. Any doubts had been broken down by the attack on 21 of August. It was clear that Syria had reached an independent chemical weapons production capability that had tried probably to reach since many years.

What is peculiar in the Syrian case is the fact that it is likely the first time that the international community started to deal with a civil war where the arsenal of chemical weapons of the state was essentially known, although it was never confirmed by the Syrian forces. At the beginning of the conflict there were two main concerns from the Western countries point of view: the former whether the Assad regime would use

[208] DIAB M. Zuhair, *Syria's chemical and biological weapons: Assessing capabilities and motivations*, The Nonproliferation Review, Vol. 5 Issue 1, 1997, p. 107.
[209] *Ibidem*.
[210] NIKITIN Mary Beth, FEICKERT Andrew, KERR Paul K., *Syria Chemical Weapons: Issues for Congress*, CRS, July 1, 2013, p. 7.
[211] *Ivi*, p. 6.
[212] BBC News, *Syria Crisis: Obama warns Assad over chemical weapons*, 4 December, 2012.

chemical weapons, the latter whether the regime could lose control over the chemical weapons arsenal[213]. After the 2013 attack it was immediately clear that the first concern had already taken shape and what shall be analyzed is how the international community dealt with such matter.

3.2 International community response to the chemical attack and the possible use of force

Coming back to the first main matter concerning the Ghouta attack on 21 August, 2013, the United Nations Mission for the investigation of the use of chemical weapons confirmed the use of chemical agents on 16 September. Even before the response was published, U.S. and other Western states, especially Great Britain and France, shared the idea that, in case of chemical weapons use against civilians, it would not have been without consequences, and the possibility of a military intervention was included. In addition to the breach to international and humanitarian law, what Obama and the other states' leaders were concerned about, was not only the possibility that these weapons could be used in the course of the civil war, but also the possible transfer to Hezbollah in Lebanon or to the terrorist groups which were taking root in the Syrian country and the fear for a possible regime collapse due to a loss of control[214]. In such circumstance, the behavior of the permanent members was different, although they still maintain their previous position in the conflict.
With regards to the United States, the American President showed his intention of a direct military attack after 2013 episode, but, indirectly, U.S. was already military involved in the conflict since there are evidences of American support to the Syrian opposition groups (even before the chemical attack), providing for them weapons, in spite of public opinion aversion. Said aversion was confirmed by some data provide by the American Think Thank, Pew Resew Center, which conducted the survey on December 2012. The results showed that 65% of Americans were against the supply of army by the U.S. and its allies to opposition groups; approximately the same percentage of Americans believed that the United States should not be involved in the Syrian conflict[215]. However, something changed in April 2013, after the complaints made by the U.S. and allies about the Syrian use of chemical agents against the rebels. If such use would have been confirmed, only 31% of the population would have been contrary to a military intervention of the country[216]. The effective attempt to a military intervention arrived after the Ghouta attack, but the Obama administration, before giving any authorization to such action "limited in duration and scope", decided to seek the formal support of the Congress[217]. With regards to the other two Western countries, on the one hand, France still supported a military intervention in Syria, while, on the other hand UK leader David

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[213] NIKITIN Mary Beth D. Nikiti, KERR Paul K., FEICKERT Andrew, *Syria's Chemical Weapons: Issues for Congress*, CRS, September 12, 2013, p. 2.
[214] NIKITIN M.B.D., KERR P.K., FEICKERT A, *op. cit*., Summary.
[215] DRAKE Bruce, *U.S. aid to Syrian rebels: Public has opposed American involvement in the past*, Pew Research Center, June 14, 2013.
[216] *Ibidem*.
[217] LEWIS Paul, *US attack on Syria delayed after surprise U-turn from Obama*, The Guardian, 1 September, 2013.

Cameron, said he would complied with the Parliament will, which has rejected the possible military intervention of the British army.

Faced with such situation, the two remaining permanent members, Russia and China, strongly supported the opposite view, i.e. no-military intervention. In particular, Russia, through the Russian foreign ministry spokesman has warned the international community to demonstrate "prudence" during the crisis and to take actions in accordance with international law[218] .

In such circumstance, even the Arab League made its views heard. It believed on the responsibility of the Syrian regime on chemical attack but, foreign ministers asked the international community and the United Nations "to take deterrent action against the Syrian regime", but every action must be in line with international law and UN Charter[219].

However, the final decision was from the Secretary-General. There was no question, as stated by Ban Ki-moon, that the episode was labeled as "war crime and a grave violation of the 1925 Protocol and other rules of customary international law"[220]; nevertheless, with regards to the possibility of a military attack, he suggested that would be illegitimate. In conclusion, although the UN did not support a military intervention, it does not mean that non-compliance with international law would have remained unpunished. Anyhow, the Secretary General called for negotiable solutions. As a consequence thereof, a military attack was avoided, especially from the U.S. side, when Syria accepted to collaborate in accordance with the U.S. and Russia negotiated deal which imposed to Syria the destruction of every single chemical weapon. Moreover, one unexpected news was the declared intention of the local government to join the Chemical Weapons Convention.

Up to this point, only the international community response has been analyzed, without taking into consideration the fact that the action of Western powers and of the Syrian regime as well, should operate in compliance with international law and customary law. None of the parts involved were allowed to use force, unless specific circumstances are met. This is the reason why both the possibility of a military attack and the use of CW will be analyzed in accordance to international rules, international treaties and customary law. The first case that will be considered is the questionable Western military intervention, particularly, in the hypothetical case it had been carried out by U.S. and to what extent the military intervention would have been justified under international law.

Generally speaking, the link between international law and the use of force is one of the most controversial issues due to the fact that since the previous actions of UN, the way to manage the use of force has always created several disagreements among states. There are a lot of debates concerning the use of force under international law, but also with respect to its content and effectiveness.

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[218] BBC News, *Syria Crisis: Russia and China step up warning over strike*, 27 August, 2013.

[219] ALJAZEERA, *Arab League urges UN-backed action in Syria*, 2 September, 2013.

[220] UN Secretary-General, *Secretary-General's remarks to the Security Council on the report of the United Nations Missions to Investigate Allegations of the Use of Chemical Weapons on the incident that occurred on 21 August 2013 in the Ghouta area of Damascus*, 16 September, 2013.

In the Syrian case, military intervention took different forms. On the one hand, the possibility of a military intervention and, on the other hand, the military support to the opposing forces (such as supply of arms and equipment, finance and training, as an indirect contribution to overthrow the Assad regime) were considered form of unlawful intervention[221]. Both form of intervention will be taken into consideration.
With regard to the former case, concerning military intervention, the starting point for any analysis over the use of force at international level is set forth in Article 2(4) of the UN Charter which was drafted as a consequence of the Second World War, with the purpose to address intra-states conflict. The article reads as follow:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[222]

Such article is the most fundamental provision forbidding the use of force, and, generally speaking, it is also considered as a norm of customary law. Under such circumstance, without any exception to this norm, it might be correctly argue that U.S. intention to take military action in Syria could not be justified under the norms of international law, considered a violation of the article mentioned above.
As regards to the latter case, concerning the legality of providing lethal aid to the rebels, since it is assumed that there are different forms of intervention in the Syrian conflict, another significant debate, less common but equally important, will be taken into account. In particular, the question is to what extent such military assistance can be justified under international law. In this respect, Article 2(4) has no mention over the legality of arming the rebels. However, the lack of jurisdiction over such form of military assistance within the UN Charter is offset by the 1986 Judgment of the International Court of Justice (ICJ) over the *Military and Paramilitary Activities in and Against Nicaragua*. With regards to the latter case, i.e. arming rebel forces, customary international law prohibits the intervention of one state in the internal affairs of another. To briefly analyze what had happened in Nicaragua, it shall be pointed out that this state accused the U.S. for using force against the government of Nicaragua and for providing its aids to the opposition forces for military and paramilitary activities; as a consequence thereof, Nicaragua brought the case to the ICJ against U.S. (1986)[223]. In such case, the Court issued, taking into account the principles of the 1970 *Declaration on Friendly Relations*, among the others, the following Judgment:

> 205. "[…] Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which

[221] GRAY Christine, *International Law and the Use of Force*, 4th Edition, Oxford University Press, Oxford (UK), 2018, p. 114.
[222] UN Charter, Article 2(4).
[223] GRAY C., *op. cit*., p. 77.

> uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State. […] These forms of action are therefore wrongful in the light of both the principle of non-use of force, and that of non-intervention […]"[224].

Moreover, the Court found that the United Sates had committed "*a prima facie* violation" of the non-use of force principle by "organizing or encouraging the organization of irregular forces or armed bands… for incursion into the territory of another State", in support of the *Contras* in Nicaragua[225].

What comes up from the ICJ Judgment is that *Nicaragua Case* is, under certain perspective, really similar to the Syrian one and the Decision of the Court, with the use of 1974 *Definition of Aggression* and of 1970 *Definition on Friendly Relations*, helped to develop customary international rules concerning the non-use of force[226]. This is the reason why, talking about Syrian arming rebels by Western countries, references to the ICJ decision on *Nicaragua Case* usually recurs. Therefore, according to the standard of the ICJ, few doubts exist over the fact that providing arms to the Syrian rebels is considered as "use of force" and, consequently, a violation of the UN Charter provisions and the similar prohibition set in customary law[227]. At the beginning, the U.S. and UK justified their support to the Syrian rebels as "non-lethal aid" and according to the opinion of these two states it was lawful, but even that statement was controversial. Indeed, even though these aids did not involve supply of arms, they included "night-vision goggles, protective gear, armored vehicles, and communication equipment as well as direct financial aid"[228].

To conclude, since the customary law, through the *Nicaragua Case*, covers all these types of assistance, supplying arms to the Syrian rebels would denote an unlawful use of force, but it cannot be classified as an armed attack; only this classification would have justified Syrian self-defense response with the use of force[229].

However, although no one of the above mentioned form of intervention has legal ground, there are few legal justifications which allowed the use of force and other methods of intervention. Indeed, two legal basis are always admitted as a justification for the use of force, expressed in the UN Charter, which are *Self-Defense*, Article 51, and *Security Council Authorization*, Article 42.

Article 51 of the UN Charter, Chapter VII that deals with "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression" states that:

[224] ICJ, *Case concerning military and paramilitary activities in and against Nicaragua*, Judgement of 27 June 1986, para. 205.
[225] *Nicaragua* case, para. 228.
[226] GRAY C., *op. cit.*, p. 13.
[227] SCMITT M.N., *op. cit.*, p. 142.
[228] GRAY C. Gray, *op. cit.*, p. 114.
[229] SCHMITT M.N., *op. cit.*, p. 142.

> 51. “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security […].”[230]

The right to self-defense is also considered a norm of customary law[231]. However, with particular reference to the first part, Article 51 restricts the use of force only in those cases when an armed attack occurs and it means “an attack that has already been launched by one State […] against another State”[232]. Under the circumstance of self-defense, the Security Council cannot consider the use of force as “threats to the peace, breaches of the peace, or an act of aggression”.

In this regard, it is also true that justifying a military attack mainly depends on the meaning attributed to self-defense. There is a controversial debate concerning how self-defense should be interpreted, and, particularly, if it includes even pre-emptive self-defense. For instance, the view of *Benedetto Conforti* and *Carlo Focarelli* embraced the thesis according to which self-defense is understood in the restrictive view defined by Article 51, and, therefore, only in the event of an armed attack. As a consequences thereof, in this view, the belief that self-defense is permitted in case of preventive attacks or attacks which has humanitarian intentions, or aimed to avoid the possibility of drug traffic or against states where terrorism is progressing, has no legal ground in the Charter[233]. However, this was not the case of the U.S. because since the terrorist attack to the Twin Towers on September 2001, the doctrine of preventive self-defense, well-known as Bush Doctrine, was included in the document titled “*The National Security Strategy of the United Nations of America*”, which allowed United States to employ pre-emptive self-defense whenever a terrorist acts or WMD attack was perceived[234]. Although the Bush doctrine has been criticized by many states as well as by the UN Secretary General and the President Obama seemed to leave, at least in theory, such doctrine, United States are developing a new doctrine with the aim to impede “imminent attack”, especially the terrorist ones[235].

Having analyzed the meaning of self-defense and the U.S. approach to Syrian conflict on 2013, it is clear that several issues on the legality of U.S. action arise. Although any military attack could be justified by the U.S. side, being considered in accordance to its domestic law, U.S. approach to Syrian conflict still remains devoid of any legal ground. For instance, it is clear that Syria had not direct attacked the Unites States and, at that time, did not seem to be evidences of any possible intention of future attack. In addition, although the civil war was creating instability within the region, it cannot justify an armed attack in terms of self-defense by the United States.

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[230] UN Charter, Article 51.
[231] *Nicaragua* case, para. 176.
[232] CONFORTI Benedetto, FOCARELLI Carlo, *The Law and Practice of the United Nations*, 4th Rev., Ed. Martinus Nijhoff, Leiden, (NL), 2010, p. 213
[233] *Ivi*, pp. 212-213.
[234] *Ivi*, p. 214.
[235] GRAY C., *op. cit*., p. 6.

The other legal basis which allows the use of force is the *Authorization by the Security Council*, covered by Chapter VII of the Charter, which gives to the Security Council important powers with the aim to maintain the world order, applying coercive measures whether needed. In other words, the Security Council has the discretionary power to adopt enforcement measures against states considered responsible for "threat to the peace", "breach of the peace" and "act of aggression" and to establish armed forces which are under the administration of United Nations. Article 42 allows measures involving the use of force only with the Security Council authorization and it reads as follow:

> 42. "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."[236]

In the case where the measures previously adopted by the Security Council, not involving the use of the force as set forth in Article 41, seems not to address the crisis, the use of military force can be authorized against that state which is considered responsible for "threat to the peace", "breach of the peace" and "act of aggression". One point shall be stressed. The main features of such article is that the prohibition to intervene "within the domestic jurisdiction of any state" as provided for in Article 2 para. 7 of the UN Charter, does not constitute a limit for the Security Council action since the enforcement measures allowed by the Charter are not included under the limits of domestic jurisdiction; indeed, when domestic crisis, civil wars and violation of human rights occur, the Security Council has the discretionary power to intervene[237]. One matter complicated the enforcement measures under Chapter VII, which is the determination of a "threat to the peace", "breach of the peace" and "act of aggression"[238].

However, in the present case, as it is possible to observe, the Security Council was unable, after the 2013 attack, to adopt any resolution which allowed enforcement measures (even because a diplomatic solution was finally proposed); consequently the hypothetical military attack by the U.S. could not be justified under international law.

In the light of the above, the circumstances mentioned do not satisfy what is required to justify a military intervention under the UN Charter framework. Nevertheless, there are two discussed legal basis which might justify a military attack in Syria: the request of military assistance by the Syrian state itself and humanitarian intervention. Putting aside for a while the matter related to humanitarian intervention which will be further developed in Chapter Six, the case of military assistance on request by a state shall be underlined.

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[236] UN Charter, Article 42.

[237] CONFORTI B., FOCARELLI C., *op. cit.*, p. 259.

[238] For further details on such matter see: CONFORTI B., FOCARELLI C., *op. cit.*, pp. 204ss.

What makes lawful a military intervention supported by the consent of the government actually in charge is the principle *volenti non fit iniuria*[239]. The consent of the government can be oral, if there is an urgent need to intervene, otherwise thorough a written agreement. Nevertheless, in order to avoid the abuse of such doctrine, four principles which allow the use of force through the State's consent shall be respected. First of all, the consent shall come from the representative government; the practice according to which the rebels of a state are recognized as "legitimate representatives of the people" seems to have no legal ground[240]. Second, the reasons behind the State's request to military intervene in its territory shall be effective, in other words there shall be the effective willingness of the requesting state itself, the request shall not be the consequence of coercive measures addressed to the requesting state[241]. The third point requires that the military action undertaken by the state which will provide military assistance shall not violate the international norms which oblige to assume a rightful behavior not only towards the state that required the intervention but even towards the other members of the international community; finally, the consent given to a third state shall not be in contrast with the norms of international law[242].
The "military assistance on request" has been even the subject of the Institute of International Law during the Rhodes session in 2011 concerning the issues related to the use of force in international law. According to Article 4 of the resolution adopted by the Institute, military assistance on request shall respect the following provisions:

1. "Military assistance may only be provided upon the request of the requesting State.
2. The request shall be valid, specific and in conformity with the international obligations of the requesting State.
3. If military assistance is based on a treaty, an *ad hoc* request is required for the specific case.
4. Any request that is followed by military assistance shall be notified to the Secretary-General of the United Nations."[243]

In light of the forgoing, the conclusion over the legitimacy of the possible use of force by the Western powers can now be drawn. It is clear that the Western intervention does not satisfy neither the provisions set in the UN Charter nor the action of military assistance on request, since the Syrian state has never done such request to the U.S. as well as to UK and France. By contrast, this last justification has been the legal ground for the military interventions carried out by the Russian state, since they occurred under the official request of the Syrian government.

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[239] RONZITTI N., *op. cit.*, pp. 44-45.
[240] *Ivi*, p. 45.
[241] *Ibidem*.
[242] *Ivi*, p. 46.
[243] Institute of International Law, *Present Problems of the Use of Force in International Law. Sub-Group C – Military assistance on request*, 8 September, 2011, Article 4.

CHAPTER FOUR

Legal Framework for the Elimination of the Chemical Weapons in Syria

4.1 Russia and the United States: one step forward

After the Ghouta episode, the Secretary-General set the UN Mission to conduct investigations on the possible use of chemical weapons and to lead appropriate analysis of the case. The investigation team gave its positive response, without explicitly blaming neither the Syrian Army nor the opposition forces. The seriousness of what happened, labeled by Ban Ki-moon as "a war crime" and believed it was a grave violation of the 1925 Geneva Protocol[244], pushed the Western countries, particularly the United States, to think about a military intervention. The use of force was seen as the proper way to cease the violence in Syria, since any Security Council action would have been blocked by the veto of Russia and China. The Security Council deadlock, which occurred immediately after the Ghouta attack, was surprisingly released by the key role assumed by Russia.

Indeed, in the interview given by Vladimir Putin for *The New York Times*, the Russian President, although reiterated his belief that chemical weapons have been used in Syria but by the opposition forces, declared his intention to advocate "peaceful dialogue enabling Syrians to develop a compromise plan for their own future. We are not protecting the Syrian government, but international law. We need to use the United Nations Security Council […]"[245]. This statement leads one to believe that Russia had the intention to collaborate with the Western side. In fact, what Russian President had in mind was to avoid the possibility of a military attack, since it would not have been justified under the United Nations Charter, even reminding that the use of military force "has proved ineffective and pointless", giving the examples of Afghanistan, Libya and Iraq.[246]

This statement might be considered a turning point for the Syrian conflict. What ought to be stressed is the central role assumed by Russia which had the intention to collaborate in order to find a compromise solution for the Syrian crisis and to put an end to the human rights violation through diplomatic tools. As a consequence thereof, the concrete possibility to find an agreement within the United Nations permanent members had shifted the solution back to the United Nations, especially to the Security Council which assumed a central role in this part of the conflict, adopting unanimously Resolution 2118 in accordance with the Syrian government[247]. But that is not all. What seemed unreasonable became a plan in the middle of September, shortly afterwards the CW employment. Under President Putin pressure, the Syrian government,

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[244] UN Doc. A/67/997–S/2013/553, 16 September, 2013, para. 1.

[245] PUTIN Vladimir, *A Plea for Caution From Russia*, The New York Times, September 11, 2013, p. 2.

[246] *Ibidem*.

[247] CASTELLANETA Marina, *Consiglio di sicurezza, armi chimiche e crisi siriana: luci ed ombre*, Diritti Umani e Diritto Internazionale, Il Mulino, Vol.7, Issue 3, 2013, p. 794.

led by Bashar al-Assad, deposited its instrument of accession to the CWC with the Secretary-General on September 14, 2013, by undertaking to comply with the provisional application before the entry into force of the Convention, on October 14[248]. Therefore, Syria would have become the 190th State Party of the Chemical Weapons Convention[249].

In the meeting held in Geneva before the adoption of the Resolution 2118 between the U.S. and Russia, the Secretary of State of United States, John Kerry, and the Foreign Minister of Russia, Sergei Lavrov, declared their mutual determination to outline the program for Syria's chemical weapons destruction. On 14 September 2014, although with several difficulties, an agreement between the two parties was reached. Said agreement, known as "*Framework for Elimination of Syrian Chemical Weapons*", called "for Syria's arsenal of chemical weapons to be removed or destroyed by the middle of 2014"[250], with the supervision and technical support of the OPCW. All the details for the destruction of Syria's chemical arsenal were set through a decision which would have been submitted to the OPCW Executive Council, with particular regard to Article VIII of the CWC in case of non-compliance. Notwithstanding, there was a general agreement between the two States on the quantity of tons (approximately 1000 tons) of chemical weapons, including sarin and mustard gas, that had to be destroyed, there was a large divergence on the number of estimated chemical sites which ought to be destroyed[251].

Based on the Framework for the elimination of Syrian chemical weapons, several points constituted the fundamental support for the upcoming Resolution 2118. In effect, this Framework included the main principles on which the resolution would have been based. In addition, in order to guarantee the immediate adoption of the Security Council Resolution 2118, Russia and the United States wanted to ensure that the resolution would have also provided for:

> "its verification and effective implementation and will request that the Secretary-General, in consultation with OPCW, submit recommendations to the Security Council on an expedited basis regarding the role of the United Nations in eliminating the Syrian chemical weapons programme"[252].

Moreover, considering that the possibility of non-compliance with the CWC and the obligations set in the resolution by the Syrian authorities was not a so unlikely scenario, the two permanent members, in addition to underline that the resolution in question should provide a periodical review of the right implementation

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[248] *Ibidem*.

[249] The Chemical Weapons Convention currently has 193 State Parties. Nowadays, four states remain outside of the Convention: Israel has signed but not ratified the CWC, while Egypt, North Korea and South Sudan have neither signed nor ratified the Convention. For further details see: ARMS CONTROL ASSOCIATION, *Chemical Weapons Convention Signatories and States-Parties*, June 2018.

[250] GORDON Michael R., *U.S. and Russia Reach Deal to Destroy Syria's Chemical Arms*, The New York Times, September 14, 2013.

[251] *Ivi*.

[252] UN, General Assembly, Security Council, *Framework for elimination of Syrian chemical weapons*, UN Doc. A/68/398–S/2013/565, 24 September, 2013.

and application, asked for providing precise measures in the event Syria had failed to comply with the norms. In this regard, "the Security Council should impose measures under Chapter VII of the Charter of the United Nations"[253].

Finally, what comes up from the Letter sent to the Secretary-General was the expectation by the Russian Federation and the United States of an immediate and effective collaboration at the international level. In this regard, not only the Syrian government should submit a reliable list concerning all the details of the chemical agents possessed and the sites located in the region, but also a full coordination and cooperation among all the parties involved was required too, especially among the OPCW, the United Nations and the other States.

The final outcome was the adoption on September 2013 of the Security Council Resolution 2118 which constitutes the solid legal foundation for the Syrian chemical disarmament. On the same day, the OPCW Executive Council adopted the *Formal Decision for the Destruction of Syrian Chemical Weapons*. The OPCW decision set forth all the details in terms of time and scope aimed at ensuring Syria compliance with the obligations of the CWC; among the obligations of the Syrian state, the declarations concerning the State's possession of chemical agents and equipment were included, following by their destruction[254].

4.2 Security Council Resolution 2118

The adoption of the Security Council Resolution 2118 on 27 September 2013 is largely based on the main points stressed in the bilateral US-Russia Framework agreement in Geneva for the elimination of Syrian chemical weapons. The resolution in question constituted a significant measure in terms of Syria chemical disarmament and breaking of the worrying Security Council deadlock which lasted more than two years. In that period, it is worth mentioning that the United Nations did not make remarkable efforts to curtail the perpetration of human rights violation in Syria due to the Russian veto. In this regard, it is considered a historical resolution not only because it was the first successful "legally binding action on Syria"[255] promoted by the Security Council since the beginning of the popular uprising, but also because it constituted an important step forward in the attempt made by the international community to reduce chemical weapons use in war. As a consequence thereof, given the efforts to manage with the crisis, it became again a prerogative of the United Nations and the Security Council assumed a central role for solving this critical situation and regaining its credibility, not only through concrete actions, but also by getting support from Syria itself.

Moreover, another central aspect should be pointed out. The agreement reached had determined the shift from a possible unilateral military intervention of United States in Syria towards a joint diplomatic action. In

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[253] *Ibidem*.

[254] McCORMACK Tim, *Chemical Weapons and Other Atrocities: Contrasting Responses to the Syrian Crisis*, International Law Studies, Vol. 92, 2016, p. 520.

[255] PAVONE Ilja Richard, *La Siria e le armi chimiche: la Risoluzione del Consiglio di Sicurezza 2118 (2013*), La Comunità Internazionale, 2013, p. 742.

this regard, one may well wonder why the Russian Federation strongly opposed to the adoption of repressive measures, such as the use of force, in order to cease the serious violation of international law and human rights. Indeed, Russia and China vetoed several Security Council resolutions, before adopting the Resolution in question. There is a common belief according to which Russia and China hostility towards the adoption of resolutions involving the use of force is partially due to the failed outcome reached with the NATO campaign in Libya: this campaign, indeed, began with the aim to create "no flight zone" and to protect civilians, but finally it shifted towards a military campaign to overthrow the regime[256].
To conclude, it was the first time since the beginning of the civil war that the five permanent members were able to adopt a text unanimously agreed upon over the matter of chemical weapons elimination. The extreme compromised nature of Resolution 2118 was seen as a diplomatic success and two important steps have been made: the former concerning the ability of developing a collective action instead of unilateral intervention, whilst the latter concerning the enforcement of international law in terms of banning the use of CW[257].

4.2.1 General remarks

As reported by the Secretary-General Ban Ki-moon, Resolution 2118 is considered a "historic decision" aiming at the complete destruction of the Syrian CW program[258]. As properly stressed by M. Castellaneta in the article "*Consiglio di sicurezza, armi chmiche e crisi siriana: luci e ombre*" the compromised nature of the resolution as well as its relevance within the framework of CW ban, remarks two important choices: on the one hand "substantial" and on the other hand "legal".
With regard to the substantial aspects, the Security Council decided as follow:

> 1. " […] the use of chemical weapons anywhere constitutes a threat to international peace and security;"[259]

What should be pointed out is the universal character of the Resolution 2118, which clearly prohibits the use of CW "anywhere", "anytime" and "under any circumstance"[260], banning the use of unconventional weapons not only for the Syrian government but also for the other factions involved in the conflict. This principle is perfectly in line with what has been done up to now by the international community to avoid the use of such weapons. In terms of international treaties, the Resolution is in line with the provisions set in the 1925 Geneva Protocol and in the CWC; while in terms of customary law Resolution 2118 is in line with the ICTY Judgment in the *Tadić Case* at the paragraph 124[261] and with the Article 8 paragraph (b)(xviii) and Article 8

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[256] *Ivi*, p. 725.
[257] STAHN Carsten, *Syria, Security Resolution 2118 (2013) and Peace versus Justice: Two Steps Forward, One Step Back?*, Blog of the European Journal of International Law, 3 October, 2013.
[258] UN, Security Council, *Letter dated 7 October 2013 from the Secretary-General addressed to the President of the Security Council*, UN Doc. S/2013/591, 7 October, 2013.
[259] UN, Security Council, *Resolution 2118 (2013)*, UN Doc. S/RES/2118 (2013), 27 September, 2013, para. 1.
[260] STAHN C., *op. cit.*
[261] *Supra* note 149.

paragraph (e)(xiv) of the Rome Statute which consider a violation of "laws and customs" the use of CW in international and non-international armed conflict respectively.

The matter of legal aspects is, by far, more complex. The main feature that should be underline is the fact that the resolution has not been adopted under Chapter VII[262] of the UN Charter, condition that prevented the possibility to undertake provisional measures, for instance ceasefire[263]. However, notwithstanding this important remark, Resolution 2118 still gives the possibility to adopt measures under Chapter VII[264], as it will be analyzed later on. It could be considered that the binding force of the Security Council resolution finds its legal basis in the UN Charter itself; indeed, according to Article 25 of the UN Charter, all the States Parties of the United Nations "agree to accept and carry out the decisions of the Security Council".

The fact that the resolution was not adopted under the Chapter VII is one of the consequences of the compromised nature of the resolution itself. In other words, the involvement of Russia in such decision had pros and cons. On the one hand Russian collaboration allowed the engagement of the Security Council, otherwise this adoption would not have been possible. Nevertheless, on the other hand, the United States had renounced to the possibility of referring the resolution under Chapter VII, with the consequence of not being able to impose immediate sanctions (or other coercive measures) in case of non-compliance by the Syrian government with the obligations set[265]. Indeed, the Syrian Arab Republic, as well as any other group involved in the conflict, has the obligation "not to use, develop, produce, otherwise acquire, stockpile or retain chemical weapons […]" and, moreover, to observe all the aspects of the OPCW Executive Council Decision of 27 September 2013 and to cooperate with the United Nations and OPCW[266].

Moreover, in spite the fact that the use of chemical weapons constitutes a threat to international peace and security, as said in the Preamble of Resolution 2118, the decision not to identify the legal basis of the resolution in question within Chapter VII, shall be considered as a clear indication of the powerful influence of the Russian Federation, which had so obtained a key role within the Security Council[267]. However, it is important to know that given the impossibility to act under Chapter VII, the Security Council can decide to adopt a second resolution, where all the permanent members agree on taking measures under the Article 41 and 42 of the Charter, if Syria does not fulfill its duties.

Another element which underlines the compromised nature of the resolution can be appreciated by the fact that the duties concerning CW disarmament imposed on the Syrian government are the same to those imposed on the other parts involved in the conflict. The explicit reference to all parties involved in the Syrian conflict avoided the possibility to expressly attribute the responsibility for the attack occurred on 21

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[262] The Chapter VII of the UN Charter deals with crisis that are underway and which constitute a "threat to peace", a "breach to the peace" or an "act of aggression". In the cases mentioned by the Chapter VII, the Security Council assumes a central role, since it can decide the actions to undertake for solving the crisis. In order to maintain international peace and security, the Security Council can choose measures such as breaking diplomatic relations, economic sanctions, use of force and others set out by Articles 41 and 42. For further details see: CONFORTI B., FOCARELLI C., *op. cit.*, pp. 175ss.

[263] CASTELLANETA M., *op. cit.*, p. 794.

[264] UN Doc. S/RES/2118 (2013), 27 September, 2013, para. 21.

[265] CASTELLANETA M., *op. cit.*, p. 794.

[266] UN Doc. S/RES/2118 (2013), 27 September, 2013, para. 4,5,6 and 7.

[267] CASTELLANETA M., *op. cit.*, p. 795.

August, 2013, to the Assad government[268].

In light of the above, the key role assumed by Russia at this point of the conflict comes up and its influence is reflected in the provisions of the Resolution. As a matter of fact, the Russian President, with his strategic decisions, had achieved two key results. On the one hand, he has ensured the Russian solidarity to the Assad government, while, on the other hand, Russia provided a kind of pressure over the Syrian government to cooperate with the disarmament process and officially confirmed such cooperation; thereof, if the Syrian government had not fulfilled its obligations, Russia would have lost its credibility[269].

4.2.2 Legal shortcomings and contradictions

Despite the historical and legal importance of Resolution 2118, there are significant weaknesses points that came up. Three main aspects shall be underlined which reflect serious critical issues in legal and substantial terms.

As mentioned above, the first aspect that shall be pointed out is the fact that the Resolution in question was not formally adopted under Chapter VII of the Charter, which means that there was not the possibility to directly apply enforcement measures in case of Syria non-compliance with the norms. Although Russia promised that it would have taken enforcement measures in case of non-compliance by the Syrian authorities[270], the text of Resolution 2118 is not completely clear on this matter. Indeed, according to para. 21 of the Resolution, the permanent members decided that "in the event of non-compliance with this resolution, including unauthorized transfer of chemical weapons, or any use of chemical weapons by anyone in the Syrian Arabic Republic, to impose measures under Chapter VII of the United Nation Charter"[271]. However, in order to impose measures provided by Chapter VII, there is a mandatory step which requires a second Security Council approval.

In light of the above, the fact that there is not a direct reference to Chapter VII, but only a Security Council referral, means that the eventual adoption of enforcement measures under Article 41 and 42 of the Chapter, is possible only through the adoption of a second Security Council resolution since there is no way to interpret the above mentioned articles in order to justify eventual unilateral action[272]. In this regard, it is important to take into account the high possibility of the Russian and Chinese veto on the second resolution, even though Russia was engaged in punishing the Syrian government in case of non-compliance[273]. Now, the contradiction of the text becomes clearer. Since the resolution provides only for Security Council referral, which, in other words, means adopting a second resolution that allows the adoption of enforcement measures, there are obvious reasons to believe that Russia would most likely use its veto and a new Security Council impasse might occur. It is now easy to understand that no progress has been made to deal with a

[268] *Ibidem*.
[269] *Ibidem*.
[270] PAVONE I.R., *op. cit.*, p. 732.
[271] UN Doc. S/RES/2118 (2013), 27 September, 2013, para. 21.
[272] PAVONE I.R., *op. cit.*, p. 733.
[273] *Ibidem*.

non-compliance scenario since a new deadlock is expected at international level. To sum up, the failure to comply with the provisions of the Resolution does not allow to automatically adopting enforcement measures under Chapter VII, for instance the possibility to apply sanctions or other necessary measures to maintain peace and security, as written in Article 41 and 42.

With regard to the second aspect, what appears evident is that no explicit reference was made to those considered accountable for the Ghouta attacks, likely the Assad regime[274]. The Resolution itself only expresses "strong conviction that those individuals responsible for the use of chemical weapons in the Syrian Arab Republic should be held accountable"[275]. However, in this regard some considerations should be done. A likely explanation for the omission of those individuals considered accountable is in line with the UN Mission Report (2013), which only confirmed the use of chemical weapons but did not mention which part used them. In addition, another reasonable interpretation is based on the opposite positions taken by the United States and Russia with respect to those responsible for the massacre: the former against the President Bashar al-Assad whilst the latter against the opposition forces. Indeed, the text of the Resolution, being the outcome of two opposite positions, does not ask neither the Syrian government to cease the violence against the civilians nor affirms the responsibility of the government to protect its own population[276].

Finally, the last remarkable aspect concerns the fact that there is no mention over the repeated use of CW during the conflict which shall be considered a crime against humanity[277].

Therefore, the direct consequence of the above mentioned aspects clearly underlines the inability and unwillingness of the Security Council to find a joint action not only to identify those individuals accountable for the massacre, but even to punish them. Indeed, Resolution 2118 seems to pay little attention on the serious problem of accountability, thus showing a clear contradiction. Formally, the text seems to focus on this crucial issue, considering accountable those individuals who used CW, and, moreover, condemning "in the strongest terms" the use of these weapons, with particular regard to the Ghouta episode, considered a violation of international law[278]. However, even though there are valid assumptions in the text to hold those individuals accountable, the matter of accountability is not properly handled. Indeed, the text of the Resolution does not contain any concrete possibility for the application of criminal jurisdiction. It seems obvious that such omission is clearly in conflict with the criminal nature of the prohibition itself and with any previous possible attempts towards the ICC referral[279].

In this regard, there has been a heated debate about the possible reasons behind a so cautious approach towards the Ghouta massacre, considering that Resolution 2118 was the outcome of that episode. One possible explanation might be given by considering the general purpose of the resolution in question. The main aim was the Syrian chemical weapons disarmament and in order to fulfill this program a close

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[274] *Ivi*, 734.
[275] UN Doc. S/RES/2118 (2013), 27 September, 2013, para. 15.
[276] PAVONE I.R., *op. cit.*, p. 734.
[277] *Ibidem*.
[278] UN Doc. S/RES/2118 (2013), 27 September, 2013, para. 2.
[279] STAHN Carsten, *Syria and the Semantics of Intervention, Aggression and Punishment. On "Red Lines" and "Blurred Lines"*, Journal of International Criminal Justice, Vol. 11, Issue 5, December 2013, p. 974.

collaboration with the local authorities and a deal of information shall be provided by the Syrian government. Any process against the Syrian president would have made things more complicated. It seems clear that Resolution 2118 was based on the idea that the Syrian civil war was ending and the solution of CW matter was the priority, instead of punishing those accountable for gross violations of human rights[280].

To conclude, Resolution 2118 prerogative to disarm Syria instead of stating criminal responsibility has created two drawbacks: on the one hand, the possibility to combine these two purposes has been ignored and, more important, on the other hand it makes the Security Council even more vulnerable to criticisms with regard to international justice, since it has missed the chance to reinforce the role of justice within the framework of intervention[281]. In other words, it is worth recalling that the new focus on chemical weapons shall not detract from the duty of accountability, not only referred to the use of these weapons but also to other kind of violence and crimes committed in Syria[282].

Several initiatives have been done by the international community to deal with individual accountability, combining domestic and international institutions, but none seems to have been successful.

4.2.3 Prospects for International Criminal Justice in Syria

As above mentioned, one of the most critical aspect of Resolution 2118 is the lack of any reference to the possibility to punish those accountable for the crimes committed in Syria. As reported by the Independent International Commission of Inquiry on the Syrian Arabic Republic (2013), the situation in Syria since the beginning of the war was critical. The report confirms the huge array of war crimes and crimes against humanity committed both by the government forces and by the anti-government armed groups[283]. In this regard, the international criminal justice process should provide a concrete foundation for future peace and ensure that those individuals held accountable are punished. Some efforts have been done, but international justice is still facing several difficulties. Indeed, all the efforts made to strengthen the prohibition of chemical weapons at the international level shall be followed as well by the imperative accountability for other kind of violence and categories of crimes. With regard to the Syrian case, war crimes and crimes against humanity have been committed not only because of chemical weapons use, as clearly emerged by the International Commission of Inquiry, but also because of the war itself. In the attempt to seek criminal justice in Syria, several institutions able to prosecute those individuals responsible for the crimes committed have been identified, despite each of them seems to face several difficulties in terms of concrete application. In this regard, five possible institutions, where justice might be sought, have been properly examined in the article "*Seeking International Criminal Justice in Syria*" by Annika Jones. Nevertheless, still today the

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[280] PAVONE I.R., *op. cit.*, p. 735.
[281] STAHN C., *op. cit.*, pp. 975ss.
[282] *Ivi*, p. 977.
[283] UN, General Assembly, *Report of the independent international commission of inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/24/46, 16 August, 2013.

problem of accountability and punishment has not been solved yet.

The International Criminal Court

It was already seen how the ICC dealt with chemical weapons use in Syria. The former case analyzed was the amendment of Article 8 of the Rome Statute at the Kampala Conference (2010) which prohibit the use of CW even in case of non-international armed conflicts. Moreover, it has been already anticipated that the jurisdiction of the ICC over the crimes committed in Syria would have been possible only through a Security Council referral.

Turning into the details of the ICC, it is known that the Court generally act as a "court of last resort", it means that when serious enough crimes occur[284] and the domestic courts are unable or unwilling to prosecute those individuals considered accountable, a potential opportunity to justice is provided by the Court in question. However, in the specific case of finding justice through the ICC over the crimes committed in Syria, some difficulties come up.

First of all, it is well known the fact that Syria did not sign nor ratified the Rome Statute. Under the current circumstances, the ICC can exercise its jurisdiction in Syria if the crime "is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations"[285]. However, a situation in which all the permanent members of the Security Council will agree on joint action to appeal to the ICC is quite difficult to obtain. Indeed, few efforts have been done by the international community in this regard, but with little result. The first attempt was made on 2013, when 64 countries, with the support of six members of the UN Security Council, including France and United Kingdom, had called for Security Council referral; the proposal was not carried out, since the U.S., China and Russia had not supported it[286]. One year later, France proposed a draft resolution (UN Doc. S/2014/348) which had the aim to refer the Syrian crisis to the ICC. However, the draft resolution was blocked, once again, by the veto of Russia and China, an umpteenth demonstration which underlines the Security Council unwillingness to collaborate and to find a joint solution to the crisis. Based on the outcome of the previous attempts, a Security Council referral can be considered highly unlikely.

In this regard, there are few possibilities to stem the Security Council impasse. There is the chance of a post-conflict government decision to ratify the Rome Statute and to refer the Syrian case to the ICC (self-referrals) or, to initiate a preliminary investigation by the Prosecutor through his/her *proprio motu* power of investigation, which may be carried out if "there is a reasonable basis to proceed with an investigation", according to the Article 15 of the Rome Statute[287]. In other words, the ICC could obtain jurisdiction to prosecute individuals who committed war crimes, crimes against humanity or genocide if the Syrian government ratified the Rome Statute or accepted the jurisdiction of the Court by a declaration, or through

[284] The ICC has jurisdiction over serious enough crimes such as genocide, crimes against humanity, war crimes and crimes of aggressions. It has jurisdiction to prosecute individuals and not states.

[285] Rome Statute of the ICC, 1998, Article 13(b).

[286] HUMAN RIGHTS WATCH, *Syria: Criminal Justice for Serious Crimes under International Law*, December 17, 2013.

[287] JONES Annika, *Seeking International Criminal Justice in Syria*, International Law Studies, Vol. 89, December 9, 2013, p. 807.

the Prosecutor, who defines whether there are reasonable basis to commence the investigation[288]. Moreover, in case the jurisdiction of the ICC occurs, the accepting state shall collaborate with the Court in order to supervise the criminal justice process[289]. Finally, in the unlikely event Syria will ratify the Statute, the Court could exercise its jurisdiction on the crimes committed during the past years of the conflict only through a State declaration[290] since, according to Article 11(1) of the ICC Statute, "the Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute".

However, regardless the path through which the crimes in question will be referred to the Court, neither the Security Council nor the State Party can undermine the ICC independence "by seeking to limit the scope of the referral to one side of the conflict", since in that case the investigation would not be done in the interest of justice[291].

In light of the above, the referral to the ICC for the crimes committed in Syria would have provided a concrete way to deal with the dilemma of accountability, not only for the use of CW but even for the crimes against humanity committed by the government and opposition forces. However, the Court jurisdiction faces so many difficulties. In addition to the above mentioned complications, the Rome Statute requires that several criteria shall be met before the Court can exercise its jurisdiction and, moreover, it would be restricted only to a specific set of war crimes. In addition, having limited capacity in this respect, the Court might provide only a partial response for all the crimes perpetrated against the civilian population in Syria[292].

Ad Hoc International Criminal Tribunal

Having seen the difficulties come up for the prosecutions at the ICC and its limitations, another way shall be found to prosecute those individuals held accountable. Among different options, one that has been fully discussed but not carried out yet is the creation of an *ad hoc* regional or international tribunal committed to deal with the crimes perpetrated in Syria. One possible solution is to create a criminal tribunal which might offer an alternative path to try the perpetrators of crimes, similar to those set for the Former Yugoslavia and Rwanda.

However, even in case of an *ad hoc* international tribunal, some difficulties in the implementation shall be pointed out. First of all, such tribunal can be concretely set up only by a Security Council resolution or by an international agreement, but, instead of the ICC, it can operate retroactively to cover all the crimes committed in the previous years[293]. It means that the creation of such tribunal will depend on a Security Council resolution acting under Chapter VII of the Charter and, in this regard, it is evident that if there was not a joint action for a Security Council referral to the ICC, it is extremely unlikely that there might be with an *ad hoc* criminal tribunal. Moreover, even though this unlikely scenario would unfold, in terms of

[288] Rome Statute of the ICC, 1998, Articles 12,13 and 15.
[289] JONES A., *op. cit.*, pp. 808-809; Rome Statute of the ICC, 1998, Article 12 para. 3.
[290] Rome Statute of the ICC, 1998, Article 11 para. 2
[291] JONES A., *op. cit.*, pp. 807-808.
[292] *Ivi*, p. 810.
[293] VAN SCHAAK Beth, *Mapping War Crimes in Syria*, International Law Studies, Vol. 92, March 29, 2016, pp. 331-332.

efficiency and cost effective it would be more logical referring to the ICC instead of creating an *ad hoc* tribunal: this is because having a permanent mechanism, such as the Court in question, would avoid all the complications in terms of time and cost for the implementation of a new institution[294].

Domestic Courts

In case of domestic courts, according to customary and conventional international law, the Syrian authorities shall collaborate to prosecute those responsible for war crimes[295]. For sure, seeking justice through domestic courts has several advantages. Since the fact that "States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects"[296], the investigation would be facilitated because of the direct access to evidences for the local authorities.

However, even in this case there are some difficulties for the effective implementation. It is worthless to say that the exercise of jurisdiction by domestic courts is unlikely in a country where the conflict is still ongoing, as it is happening in the Syrian case. In the event of conflict end, setting up domestic courts would be a crucial ground for justice, taking into account the restricted capacity to ensure justice for other international institutions, such as ICC or *ad hoc* international tribunal, and third states, in terms of investigation supervision and prosecutions of several cases[297].

To conclude, until when the conflict in Syria is still ongoing, domestic courts cannot play a central role in this field to prosecute those individuals responsible for the crimes committed.

An Internationalized Criminal Tribunal

Another possibility to exercise criminal justice is through the creation of an Internationalized Criminal Tribunal, which combines international and domestic elements with regard to the personnel and the applicable law[298]. Indeed, one first attempt to establish such tribunal in Syria dates back to August 2013, when several Chief Prosecutors, who came from different international tribunals, tried to put in practice this project, discussing "the structure, mandate and functioning of a potential future extraordinary tribunal to prosecute atrocity crimes in Syria"[299].

The tribunal main purpose was set forth in Article 1 of the draft Statute for the Syrian Tribunal, which states as follow:

> c) "The Tribunal will bring to trial those
> [most responsible]
> [who bear the greatest responsibility]

[294] JONES A., *op. cit.*, p. 811.
[295] HENCKAERTS J.M., DOSWALD-BECK L., *op. cit.*, p. 607, Rule 158.
[296] *Ibidem*.
[297] JONES A., *op. cit.*, p. 805.
[298] *Ivi*, pp. 811-812.
[299] Draft Statute for a Syrian [Extraordinary] [Special] Tribunal to Prosecute Atrocity Crimes, August 27, 2013.

> for the crimes and serious violations of international humanitarian law and custom, and international conventions recognized by Syria as set forth in this Statute."[300]

The venue of such internationalized tribunal would have been in Damascus and would have provided a possible path to justice, but the attempt failed.
Generally speaking, an internationalized criminal tribunal has pros and cons. As regards to the former, the main positive aspect reflects the key feature of the tribunal itself: the possibility to have internationalized personnel, such as judges and counsels, who can strictly collaborate with domestic staff. On the one hand, the involvement of local personnel would provide for "domestic ownership and impact of proceeding within the local population"[301], whilst, on the other hand, international experts would ensure "perceived independence and impartiality of the criminal justice process"[302].
However, in light of the past experience of the Iraqi High Tribunal and the Extraordinary Chambers in the Courts of Cambodia, similar challenges might be faced. First of all, as stated by Annika Jones, involving victors in the trial of defeated could generate a common belief of "biased and unfair trials", matter that could be avoided by combining the tribunal work with the referral to the ICC. In addition, there is the possibility that a new tribunal might face difficulties such as financial instability, lack of coordination between international and national administration as well as lack of collaboration between local and third states administrations[303].

The Domestic Courts of Third States
In the attempt to exercise criminal jurisdiction, there is even the possibility that individuals might be brought to trial before courts of third states. It is possible since the existence of the principle of universal jurisdiction. The principle of universal jurisdiction in criminal matters, which is primarily based on customary international law, provides:

> "the competence of a State to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or other grounds of jurisdiction recognized by international law"[304].

It means that if the Syrian state, through the above mentioned institutions, is unable or unwilling to prosecute those individuals accountable for serious crimes, as recognized by international law, third States can

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[300] *Ivi*, Article 1(c)
[301] RAUB Lindsay, *Positioning Hybrid Trials in International Criminal Justice*, 42 International Law and Politics 1013, 1017, 1041–44 , 2009 and DICKINSON Laura A., *The Promise of Hybrid Court* 97, American Journal of International Law, 295, 306 (2003), quoted by A. Jones, *op. cit.*, p. 812.
[302] DICKINSON Laura A., *op.cit.*, quoted by A. Jones, *op. cit.*, p. 812.
[303] RAUB L., *op.cit.*, 1044-46, quoted by A. Jones, *op. cit*., p. 813.
[304] Institute of International Law, *Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes*, Resolution adopted on August 26, 2005.

constitute a possible way to exercise criminal jurisdiction. Nevertheless, it is not easy to commence a trial before domestic court of third States, since three conditions shall be met. First, domestic laws, which allows to investigate and to persecute in accordance with universal jurisdiction, shall be enacted; second, in order to have an efficient prosecution, the third state shall provide for a sufficient number of witnesses and reliable evidences; third, domestic law of third state might demand for the physical presence of the individuals accountable on the territory where the jurisdiction will be exercised[305].

To conclude, several accountability measures have been analyzed which can be considered possible options to provide justice for the crimes committed in Syria. For each one of these mechanisms, the benefits and drawbacks have been taken into account, but the critical point that comes up is the fact that the international community has not yet identified the best path to exercise criminal justice. The investigation and prosecution through the implementation of internationalized and *ad hoc* tribunal or through the national court of third States would meet practical disadvantages. Although there is a common belief according to which the ICC referral would be the most suitable mechanism to exercise jurisdiction over the crimes committed in Syria, up to now nothing has been implemented[306].

Regardless which mechanism is considered the most appropriate, even in more recent times there has been no tangible progress in the exercise of criminal justice. The international community is still evaluating which should be the most appropriate measure to be undertaken, re-evaluating the potential role played by domestic courts and *ad hoc* tribunal for Syria. However, one step forward has been done in the field of international criminal justice: on 2016 the UN created the International, Impartial and Independent Mechanism for Syria which will be analyzed more in details in the following section.

4.3 Chemical weapons elimination: Syria and the OPCW

It is fair knowing that the Middle East is one of the most difficult region for the promotion and application of the CWC, since the matter of CW disarmament is strictly linked with the nuclear threat, the nuclear weapons arms control and, more generally, with the aim to create areas free from WMD use.

In the struggle against Syrian chemical weapons disarmament, the latter piece of the puzzle to be brought up is the key decision by the OPCW Executive Council on Syria CW elimination which was adopted on 27 September 2013, the same day of the Resolution 2118. The ambitious plan of action set up by the Executive Council decision EC-M-33/DEC.1, "Destruction of Syrian Chemical Weapons", along with the Security Council resolution, aimed to ensure an accelerated transportation and destruction of the CW. The plan was, by far, the most urgent than any other process for the elimination of declared stockpile up to that time[307].

As reported by the decision in question, the CWC would have entered into force in Syria on 14 October 2013

[305] JONES A., *op. cit.*, p. 814.

[306] HUMAN RIGHTS WATCH, *op. cit.*; General Assembly, *Report of the independent international commission on the Syrian Arab Republic*, UN Doc. A/HRC/22/59, 5 February, 2013, *Annex* XIV.

[307] WALKER Paul F., *Syrian Chemical Weapons Destruction: Taking Stock and Looking Ahead*, Arms Control Association, December, 2014, p 2.

and before that date, by 19 of September, the Syrian authorities would have submitted "the detailed information, including names, types, and quantities of its chemical weapons agents, types of munitions, and location and form of storage, production, and research and development facilities"[308]. In this regard, during the first part of the disarmament process there seemed to be a complete Syrian willingness to cooperate "with total transparency", as officially confirmed by the Assistant Minister for Foreign Affairs in Syria[309]. Therefore, the first Syrian step to fulfill its obligations was to provide all the information in its possession. In all, 41 facilities at 23 sites have been declared, in addition to around 1.300 metric tons of CW, divided in Category 1 (binary chemical weapon precursors) and Category 2 chemical weapons and almost 1.230 unfilled chemical munitions[310].

Nevertheless, the basic purposes of the disarmament program were set by the decision EC-M-33/DEC.1, which provides that the Syrian Arabic Republic shall:

> (a) "not later than 7 days after the adoption of this decision, submit to the Secretariat further information, to supplement that provided on 19 September 2013, on the chemical weapons […];
>
> (c) complete the elimination of all chemical weapons material and equipment in the first half of 2014 […];
>
> (d) complete as soon as possible and in any case not later than 1 November 2013, the destruction of chemical weapons production and mixing/filling equipment;
>
> (e) cooperate fully with all aspects of the implementation of this decision, including by providing the OPCW personnel with the immediate and unfettered right to inspect any and all sites in the Syrian Arab Republic; […]"[311].

Practically, in order to support the OPCW operations in Syria according to Resolution 2118 the UN provided for a United Nations advanced team, with the aim to preside a really stringent system of double check and control[312]. To this end, the OPCW-UN Joint Mission in Syria (JMIS) was formally established on 16 October 2013[313]. Since the task of the JMIS was to supervise the correct and timely elimination of the chemical weapons, its mandate can be defined as a fixed-term mandate, because the operations would have been closed at the expiry of the mission duration.

However, it is worth pointing out one innovative aspect of the verification system implemented in Syria. It

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[308] OPCW, Executive Council, *Destruction of Syrian Chemical Weapons*, Doc. EC-M-33/DEC.1, 27 September, 2013, *Preamble*.

[309] OPCW, Executive Council, *Statement delivered by Mr. Hisamuddin Alla Assistant Minister for Foreign Affairs and Expatriates in the Syrian Arab Republic at the thirty-fourth meeting of the Executive Council*, Doc. EC-M-34/NAT.4, 15 November, 2013.

[310] OPCW, Executive Council, *Progress in the Elimination of the Syrian Chemical Weapons Programme*, Doc. EC-M-34/DG.1, 25 October, 2013, para. 4 (a).

[311] OPCW Doc. EC-M-33/DEC.1, 27 September, 2013, para. 1(a),(b),(c),(e).

[312] UN Doc. S/RES/2118 (2013), 27 September, 2013, para. 7 and 8.

[313] OPCW Doc. EC-M-34/DG.1, 25 October, 2013, para. 17.

was already faced, in the previous Chapter, the controversial matter concerning the most intrusive form of inspections in a state's territory. What came up was that a state Party is not always obliged to grant collaboration when extremely intrusive form of verification occurs. Nevertheless, in the Syrian case Resolution 2118 not only requires a full cooperation between the Syrian authorities and UN-OPCW, but also an "immediate and unfettered access and the right to inspect" for the personnel nominated by the UN and OPCW[314]. It means that, in order to provide an efficient verification, the function assumed by one-site inspections is not based on a confidence-building system, according to which all the Parties commit to comply with the proposals set by the Convention, but the mentioned function allows intrusive monitoring inspections aimed to supervise whether cases of non-compliance occur[315]. Moreover, the joint mission UN-OPCW had not only the responsibility to carry out one-site inspections in chemical weapons production facilities declared by the same Syrian authorities, but even in any other facility considered involved in CW production by another State Party of the Convention[316]. It means that the removal and destruction of the Syrian arsenal would have followed "coercive" measures[317], because Syria appeared to have no say over the verification procedure and the elimination process. What is remarkable in the Syrian CW elimination is the lack of a fully compliance by the States Parties with the provisions set forth by the CWC, especially with regards to the verification process.

However, as a matter of principle, if the decision EC-M-33/DEC.1, along with Resolution 2118, seems to provide a precise plan for the Syrian disarmament, in practical terms there were serious concerns to be taken into account, which would make this disarmament process unique in various forms and even more difficult to implement.

First of all, the elimination of the chemical weapons occurred under the condition of an ongoing civil war, which would have slowed down the process and made it even more complicated. In addition to this concern, the considerable amount of materials to be destroyed, in addition to the high number of production facilities, induced the international community to put in practice the destruction outside Syria. In other words, after the inspections, the destruction activities had to take place out of the Syrian border. Moreover, another critical matter concerned the cost of verification and destruction of the site facilities and chemical weapons arsenal. According to Article IV para. 16 of the Convention "Each State Party shall meet the costs of destruction of chemical weapons […]. It shall also meet the costs of verification of storage and destruction of these chemical weapons unless the Executive Council decides otherwise"[318]. Here the point. Since the beginning, the Syrian authorities made the international community aware about their impossibility to afford the costs for the demilitarization plan: it would be able to cover the costs for "land-based transportation, security and facility destruction" but not those for the transportation and destruction of the chemical weapons outside of

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[314] UN Doc. S/RES/2118 (2013), 27 September, 2013, para. 7.

[315] SOSSAI Mirko, *Come assicurare la punibilità dell'uso delle armi chimiche in Siria?*, Diritti Umani e Diritto Internazionale, 2017, p. 422.

[316] *Ibidem*.

[317] *Ibidem*.

[318] CWC, Article IV(16).

the country[319]. Syria affirmed that it could not support additional costs, due to the economic difficulties it was facing for the ongoing war and to the economic sanctions imposed.

In such circumstance, there was a clear need to grant adequate funds from the outset of the process, since there could be the risk of a failure because of the lack of financing for the implementation of CW elimination plan. To this end, the support of the states was crucial. The OPCW established several trust funds, with the contribution of a deal of States Parties, not only in economic terms but also in providing help for deploying personnel or for transportation needs or security measures, due to the high risk of transporting chemical agents[320].

Turning to the details of the CW elimination, the decision EC-M-34/DEC.1 sets forth the details for the destruction of CW and CW production facilities. It officially declared the completion dates for the destruction of chemical weapons and facilities within the Syrian territory and, in addition, for the destruction of those outside the border[321]. As already mentioned, the destruction of all chemical weapons and equipment should be completed within the first half of 2014, whilst, the date to complete the elimination of all weapons and production sites, outside the territory, was established on 30 June 2014. Moreover, all the parties agreed on maintaining the ownership of the chemical weapons to the Syrian Arab Republic, until when they would be destroyed, but over the removal period Syria had no longer the "possession, nor jurisdiction, nor control over these chemical weapons"[322].

However, for those activities which would have been carried out in its territory, the responsibility to plan their effective implementation was left to the Syrian Arabic Republic. By contrast, the plan for the transportation and destruction of the weapons outside the Syrian territory was the result of the joint discussion between the OPCW Director-General and the States parties, to be brought before the Council[323].

Nevertheless, since the majority of the declared chemical weapons should be destroyed outside the Syrian territory, the collaboration of the States Parties was fundamental. In this regard, it should be acknowledged the contribution given by States Parties not only supporting the operations in financial terms, but even providing assistance for transport and destruction of CW. Indeed, in order to comply with the 30 June 2014 deadline set by the decision EC-M-34/DEC.1, the first operation of transport and destruction of chemical weapons stockpile took place in the first half of January 2014. As above mentioned, several states took part in the operation[324]. Indeed, in November 2013 with the close collaboration of the United States, the ship *Cape Ray*, equipped with two Field Deployable Hydrolysis Systems, was chosen as suitable platform for the chemical agents neutralization[325]. The ship would have neutralized the chemicals in the international water

[319] WALKER P.F., *op. cit.*, p. 9.
[320] TRAPP Ralf, *Elimination of the Chemical Weapons Stockpile of Syria*, Journal of Conflict and Security Law, March 18, 2014, p. 12.
[321] OPCW, Executive Council, *Detailed Requirements for the Destruction of Syrian Chemical Weapons and Syrian Chemical Weapons Production Facilities*, Doc. EC-M-34/DEC.1, 15 November, 2013, para. 2 and 3.
[322] *Ivi*, para. 4 and 5.
[323] *Ivi*, para. 8 and 9.
[324] OPCW, Executive Council, *Progress in the Elimination of the Syrian Chemical Weapons Programme*, Doc. EC-M-38/DG.1, 23 January, 2014.
[325] WALKER P.F., *op. cit.*, p.3.

of the Mediterranean Sea. The starting point of the demilitarization process was the port of Latakia, northwester Syria, where the verification activities of the already packed chemical agents were completed under the supervision of the Joint Mission, before loading them. Syria was responsible only of the chemical agents transport to the port of Latakia. From Latakia port, the chemical agents would have been carried away (outside the Syrian territory) by two fighters, the Danish *Ark Futura* and the Norwegian *Taiko*. The more dangerous chemicals (Priority I) would have been delivered first, in order to be neutralized in the Mediterranean Sea on the *Cape Ray*, whilst the less dangerous agents (Priority II) would have been transported to the incinerators in Finland, UK and the United States[326].

In the elimination of the Syrian chemical weapons, an important role was played even by Italy. Indeed, in accordance with the note by the Director-General:

> "On 16 January 2014, the Italian Government announced that the transloading of chemicals from the Danish and Norwegian cargo ships to the MV Cape Ray would take place at the port of Gioia Tauro in southern Italy. An exchange of letters has been finalised between the OPCW and the Government of Italy aimed at facilitating the access of OPCW inspectors to the relevant port facilities on Italian territory for carrying out verification activities with respect to Syrian chemical weapons, and at granting them the necessary privileges and immunities."[327]

The support provided by the port of Gioia Tauro was crucial for the successful completion of the demilitarization process. Since the *Cape Ray* had not the right to access into the Syrian territorial water, there was the need of a Mediterranean port where the chemical agents, carried by the two fighters, should be received[328]. After the "transloading" at the port of Gioia Tauro, the chemical weapons were directly transferred to the *Cape Ray* for the neutralization process.

To sum up the time spent on the operations, the first Danish fighter left Latakia on January 7, but the last shipment abroad the *Ark Futura* left the Syrian port on June 23rd, while, the other chemical agents were carried by the Norwegian vessel in the early June, to be incinerated in the port of Finland and in a facility outside Houston[329]. Nevertheless, the destruction process was carried out even in Europe, Germany and U.K. specifically. On 7 of July, the *Cape Ray* began the neutralization process in the Mediterranean Sea and the work ended by 20 of October 2014. The operations led towards the destruction of all declared agents labeled as "Category 1" and about 89 percent of "Category 2" agents; the remaining part would have been destroyed within the following months[330].

In view of the above, it might be stated that after one year of active and efficient demilitarization operations, where almost all the declared chemical weapons were destroyed, the collaborative work between UN and

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[326] *Ivi*, pp. 3-4
[327] OPCW Doc. EC-M-38/DG.1, 23 January, 2014, para. 14(f).
[328] WALKER P.F., *op. cit.*, p. 4.
[329] *Ibidem*.
[330] *Ivi*, p. 5.

OPCW, with the States Parties support, led towards a large success even if not complete. Nevertheless, as it will be analyzed, the multilateral disarmament effort was not able to put an end to the crisis. Clear evidences confirmed not only the ongoing use of chemical agents, demonstrating that the declarations of the Syrian government were not completely correct, but even the escalating violence perpetrated in Syria.

4.3.1 Legal issues of the elimination process

The disarmament obligations set by the Security Council Resolution 2118, with the support of the Executive Council decision EC-M-33/DEC.1, created a debate concerning the legality of the external operations required for the destruction of chemical weapons since Syria cannot afford them within its territory, as instead required by the Chemical Weapons Convention[331]. In this regard, there seems to be a contradiction between what is set by Resolution 2118 and what, instead, is established by the CWC. Indeed, according to para. 10 of the resolution in question, the Security Council decided "to authorize Member States to acquire, control, transport, transfer and destroy chemical weapons", while, by contrast, the CWC completely denied, *under any circumstances*, these operations. In light of the above, one may argue if the potential conflict between the obligations set by the resolution and those set by the Convention should be solved in favor of the former or the latter[332]. In other words, the matter that comes up is whether the Syrian disarmament process should have been carried out according to the principles of Resolution 2118 or to those established in the CWC.

In order to dispel any doubts concerning said contradiction, a reference to the UN Charter is required. Generally speaking, any obligations under the UN Charter shall prevail over those set by other international agreements, as established by Article 103 of the UN Charter[333]. However, in our case we are referring to a Security Council resolution not directly to the UN Charter. But, according to Article 25 of the UN Charter "The Members of the United Nations agree to accept and carry out the decisions of the Security Council". It means that the measures taken, even if set by a Security Council resolution, constitute for Syria an obligation stemming from the Charter, so that neither such country nor the Member States can refrain[334]. In other words, the external operations required for the successful elimination of the chemicals have their legal ground under Resolution 2118 which recalls Article 25 of the Charter confirming that Member States are obliged *to accept and carry out* the decision of the Council[335]. As a consequence thereof, the Parties are enabled to *transfer* and *destroy* the chemical weapons outside the Syrian territory in accordance to the obligations set by the Security Council, which acts under the UN main purposes and principles to maintain international peace and security.

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[331] CWC, Article I(2).

[332] RONZITTI N., SCISO E., *op. cit.,* pp. 146-149.

[333] UN Charter, Article 103: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

[334] RONZITTI N., SCISO E., *op. cit.,* p. 147.

[335] UN Doc. S/RES/2118 (2013), 27 September, 2013, *Preamble*.

Nevertheless, the considerations previously made, with respect to the legitimacy of chemical weapons transfer, point out one more issue. Since the previous analysis assumed that the states are allowed to transfer the chemical weapons out from Syria in order to finalize the elimination process, one may well query whether, in future situations and in the absence of any Security Council resolution, such operation has legal ground, or, instead, chemical weapons shall be destroyed within the territory of the possessor state. In order to clarify such issue, two aspects will be taken into account. The former concerning the provision of the CWC, set forth in Article I para. 1(a) and the latter concerning the past States practice over the matter of chemical agents elimination out of the possessor state.

As regards to the first provision, it is worth once again recalling that the CWC states: "Each State Party to this Convention undertakes never under any circumstances: to develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone"[336]. Turning to the details of such disposal, N.Ronzitti and E. Sciso, as well as R.A. Friedman come to the same conclusion. According to their analysis, it is true that in Article I seems to be neither exceptions over the CW movement across the possessor state borders nor any distinction between "bad transfers" (e.g., for proliferation) or "good transfers" (e.g., for elimination); however, it is also true that according to Article 31 of the Vienna Convention on the Law of Treaties "A treaty shall be interpreted in good faith […] and in the light of its object and purpose"[337]. At that point, the interpretation of the CWC could be more flexible, allowing the movement of chemicals across the borders if it will be made according to a "good faith" interpretation of the Convention aimed at avoiding the proliferation and the use of chemical weapons.

Moreover, with regard to the latter aspect concerning the removal of chemical weapons from the possessor state to another, there are two previous cases in which the international community provided assistance to the possessor state for the destruction operations. The first situation that occurred was the removal of old chemical weapons (OCW) in Austria in 2007 whilst, the second one, in the Netherlands in 2013. In the former case, the weapons would have been destroyed in a German facility, so that the two States informed the OPCW Executive Council of their plan, which approved the transportation to Germany; in the latter case, the chemicals would have been destroyed in Belgium, which, jointly with the Netherlands made aware the Executive Council of their plan which did not take any formal actions to impose conditions on the operation[338]. No other resolutions have been adopted by the Security Council to allow the transfer of chemical weapons from one state to another.

In light of the above, although there are several provisions that require the elimination of the chemical weapons within the territory of the possessor state, it is even true that the provision set by Article I of the CWC does not need to be interpreted in restrictive terms, taking into account Article 31 of the Vienna Convention and previous states practice in Austria and Netherlands over OCW removal. It means that in the

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[336] CWC, Article I(1)(a).

[337] FRIEDMAN Robert A., *Legal aspects of weapons of mass destruction elimination contingencies*, The Nonproliferation Review, Vol. 23, Issue 1-2, 2016, p. 64; RONZITTI N., SCISO E., *op. cit.,* pp. 148-149.

[338] FRIEDMAN R.A., *op. cit.*, p. 68.

event a situation similar to the Syrian case should occur in the future, the transfer of chemical weapons from one state to another cannot be completely considered in violation of international law.

4.3.2 Additional verification mechanisms in Syria

It was already shown as, among the Syrian obligations and responsibilities, an active and fruitful collaboration by Syrian authorities was required, in order to implement the measures laid out by Resolution 2118 and by the OPCW decisions, to ensure "immediate and unfettered access to and the right to inspect" to the UN-OPCW personnel team[339]. The verification system provided by the CWC, aimed at guaranteeing the implementation on the ground of the measures taken, was already in place. Nevertheless, the verification system set up in the Verification *Annex*, part IV(A) of the Convention, does not take into account the potential transfer of the chemical weapons across the border of one state (since this option is not provided by the CWC itself). In addition, as already explained, the operations in Syria were carried out in extremely challenging and complex framework. First of all, the disarmament program had to be implemented during the ongoing armed conflict; therefore, due to this particular situation and to the dangerous conditions in Syria, the normal standard of verification could not completely assure the compliance of all the norms set in the Verification *Annex*. In this regard, new different systems of verification have been created with a specific mandate to be fulfilled. Generally, it was a fix term-mandate and it means that the related operations shall be closed within well-defined period.

It has already been mentioned the OPCW-UN Joint Mission, formally implemented on 16 October, 2013. The mandate of the OPCW-UN Joint Mission in Syria (JMIS) was established by the OPCW and the United Nations, to supervise the correct implementation of the OPCW decision EC-M-33/DEC.1 and the United Nations Resolution 2118. More in details, the Joint Mission had the aim to "oversee the timely elimination of the chemical weapons programme […] in the safest and most secure manner possible"[340] and after almost one year of inspections, at the end of its mandate (on September 2014), it confirmed the destruction of a considerable number of production facilities and chemical agents. In total, among the sites and agents declared by the Syrian authorities, 13 chemical weapons production facilities have been destroyed with unfilled chemical munitions and the removal of chemical-warfare agents have been undertaken for the following destruction outside the country; the remainder would have been completed in the short term[341]. Nevertheless, although the importance of the Joint Mission, even before the end of its mandate several concerns over the ongoing use of chlorine gas by the Syrian Government came up from some Security Council members[342]. As a consequence thereof, the OPCW established two different mechanisms to support the verification system: the Declaration Assessment Team (DAT) and the Fact-Finding Mission (FFM), respectively.

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[339] UN Doc. S/RES/2118 (2013), 27 September, 2013, para. 7.

[340] OPCW, *Closure of OPCW-UN Joint Mission*.

[341] TRAPP R., *Lessons Learned from the OPCW Mission in Syria*, 16 December, 2015, para. 1.

[342] UN News, *Ninety-six percent of Syria's declared chemical weapons destroyed – UN-OPCW mission chief*, 4 September, 2014.

With regard to the DAT, on March 2014 the OPCW Director-General set a team of experts, which was designed in order to urge the Syrian authorities for more accurate national declarations and "to clarify issues related to declarations and to ensure their completeness"[343], since the substantial gaps and inconsistencies came out in Syrian authorities declarations. With regard to the FFM, the following month, the Director-General announced the creation of the Fact-Finding Mission with the aim "to establish facts surrounding allegations of the use of toxic chemicals, reportedly chlorine, for hostile purposes" perpetrated in Syria[344].

During the mandate of the FFM, in its third report on the investigation system, the concerns of the Security Council members about the possible use of chemical agents were confirmed. Indeed, the "Mission has presented its conclusions with a high degree of confidence that chlorine has been used as a weapon. […] Based on the available information, the Mission has completed its work with regard to the allegations of the use of chlorine in the villages of Talmenes, Al Tamanah, and Kafr Zita"[345]. The finding of the FFM constituted the first clear evidence that chemical agents have been used again by a State Party of the CWC. Although the use was confirmed, one of the FFM limit was the impossibility to attribute responsibility to specific parties or individuals of the conflict, therefore, the international community, therefore, adopted new measures in order to curtail such violations[346]. In this regard, the OPCW Executive Council, through its decision on February 2015, emphasized the fact that any use of chemical weapons, under any circumstance, is a violation of international law and those responsible shall be held accountable[347]. One month later, the Security Council adopted Resolution 2209, with the aim to emphasize the assertions already made by the OPCW.

However, up to that moment the problem was always the same which can be summarized in two questions: on the one hand, the lack of any mechanism aimed at identifying those accountable, and, on the other hand, a mechanism able to ensure international criminal justice. Indeed, as it was already stressed, up to this point the international community had done no more than condemning the use of chemical weapons as a violation of international law and expressing the conviction that individual considered responsible for that perpetration should be held accountable, but without giving any indication on how to do that. In other words, since the military intervention cannot be considered the only means to punish any violation of international law and to cease the perpetrations of war crimes and crimes against humanity, there was always the need for accountability and justice, not yet concretely ensured.

However, despite the adoption of the OPCW decision of February 2015 and the Security Council Resolution 2209 on August 2015, the repeated use of chlorine pushed the Security Council to adopt unanimously, on the basis of the agreement between Unites States and Russia, Resolution 2235. Compared to other decisions,

[343] TRAPP R., *op. cit.*, para. 73.

[344] OPCW, Technical Secretariat, *Second Report of the OPCW Fact-Finding Mission in Syria Key Findings*, Doc. S/1212/2014, 10 September, 2014, para. 1.

[345] OPCW, Technical Secretariat, *Third Report of the OPCW Fact-Finding Mission in Syria*, Doc. S/1230/2014, 18 December, 2014, para. 3.

[346] McCORMACK T., *op. cit.*, p. 522.

[347] OPCW, Executive Council, *Reports of the OPCW Fact-Finding Mission in Syria*, Doc. EC-M-48/DEC.1, 4 February, 2015, para. 3 and 4.

Resolution 2235 established the OPCW-UN Joint Investigative Mechanism (JIM), whose mandate was aimed not only at verifying Syrian compliance with its obligations, but even at identifying "those individuals, entities, groups, or governments responsible for any use of chemicals as weapons, including chlorine or any other toxic chemical"[348]. Resolution 2235 was a key step, since, until that time, there was no official document which had explicitly blame neither the Assad government nor the opposition forces. The JIM began its mandate on September 2015, for at least one year, but its mandate was extended for one year more with Resolution 2319 (2016).

The JIM investigated on nine selected cases, according to which there were high possibilities that chemical agents or poisons gas had been used again. Among those investigated incidents, the JIM reached in three cases "sufficient information" which confirmed the use of chlorine and the identity of the perpetrators; in others, the investigation mechanism "was close to having sufficient information" and for the remaining it was not able to provide clear information due to insufficient evidences[349]. However, among those incidents where "sufficient information" were available, the Leadership Panel of the JIM recognized that in two incidents toxic agents have been used by the Syrian Arab Armed Forces: the former in Talmenes, on April 2014, where toxic substance were released, while, the latter in Sarmin, on March 2015, where, most likely, the toxic substance released was chlorine[350]. In addition, the Leadership Panel confirmed, on March 2015, that the Syrian Arab Armed Forces "dropped one device or barrel bomb" in the village of Qmenas[351].

To conclude, in two episodes the JIM recognized the Syrian government as responsible for the use of toxic agents. It was the first time that a State Party of the CWC had violated the obligations set in the arms control treaty, but, above all, it was the first time that a mechanism established by the Security Council had exactly held the Syrian Government accountable for the violations of international law[352].

4.4 The International Impartial and Independent Mechanism for Syria

In light of the above and as previously predicted by many, despite Resolution 2118 and the several decisions adopted by the OPCW, the use of chemical weapons has not come to an end. In addition to the ongoing use of chemical agents, the failure by the Security Council to refer any crimes carried out within the Syrian territory to the ICC or the failure to establish a new tribunal, emphasized how the international community was mainly unable to cease, investigate and prosecute the crimes perpetrated in Syria. Such circumstance led the General Assembly to create an "International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law"

[348] UN, Security Council, *Resolution 2235 (2015)*, UN Doc. S/RES/2235 (2015), 7 August, 2015, para. 4.

[349] UN, Security Council, *Letter dated 24 August 2016 from the Leadership Panel of the Organization for the Prohibition of Chemical Weapons-United Nations Joint Investigative Mechanism addressed to the Secretary-General*, UN Doc. S/2016/738, 24 August, 2016.

[350] *Ivi*, para. 54 and 56.

[351] *Ivi*, para. 64.

[352] McCORMACK T., *op. cit.*, p. 525.

(IIIM)[353], committed since the beginning of the Syrian civil war. Before entering into details of the new Mechanism, it is important to underline that such decision was historic, since it had never happened before that the General Assembly established a body aimed at assembling and analyzing evidences of international crimes could be helpful for the activities of future tribunals[354]. Moreover, as established by the General Assembly in the decision A/71/L.48, the Mechanism shall closely collaborate with the Independent International Commission of Inquiry on Syria, established by the Human Rights Council on August 2011. However, the creation of the mechanism further underlines, one the one hand, the fragility of the international criminal project in Syria, and, on the other hand, it stresses the unsolved accountability matter that was still surviving notwithstanding six years of conflict.

At the time of the new Mechanism creation, one of the main concerns to this project among the opponent states was the fact that its activities could, to some extent, replicate the activities already done by other international justice actors which had already worked on securing justice and ensuring accountability in the past years[355]. In this regard, it is worth evaluating which are the peculiarities and functions of this new Mechanism.

The IIIM has been considered an innovative step to deal with the accountability issue. The IIIM has been formally established by the General Assembly resolution 71/L.48, on December 2016, although the drastic opposition of the Syrian Arab Republic. According to said resolution and to the terms of reference of the mechanism, it is possible to sum up its primary function in two main objectives. The former aimed "to collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses"; the latter aimed "to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes"[356]. In this regard, the United Nations fulfill a dual purpose, "conservative" and "preparatory"[357]. It can be defined "conservative" since the fact that collecting evidences to prosecute the crimes would have prevented the possibility that the evidences gathered might be lost or destroyed, and then, "preparatory" since such Mechanism places the foundations for the prosecution of those accountable, by assisting the criminal proceeding when the conditions for the prosecuting trials would have been matched[358]. Moreover, the Mechanism is led by a senior judge or prosecutor with wide experiences in the field of criminal investigations and prosecutions.

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[353] UN, General Assembly, *International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, UN Doc. A/71/L.48, 19 December, 2016, para. 1,2,3 and 4.

[354] WHITING Alex, *An Investigation Mechanism for Syria, Journal of International Criminal Justice*, Vol. 15, Issue 2, May 2017, p. 232.

[355] Elliott Ingrid, *A Meaningful Step towards Accountability?: A View from the Field on the United Nations International, Impartial and Independent Mechanism for Syria*, Journal of International Criminal Justice, Vol.15, Issue 2, May 2017, pp. 242-246.

[356] UN Doc. A/71/L.48, 19 December, 2016, para. 4.

[357] RONZITTI N., SCISO E., *op. cit.,* p. 95.

[358] *Ibidem*.

In light of the above, it is worth mentioning that the mechanism has not powers that can be considered "prosecutorial in nature"[359], since it cannot provide for the prosecution of individuals; by contrast, it is close to have prosecutorial functions, which means that it cannot adjudicate the cases, but it can safeguard the possibility for future tribunal to bring criminals to justice. What makes the IIIM a prosecutorial body is simply the standards it adheres in order to collect and to analyze evidences: indeed, it follows criminal law standards to accomplish its functions[360]. As a consequence thereof, such Mechanism cannot be compared to the already existing institutions but it can be considered a complementary tool to them[361].

To conclude, the IIIM peculiarity is determined by the fact that it can be considered a bridge between finding evidences as the other mechanisms and collecting as well as preserving evidences for future moment of accountability in Syria, even though its activity cannot be traced back to the adjudication of cases; in this regard the Mechanism has been defined as a "prosecutor without a tribunal"[362].

However, one of the most discussed issues over such Mechanism was the procedure followed for its creation. Actually, the creation of this Mechanism has been widely hampered by Russia and Syria. These two States had challenged the legal basis through which such Mechanism has been established, since they considered that the General Assembly acted beyond its powers. Thereof, behind their opposition the reason that they put forward was of a legal nature (although it is well known that there were political reasons behind that). However, in order to verify whether the accusations moved by Russia and Syria had legal ground, the powers of the General Assembly shall be taken into consideration.

First of all, it is important to know that it was the first time the General Assembly established this kind of body for analyzing evidences of international crimes. Generally speaking, indeed, only the Security Council has the authority to create tribunals, according to the provisions of the UN Charter, which has compulsory legal authority over individual and states[363]. However, the first important aspect that shall be highlighted is the fact that the activities of the IIIM cannot be compared to those of a tribunal, since it is not allowed to prosecute individuals (only the Security Council can refer such power), but it is seen as a prosecutorial body simply because the performance of its action was in line with the standard of criminal law, in terms of collecting and analyzing evidences[364]. Having said that, it is worth confirming that the General Assembly acted within its functions and powers set forth in the Charter. Indeed, according to Article 22 of the UN Charter the "General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions". But this explanation is not enough. In addition to the power of creating such organ, the General Assembly has even the authority to "discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present

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[359] WHITING A., *op. cit*., p. 234.
[360] *Ibidem.*
[361] RONZITTI N., SCISO E., *op. cit.,* p. 95.
[362] Reinl, *Could Syria's "Prosecutor without a Tribunal" Work?*, May 31, 2017, quoted by RONZITTI N., SCISO E., *op. cit.,* p.100.
[363] WHITING A., *op. cit*., p. 232.
[364] *Ivi*, p. 234.

Charter […]"[365]. It means that the General Assembly has the power to make "recommendations" on several matters, including those of international criminal law[366]. In view of the foregoing, the objections to the Mechanism made by Russia and Syria had political rather than legal ground.

To conclude, it is important to recognize that the Mechanism represented a considerable step towards the international criminal justice project in Syria and, at the same time, it set up a valuable precedent for future scenario. However, the situation is more complicated. The General Assembly, indeed, has not coercive power: it means that the Mechanism, in order to fulfill its mandate, needs the cooperation of "all parties to the conflict as well as civil society"[367]. Nevertheless, based on Syria opposition, there are high possibilities that such Mechanism will have the effect to slow down the negotiation peace process with the government of Bashar al-Assad and the collaboration required will not be accomplished. All these considerations lead towards a partial resolution of the accountability problem.

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[365] UN Charter, Article 10.
[366] RONZITTI N., SCISO E., *op. cit.,* p. 102.
[367] UN Doc. A/71/L.48, 19 December, 2016, para. 6.

CHAPTER FIVE

International Law Prospective for the Use of Military Force in Syria

5.1 New chemical attacks: the case of Khan Shaykhun and Douma

In light of the above mentioned facts, obvious contradictions came up between what the Syrian authorities declared and what was actually going on with the employment of chemical agents. At the end of January 2016, it was reported by the OPCW Director-General that almost the entire CW elimination program, set by the Executive Council decisions EC-M-33/DEC.1 and EC-M-34/DEC.1, was achieved. Indeed, the OPCW had confirmed "the destruction of 24 of the 27 chemical weapons production facilities (CWPFs) declared by the Syrian Arab Republic" and it also confirmed that "all of the chemicals declared by the Syrian Arab Republic that were removed from its territory in 2014 have now been destroyed"[368]. However, it was not in line with what happened after the Ghouta episode.

The contradictions that came up from the DAT declarations were due to the warring gap between the Syrian declarations and the ongoing episodes of chemical agents use. The OPCW Executive Council repeatedly showed a *grave concern* over the ongoing use of chemical weapons. Said concern led the Executive Council to have several doubts regarding the accuracy of the previous declarations made by the Syrian authorities, particularly over the possession of chemicals and the exact number of production facilities. The *grave concern* came from the use of toxic chemicals in the cases of Talmenes, Sarmin and Qmenas which required further inspections in the Syrian sites[369]. The most serious issue can be summarized through the following OPCW statement: the impossibility "to resolve all identified gaps, inconsistencies and discrepancies in the declaration of the Syrian Arab Republic, and therefore cannot fully verify that the Syrian Arab Republic has submitted a declaration that can be considered accurate and complete"[370]. This deadlock was due to the lack of access to several locations. In addition to the repeated use of chemical weapons, what makes the situation even more complicated was the high possibility of developing, acquiring and using these weapons over time by other entities, especially non-state actors.

In addition, after the results of some inspections carried out in the Syrian territory, the existence of "unexpected or undeclared chemical compounds"[371] was confirmed. As a consequence thereof, after the consultations with the Syrian Arab Republic over this issue, the OPCW Secretariat came to the conclusion that:

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[368] OPCW, Executive Council, *Progress in the Elimination of the Syrian Chemical Weapons Programme*, Doc. EC-84/DG.6, 22 December, 2016, para. 6 and 7.

[369] OPCW, Executive Council, *OPCW-United Nations Joint Investigative Mechanism reports on Chemical Weapons Use in the Syrian Arab Republic*, Doc. EC-83/DEC. 5, 11 November, 2016, para. 1.

[370] *Ivi*, para. 6.

[371] OPCW, Executive Council, *Conclusions on the Outcome of Consultations with the Syrian Arab Republic Regarding its Chemical Weapons Declaration*, Doc. EC-82/DG.18, 6 July, 2016, para. 5(b).

> "Following extensive technical consultations on these results, the Secretariat considers that many of the explanations provided by the Syrian Arab Republic are not scientifically or technically plausible, and that the presence of several undeclared chemical warfare agents is still to be clarified"[372].

In fact, following the consultations with the Syrian authorities what appeared evident was the impossibility to completely solve the issue regarding the inconsistencies and discrepancies with the Syrian declarations. More in details, two doubts still persisted over such issue. The first doubt concerning whether the declarations submitted by Syria lacked of accuracy and completeness from the beginning, i.e. since when the Assad regime decided to collaborate actively with the disarmament process and to provide all the information required by Resolution 2118 and by the decisions EC-M-33/DEC.1 and EC-M-34/DEC.1. The second doubt concerning whether chemical weapons were subsequently produced after the ratification of the CWC by the Syrian President. The impossibility to effectively verify the accuracy of the Syrian authorities' declarations kept those doubt still alive. In effect, the lack of free access to several Syrian locations, because of their existing dangerous conditions, did not allow any inspection on the ground.

As confirmation of the various gaps within the Syrian disarmament process and of the Security Council shifty behavior, the latter mainly due to the political influences among the permanent members, two new serious chemical attacks occurred in more recent times: in Khan Shaykhun, 2017, and in Douma, 2018, respectively. What makes these two attacks different from that already mentioned in Ghouta, is the consequences they brought. If in 2013 a diplomatic compromise was reached by the permanent members in order to avoid a military attack, through the *Framework for Elimination of Syrian Chemical Weapons*, after these new cases, Western powers carried out a series of military strikes against several government' sites in Syria. However, before developing such matter, it is worth briefly reviewing what happened in the attacks and who was held accountable.

With regard to the attack at Khan Shaykhun, the area in question is located in southern Idlib and it was controlled by armed groups and by HTS (Hay'at Tahrir al-Sham)[373]. In the morning of April the 4th 2017, a series of airstrikes were launched on the town of Khan Shaykhun and in the following hours media denounced that civilians were suffering for symptoms that could be linked to sarin exposure, whose use was confirmed the following days by the OPCW FFM analysis[374]. In all, 83 persons were killed, among them, 28 children and 23 women, and other 293 persons were injured for being exposed to the gas released by

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[372] *Ibidem*.

[373] It is the active Salafist jihadist militant group which is involved in the Syrian civil war.

[374] UN, General Assembly, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN. Doc. A/HRC/36/55, 8 August, 2017, *Annex II*.

chemical bombs[375]. This attack represented the second largest use of chemical weapons in Syria following the 2013 attack in Ghouta.

After such event, the international community, especially the Western powers, blamed the Syrian forces for the attack just carried out. By contrast, the Syrian authorities with the support of Russia, their traditional ally, made declarations denying any involvement in the chemical attacks, indicating, instead, the terrorist groups in Khan Shaykhun as responsible[376]. However, proofs of the Syrian forces involvement in the sarin attacks were not long in coming. Since the mandate of the FFM was only to establish the effective use of chemical weapons, confirmed on the basis of its work[377], the task to identify who were the perpetrators was of the JIM. Based on the analysis conducted by such mechanism and taking also into account the previous evaluation made by the FFM, the Leadership Panel stated that the Syrian state was responsible for the chemical attacks in Khan Shaykhun[378].

However, another large-scale use of CW took place one year later, on 7 April 2018, in the city of Douma, located in the Easter Ghouta. The FFM came to its conclusions after several months of inspections, due to the lack of free access to the locations. According to its report issued on 1st March 2019, toxic chemicals were used with reasonable grounds[379], when more than 40 persons were killed. However, what makes this event different from the Khan Shaykhun attack was the fact that no responsible for the attack was identified given that the JIM ended its mandate at the time of Douma attack. Indeed, the expected Russian veto blocked the Security Council resolution which would have extended the JIM mandate; it means that, except for the OPCW, there was no other international body able to determine the responsibility of the chemical attack in Douma at that time[380].

However, the international community response was the same for both episodes, leading towards the use of force. Although in the latter incident the responsibility was not established, the Western powers believed, with high confidence, that the Syrian forces were still accountable. In the case of Khan Shaykhun attack, the United States unilaterally responded to the chemical attack with missile strikes which destroyed 20% of the Syrian Air force; in the case of Douma, Trump launched air strikes against Syria in response to the alleged use by the Syrian forces of chemical weapons, together with the United Kingdom and France[381]. Neither of those attacks was under the authorization of the Security Council which could permit the use of force under Chapter VII of the UN Charter. The doubts that arouse were about the legality of such action, even though undertaken as a consequence of CWC and international law violations by the Syrian authorities.

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[375] *Ivi,* para. 32.
[376] *Ivi,* para. 2.
[377] OPCW, Technical Secretariat, *Report of the OPCW Fact-Finding Mission in Syria Regarding an Alleged Incident in Khan Shaykhun, Syria Arab Republic April 2017*, 29 June, 2017.
[378] UN, Security Council, *Seventh report of the Organisation for the Prohibition of Chemical Weapons-United Nations Joint Investigative Mechanism*, UN Doc. S/2017/904, 26 October, 2017, para. 46.
[379] OPCW, Technical Secretariat, *Report of the Fact-Finding Mission Regarding the Incident of Alleged Use of Toxic Chemicals as a Weapon in Douma, Syrian Arab Republic, on 7 April 2018*, Doc. S/1731/2019, 1 March, 2019, para. 2.17.
[380] NAQVI Yasmin, *Crossing the red line: The use of chemical weapons in Syria and what should happen now*, International Review of the Red Cross, Vol. 99, Issue 906, 2017, p. 973.
[381] GALBRAITH Jean, *United States bombs Syrian government facilities in response to chemical weapons use*, American Journal of International Law, Vol. 112, Issue 3, 2018, p. 522.

5.2 International law and military force: the c*ounterproliferation* policy

The use of missiles in response to the chemical attacks in Syria has been largely debated within the international community, especially regarding the legality of the use of force under international law. The responsibility of the Syrian government for the first attack was confirmed, but not for the second one, for the reasons already mentioned, even though the Western powers believed with high confidence that Bashar Al-Assad used chemical agents even in Douma. However, regardless which part should be held accountable, it remains the fact that in Khan Shaykhun a unilateral military action by the United States occurred, whilst, in Douma, a collective military action was carried out by the U.S with the support of France and United Kingdom. In both cases the sovereign territory of the Syrian state and Article 2(4) of the UN Charter were violated, without any Security Council authorization and any direct armed attack against the States which employed military force[382].

In order to evaluate the legality under international law of the missile strike in the Syrian territory in response to the Syrian authorities use of chemical agents, it should be recalled what justify the use of force under international law. In addition, we will focus especially on the U.S. and other powerful states recent doctrine of pre-emption in the field of "*counterproliferation*" policy. However, before entering into such matter, it is worth mentioning which have been the repeated violations of international law by Syria, due to the repeated use of chemical agents against civilians. Said violations confirm, with high level of confidence, the likely possession of a secret chemical weapons arsenal by Syria. As things stand, the violation of international law by the Assad regime can be summed up in three main points:

1. "Violation of the 1925 Geneva Protocol, which was ratified by Syria in 1968.
2. Violation of the 1993 Chemical Weapons Convention, which was signed by Syria in more recent times, in 2013.
3. Violation of few Security Council resolutions, i.e. resolution 2118 (2013) and 2235 (2015), which affirm the use of chemical weapons as a violation of international law and allow the Council's recourse to the coercive measure under Chapter VII in response of non-compliance"[383].

As a consequence thereof, the direct involvement of the U.S. in Syria, until that moment limited only to the support of the rebels and the use of force against non-state actors (ISIL), has been justified by Trump administration with several factors, but no justifications under international law was invoked. Notwithstanding the use of force, it was clear that the U.S. President did not take into account legal constraints. Generally speaking, from the American perspective, the reasons behind both attacks can be summarized with the aim to punish the humanitarian disaster and the repeated violations of international law

[382] QURESHI Waseem Ahmad, *International Law and Military Intervention: U.S. Action in Syria*, 40 U. Haw. L. Rev. 115, 2018, p. 2.
[383] GOUVERNMENT.fr, *The military intervention in Syria has punished a repeated violation of international law*, 17 April, 2018.

by the Syrian government as well as to set a powerful deterrent in order to cease the production, spread, and use of chemical weapons in the national security interest of the United States[384]. Indeed, Trump stated, after the airstrikes in Khan Shaykhun, that when the international community fails in the duty to take collective action, the states are obliged to take necessary measures and the unilateral intervention becomes lawful[385].

In addition, United Kingdom and France, involved in the military airstrikes following the Douma event, argued that the use of military force was in line with international law: on the basis of "humanitarian intervention" according to the British government, whilst France supported the airstrikes without giving any clear justification[386]. Nevertheless, the position of these two Western powers was already known after the first airstrikes by the U.S.: both supported the American military action even in 2017, so it was not surprising their direct involvement in the second attack. Indeed, regarding to the airstrike in Khan Shaykhun, according to the British government it was a "proportionate response" to the humanitarian distress, whilst, for the French one, it was a "legitimate response" because of the repeated violation of international humanitarian law by the Syrian government[387]. Generally speaking, the targets of the military operations were scientific research centers, storage facilities and bunker, where the production of chemical weapons could take place. In the second attacks the strikes were carried out on three military locations: an alleged chemical weapons facility and an equipment storage site, both near Homs, and a research center at the airport in Damascus [388].

Despite the declarations made by the Western powers, they appeared not to have any clear legal justifications. In any case, the use of force was inconsistent with the obligations set by Article 2(4) of the United Nation Charter, which denied the possibility of the "use of force against the territorial integrity or political independence of any state". As it was already mentioned in Chapter Two, two exceptions under the Charter justify the use of force. The former is Article 51 which clearly grants the "inherent right" of the states to self-defense, so that a military response can be justified only in case of self-defense. The latter case is the use of force under Chapter VII of the Charter, only through the Security Council authorization, in addition to a military assistance request by Syria itself. Since the fact that the military strikes realized by the Western powers did not satisfy even one of these preconditions, they did not find any legal justification under the Charter and under international law. Having said that, it is also worth mentioning that it has been rejected by the UN members the Russian Federation proposal to condemn as an act of aggression, the military airstrikes carried out by the United States and its allies[389].

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[384] DAUGIRDAS Kristina, MORTENSON Julian Davis, *United States Strikes Syrian Government Airbase in Response to Chemical Weapons Attacks by Syrian Forces; Two Additional Strikes on Syrian Government Forces Justified by Defense of Troops Rationale*, American Journal of International Law, Vol. 111, Issue 3, 2017 pp. 783-784; GALBRAITH J., *op. cit.*, p. 522.
[385] RONZITTI N., *op. cit.*, p. 55.
[386] GALBRAITH J., *op. cit.*, pp. 523-524.
[387] UN, Security Council, UN Doc. S/PV.7919, 7 April, 2017.
[388] UN, Security Council, *Following Air Strikes against Suspected Chemical Weapons Sites in Syria, Security Council Rejects Proposal to Condemn Aggression*, UN Doc. SC/13296, 14 April, 2018.
[389] *Ibidem*.

However, up to this point one deeper analysis is required. It is, of course, true saying that the military strikes have not legal justification under the United Nations Charter, but, equally, in 1945, when the Charter was adopted, the main aim of the UN members was to counter international threats caused by conventional actors, which were only represented by states[390]. This matter is reflected in the Charter and in the Articles above mentioned. Indeed, Article 2(4) adopted after the Second World War "prohibits the threat and the use of force by states against states"[391] as well as Article 51 is referred to an armed attack, perpetrated by state actors. It means that the issue of WMD (even terrorism but is not the subject of the present analysis) was not taken into account as a possible threat. When the Charter was drafted, the possible use of chemical, biological and nuclear agents, was not seriously considered, even though chemical agents were used during the First World War (the 1925 Geneva Protocol was the consequence thereof), probably because these weapons were not significantly employed during the Second World War. Therefore, at the time when the purposes and principles of the Charter were set out, WMD were not included, as they were not yet considered a serious hazard[392].

It was exactly within this gap of the international law that the issue concerning the legality of the use of force developed, not only with regard to the Syrian case (e.g. controversial military operations in Iraq, 2003). In this context and after the tragic event of 11 September 2001, the doctrine of pre-emption promulgated by Bush administration took place. More recently, the link between international law and the use of force is constantly changing due to the increased number of conflicts among states[393] and new international threats. More than once, the Security Council has not been able to properly face the new challenges, generally due to the political discrepancies within the permanent members. As a consequence thereof, the strict interpretation of the Charter, as the only source of law to justify the use of force, seems to be restrictive. Indeed, even the Secretary-General, Kofi Annan, talking about the new threats that shall be faced, such as terrorism and proliferation of WMD and the consequent interpretation of Article 51, seemed to accept the idea that significant changes must take place, as confirmed in its speech on September 2003:

> "The Council needs to consider how it will deal with the possibility that individual States may use force "pre-emptively" against perceived threats.
> Its members may need to begin a discussion on the criteria for an early authorization of coercive measures to address certain types of threats […]"[394].

[390] AREND Anthony Clark, *International law and the preemptive use of military force*, The Washington Quarterly, Spring 2003, p. 97.
[391] *Ibidem*.
[392] *Ibidem*.
[393] For further details about the recent conflicts see: GRAY C., *op. cit*., pp. 1-6.
[394] United Nations, *The Secretary-General Address to the General Assembly*, New York, 23 September, 2003.

The speech of the Secretary-General shall be put into the wider debate concerning the use of pre-emptive force to avoid the possibility that state and non-state actors can develop and use WMD, a crucial matter in international law, which has become even more serious in the new century.

In this regard, in more recent times, the policy of "*counterproliferation*", strictly linked with the doctrine of pre-emption, has taken root among the U.S. and other great powers. The doctrine of *counterproliferation* is well explained in the "*Oxford Handbook of the Use of Force in International Law*":

> "counterproliferation efforts are generally designated to forcefully […] degrade and destroy an actor's existing WMD capability. Such counterproliferation efforts include […] pre-emptive acts of force against either actual or potential possessors of WMD"[395].

The international appeal towards the *counterproliferation* policy should not be underestimated. Indeed, the *counterproliferation* policy appears in many official statements of several states and it was formally adopted by the U.S. for its foreign security policy; one concrete demonstration concerning the shift to pre-emptive measures to address the WMD issue can be found in the Proliferation Security Initiative (PSI), which involves almost 50 states and contains a set of principles to curb the proliferations of WMD and related materials.[396]

Nevertheless, one main concern over the *counterproliferation* action is the fact that the use of force can be used against states and non-state actors which are developing or in possession of WMD, even without the imminent threat that these weapons will be used against the state that is planning to use force[397]. However, although the considerable attention on the doctrine of pre-emption, forceful *counterproliferation* measures do not fit perfectly with the existing international law principles which still recognize only two legal justifications for the use of force according to the interpretation of the UN Charter[398]. Although the serious concern over WMD proliferation, there are no legal standards that settle under which circumstances pre-emptive actions would be permitted. Here the contradictions. The international use of force is still following the principles and norms laid down in 70 years old Charter, although the national security interest of several states requires them to act in violations of these principles.

To conclude, what makes the matter of international use of force crucial is the gap between the present international law principles on the use of force and the international threats that shall regulate these principles: an emerging inconsistency between law and facts, due to the new challenges the international law shall face, could lead towards continuous deadlocks at international level. It means that although the military

[395] WELLER Marc (edited by), *The Oxford Handbook of the Use of Force in International Law*, Oxford University Press, Oxford (UK), 2015, p. 1037. As explained in the present book, the doctrine of "counterproliferation" is different from the one of "non-proliferation". The non-proliferation doctrine is strictly based on diplomacy and on state implementation of treaty laws and rules and it is not the case of counterproliferation, as above mentioned.

[396] *Ivi*, pp. 1037-1038.

[397] *Ivi*, pp. 1042-1043.

[398] *Ivi*, p. 1039.

strikes have not legal ground in the UN Charter, these actions are frequently justified under domestic law, especially in the case of the United States.

5.2.1 Amendment to Article 51

It is not the first time that the matter about the possible amendment of the UN Charter as well as the changing in membership and size of the Security Council is discussed[399]. However, what it is important to take into account for the purpose of this analysis is the international community consideration to amend the Charter system about the use of force, due to the new international threats, i.e. the proliferation of WMD and terrorism. In this regard, the issue of pre-emptive acts aimed at facing these threats shall be discussed and it is strictly linked with self-defense issue contained in Article 51 of the Charter. In light of the above, within the framework of "counterproliferation-oriented pre-emptive use of force", Article 51, even in its wider interpretation, has no legal basis which can justify pre-emptive strikes in view of *counterproliferation* policy[400].

However, according to an interesting study carried out by D.H. Joyner in "*The use of force in International Law*", the states that have embraced the *counterproliferation* policy ask for a "formal amendment or authoritative reinterpretation" through state practice which allows the right of anticipatory self-defense, including pre-emptive attacks, when two conditions are met. First, there should be the evidence that a state or non-state actors are engaged in the development or possession of WMD and the second condition requires that there should be reasonable ground to suspect that these weapons will be used to threaten the state in question in the future[401].

Nevertheless, although the common purpose of several states, one clear weakness came up. Actually, without clear indications of what evident production/possession of WMD means or when a perception of a likely threat can be considered reasonable, the possibility to amend Article 51 seems to be deeply vague and indeterminate. One possible explanation to such vagueness and subjectivity is that states want such condition in order to have the legal flexibility they need to pursue the *counterproliferation* policy[402]. However, as already mentioned, it is well-known the controversial application of Article 51; under such circumstance, emphasizing the high standard of vagueness and subjectivity already existing in this Article, is going to worsen nothing than this issue.

To conclude, the difficulties met in the event of Article 51 application, in the context of self-defense, have brought part of the international community to rely on the amendment of this Article in order to have a more flexible right to employ self-defense as well as to allow the powerful states to pursue their *counterproliferation* policy. However, it is also true that the Security Council is an international political body, since it is made up not only by states, but also by states with different viewpoints and conflicting

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[399] For further details see: WELLER M., *op. cit.*, pp. 1048-1052.
[400] *Ivi*, p. 1052.
[401] *Ivi*, p. 1053.
[402] *Ibidem*.

interests. It means that in order to apply the doctrine of the pre-emptive use of force against WMD menace, the only way forward is to reach a substantial agreement among the members of the Security Council, which basically means having the same perceptions of international threats and circumstance which is highly unlikely[403].

5.3 The International Partnership against Impunity

It was already mentioned how in the last chemical attack in Douma, only the use of chemical agents was confirmed, without clarifying who was responsible for the perpetrated attack, due to the Russian veto on the Security Council resolution to extend the JIM mandate. As a consequence thereof, without the JIM there is no international mechanism aimed to attribute responsibilities for the attacks. For instance, Syria was held accountable for the perpetration of around 150 attacks and still there was no penalty applied for said accountability.

On January 2018, absent a mechanism able to identify those accountable, the international community met in Paris and, based on the French initiative together with other 25 states, the International Partnership against Impunity for the Use of Chemical Weapons was created. This Partnership, which to some extent seems to resume the IIIM, is an intergovernmental initiative aimed to strengthen and support international treaties and norms, especially those of the OPCW and the United Nations, against the proliferation and use of chemical weapons and, above all, to punish those responsible of their use. No wonder if the new mechanism is considered really like to the IIIM: this intergovernmental initiative, indeed, is basically focused on the matter of impunity for the perpetrators of chemical weapons, not only in Syria, but wherever this issue occurs[404].

However, although the Partnership is not the only international mechanism seeking to support the international treaties and norms against chemical weapons use, it is considered the most suitable initiative which endorses collective action. Indeed, what can make different this mechanism from the JIM is the strict cooperation among the State Parties that the Partnership requires. Such form of cooperation can be identified within two important spheres of actions, which are well explained in the Declaration of Principles of the International Partnership. On the one hand, what is required to the states who joint the Partnership is "to collect, compile, retain and preserve relevant information" and "to facilitate the sharing of such information, with participating States, and international, or regional organizations as appropriate" in order to bring those hold accountable to justice[405]. What should be remarked is that sharing information among the State Parties of the Partnership will support the creation of a repository for information and analysis that can be employed for assigning the attacks and for taking the appropriate consequences for any further use of CW[406]. However, this mechanism of collecting and storing information seems to recall the functions of the IIIM. In addition,

[403] *Ivi*, p. 1051.
[404] INTERNATIONAL PARTNERSHIP AGAINST IMPUNITY FOR THE USE OF CHEMICAL WEAPONS, *Chemical weapons: No impunity*!, website.
[405] INTERNATIONAL PARTNERSHIP AGAINST IMPUNITY FOR THE USE OF CHEMICAL WEAPONS, *Chemical weapons: No impunity!*, website, Declaration of Principles.
[406] HERSMAN Rebecca, *Resisting Impunity for Chemical-Weapons Attacks*, Survival, Vol. 60, Issue 2, 2018, p. 81.

on the other hand, the International Partnership intended to use the already existing legal structure in order to sanction individuals, entities, groups or governments which are considered involved in the proliferation or use of chemical weapons and to publicize the responsible by a specific website[407]. The idea behind such public list, to "name and shame" those involved in the chemical weapons attacks, is to make all the states aware of the identity of the responsible of said attacks in order to arrest and punish them in the case in which they pass through a State Party's territory[408].

In view of the foregoing, the only new elements of the French initiative seem to be the strict collaboration among states and the idea to practically do something against the responsible, i.e. putting them under sanction. This can be considered the only additional value compared to the previous mechanism, i.e. the JIM and the IIIM already in place.

Nevertheless, the International Partnership has been implemented in relatively recent times and assessing reliable results is not possible. Moreover, such mechanism is not well known yet, compared to the other mechanisms already implemented. Up to know, there are almost 40 countries and international organizations which support such International Partnership in the struggle against the impunity for chemical weapons use[409].

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[407] INTERNATIONAL PARTNERSHIP AGAINST IMPUNITY FOR THE USE OF CHEMICAL WEAPONS, *Chemical weapons: No impunity!,* website, Declaration of Principles.

[408] HERSMAN R., *op. cit.*, p. 82.

[409] INTERNATIONAL PARTNERSHIP AGAINST IMPUNITY FOR THE USE OF CHEMICAL WEAPONS, *Chemical weapons: No impunity*!, website.

CHAPTER SIX

Humanitarian Intervention and R2P in Syria: Legal Basis

6.1 International humanitarian law of non-international armed conflict

Before entering in the specific case of non-international armed-conflict, it is worth mentioning that since the end of the Second World War, a wide range of human rights have been set at international level, starting with the Universal Declaration of Human Rights, proclaimed by the UN General Assembly on 1948. After said Declaration, the United Nations have developed several international binding conventions, with subsequent additional protocols, codifying human rights in different spheres. Among them, there is the Convention on the Prevention and Punishment of the Crime of Genocide (1948), Covenants of Human Rights (1966), which includes the International Covenant on Civil and Political Rights and International Covenant on Economic, Social, and Cultural Rights. Two other conventions are important to be evoked: the International Convention on the Elimination of all Forms of Racial Discrimination (1965) and the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1984). However, said conventions are not the only international human rights conventions used at international level; indeed, the increasing role of human rights have been supported by further multilateral treaties, at international level as well as regional level.

As mentioned in the previous chapters, if an international conflict may have solid source of law to deal with, the same cannot be said for non-international conflict. The limits of an *ad hoc* regulation for non-international armed conflict have pushed towards the necessity to manage with internal conflicts through the international humanitarian law; indeed several attempts had been made by the International Committee of the Red Cross (ICRC), which tried to regulate internal armed conflict, starting from the adoption of the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field[410]. This Convention was the previous treaty to the four Geneva Conventions, for the protection of civilians in times of civil wars. In more recent times, a concrete step was reached with the adoption of the Geneva Conventions of 1949[411], mainly for the adoption of common Article 3 to the four Geneva Conventions, which specifically deals with conflict of non-international character. Indeed, according to Article 3, each State Party shall treat humanely all persons who have not taken part in the hostilities and, as a consequences thereof, the following acts are prohibited “at any time and in any place”:

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[410] SIVAKUMARAN S., *op. cit.*, pp. 30 ss.

[411] The subject of the four Conventions is given below:

- Geneva Convention or the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;
- Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;
- Geneva Convention relative to the Treatment of Prisoners of War;
- Geneva Convention relative to the Protection of Civilian Persons in Time of War.

a) "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

b) taking of hostages;

c) outrages upon personal dignity, in particular humiliating and degrading treatment;

d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[412]

However, after the adoption of the Geneva Conventions, two additional Protocols were adopted in 1977, the Additional Protocol I, which deals with the "Protection of victims of International Armed Conflict", and the Additional Protocol II, which deals with the "Protection of Victims of Non-International Armed Conflicts". The Additional Protocol II, although it is a very simplified text (it contains only 28 articles) compared to the Protocol I, provides for a considerable development of common Article 3 of the Conventions, taking into account norms on human treatment. It covers the following main subjects: human treatment, protection for the wounded, sick and shipwrecked and protection of the civilian population[413]. The Part II of the Protocol II extends the content of common Article 3. In Protocol II, the principle according to which the rebels are not legitimized and they might be punished by the government in power is still in place[414]. It is worth mentioning for the purpose of this analysis that Syria is a State Party of the Geneva Conventions of 1949 and of the Additional Protocol I, but it has not ratified the Additional Protocol II[415].

Except for the said Geneva Conventions stated above, no significant progress has been done in case of the codification of non-international armed conflict through humanitarian law. One more recent initiative can be mentioned, which was the 1990 Declaration on the Rules of International Humanitarian Law governing the Conduct of Hostilities in Non-International Armed Conflicts of the Institute of International Humanitarian Law. Said Declaration included, in addition to principles and rules listed to avoid human suffering, not only a set of prohibitions in wartime against civilian population and objects, but even the prohibition of and limitation on specific weapons use, including the chemical weapons[416]. This Declaration has been taken into account by tribunals and courts in order to consider the state of law and to judge the conduct of parties in non-international armed conflict[417]. The last attempt that deserves to be mentioned in the field of internal armed conflict is the private initiative known as "Fundamental Standards of Humanity" or "Minimum Humanitarian Standards", which was sent to the United Nations for the adoption by states, but it still seems to be stalled[418].

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[412] Geneva Conventions, 1949, Article 3.
[413] Geneva Conventions, Additional Protocol II, 1977.
[414] RONZITTI N., *op. cit.*, p. 371.
[415] *Ibidem*.
[416] SIVAKUMARAN S., *op. cit.*, p. 52.
[417] *Ibidem*.
[418] *Ibidem*.

Nowadays, the international humanitarian law of non-international armed conflicts relies on several sources of law, in terms of treaties. Among them, there are the above discussed common Article 3, the Additional Protocol II and the Hague Convention on Cultural Property with its second Protocol. It also relies on several weapons treaties, including the well-known CWC, the Biological Weapons Conventions and the Convention on Certain Conventional Weapons, and also the Rome Statute of the ICC, after the 2010 Review Conference of the Statute in Kampala[419]. Many other treaties of international and regional character play an important role in terms of protecting human rights, even in non-international armed conflict[420]

6.2 State practice over humanitarian intervention

In the previous Chapters, the lawfulness of the use of force has been taken into account in order to determine whether the military strikes carried out by the U.S. and its allies have any legal ground. As previously discussed, under the UN Charter the use of force has no legal justifications. Nevertheless, time has come to determine whether the use of force for humanitarian purposes has legal justification under international law.

Before the development of the R2P doctrine, it may be noted that states practice over humanitarian intervention has never been characterized by a clear course of action. Indeed, it has happened that sometimes states used military force to cease atrocity crimes, in the name of self-defense (Tanzania intervention in Uganda); sometimes states required the Security Council authorization before the use of force (1991 Western States intervention in Iraq for the protection of the Kurds); or sometimes it happened that states took a military action without the Security Council authorization (1999 NATO intervention in Kosovo)[421].

It can be noted that, humanitarian intervention has always been a controversial matter within the international community, since the legality of this form of military intervention has always been debated by states, because a lack of clear international and customary rules on the subject. Indeed, states practice has not created a clear doctrine concerning humanitarian intervention under international law.

However, it is worth saying that the role of humanitarian intervention has changed by raising states awareness on the importance of human rights matter over the years. In order to better understand this changing, it is time to take into account few episodes which implicitly seem to claim the doctrine of humanitarian intervention. For instance, it is worth recalling the 1970s, when the military action carried out by India against Bangladesh (1971) to help people to gain independence from Pakistan and to cease the repression, as well as by Vietnam in Cambodia to overthrow the Cambodian leader (1978) or by Tanzania in Uganda to overthrow the Ugandan dictator (1979), were not justified under the basis of humanitarian intervention, but mainly on self-defense[422]. With regard to these episodes, UK and France stated that

[419] *Ivi*, pp. 101-102.

[420] For international and regional treaties on human rights applicable in non-international armed conflicts see: SIVAKUMARAN S., *op. cit.*, pp. 101-102.

[421] PILPG, *Humanitarian Intervention in Syria: the Legal Basis*, July 2012, p. 8.

[422] GRAY C., *op. cit.*, p. 40.

violation of human rights did not authorize the use of military force[423]. What is important to point out is that this belief has completely changed over the years, especially for UK, as can be observed in some cases, such as the protection of Kurds and Shiites in the Iraq/Kuwait War or even in the Syrian case after the chemical weapons attack in Ghouta in the Syrian case.

In more recent times, one example in which states seem to rely more on the doctrine of humanitarian intervention, occurred after the Iraq/Kuwait War, when UK, with the Support of U.S. and France, undertook military operations to defend Kurds and Shiites in Iraq. It was under such circumstance that UK itself openly relied on the doctrine of humanitarian intervention[424]. Nevertheless, its application has become even more controversial after NATO bombing campaign in Kosovo in 1999 to protect the ethnic Albanians against the repression of President Milosevic, without the authorization of the Security Council[425]. Indeed, with the military intervention in Kosovo arose the recurring dilemma on the possibility and legality to use force without the authorization of the Security Council, with the aim to protect population form grave abuse. The analysis carried out by the Professor F. Francioni in the article "*Of War, Humanity and Justice: International Law after Kosovo*" may suggest that there is no any legal grounds under the UN Charter and international law which might justify the use of force by NATO. Indeed, the resolutions adopted by the Security Council to solve the crisis in Kosovo did not authorize implicitly or explicitly the use of force; moreover, NATO action cannot be justified neither under Chapter VIII of the Charter, since even regional organizations require the authorization of the Security Council to use force[426]. In addition, the Professor recalls that the Security Council Resolution 1244 has not legitimized *ex post*, in any way, the military intervention of NATO[427]. Having said that, NATO intervention was unlawful under the UN Charter, one further analysis is whether there is any legal ground to justify the action among the principles of customary international law. Generally speaking, humanitarian intervention, in spite of its moral purpose to safe civilian from suffering, had not yet reached a general consensus within the international community in case it lacked of a Security Council authorization[428]. It means that although NATO intervention in Kosovo could have moral grounds, one case which lacked the authorization of the Security Council could not create instantly a new norm of customary law, but, instead, it could be the beginning of a new practice[429]. From this analysis, it seems clear that the intervention in Kosovo can be justified neither under the UN Charter nor under international law. However, an alternative interesting analysis over NATO intervention in Kosovo has been made by the Professor A. Cassese in the article "*Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community*?". Although the Professor argues that such intervention can be justified only by an ethical point of view, even though it still remains contrary to

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[423] *Ibidem*.
[424] *Ivi*, pp. 42-44.
[425] *Ivi*, pp. 42 ss.
[426] FRANCIONI Francesco, *Of War, Humanity and Justice: International Law after Kosovo*, Max Planck Yearbook of United Nations Law, Vol. 4, 2000, pp. 115-116.
[427] *Ivi*, p. 116.
[428] *Ivi*, p. 118.
[429] *Ibidem*.

current international law[430], what is even more interesting is the possibility to take NATO intervention as evidence of a new developing doctrine in international law based on the use of force to cease serious violation of human rights when the Security Council is unable to act timely and properly. Indeed, the Professor argues that, since the matter of human rights has become one of the main concerns of the international community, there are specific conditions under which the use of force without Security Council authorization might be justified[431]. The new theory, based on a "breach" of international law, might lead towards the formation of a new general rule of international law which authorizes the use of force without the mediation of the Security Council only for the purpose to end serious human rights violation[432]. This new rule might evolve in the world community, creating "an *exception* to the UN Charter system of collective enforcement based on the authorization of the Security Council"[433].

In light of the forgoing, the Kosovo episode shall be inserted in a wider debate over humanitarian intervention. Indeed, the bombing campaign led by NATO in Kosovo might establish a "legal basis for the doctrine of humanitarian intervention in international law"[434]. In other words, after such episode, the approach of international community over the doctrine of humanitarian intervention has been largely revised, since the role of human rights in the society has become one of the main concerns of the international community. This assertion might be justified by the new approach assumed by several states on this doctrine. For instance, if number of states completely denied the legality of the Vietnamese intervention in Cambodia, after 1999 the idea that ceasing serious human suffering could justify the use of force, took root[435]. Over this new practice there seems to be a general consensus in the doctrine and this new approach can be based on the argument known as "balancing of values" between the increasing role of human rights which requires their protection, and the resulting erosion of the absolute notion of sovereignty[436]. There is a common belief according to which if the said values clash, the former will prevail over the latter[437]. A similar methodological approach has been applied in Afghanistan and in Iraq, i.e. the need to use force against the possibility of terrorist attacks, the well-known doctrine of pre-emption. To sum up, at the root of the balancing of values approach there is the belief that "the international law governing the use of force must not look, retrospectively; […] it must lean forward, prospectively, and take into account the emerging values and interests […] of the international community as a whole"[438]. Nevertheless, it is worth saying that this new approach has been already applied in several judicial and diplomatic practices[439], but there is still a controversial application in the regulation of the use of force. In *Nicaragua Case*, for instance, the ICJ at

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[430] CASSESE Antonio, *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community*?", European Journal of International Law, Vol. 10, Issue 1, 1999, p. 25.
[431] *Ivi*, p. 27.
[432] *Ivi*, p. 29.
[433] *Ibidem*.
[434] CANNIZZARO Enzo, PALCHETTI Paolo (edited by), *Customary International Law on the Use of Force. A Methodological Approach*, Martinus Nijhoff Publishers, Leiden (NL), 2005, p. 246.
[435] *Ivi*, pp. 246-247.
[436] *Ivi*, p. 247.
[437] *Ibidem*.
[438] *Ivi*, p. 248.
[439] For the judicial cases of the balancing of values approach see: CANNIZZARO E., PALCHETTI P., *op. cit*., pp. 251-259.

para. 268 seems to exclude the use of force by the United States, even though aimed at the respect of human rights in Nicaragua[440]. It means that the balancing of values approach does not constitute yet a legal justification for humanitarian intervention, but it makes a significant contribution for the inclusion of new shared values, already part of the existing role, which might give rise to a new state practice which can be legally justified[441].

In light of the foregoing, the above mentioned episodes (although only few examples concerning the practice of humanitarian intervention) and the just explained new approach are useful to understand why such doctrine is considered so controversial.

Having now more details over the practice of humanitarian intervention, it is worth analyzing more deeply if humanitarian intervention has been advocated by the Western powers in Syria to justify the military use of force. During the Syrian conflict, the first humanitarian intervention was advocated by the UK government in 2012, due to the grave concern over the use of chemical weapons. What the British government hoped was a resolution from the Security Council which authorized all necessary measures to protect the Syrian population from chemical weapons. In this regard, the UK argued that in the case of veto, it would have allowed exceptional measures, under international law, to cease the humanitarian catastrophe which was affecting the civilians[442]. In order to justify such humanitarian intervention, three conditions should be met. The first implies that there were clear evidences, accepted by the international community, of human rights violations on large scale, which requiring urgent relief; second, the use of force was the only practicable alternative and, finally, the use of force should be necessary and proportionate to the humanitarian assistance and restricted in time and scope[443]. However, as previously mentioned, after the Ghouta attack, the British government did not obtain the Parliament's approval for the use of military force, on the basis of this doctrine.

However, in the attack of 2013, UK was not the only state which threatened the use of military force. As already seen, Obama administration described the chemical attack in Ghouta as a "crossing the red line" which could have led towards the employment of force to cease repeated violence on civilians due to the use of chemical weapons. However, in this episode, Obama did not justify the possible intervention within the field of humanitarian doctrine. By contrast, no clear legal justification was given. In that circumstance, only Denmark openly supported humanitarian intervention[444].

The situation was not different for the following attacks. In 2017, the Trump administration, in return for the ongoing use of chemical weapons, authorized military airstrikes. In line with the Obama administration, neither a legal justification nor the reference to a humanitarian intervention was given by the U.S. administration to justify the military attack. According to the President Trump, as said, the military airstrikes have been done for the national security and interest of the United States and for the cessation of the

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[440] *Nicaragua Case*, para. 268.
[441] CANNIZZARO E., PALCHETTI P., *op. cit.*, p. 268.
[442] GRAY C., *op. cit.*, p. 57.
[443] *Ibidem*.
[444] *Ibidem*.

perpetrated chemical weapons use. The same situation occurred for the airstrikes in 2018, carried out by the U.S. and its allies. No legal justifications were effectively put forward, with the exception of the necessity to preserve international prohibition against chemical weapons use and to cease any further use of chemical weapons against civilians[445].

The clear lack of any reference to humanitarian intervention in Syria emphasizes once again the gap between the international community acceptance of this practice as a legal ground for using force and the doubt about its capability[446].

6.2.1 The controversial doctrine of humanitarian intervention in light of the Syrian conflict

Considering in more details the issue of humanitarian intervention, the debate that took place in the international community since 2013, when the first menace of military action occurred, was whether without any Security Council authorization, the employment of unilateral or collective force, with the aim to protect the Syrian population from grave human rights violations has legal justification within the international law. In other words, the matter is if unilateral or collective intervention can be justified under the Security Council authorization acting under Chapter VII only or there are other possible ways forward. As it was already mentioned, the positions assumed by U.S., U.K. and Denmark, especially after the first attack in Ghouta, do understand that said states assumed that international law is not completely in conflict with this kind of military intervention. Indeed, according to these states, in situations of extreme necessity "a right to unilateral humanitarian intervention *does* exist"[447]. By contrast, Russia was not on the same way. The Russian government strongly believed that in the absence of any mandate by the Security Council, the recourse to the use of force against the Syrian territory must be considered an act of aggression[448].

Taking into account the above state practice, it is now appropriate to clarify the matter of humanitarian intervention, even though the international community has not reached yet a common view on this issue. More in details, what divided the international community is the fine wire between undertaking humanitarian action pursuing the legality or legitimacy of humanitarian intervention or pursuing the moral imperative, which does not necessary means acting in accordance to the principles of the UN Charter. Indeed, for some states humanitarian intervention is still forbidden under any circumstances. Others believe that under specific circumstances, when grave and massive human rights violations occur and the Security Council fails to act or there is a situation of deadlock at international level, the use of force as a means of last resort, even though still illegal, can be tolerated; finally, for others, in extreme circumstances humanitarian crisis legitimizes military intervention, which, nevertheless, still remain illegal under the UN Charter[449].

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[445] WELLER Marc, *Syria air strikes: Were they legal?*, BBC, 14 April, 2018.
[446] GRAY C., *op. cit.*, p. 58.
[447] HENRIKSEN Andres, SCHACK Marc, *The Crisis in Syria and Humanitarian Intervention*, Journal of the Use of Force and International Law, Vol. 1, Issue 1, 2014, p. 123.
[448] *Ibidem*.
[449] FASSBENDER Bardo (edited by), *Securing Human Rights? Achievements and Challenges of the UN Security Council*, Oxford University Press, Oxford (UK), 2011, pp. 21-22.

The analysis of the humanitarian response under international law shall start with the definition of humanitarian intervention. Considering that there is not a unique definition for this action, in the present analysis it is embraced the definition proposed by J. Pattinson in his book "*Humanitarian Intervention and the Responsibility To Protect: Who Should Intervene?*" which defines humanitarian intervention taking into account four conditions precedent. It needs:

> "(a) to be engaged in military and forcible action; (b) to be responding to a situation where there is impending or ongoing grievous suffering or loss of life; (c) to be an external agent; and (d) to have a humanitarian intention, that is, the predominant purpose of preventing, reducing, or halting the ongoing or impending grievous suffering or loss of life."[450]

From these four conditions, J. Pattinson has developed his definition of humanitarian intervention that can be summarized as follow:

> "forcible military action by an external agent in the relevant political community with the predominant purpose of preventing, reducing, or halting an ongoing or impending grievous suffering or loss of life"[451].

It is fair to note that there is not only this definition available; however, for the purpose of the present analysis, it seems to be the most exhaustive.

Having identified a suitable definition of humanitarian intervention, it is now time to look at the present status of international law on humanitarian intervention. As argued by J. Pattison, there are different opinions and readings over the matter, but two of them seem to be the most enlightening: the international legal positivism and the natural law theory.

The international legal positivism gives a strict interpretation of the Charter. In other words, this approach embraces the "separability thesis" according to which there is a deep difference between what international law requires and what, instead, morality demands[452]. This approach has two sources of law that must be followed, which are international law treaty and customary law. These are the only source of law that can legally justify a military action; only moral considerations are not taken into account for the admission of humanitarian intervention, since morality has not legal validity.

Generally speaking, those scholars who embrace the international legal positivism doctrine justify the humanitarian intervention only through the strict interpretation of the UN Charter. Starting from Article 2(4) which provides a general prohibition to the use of force, there are only two exceptions to the use of force:

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[450] PATTISON James, *Humanitarian Intervention and the Responsibility To Protect: Who Should Intervene?*, Oxford University Press, Oxford (UK), 2010.

[451] *Ibidem*.

[452] PATTISON J., *op. cit*.

self-defense and Security Council enforcement measures under Chapter VII. Moreover, with regards to customary law, legal positivists cannot agree upon the idea that humanitarian intervention has legal ground since the existence of customary international law on this matter. This argument, they say, cannot be supported, since there is an insufficient state practice to establish an unauthorized humanitarian intervention as a customary norm[453]. In addition, it could be said that the Security Council practice over the matter of humanitarian intervention has always been questionable. It is true that the Security Council has the right to outline what represents an "international threat to peace and security", but is also true that the way through which Security Council dealt with humanitarian crisis is questionable. Indeed, to confirm the controversial Security Council ability and willingness to deal with humanitarian crisis it is worth recalling the failure to prevent the genocide in Rwanda and Srebrenica, in 1994 and 1995 respectively, as well as the failure to prevent the genocide and to punish those responsible for the crimes against humanity in Darfur, in 2003. As a consequence thereof, it is difficult to establish any customary international law without a clear states and Security Council practice over time.

A similar position to the legal positivists has been assumed by N. Ronzitti, as reported in his book "*Diritto Internazionale dei Conflitti Armati*". Indeed, according to the Professor, when the humanitarian intervention is not authorized by the Security Council such action must be considered an unlawful act and its unlawfulness has been confirmed by *Nicaragua Case* at the para. 268, where the Court, talking about the military intervention of the United States concerning the respect of human rights in Nicaragua, argued that "the use of force could not be the appropriate method to monitor or ensure such respect"[454]. Moreover, the Professor states that, although NATO humanitarian intervention in Kosovo was unlawful since it occurred without the authorization of the Security Council, several states have justified the intervention, notwithstanding they were normally against this kind of intervention. Nevertheless, it cannot be said that a new norm of customary law is now in place, since it lacks of two important elements which are *diuturnitas* and *opinio juris*; however, it can only be argued that after the military campaign in Iraq (1991) to help the Kurds, few Western states, especially U.K., have supported the lawfulness of humanitarian intervention[455]. It is worth saying that the humanitarian intervention is not an act of aggression, as long as it is effectively an intervention aimed at protecting the population of a third state from the inhuman and degrading treatment by its government[456].

Nevertheless, it is even true that such rigid positivist approach creates some issues. A recent interpretation on the permissibility of military action without Security Council authorization has been given by the Professor F. Francioni within the framework of the Responsibility to Protect (R2P), in the article "*Responsibility to Protect in the Age of Global Terror: A Methodological Reassessment*", who presents a new methodological approach with the aim to find an alternative way to the controversial matter of the

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[453] PATTISON J., *op. cit.*
[454] RONZITTI N., *op. cit.*, p. 51; *Nicaragua Case*, para. 268.
[455] *Ivi*, p. 52.
[456] *Ibidem*.

prohibition of the use of force and the responsibility to protect individuals against serious crimes. One of the most crucial point is the fact that a strict interpretation of the UN Charter has the consequence to limit the progressive evolution of international law, in moment when human rights are having a significant impact on the international law itself: first, becoming one of the main concern of the entire international community, second, eroding the well-known field of domestic jurisdiction[457]. In the article, the Professor gives a new methodological perspective which might justify the use of force even without Security Council authorization. The former analysis deals with Article 48 of the 2001 *Draft articles on Responsibility of States for International Wrongful Acts*, while the latter, deals with the possibility to use the recent doctrine of R2P as a starting point for the progressive evolution of international law[458].

With regard to the first aspect, Article 48 claims that "Any State other than an injured State is entitled to invoke the responsibility of another State […]"[459]. As reported by the Professor, there is no doubt that the ILC's codification over international wrongful acts is not only a matter of the state directly injured, but it is a collective matter, which involves the entire international community; in other words each state might promote the enforcement of international responsibility in response to grave breaches of human rights[460]. However, two matters affect this first aspect: the former is that such interpretation has been largely rejected by humanitarian intervention literature and the latter is that Article 48 is "an incomplete normative construct", since it provides international responsibility but without identifying such practice as a right and without referring to coercive measures, as the use of force[461].

With regard to the second aspect, the matter is by far more complex. Assuming that, in spite of the recent doctrine of R2P, no significant progress has been made to avoid humanitarian catastrophe and Syrian is one of the most suitable example, it is interesting to know whether it is possible to cease such serious crimes through the use of force which does not necessary requires the authorization of the Security Council. This approach moves away from the legal positivism and it takes into account the continuous innovation and development of international law, far from the strict interpretation of the UN Charter. Professor F. Francioni proposes a theory for progress which involves the concept of reforming the law through "breaching" the existing norms; once the practice is generalized and perceived with a sense of legal obligation by states, it becomes a new international customary norm[462]. As things stand, coming back to the previous matter whether humanitarian intervention is legal even without Security Council authorization, it is worth saying that there is not a clear answer yet; however, if the "breach" of existing norms occurs with consistent practice and it arises a common sense among states that the new practice has legal obligation, such answer could turn into[463].

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[457] FRANCIONI Francesco, *Responsibility to Protect in the Age of Global Terror: A Methodological Reassessment*, The International Spectator, Vol. 51, Issue 2, 2016, p. 24.
[458] *Ivi*, p. 25.
[459] ILC, *Draft articles on Responsibility of States for International Wrongful Acts,* 2001, Article 48(1).
[460] FRANCIONI F., *op. cit.*, p. 25.
[461] *Ibidem*.
[462] *Ivi*, p. 26.
[463] *Ibidem*.

In order to conclude this first part on the strict interpretation of the Charter to justify the use of force in protection of human rights, it shall be also pointed out that, in the Charter, there is no any specific mandate "to promote, protect, and enforce human rights"[464] (this is why the Security Council itself has assumed a relevant role in the protection of human rights), other than Article 1 para. 3 of the UN Charter which promote "to achieve international co-operation in solving international problems of [...] humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all [...]"[465].

Having analyzed the widely shared legal positivism approach to humanitarian intervention, it is worth briefly mentioning the naturalist view, which, by contrast, strongly rejects the separation between legal validity and morality. In other words, humanitarian intervention does not need Security Council authorization to be lawful, since the strict interpretation of international law treaty and customary law is impracticable; what is required is to interpret the sources of law according to the best moral theory of international law purposes[466]. In other words, since the state practice has always been contradictory over such matter, the interpretation of humanitarian intervention precedents, following moral and political values, and not only through the strict interpretation of the Charter, is the only way to confirm or to doubt the existence of customary law allowing humanitarian intervention[467]. However, it seems to be a too vague doctrine to find application under international law.

In light of the above, it is not time to come back to the previous question concerning the legality of humanitarian intervention in the Syrian case. What comes up from this analysis is the fact that, according to the interpretation of the Charter, even though United States with its allies would have justified their military attack through the doctrine of humanitarian intervention, these attacks could not be considered legal under the norm of international law. It means that, the military airstrikes carried out by U.S., U.K. and France have no legal grounds neither under international law, as already stressed in the previous Chapter, nor under humanitarian intervention, since there are not clear statements in the UN Charter that justify the use of force to protect human rights, in addition to a lack of clear state practice.

Last point before concluding this section. The military attacks carried out by the United States and its allies, have been described by Russia as act of aggression. Indeed, according to Article 8 *bis* para. 2 of the Rome Statute, it is described as a crime of aggression "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations"[468]. More in details, following the General Assembly Resolution 3314 (1974), said military attacks have also been qualified as an act of aggression, "an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State"[469]. As already mentioned, after

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[464] FASSBENDER B., *op. cit.*, p. 11.
[465] UN Charter, Article 1(3).
[466] PATTISON J., *op. cit.*
[467] PATTISON J., *op. cit.*
[468] Rome Statute of the ICC, 1998, Article 8 *bis* (2).
[469] Rome Statute of the ICC, 1998, Article 8 *bis*(2)(d).

the military airstrikes of 2018, the Security Council rejected the Russian proposal to condemn such action as an act of aggression, even though it seems to reflect what has been established by the ICC as a crime of aggression.
What comes up from this analysis is a general lack of any action which can be considered consistent with the UN Charter and international law. Although the Syrian government is failing to comply with its obligations, the Western allies as well are not acting consistently with the UN Charter and with international law. Although Western' ethics and moral justifications could validate the employment of all measures to cease humanitarian suffering in Syria and although the idea that the interpretation of the Charter shall be done in a good faith without being frozen over time, no legal justification has been found for their practice. Probably, under different conditions, without the political constraints which characterized since the beginning the Syrian conflict, the military action undertaken by the Western powers would have been labeled as an act of aggression by the international community.
To conclude, except for the humanitarian intervention in the Syrian crisis, the doctrine of humanitarian intervention itself is still controversial. Indeed, more recently, the *Institut de Droit International* has given up the idea, during the Tallinn Session in 2015, to adopt a resolution on this subject, due to the opposite view within its members[470].

6.3 From humanitarian intervention to R2P

Having seen the limited applicability of the humanitarian intervention, it is worth mentioning that, in more recent times, a new doctrine has been developed to deal with intervention for humanitarian purposes, even though military action, with a more clear and credible standards to guide Security Council and states in such practice. Since the controversial matter of humanitarian intervention, in addition to the failure of Security Council to deal with humanitarian catastrophe (such as Rwanda, Srebrenica and Darfur) the Responsibility to Protect doctrine (R2P) can be seen as a more detailed doctrine which tries to rule the doctrine of humanitarian intervention through principles first articulated by the International Commission on Intervention and State Sovereignty. The new principles set forth by the R2P shall not be undermined: the remarkable aspect is that the doctrine helped to generate, among the UN member states, a political consensus on how to prevent and to respond to mass atrocities[471]. Four are the most important new features upon which the new doctrine is based: (i) the R2P has a narrow scope, it means that such principle can be applied only to the gravest international crimes, no to any general situation of human right violation; (ii) the Summit Outcome Document defines who has the responsibility to protect, falling within the state authority; (iii) the R2P doctrine focuses on two aspects on the one hand civilian population suffering and on the other hand state sovereignty; the conviction is that member states strengthen their sovereignty when the protection of

[470] RONZITTI N., *op. cit.*, p. 54.
[471] WELSH Jennifer M., *The Responsibility to Protect at Ten: Glass Half Empty or Half Full?*, The International Spectator, Vol. 51, Issue 2, 2016, p. 4.

individuals by serious crimes is ensured; and (iv) the R2P principles limit the possibility to abuse of such doctrine, although it provides for a wider range of possibilities for the international community to react and prevent atrocity crimes and, moreover, the doctrine recalls that the use of force requires the Security Council authorization, in other words there are no other means of intervention[472].

This doctrine was first proposed at the beginning of the new century, in 2001, in the Report of the International Commission on Intervention and State Sovereignty (ICISS), whose institution was announced at the General Assembly by the Government of Canada with other founding states on September 2000. The main theme proposed by the Commission focuses on the idea that "sovereign states have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states"[473]. It means that the primary responsibility to protect falls under the government of that state, but, if the government fails to do so, the responsibility falls under the international community.

More in details, as clearly written in the Report of the Commission, the Responsibility to Protect implies three particular responsibilities to be respected: the responsibility *to prevent*, *to react* and *to rebuild*. The first aims at addressing the root and direct causes of an internal armed conflict; the second allows the use of all measures, even military force if necessary, in case of humanitarian crisis; the last duty implies that a full assistance must be provided in terms of "recovery, reconstruction and reconciliation", especially after a military intervention[474].

The R2P doctrine was formally embraced at the 2005 World Summit, where the General Assembly states that "each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity"[475] and when the state government fails to protect its own population from the crimes enumerated, a collective action shall be undertaken, in timely and decisive manner, through the Security Council, acting in accordance with the Charter and Chapter VII[476].

The ICISS put limitations for the use of the said doctrine, in order to avoid the possibility that states could abuse of it. First of all, military intervention shall be an "exceptional and extraordinary measure", which can be used when a *large scale loss of life* and *large scale ethnic cleansing occur*[477]. Moreover, according to the ICISS Report, the Security Council can authorize the use of force with the aim to exercise collective action under the R2P, only when four principles are met:

(a) "*Right intention*: which means that the main purpose of the intervention is "to halt or avert human suffering";

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[472] *Ivi*, p. 5.
[473] ICISS, *The Responsibility to Protect*, Report, 2001, p. VIII.
[474] *Ivi*, p. XI.
[475] UN, General Assembly, *World Summit Outcome*, UN Doc. A/RES/60/1, 25 October, 2005, para. 138.
[476] *Ivi*, para. 139.
[477] ICISS, *op. cit.*, p. XII.

(b) *Last resort*: military intervention can be effectively employed when all the other peaceful measures have been explored, but there are sufficient evidences to believe that they would not have succeeded;

(c) *Proportional means*: the military intervention shall be the minimum necessary in terms of scale, duration and intensity;

(d) *Reasonable prospects*: there must be reasonable chance of success if a military intervention is undertaken to halt and avert human suffering"[478].

What makes different the R2P is not trying to replace the Security Council with another body as a source of authority to allow the use of force, but just to ensure that the Security Council could work better than the past years. It means that the Security Council has the obligation, not only the discretion, to take actions when large scale loss of human life or ethnic cleansing occurs. In addition, if the Security Council fails to act, there are two alternative options to avoid a general impasse at the international level. The former involves the General Assembly, which can consider the humanitarian matter calling for "Unity for Peace Procedure" during the Emergency Special Session, whilst, the latter includes the actions undertaken by regional or sub-regional organizations under the Chapter VIII, but authorized by the Security Council[479].

The R2P doctrine has had a positive response within the international community. Indeed, in 2009, Secretary-General Ban Ki-moon presented the three-pillar strategy, reported in the Secretary-General's Report (2009), deepening the provisions set out in the para. 138 and 139 of the 2005 World Summit Outcome. According to the "three-pillar approach", the first one underlines "the protection responsibilities of the State", which means that each state has the duty to protect their people from genocide, war crimes, ethnic cleansing and crimes against humanity; the second pillar provides for "international assistance and capacity-building", which occurs when the state in question fails to protect its own population from the crimes above mentioned and the international community (Member States, organizations, civil society, private sector) shall help the state to comply with its responsibilities; the third pillar requires a "timely and decisive response" by Member Sates when the state fails to provide protection to its own population, in accordance to the provisions set forth in the Charter[480]. This was the latest development of the R2P doctrine, before its practical application to the Libyan case.

6.3.1 The failure to protect in Syria: who was responsible?

The first concrete application of the R2P occurred during the Arab Spring, particularly in the Libyan civil war. In order to have an idea on what happened in Libya and to understand why states became subsequently reluctant to the application of R2P, it is useful to briefly analyze the Libyan case. Without entering into details of such conflict, the Security Council Resolution 1973 (2011) called on the Libyan authorities to

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[478] ICISS, *op. cit.*, p. XII.

[479] *Ivi*, p. XIII.

[480] UN, General Assembly*, Implementing the Responsibility to Protect*, UN Doc. A/63/677, 12 January, 2009, para. 11(a),(b),(c).

protect its own population and it qualified the widespread and systematic attacks against civilians as crimes against humanity[481]. In this regard, the Security Council established "no fly zone" over Libya and authorized the member states "to take all necessary measures to protect civilians and civilian populated area"[482]. However, what was meant by necessary measures was left to be determined by the military and political leadership of those states which led the military campaign. As a consequence thereof, disagreement over the measures that should be taken to protect civilians led towards a division within the members of the Security Council and of the NATO coalition[483]. Moreover, NATO air campaign was expanded even beyond the no-fly zone. Indeed, the serious doubts that arose among several states were if NATO air-campaign for the protection of civilians had succeeded or had killed even more civilians. The abuse and misuse of the resolution in question, in addition to the absence of any reference to the second element of the doctrine in Resolution 1973, namely the responsibility of international community to protect the populations which underlines the lack of a general agreement over the legality of the intervention[484], did not have a positive impact on the possible future application of the R2P. The practice of removing by force a regime, which was creating humanitarian suffering, has led towards the murder of innocent civilians and this practice has made several states awareness that the imposition of a regime change by foreign states might create complications. Indeed, there is a common belief among different states according to which "the death of the R2P doctrine in Syria was made inevitable by Western abuses in Libya"[485].

With regard to the Syrian case, the scenario is even more complicated. In this case, indeed, the R2P has never been invoked, since a political deadlock took place within the permanent members of the Security Council which has completely failed in the attempt to cease the widespread and ongoing human rights violations perpetrated both by the government and rebel forces. The repeated use of chemical weapons, in addition to the ongoing civil war, resulted in an unprecedented humanitarian crisis. The expected impasse reached at the international level was the consequence of eight vetoed draft resolutions on Syria by Russia and China since 2011, sometimes justifying implicitly or explicitly their action with the Libyan legacy[486].

Being aware that the failure to protect the civilian population in Syria is strictly associated to the Security Council inability and unwillingness to take any action, what it is important to point out is whether the failure of the R2P application was only due to the Security Council inaction, or, there were, actually, other possible paths to be taken. In other words, when a Security Council deadlock occurs, the R2P provides a legal framework where the General Assembly or the international community are authorized, under certain conditions, to intervene in different manners. Before coming to this conclusion, it is useful to analyze

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[481] UN, Security Council, *Resolution 1973 (2011)*, UN Doc. S/RES/1973 (2011), 17 March, 2011.
[482] *Ivi*, para. 4.
[483] FASSBENDER B., *op. cit.*, p. 25.
[484] FRANCIONI Francesco, BAKKER Christine, *Responsibility to Protect, Humanitarian Intervention and Human Rights: Lessons from Libya to Mali*, Transworld Working Paper 15, April 2003, p. 8.
[485] NURUZZAMAN Mohammed, *The "Responsibility to Protect" Doctrine: Revived in Libya, Buried in Syria*, Insight Turkey, Vol. 15, Issue 2, 2013, p. 58.
[486] AKBARZADEH Shahram, SABA Arif, *UN paralysis over Syria: the responsibility to protect or regime change?*, International Politics, Vol. 56, Issue 4, August 2019, pp. 544-549.

whether the Syrian conflict has legal basis for the application of the R2P and the following possible military response (since it would violate the territorial and political integrity of the state), in line with the principles set in (i) the 2001 ICISS Report, (ii) in the following 2005 World Summit Outcome and (iii) 2009 Secretary-General's Report over the three pillar strategy.

First of all, to allow the international community's right to intervene under the umbrella of R2P, bypassing the Security Council impasse, there is the need to establish a *prima facie* case, whether atrocity crimes have been committed by the government in power[487]. Indeed, according to the R2P principles, the Assad regime has the responsibility to protect his population from massive loss of human life. Crimes against humanity are committed, if there is a "widespread or systematic" violation by the government of the acts listed in Article 7(1) of the Rome Statute against civilian population. Moreover, since the Syrian civil war has been classified as a non-international armed conflict, the government could be even held accountable for war crimes committed against its population. If a violation of the common Article 3 of the Geneva Conventions or the crimes listed in Article 8(2)(e) of the Rome Statute occurs, it means that war crimes have been committed. Given the great deal of episodes where human rights have been violated against Syrian population, as reported by international bodies and mechanisms which are dealing with the Syrian crisis, it might be argued that the Syrian government, as well as opposition forces, is committing crimes against humanity and war crimes[488]. There is no question over the fact that Syria is experiencing since the beginning of the civil war a large scale loss of life. Indeed, evidences of repeated atrocity crimes by the forces involved have been confirmed by the United Nations itself as well as by the Independent International Commission of Inquiry on the Syrian Arab Republic and by the UN Human Rights Watch, and by other international bodies and mechanisms actively engaged in Syria, i.e. FFM and IIIM, and the most recently, the International Partnership against Impunity.

Having analyzed the principle of "just cause", another point shall be outlined. The use of force can be employed if all the other peaceful measures have been exhausted. As mentioned in the principles of the R2P, military intervention can occur only as a measure of "last resort". In the Syrian case, several measures not involving the use of force have been implemented, but they have not been successful. For instance, several sanctions have been applied to the Assad regime since the beginning, as well as peaceful plans have been implemented, such as the UN-Arab League peace plan or the Framework for Elimination of Syrian Chemical Weapons. None of these measures was successful.

Now, it can be said that the R2P criteria set forth in the previously mentioned documents are met for the use of military intervention in Syria. The "just cause" principle is broadly respected, since human rights protection purposes exist; in addition, it means that there is even a right intention behind the intervention moved by the aim to cease civilian suffering. The use of military force comes after several peaceful attempts to solve the humanitarian crisis, so it can be considered a means of last resort; moreover, there shall be a

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[487] PILPG, *op. cit.*, p. 17.

[488] *Ivi*, pp. 18-19.

proportional response to the humanitarian crisis and finally, there shall be reasonable chances of success, but these criteria can be satisfied only when the intervention is carried out[489].

Having analyzed the legitimacy of the military intervention under the R2P and the impasse at the international level due to the Security Council deadlock, it is worth mentioning that there is an alternative way for the application of the R2P which does not fall only within the competence of the Security Council. The controversial matter which comes up concerns the authorization of the use of force by other mechanisms, for instance the General Assembly or the regional organizations and, in general, the international community. Such alternative way, which takes into account the possible use of force without Security Council authorization, is discussed in several articles, but it needs a further analysis[490]. If we look closer to what is authorized by the R2P doctrine and its evolution over the years, there is no any clear mention about the possibility for a military intervention by the international community without Security Council authorization.

In case of Security Council failure to deal timely with the crisis, the ICISS recognizes that there could be sought a support for a military intervention within the General Assembly through the calling of "Uniting for Peace" procedure. More in details, although "the General Assembly lacks the power to direct that action be taken, a decision by the General Assembly in favor of action, if supported by an overwhelming majority of member states, would provide a high degree of legitimacy for an intervention […] encourage the Security Council to rethink its position"[491]. However, it is also true that the authorization for the use of force by the Generally Assembly goes beyond its powers and functions, since it can discuss and make recommendations on any matters within the scope of the Charter, but not requiring for a military intervention. Moreover, with regard to regional organizations, the Report of the ICISS itself confirms that said organizations have the jurisdiction to act, but their action should be subsequently authorized by the Security Council[492]. In addition, it is worth recalling that, according to Article 53 of the UN Charter, "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council"[493]. Therefore, it seems to be clear that regional organizations have not a so wide discretionary power in terms of using force.

Finally, it is true that even the international community has the responsibility to protect the population from human suffering, but para. 139 of the 2005 World Summit Outcome, specifies that in order to cease crimes

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[489] *Ivi*, p. 20.

[490] There is a belief according to which when the Security Council fails to act, the international community can use force under the R2P, if the principles required by the doctrine are met. For further details over the debate on the military intervention without Security Council authorization see: PILPG, *op. cit.*, pp. 20-22: " […]may the international community authorize the use of force as a last resort.", "under R2P the international community can now use force to stop ongoing atrocity crimes"; WILLIAMS Paul R., WORBOYS Jonathan, ULBRICK J. Trevor, *Preventing Mass Atrocity Crimes: The Responsibility to Protect and the Syria Crisis, Case W. Res*, Journal of International Law, Vol. 45, 2012, p. 486: "Only in rare instances will R2P permit the international community to use force. In these circumstances R2P's three-pillar framework ensures the international community will only use force when absolutely necessary"; HENRIKSEN Anders, SCHACK Marc, *The Crisis in Syria and Humanitarian Intervention*, Journal of the Use of Force and International Law, Vol. 1, Issue. 1, 2014, pp. 128-133.

[491] ICISS, *op. cit.*, p. 53.

[492] *Supra* note 479.

[493] UN Charter, Article 53(1).

against humanity, said actions shall be undertaken in diplomatic, humanitarian and other peaceful manner, in accordance with Chapters VI and VIII of the Charter[494]. Nevertheless, according to the latest development of the R2P doctrine, in the Report of the 2009 Secretary-General, Pillar three allows to take measures which include "pacific measures under Chapter VI […], coercive ones under Chapter VII and/or collaboration with regional and subregional arrangements under Chapter VIII", but it is also specified that "measures under Chapter VII must be authorized by the Security Council"[495].

However, it might be argued that the international community also has its faults. Starting with the assumption that the Syrian state has three obligations to be fulfilled under international law, due to the violation of *ius cogens* norms, i.e. serious violation of human rights[496], the questionable action of the international community to deal with the Syrian crisis shall be pointed out. To begin with the obligations of the Syrian government, first of all, the state shall neither recognize the legitimacy of its actions nor to provide assistance to sustain the situation created; secondly, the state shall cooperate to put an end to the situation; finally, peaceful means shall be taken into account to solve the issue[497]. It is well known that when breaches of *ius cogens* occur, it is even an obligation of the international community to cease them, as a fundamental pillar of the R2P doctrine. If we look into details of the Syrian conflict, it is interesting to note that there was not a timely response or a willingness, neither by the international community nor by the Assad regime to provide any form of cooperation or negotiations among the parties. For instance, the Annan's Six-Point Plan was put into practice in March 2012, various months after the starting of the Syrian civil war; moreover, the Syrian government did not take part in the first Geneva peace talk, and the new Geneva peace talks occurred again at the end of January 2014, but only in 2015 and 2016 there was a direct collaboration with the Syrian government considered indispensable[498]. It is not clear why direct negotiations were avoided or obstructed in the first years of the conflict, but it is clear that the international community failed in its obligation "to encourage and help States" to protect their population from serious violation of human rights, according to the second Pillar of the 2005 World Summit Outcome. One may conclude that such behavior has not contributed to a correct and successful implementation of the R2P in the Syrian crisis.

In consideration of the forgoing, there is no question over the controversial matter concerning the use of force without the authorization of the Security Council. Nevertheless, in the above mentioned documents and in the UN Charter itself, there seems to be no solid legal ground for the international community and other organizations to military intervene without the authorization of the Security Council. It does not mean that the international community and the General Assembly partial inaction in the Syrian crisis is justified, but it is to say that among the measures that can be undertaken, the use of force is not provided.

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[494] UN Doc. A/RES/60/1, 25 October 2005, para. 139.

[495] UN Doc. A/63/677, 12 January, 2009, para. 11(c).

[496] DE GROOF Emmanuel, *First Things First: R2P Starts with Direct Negotiations*, The International Spectator, Vol. 51, Issue 2, 2016, p. 33.

[497] *Ibidem*.

[498] *Ivi*, p. 45.

In light of the above, what comes up is that the tragic downfall of the R2P in Syria is, without question, due to the inability of the Security Council to take an effective and timely action, but that is not all. As previously discussed, the R2P imposes a duty to the international community to intervene. The General Assembly and the regional organizations, as well as the Member States, have the right to do so through the above discussed measures, but no concrete progress has been achieved. The failure of the R2P in Syria is not only the evidence of a further failure by the Security Council, but it is the evidence of the inability and unwillingness of the international community as a whole to mark a significant step for the protection of the Syrian population against the widespread violation of human rights, perpetrated even by the local government.

6.3.2. The Responsibility Not To Veto

In the Syrian civil war, as in other previous conflicts, it is well known that the failure of the Security Council to act in a decisive and timely manner was mostly due to the different interests, domestic political concerns and objections occurred within the permanent members. In order to avoid that geo-political interests can affect decision on such delicate issue, as it is the one of humanitarian intervention, in the past years a less known initiative has emerged, which is the "Responsibility Not To Veto" (RN2V). The general idea behind this doctrine was that the permanent members should agree on not to use or menace to use their veto in situation when the Security Council is called to address mass atrocities crimes[499]. It was within the framework of ICISS R2P proposal in 2001 that the French Minister of Foreign Affairs, Hubert Védrine, launched such initiative. The new way of conduct for the permanent members in the field of R2P was aimed at reaching an agreement regarding the use of veto in matter that deal with humanitarian crisis. This agreement should have provided the permanent members not to use their veto in resolutions that need sufficient number of votes to pass, overshadowing their national interests[500]. According to the French Minister, this new form of behavior would have made more effective the actions undertaken by the Security Council, probably generating, in return, more credibility and reliability for this body, largely questioned over the last years. The concept of the Responsibility Not To Veto was proposed again even during the 2005 World Summit Outcome, but without a concrete response by the Member States.

In more recent times, the matter of not to veto has come up again with regard to the Syrian crisis, especially in light of the several vetoed resolutions posed by Russia and China, which were trying to halt and to avert human suffering. Indeed, on 23 September, 2013, during the 68th Session of the General Assembly, sixty-three states agreed on a reform of the Security Council that proposed a restriction on the use of veto in case atrocity crimes occur[501]. However, it was not all. On 2015, the same proposal on the responsibility not to

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[499] BLÄTTER Ariela, WILLIAMS Paul D., *The Responsibility Not To Veto*, Global Responsibility to Protect, Vol. 3, Issue 3, 2011, pp. 313-314.
[500] *Ibidem*.
[501] ADAMS Simon, *Failure to Protect: Syria and the UN Security Council*, Global Centre for the Responsibility to Protect, March 2015, p. 20.

veto was jointly formulated by France and Mexico. The *Statement* proposed by France and Mexico calls the permanent members to sign a "voluntary and collective agreement" concerning the abstention from veto when Security Council resolutions deal with crimes against humanity; however, at the present day, the document has been signed by 93 Member States, but among the permanent members only France has put its signature[502].

Moreover, during the 70th Session of the General Assembly, another parallel initiative to the one above mentioned has been proposed by 25 states. This initiative consists in adopting a voluntary Code of conduct within the Member States concerning the limitation of veto in specific circumstances. Consequently, the permanent members shall be obliged to refrain from using their veto, when credible draft resolutions to cease mass atrocities were proposed and allowed the Security Council to settle a crisis[503]. This Code has been signed on 12 January 2017 by 112 Member States, among them only two are members of the Security Council, France and UK[504].

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[502] RONZITTI N., SCISO E., *op. cit*., pp. 29-30.
[503] *Ivi*, p. 30.
[504] *Ibidem*.

CONCLUSION

It has been the purpose of the present dissertation to discuss the effectiveness of the Security Council actions and of international law regulation over the prohibition of chemical weapons use in war. At the time of writing, after eight years since the beginning of the civil war in Syria, the ongoing use of unconventional weapons by the parties involved in the conflict clearly underlines that the United Nations intervention, mainly that of the Security Council with the strict collaboration of the OPCW, has been inadequate for different reasons. Recently, according to Human Rights Watch and with the support of other independent organizations operating in Syria, 85 chemical weapons attacks have been confirmed between 2013 and 2018, mostly committed by the Syrian forces, but the current number is most likely higher[505].

Until today, the Security Council is still divided on the Syrian conflict itself and on the continued employment of chemical weapons. The Security Council has shown once again the institutional limitations to appropriately perform its role. The Syrian crisis clearly underlines how the dynamics of the Council are still affected by a polarization among the permanent members, due to geo-political constraints and different domestic interests, creating a worrying paralysis at the international level in those topics for which the Syrian conflict is mostly discussed: chemical weapons and humanitarian crisis.

Nevertheless, except for the Security Council political impasse which first comes up from this analysis, the Syrian conflict has created few positive effects as well as controversial ones. Indeed, the adoption of Resolution 2118 on 27 September 2013 marked one of the most important turning points not only in the Syrian crisis, but also in the fight against the perpetration and employment of chemical weapons use in armed conflict. With said Resolution, the Security Council has assumed a temporary central role in the crisis and has regained credibility through this concrete action; in addition, it has provided a diplomatic way as viable alternative to deal with the conflict instead of using force. Resolution 2118 shows the concrete political will of the permanent members of the Security Council to stop the widespread use of CW against the civilian population.

Above all, Resolution 2118 marks the transition from a “law-breaking moment” towards a “lawmaking moment”, which means that the international law is not static but might change to face new threats[506]. In other words, it cannot be denied that Resolution 2118 marks a turning point in the attempt to effectively deal with chemical weapons, since the international community as a whole has been widely sensitized over such matter. Indeed, the Member States created, with a broad consensus, several verification mechanism, such as JIMS (2013), DAT (2014), FFM (2014), JIM (2015), aimed at confirming the compliance with the

[505] HUMAN RIGHTS WATCH, *Syria. Events of 2018*, 29 June, 2018.

[506] STAHN Carsten, *Between Law-Breaking and Law-Making: Syria, Humanitarian Intervention and What the Law Ought to B*e, Journal of Conflict and Security Law, Vol. 19, Issue 1, 2014, p. 46.

provisions set by the Security Council resolutions, the OPCW and the CWC, and at identifying those responsible of the chemical attacks. In addition, few mechanisms which try to deal with the issue of accountability are taking root: the IIIM (2016) and International Partnership Against Impunity for the use of chemical weapons (2018).

Nevertheless, Resolution 2118 suffers from legal shortcomings and contradictions. Although the use of chemical weapons has been labeled as a violation of international law since it constitutes a "threat to international peace and security", the only possibility provided in case of non-compliance is the adoption of a second resolution, which would have allowed enforcement measures under Chapter VII of the UN Charter. However, no mention in Resolution 2118 was made over the possible instruments of accountability and criminal justice. There should be several options to prosecute those held accountable for the crimes committed in Syria, such as the ICC referral, *ad hoc* tribunals on chemical weapons crimes or internationalized criminal tribunal as well as domestic courts. Unfortunately, none of these said mechanisms have been taken into account to exercise criminal jurisdiction for the crimes against humanity and war crimes committed. The attempt to establish accountability for the use of chemical weapons has been completely vain so that the Security Council passes up a chance to enhance the role played by justice within the Syrian crisis debate.

The other serious defeat of the Security Council (and not only) comes in the field of human rights. Although the humanitarian catastrophe was taking place, no intervention to cease serious violations of human rights under the umbrella of R2P has been undertaken. Since humanitarian intervention has always been a controversial doctrine, the R2P defines, more clearly, the means of intervention for the Security Council, attributing to this body a central role in this filed. Although the Syrian case meets all the conditions to authorize military force, R2P has played no role. Nevertheless, the analysis made shows that an alternative path could be undertaken, which includes peaceful and diplomatic actions carried out by the General Assembly or by the international community as well. With regard to the General Assembly, although it has not the right to directly authorize the use of force, such organ has the right to support a military intervention within the "Uniting for peace procedure", pushing the Security Council to think again about its position not to act. But more than the General Assembly, a complete failure to offset the Security Council inaction shall be attributed to the international community. As stated by the second Pillar of the R2P, the international community has the duty to provide for peaceful and diplomatic tools, such as negotiations between the parties, in order to balance the inaction at international level. Nevertheless, such obligation has not been correctly fulfilled, since negotiations among the parties have been weakly conducted few years after the beginning of the war, when the humanitarian catastrophe already occurred. It is clear that the failure to protect Syria is not only a clear defeat of the Security Council, but even of the international community as a whole.

In light of the foregoing, there is no question that the legacy of Syria has strengthened the universal condemnation by the international community of the chemical weapons use in armed conflict. Moreover, the

failure to solve the current crisis cannot be attributed to a lack of international regulations over the matter of chemical weapons, since several international treaties, customary law, Security Council resolutions and OPCW decisions exist and are in full force and effect. The major issue is not the lack of international regulation over the matter of chemical weapons, but the problem is how the international bodies are dealing with the implementation of the existing norms.

Nevertheless, chemical weapons are still being used in Syria and two are the scenarios to explain what is still going on: the previous declarations made by the Syrian authorities were not complete, and therefore there were additional CW production facilities, or the Syrian authorities were able, since the lack of controls due to the ongoing war, to continue the CW production. Although the "red line" of using unconventional weapons has been crossed more than once by the parties involved in the conflict, there is no legal justification which can defend their use. It is a matter of fact that the prohibition of the chemical weapons use is absolute and unequivocal under international law.

Even though the failure to protect the Syrian population shall be ascribed also to the international community and to other international bodies, such as the General Assembly and regional organizations, the political constraints that characterized the permanent members have not only paralyzed the decisions of the Council, but have made the Security Council itself a serious obstacle to the attempt to solving the Syrian crisis[507] as regards the chemical weapons ban and humanitarian crisis settlement.

[507] AKBARZADEH S., SABA A., *op. cit.*, p. 549.

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SUMMARY

The Syrian civil war is at its eight years and the stability reached during the autocratic regime of Hafez-al Assad is by now a memory of the past. Today, the main concern of the international community over the Syrian crisis regards the repeated use of chemical weapons against civilians, the war crimes and crimes against humanity committed both by Bashar al-Assad forces and by the opposition forces. During these eight years, the Syrian population has been exposed to several chemical weapons attacks but three are considered the most serious in terms of death tool and legal consequences at international level: Ghouta attack in 2013, Khan Shaykhun in 2017 and Douma in 2018. Once the Syrian conflict has reached the point of no return, the mediation of the United Nations, through the controversial role of the Security Council, was required and carried out jointly with the Organization for the Prohibition of Chemical Weapons (OPCW). Notwithstanding the efforts made by the Security Council and by the OPCW to cease the use of chemical weapons and to cease the humanitarian suffering, no concrete solutions have been provided yet.

In light of the above, the present dissertation focuses on the international law perspective and United Nations action over the chemical weapons use in the Syrian conflict with the aim to assess their capabilities and limitations. To this end, international regulation related to the law jurisdiction on chemical weapons proliferation and use has been taken into account. Therefore, a deep analysis has been provided for the relevant treaties, namely the Chemical Weapons Convention (CWC), the existing customary law and the United Nations and state practice. In addition to the international law norms on the chemical weapons prohibition, the relevant law of armed conflict has been deepened, since it should bear in mind that the Syrian civil war is going on and the chemical attacks in Khan Shaykhun and Douma have led towards the use of force by the U.S. and its Western allies. To conclude, the application of international law, in terms of rights and obligations of the parties involved in the conflict, has been widely discussed.

There are clear evidences that the ongoing use of chemical weapons shows another failure for the United Nations to properly deal with the Syrian crisis on two of the most discussed concerns of the international community: the chemical weapons employment and the humanitarian crisis. Thus, in order to assert the capabilities and limitations of the international law and the United Nations action over the Syrian crisis, it has been considered necessary dividing the dissertation into six Chapters, and giving a view as much comprehensive as possible on the actions carried out until the present days.

The Syrian Civil War and its Implications

The dissertation opens with the analysis of the history, geopolitics and identity of the Syrian state and then the analysis moves on towards the internal and external factors that have contributed to the outbreak of the Syrian civil war. Indeed, the Syrian state, as it is known today, is the result of the geo-political transformation which dates back the period of the Grater Syria. During the period of the Ottoman Empire,

the territory of the Garter Syria included the present-day Syria, Jordan, Lebanon Palestine and part of the modern southern Turkey. Nevertheless, this territory has been widely reduced after the First World War with the 1916 Sykes-Picot agreement, which defined the Arab territory between France and Britain. The Syrian population has always been characterized by a heterogeneous socio-religious scenario made up by 90,3% of Arabs and other minorities (Curds, Armenians), while the greatest religion is Islam practiced by 87% of the population (among them Sunni, Alawites, Ismaili and Shiites) and other religious minorities such as Christian and Druze.

Although the Syrian state gained its independence in 1946, it cannot be said that the state experienced a period of stability. Only between 1970 and 2000, under the autocratic regime of Hafez al-Assad, father of the current President, and the strict control of the Ba'th party over the population, the past decades of instability ended but not the political fragility, hidden behind said autocratic regime. However, it was under the current President Bashar al-Assad that Syria took part in the Arab Spring. The Syrian uprising, started with peaceful demonstrations that gradually shifted into the cruel sectarian conflict of today, was the result of the Syrian state's weaknesses which slowly came up in the new century. Indeed, political, economic and socio-religious factors which underline the fragility of the Syrian state have been discussed. With regards to the political perspective, President Bashar al-Assad consolidation of power stressed the political corruption within the Syrian authorities. Indeed, favourable circumstances allowed Bashar al-Assad to get the presidency, amending the Syrian constitution so that he could run for the presidency. Said corruption was the result of a long process of control of the key Syrian institutions which began under Hafez al-Assad. Indeed, at the time of Hafez al-Assad the power system was based on formal and informal power and on visible and hidden power: formally the decisions were taken at the level of visible power, but, practically, the control was held by the hidden power, shared among the security apparatus, the main representative of the Ba'th party and few units of the military apparatus.

Nevertheless, peaceful demonstrations started in the middle of February, but it was on March 2011, on the wave of the other Arab revolts, that teenagers of the town of Der'a started to draw graffiti on the walls of school asking for more freedom. After such episode, the revolts against the corruption of the regime considerably increased and the government forces were unable and unwilling to cease them. Therefore, the consequence of these revolts became irreversible. Of course, the situation worsened even due to the interference of foreign countries, such as Turkey and Saudi Arabia, which at the beginning assumed the role of mediators between the regime and the rebels but, when the point of no return has been passed, they started to finance the rebels with aids and weapons.

With regard to the economic perspective, according to the World Bank Report, in the new century Syria was experiencing an economic growth in aggregate terms, even due to important economic initiatives, above all the shift towards a hybrid "social market economy". Notwithstanding the positive growth, the main issue was the lack of economic and political inclusion within the population, in addition to the lack of political transparency and civil liberties.

Finally, the Syrian civil war has been defined "sectarian" since ethno-religious divisions among the groups led towards the creation of solidarity among the groups themselves which became political players looking for the power. More in details, deep hostility remained between the Alawites and Sunni. Alawites were accused by the other minorities to enjoy special privileges ensured by the government, especially by the Sunni, who, under Bashar al-Assad, were excluded by the highest level of the political power so that they began few protests against the regime. As regards to the other minorities, they did not create serious problems even because of their small number, except for the Kurds community which wanted to establish an autonomous Kurdish territory in the North part of Syria and therefore organized militias in order to defend their territories.

Having considered the internal factors of the Syrian civil war, in order to clarify who are the supporters of the Syrian regime, and who, by contrast, supporters of the opposition forces, the external actors have been taken into account. On the Assad side, the most influential are Russia and China since being permanent members they vetoed more than once Security Council resolutions. The reasons behind their support are mostly due to geo-political and economic interests these countries have, especially for Russia which dates back the period of the Cold War. In addition to these two states, Iran and the Hezbollah have strict relationship with the Syrian regime mainly due to their common enemy, Israel. By contrast, the U.S., United Kingdom and France support the opposition regime, financing with economic aids and weapons the rebels, especially the U.S. and United Kingdom. Among the opposition forces which have the aim to weaken the Assad regime, a relevant role is assumed by the Syrian National Council, by the Free Syrian Army and, finally, by the Syrian Opposition Coalition.

Chapter One ends with the United Nations response after the first two years of the Syrian conflict. Even though there was not an immediate response, one remarkable step has been reached with Annan's Six-Point Plan which tried to cease the violence between the parties through diplomatic tools but its failure was not long in coming. Although the attempt of the international community and of the United Nations to end the violence, on August 21st 2013, chemical weapons attacks occurred in the town of Ghouta, where 1.400 people were killed, including 400 children. Few days later, the United Nations Mission was allowed by the Syrian government to inspect on the effective use of chemical weapons in the attack. The UN team, with the support of the World Health Organization and of the OPCW, came to the conclusion that chemical agents have been used against civilians, but there has been no mention concerning who was responsible.

The International Legal Framework of the Chemical Weapons Use in War

Since the use of chemical weapons in the Syrian attack has been confirmed, it is appropriate discussing the main principles of international law related to the use of chemical weapons in armed conflict. Generally speaking, what has been pointed out is a general consensus of the international community over the prohibition of these unconventional weapons in time of armed conflict. But, proceeding by order, among the

sources of law which prohibit the use of chemical weapons, international treaty and customary law have been taken into account.
With regard to the international treaties which focus on the use of unconventional agents, their development dates back the end of XIX century, with the 1899 Hague Declaration (VI,2) concerning Asphyxiating Gases which bans the use of asphyxiating gases and other deleterious gases which can cause suffering on civilians. Even though the Hague Declaration can be defined as the first attempt to prohibit the use of chemical agents, the definition of unconventional agents given therein was too vague and it was difficult to define which agents should be banned during the war. As a consequence thereof, the Hague Declaration has been replaced by the 1925 Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare. The 1925 Geneva Protocol is the consequence of unconventional agents used during the period of the First World War and it includes more complete definitions of the agents and gases banned during the war. Nevertheless, although one step forward has been done even with the Geneva Protocol, some weaknesses come up. Above all, as in the case of the Hague Declaration of 1899, there is an open debate concerning the interpretation of which gases and other agents are effectively banned. Moreover, the provisions set forth in the 1925 Geneva Protocol can be applied only to the contracting parties and finally, said Protocol seems to allow the State Parties to make reservations which allow them not to be bound by some principles of the Protocol if another state does the same, for instance in time of war.
However, the Chemical Weapons Convention (CWC), signed on January 1993 and entered into force on April 1997, is considered the most significant step for the struggle concerning international disarmament and for the development of proper law on arms control. Its importance is due to the fact that it bans an entire category of weapons, i.e. the chemical ones, "under any circumstance" and Article II of said Convention gives a specific definition on what chemical weapon means. In addition, the Chemical Weapons Convention provides for Verification system whose principles are set forth in the Verification *Annex*, which has the aim to ensure compliance with the principles of the Convention within the State Parties. Finally, the work of the Convention is supported by a supervisory organization, known as the Organization for the Prohibition of Chemical Weapons (OPCW) whose function is established by the Convention itself in Article VIII. The OPCW is made up by three organs: the Conference of the State Parties, the Executive Council and the Technical Secretariat.
With regards to the customary international law related to the prohibition of chemical weapons in internal armed conflict, two episodes have been taken into account: the use of chemical agents in the Iraqi region of Halabja, in 1988 with its international response, and the amendment to Article 8 of the Rome Statute of the International Criminal Court during the Kampala Conference, in 2010.
The Halabja episode is reminded for the use of chemical agents against the Kurdish population which killed around 5.000 people. However, what was remarkable of this case was the fact that it has been discussed within the decision of the International Criminal Tribunal for the former Yugoslavia (ICTY) concerning the *Tadić Case* in 1995. The ICTY decision has left an important legacy since there was a general consensus

among the international community to ban the use of chemical weapons by the Iraqi authorities against the civilians of Halabja. Two are the relevant paragraphs of the Judgment in the *Tadić Case*, para. 124 and 125 respectively, which not only underline a general agreement within the international community over the ban of chemical weapons in internal armed conflict, but also they confirm that norms of customary law have taken shape concerning the prohibition of these unconventional weapons in conflict of non-international character.

The case of the ICC concerns the amendment to Article 8 of the Rome Statute which includes as a violation of laws and customs even the use of chemical agents in international armed conflict. At the Kampala Conference, the contracting parties adopted Resolution RC/res.5 which added several provisions to Article 8, particularly the prohibition of chemical agents even in the case of non-international armed conflict, as confirmed by Article 8 para. 2(e)(xiv). Nevertheless, it is worth saying that although the definition of CW is not mentioned in both Article 8 para. 2(b)(xviii) and Article para. 2(e)(xiv), but the definition given seems to duplicate the 1925 Geneva Protocol, several problems arose within the contracting states regarding the effective jurisdiction of the ICC even on CW. Today there is a general consensus within states according to which the use of chemical weapons shall be considered a violation of laws and customs, included in the list of war crimes contained in the Rome Statute.

Having analyzed the international regulation over the matter of chemical weapons, the ending part of Chapter Two discusses first the application of the CWC in conflict of non-international character and then, a further analysis is provided to evaluate its possible application even to non-state actors having regards to their controversial legal status and legitimacy. With respect to the application of the CWC, it is worth saying that the Vienna Convention on the Law of Treaties of 1969 does not take into account the case of armed conflict as a circumstance which can lead towards the suspension or termination of a treaty. Starting from the assumption that the distinction between the two types of armed conflict, international and non-international, is blurred over time as reported by the International Law Commission (ILC), referring to armed conflict does not exclude the possibility to refer to one conflict or to the other. Having said that, there is a general consensus in the literature over the applicability of the CWC in time of armed conflict which seems to be justified by the fact that said Convention shall be applied *under any circumstance*. Nevertheless, all doubts have been clarified by Article 3 on the *Draft articles on the effects of armed conflicts on treaties* of the ILC. Indeed, during the 2011 Session, the ILC confirmed that the existence of an armed conflict is not a sufficient condition which leads towards the suspension or termination of the treaties.

The latter case concerns the application of the CWC to non-state actors. Assuming that the legal status and legitimacy of the rebel and insurgents is controversial, it cannot be denied that under specific circumstances they have international legal subjectivity, which means they have international rights and obligations to respect, even though for an interim period. Even though it should be the treaty itself which contains specific provisions specifying whether the treaty is binding even for non-state actors, generally, rules concerning the prohibition of chemical weapons are generally binding even for non-state actors. Nevertheless, as for the

CWC application in armed conflict, even in the case of non-state actors any doubts is clarified by the *Martens Clause* set forth in the *Preamble* of the 1907 Hague Convention (IV) Respecting the Laws and Customs of War which states that belligerents are subjected to the "law of nations", including the respect of "laws of humanity" and "the dictates of the public conscience".

The Application of the International Regime on Chemical Weapons

Before entering into details of the concrete application of law jurisdiction on chemical weapons, it is worth mentioning the reasons behind the development and production of chemical weapons within the Middle East, with particular reference to the Syrian state. Assuming that establishing whether a state owns, produces and uses chemical weapons is never easy, there is a common belief according to which the first country which began the production of these weapons was Egypt in the second half of XX century, when the first Company for Chemicals and Insecticides in 1963 outside of Cairo. In addition, during the Arab-Israeli war, since the Egyptian chemical arsenal grew significantly, even Israel developed its own chemical arsenal to offset the worrying military power of the Egyptian state. By contrast, assessing when Iraq started to produce it chemical weapons is not clear, probably since the 1980s, when Iraq wished to contain Israel and Iran powers.

Generally, there are several reasons behind the decisions to produce weapons of mass destruction (WMD), including chemical weapons, which can be summarized in four points: (i) self-preservation and deterrence, (ii) effectiveness and military utility, (iii) technology transfer and (iv) worldwide complacency.

With regards to the Syrian case, there is a general agreement according to which such state owned CW and production facilities since the last century. More specifically, Syria began its chemical program between the 1970s and 1980s, although it was since the 1970s that this country started to acquire significant quantity of these weapons mostly from USSR and Egypt but even from Czechoslovakia. Moreover, with the purpose to encourage its chemical program, Syria supported the settlement of pharmaceuticals industries in its territory, which had the aim to hide the production or acquisition of substance related to the production of chemical agents. In this regard, there were some European suppliers which financed and supported such plan: the German and the French companies. The reasons behind the Syrian chemical program were mainly strategic. Above all, there was the question of Israel and its nuclear capabilities so that Syria chemical arsenal can be seen as a deterrent against the Israel nuclear power. Moreover, other two reasons can be ascribed. The first was related to Turkey due to the fact that the relations between the two states deteriorated because of the question of PKK. The second was Iraq even though a conflict between Iraq and Syria was unlikely for the ethnic and social links existing between the two countries, in addition to the common enemy, Israel.

At the end of Chapter Three Ghouta attack is discussed again, assessing the international community response after this attack and the consequent use of force. The use of force under the UN Charter and international law becomes the concluding theme of this Chapter, since after the Ghouta chemical attack, the Western powers, particularly the U.S. and United Kingdom, were thinking to carry out military airstrikes

against Syria. As stated by the Secretary-General Ban Ki-moon, Syria has committed a war crime and it has violated the 1925 Geneva Protocol (at the time of the attack Syria has neither signed nor ratified the CWC).
In the Syrian case, military intervention took different forms: the possibility for a military intervention and the military support to the opposition forces. With regards to the former case, the possibility to military intervene in violation of the territory of another state is prohibited under Article 2(4) of UN Charter which states that the Member States "shall refrain […] from the threat or use of force". With regards to the latter case, arming the rebels is considered an unlawful use of force as stated in *Nicaragua Case* (1986) by the International Court of Justice at paragraph 205 of the Judgment.
Nevertheless, under the UN Charter there are two possibilities that justify the use of force: Article 51 which allows self-defense and Article 42 which allows the use of force under Chapter VII of the Charter through the Security Council authorization. With regard to the principle of self-defense, a debate arose within the international community over the possibility to use pre-emptive force when there is the possibility that a military attack might occur. This doctrine has been largely embraced by the U.S. especially after the terrorist attack to the Twin Towers, but it does not find any legal justification in the Charter. Neither of these two principles has been satisfied, it means that the potential military intervention of the United States had not legal ground under the UN Charter.
Chapter Three ends with the possibility to justify military intervention under international law by the military assistance on request by a third state. What makes lawful this form of intervention is the principle *volenti non fit iniuria* which means that if there is the consent of the effective government of the state that requires the intervention, the use of force by a third state has legal ground. This principle of international law has been the subject of the Institute of International Law during the Rhodes session in 2011. Nevertheless, neither this case can justify the use of force by the U.S. since no request has been made by the Assad regime; by contrast, such international law principle had justified Russia military intervention, carried out under the authorization of the Syrian authorities.

Legal Framework for the Elimination of the Chemical Weapons in Syria

After the Ghouta attack, the Security Council took the first concrete step to deal with Syria chemical disarmament. It was the first time that the Council assumed a central role in the Syrian crisis, since the United States and Russia reached an agreement on 14 September 2014 named *Framework for Elimination of Syrian Chemical Weapons* which was aimed at the destruction of the Syrian chemical arsenal by the middle of 2014. If said Framework put the basis for setting up the guiding lines of the elimination of CW and production facilities, it was with the Security Council Resolution 2118 and the OPCW Executive Council decision EC-M-33/DEC.1 that such plan was put into practice. Chapter Four discusses first the said Resolution and its contradictions and then Executive Council decision EC-M-33/DEC which provided for the technical details for the elimination process.

With regard to Resolution 2118, it has been considered a historical resolution on the Syrian conflict for several reasons. Above all, said Resolution had legally binding effects on Syria and it constituted an important step forward in the attempt to strengthen the prohibition of chemical weapons use in armed conflict under international law. In addition, Resolution 2118 broke the impasse reached at the international level after the Ghouta attack, avoiding the adoption of the use of force in favor of a joint diplomatic action. In this circumstance, the Security Council assumed a central role in the attempt to solve the crisis which required a direct collaboration with the Syrian state itself and regained its credibility since it was the first time that the five permanent members agreed on a resolution dealing with chemical weapons elimination in Syria.

In order to reach such agreement, the text of the Resolution has an extreme compromised nature. In addition to reaffirm that the proliferation of chemical weapons represents "a threat to international peace and security", Resolution 2118 states that the use of these weapons constitutes a violation of international law and the responsible for the chemical attacks shall be held accountable. Said Resolution required a strict collaboration with the OPCW in order to put into practice the chemical weapons elimination program, but, above all, it required a strict collaboration with the Syrian Arab Republic itself. Indeed, Syria accepted to ratify the CWC, which would have entered into force on 14 October 2013. However, Syrian authorities ensured the compliance with the Convention even before its entry into force in the State.

Notwithstanding the historical and legal importance of Resolution 2118, it suffers from legal shortcoming and contradictions. The first weakness that comes up is the fact that said Resolution has not been adopted under Chapter VII of the UN Charter, although the resolution itself allows to impose measures under Chapter VII in case of non-compliance. It means that in order to impose enforcement measures provided by Chapter VII, for instance in case of non-compliance, the adoption of a second resolution is required but the likely veto of Russia and China might lead towards a new impasse at international level. The second important contradictory aspect of the Resolution is the fact that no mention has been made over those considered accountable of the Ghouta attack and although it is written that those responsible of any chemical attacks shall be held accountable, in practice no mechanism has been provided.

It is worth mentioning that Syria is experiencing the gravest humanitarian catastrophe of the new century, not only due to the chemical weapons use but even for the war itself. Going on with the analysis, several mechanisms which can ensure international criminal justice in Syria have been discussed, although each of them has limitations in their concrete application. Among the mechanism analyzed there are: (i) the International Criminal Justice; (ii) *ad hoc* international criminal tribunal; (iii) domestic courts; (iv) internationalized criminal tribunal; and (v) domestic courts of third state. Notwithstanding several possibilities existed to ensure international criminal justice, the international community is still assessing which one is the most appropriate path to take. The Security Council has completely failed in the possibility to strengthen the role of criminal justice in the Syrian crisis.

Having analyzed Resolution 2118 in all its aspects, the second part of the Chapter deals with the chemical weapons elimination process, starting from the OPCW decision EC-M-33/DEC.1 which provided all the basic purposes for the disarmament process. As reported by such decision, the Syrian authorities would have provided details over all chemical agents and production facilities. In the end, 41 facilities at 23 sites have been declared by the government, in addition to 1.300 metric tons of chemical agents divided in Category 1 and Category 2 and 1.230 tons of vacant chemical munitions. In order to ensure the smooth running of the OPCW operation, the OPCW-UN Joint Mission in Syria (JMIS) has been established on October 2013. Moreover, in Syria extremely intrusive method of verification occurred.

Although Resolution 2118 and decision EC-M-33/DEC.1 with the support of decision EC-M-34/DEC.1 provided a precise plan, in practical terms few complications came up. First of all, the elimination of chemical weapons occurred during the ongoing civil war; this condition induced the international community to put into practice the destruction plan outside Syria. The other concern regarded the cost of the verification and destruction plan. According to Article IV para. 16 of the CWC, the destruction costs of chemical weapons shall be met by each State Party, but in this case Syria was unable to provide for these costs, since the economic sanctions applied to the country and the ongoing civil war. In this case, the contribution of the State Parties in terms of financial aids, transportation and destruction of CW was crucial. At the end, Syria was responsible only for the activities carried out in its territory; by contrast, the plan for the transportation and destruction of such weapons was left to the OPCW Director-General and the State Parties. The deadline for the destruction of all the declared CW stockpile and production facilities was fixed on 30 June 2014 and several states have been involved in the destruction process, including Italy which made available the port of Gioia Tauro for activities of "transloading".

Nevertheless, as in the case of Resolution 2118, even the disarmament program created a debate within the international community concerning the legality of the external operations carried out for the destruction of the CW, since the CWC itself requires that these operations should be performed within the territory of the state in question, being the transport of weapons not allowed. As a consequence thereof, a contradiction between what was established by Resolution 2118 (since it allowed the destruction outside the territory) and what was established by the Chemical Weapons Convention came up. The assumption that external operations were unlawful had not legal basis as confirmed by Article 25 of the UN Charter which states that Member States must perform the decisions taken by the Council, being aware that, according to Article 103 of UN Charter, the obligations of the Charter prevail over those set forth by other international agreements. Moreover, according to Article 31 of the Vienna Convention on the Law of Treaties, a treaty shall be interpreted in its good faith, it means that if the transportation of chemical weapons was aimed at their destruction, transportation could not be considered unlawful. A further confirmation of the legitimacy to carry out external operations came from past state practice. Indeed, it happened in Austria in 2007 and in the Netherlands in 2013 that old chemical weapons have been removed outside the possessor state.

Since one important aspect for the successful outcome was a fruitful collaboration of the Syrian authorities requiring the respect of obligations and undertaking of responsibilities by the Syrian states, several verification mechanisms between OPCW-UN have been established in order to supervise if cases of non-compliance occurred. Among them, the already mentioned JMIS was established on October 2013. In addition, the OPCW established few mechanisms to support the verification system: the Declaration Assessment Team (DAT), on March 2014 and the Fact-Finding Mission (FFM) one month later. Moreover, the Joint Investigative Mechanism was established unanimously by Resolution 2235 on February 2015.
Finally, the International, Impartial and Independent Mechanism (IIIM) for Syria was established by the General Assembly. Such new mechanism marked an important step forward in the attempt to strengthen the role of criminal justice in the Syrian conflict. Indeed, its aim is to collect and preserve serious violations of human rights and humanitarian law and to prepare files which could be useful for a future process before courts or tribunals of individual accountable. Nevertheless, the IIIM cannot be compared to a judicial body since it has not the power to provide for the persecution of individuals, but it has "quasi-prosecutorial functions" which means that it is not able to adjudicate cases of individual accountable but it helps future tribunal to bring those accountable to justice.

International Law Perspective for the Use of Military Force in Syria

The failure of the disarmament program set by Resolution 2118, OPCW decisions EC-M-33/DEC.1 and EC-M-34/DEC.1 was not long in coming. Although the amount of chemical weapons and productions facilities declared by the Syrian authorities was destroyed within the time established, several chemical attacks occurred even after June 2014. Nevertheless, the gravest attacks in terms of death tool and consequences took place in Khan Shaykhun, 2017, and in Douma, 2018, respectively. In the first attack, the FFM established that chemical weapons have effectively been used, whilst the JIM established that the Syrian Arabic Republic was responsible for this attack. With regards to the second attack, the FFM stated that chemical weapons have been used with reasonable grounds, but, since the Security Council was not able to renew the JIM mandate due to the Russia veto, there was no international body at that time able to identify the responsible of the attack. Although no confirmation has been obtained in the second episode, the Western powers believed, with high confidence, that the Syrian regime was responsible even for the second attack.
Nevertheless, the international community response was the same for both attacks. Since Syria violated the 1925 Geneva Protocol, the 1993 Chemical Weapons Convention and Security Council Resolution 2118 (2013) and 2235 (2015), Western powers supported the idea of the U.S. based on military intervention. Indeed, after the Khan Shaykhun attack a unilateral military action has been performed by the U.S., while after the attack in Douma military airstrikes have been carried out by the U.S. with the support of the Western allies, United Kingdom and France. Although the repeated violations of international law by the Syrian states, even in these attacks there were no legal ground which could justify the use of military force.

The use of force was inconsistent with the obligations set forth in Article 2(4) of the United Nations Charter and the military airstrikes did not find any legal justification neither under the case of self-defense nor under the authorization of the Security Council acting under Chapter VII of the Charter.

In this regard, having clarified that there was no legal justification under UN Charter for the military airstrikes, it is even worth recalling that a strict interpretation of the Charter, drafted in 1945, is not the best way to take since the possibility of the progress and development of law is not contemplated. In other words, the international use of force is still acting under the principles set in 70 years old Charter, although the national security interest of several states requires to act in violation of it. For instance, at the time when the Charter was drafted, the possible use of biological, chemical or nuclear agents was not seriously took into account and, as a consequence thereof, neither the possible use of pre-emptive force to avoid the possibility that attacks with WMD occurred. However, something has changed in the new century. With the terrorist attack to the Twin Towers in 2001, the idea of using pre-emptive force in case of WMD and terrorist attacks, giving a new interpretation to Article 51, started to take root within the international community. In this regard, an international appeal towards the *couterproliferation* policy grew which appeared in several official statement and was formally adopted by the U.S. in its foreign policy. The *couterproliferation* policy provides for the use of military force to degrade or destroy an actor which has WMD capabilities; according to such doctrine, pre-emptive acts against the possessor or possible possessor of WMD are allowed. As a consequence thereof, several states push for an amendment to Article 51, which means allowing the use of pre-emptive force in the framework of c*ounterproliferation* policy when two conditions are met: first, there should be sufficient evidences that or the state or the non-state actors develop or possess WMD; second, there should be valid reasons to believe that these weapons will menace or will be used against a state. The discussion about the amendment of Article 51 is still in place and no concrete progress has been reached yet.

Chapter Four ends with the last attempt of the international community to punish those accountable of the war crimes and crimes against humanity committed in Syria: after the latest attacks, when JIM was unable to attribute responsibilities thereof, a French initiative took place. It was on January 2018 that the international community met in Paris and 25 states created the International Partnership against Impunity for the Use of Chemical Weapons. Such new mechanism is basically focused on the issue of impunity for those accountable of using chemical weapons, not only restricted to the Syrian case, but whenever the issue occurs. There is no question that it can be considered the most suitable initiative based on a collective action in support to the mechanism aimed at curtailing chemical weapons use and proliferation as well as to punish those responsible of unconventional weapons. Nevertheless, the International Partnership has been implemented in recent time and thereof assessing its result is not possible. However, several states and international organizations joined such initiative.

Humanitarian Intervention and R2P in Syria: Legal Basis

Since the unsolved humanitarian catastrophe that Syria is experiencing from the beginning of the conflict, the last Chapter of the dissertation deals with the matter of humanitarian intervention and recent doctrine of Responsibility to Protect. Before deepening these two questions, the first focus is on the international humanitarian law in case of non-international armed conflict. The absence of solid source of law in internal armed conflict led towards the need to regulate conflict of non-international character through humanitarian law. In this regard, it was worth recalling the common Article 3 to the four Geneva Conventions of 1949 which deals with the acts that are prohibited against civilians " any time and in any place", in addition to two additional Protocols adopted in 1977, the Additional Protocol I and the Additional Protocol II. Only Protocol II deals with "Protection of Victims of Non-International Armed Conflicts"; nevertheless, Syria ratified the Geneva Conventions of 1949, but no the Additional Protocol II. Except for the said Geneva Conventions, no significant progress has been done in the matter of humanitarian law concerning non-international armed conflict. Only two initiatives can be mentioned: the 1990 Declaration on the Rules of International Humanitarian Law governing the Conduct of Hostilities in Non-International Armed Conflicts and another private initiative called "Fundamental Standards of Humanity".

Turning to the details of humanitarian intervention, it is a common knowledge that humanitarian intervention has always been a controversial matter within the international community. Moreover, states awareness over the importance of human rights and their approach towards humanitarian intervention has changed over time. The turning point of states approach on such doctrine and on human rights has been the bombing campaign of NATO in Kosovo. NATO intervention influenced the international community towards the legality of the humanitarian intervention. In other words, although there is a common belief in literature that NATO intervention has no legal ground neither under the UN Charter nor under international law so that it may be justified only by an ethical point of view, the importance of such episode is due to the fact that it may mark a new evidence and practice concerning the doctrine of humanitarian intervention. It is based on the idea that when serious violations of human rights occur and the Security Council is unable or unwilling to intervene, the international community can use force to cease humanitarian suffering even without the authorization of the Council.

NATO intervention in Kosovo has been inserted in the wider debate of humanitarian intervention. As already mentioned, the international community approach after such episode changed. In other words, the idea to military intervene in case of serious violation of human rights started to take root based on the "balancing of values" argument between the increasing role of human rights and the inevitable erosion of state sovereignty. According to this new doctrine, a possible clash between these two values will lead towards the predominance of the former towards the latter.

Having analyzed the controversial role of humanitarian intervention, it is worth examining the Western approach towards humanitarian intervention in light of the Syrian conflict. After the first chemical attack in 2013, only UK and Denmark would have justified a possible military attack under the umbrella of

humanitarian intervention, since such doctrine has not been mentioned by the Obama administration. The same happened to the following attacks. In 2017 as well as in 2018, the Trump administration authorized the use of force, but no legal justification or reference to humanitarian intervention has been provided. Although no mention over humanitarian intervention has been provided, a further analysis over the legality to use humanitarian intervention in Syria has been undertaken. After a definition of humanitarian intervention provided by J. Pattinson, two approaches over the doctrine of humanitarian intervention have been examined: the international legal positivism and the natural law theory. The former theory gives a strict interpretation to the Charter, it means that there is a deep difference between international law and moral values and humanitarian intervention can be justified only through the provisions set in the UN Charter. In other words, moral values cannot be considered a justification to humanitarian intervention since they lack of any legal ground. On this matter there is a wider debate within the international community. More in details, what comes up is that a strict interpretation of the Charter might lead towards a limitation in the progressive evolution of international law. In this regard, a new methodological approach within the framework of human rights violation, over the possibility to use force without Security Council authorization has been discussed. This new methodological approach is based on the concept to reform the law by "breaching" existing international norms.

Coming back to the latter approach concerning humanitarian intervention, the naturalist view, by contrast, does not require a strict interpretation of the Charter to allow humanitarian intervention but who embraces such doctrine agrees that the sources of law must be interpreted following their moral purposes. In other words, humanitarian intervention might be justified if this action is morally correct, it does not require a strict interpretation of the Charter.

As things stand, it is possible to answer the previous question concerning the applicability of humanitarian intervention in the Syrian case. According to the interpretation of the Charter, in the event the U.S., UK and France would have justified their military airstrikes as a humanitarian intervention, the attacks did not have any legal ground under international law.

Nevertheless, having seen the limitations in the applicability of humanitarian intervention even due to a lack of international law regulation and to the failure of the Security Council to deal with humanitarian catastrophe (such as Rwanda, Srebrenica and Darfur), the Responsibility to Protect (R2P) has taken place. The new doctrine tries to create an international regulation for the doctrine of humanitarian intervention and to define more clearly the role of the Security Council in the field of human rights. This doctrine has been proposed for the first time in 2001 in the Report of the International Commission on Intervention and State Sovereignty (ICISS), but it has been formally embraced in 2005 at the World Summit. The Responsibility to Protect allows the use of force when "large scale loss of life and large scale ethnic cleansing" occur and it focus on three main responsibilities that must be respected in the field of humanitarian crisis: *to prevent*, *to react* and *to rebuild*. Nevertheless, in order to avoid the possibility to an erroneous interpretation of such doctrine, limitations to the use of force have been provided. In this regards the use of force shall meet these

four principles: (i) *right intention*; (ii) *last resort*; (iii) *proportional means*; and (iv) *reasonable prospects of success*. It is worth saying that the Responsibility to Protect had a positive response within the international community, to the extent that the Secretary-General Ban Ki-moon presented a three pillar strategy in the Secretary-General's Report (2009) which underlines that the first responsibility of each state is to protect their population; if it does not occur the international assistance is required and moreover, member states shall act in a "timely and decisive response".
Responsibility to Protect has been applied for the first time during the Arab Spring in Libya (2011), although its application cannot be considered by far a great success. In the Syrian case happened the opposite: R2P has never been applied. The Syrian civil war satisfies all the criteria required for the application of the doctrine. Nevertheless, the Security Council inability and unwillingness to take concrete actions (including the use of force), due to several vetoed resolution by Russia and China, has not been offset by any peaceful measures discussed within the General Assembly or by any peaceful measures or negotiations undertaken by the international community. Starting from this worrying deadlock created at international level in the field of human right protection, a recent initiative known as Responsibility Not To Veto (RN2V) is taking root within the international community. According to the RN2V doctrine, the permanent members shall refrain from menacing to use or using their veto when resolution of humanitarian matters are discussed by the Security Council.

To conclude, although important steps have been undertaken by the United Nations in the attempt to strengthen the prohibition of the use of chemical weapons under international law, the failure to deal with the Syrian crisis appears now clear for all. Although the failure to avoid the humanitarian catastrophe can be ascribed even to the international community as other international bodies, for instance the General Assembly, the political constraints which characterize the Security Council created a worrying deadlock at international level and made the Security Council itself an obstacle to solve the crisis, in terms of chemical weapons use and humanitarian crisis settlement.