

CHAPTER FOUR

FINDING AND ANALYSIS

A. History of the Involvement of the United Nations Security Council in Prohibiting the Chemical Weapons

The occurrence of World War II in 1939-1945 led to the belief that the protection of international security from warfare could only be carried out by establishing a public organization of states. In 1942, the allied states called it a United Nations.³⁸ On August 14th, 1941, the president of the United States, Franklin Delano Roosevelt and the British prime minister, Winston Churchill held a meeting on the Augusta ship that sailed in the middle of the Atlantic Ocean. The meeting resulted in an agreement called the Atlantic Charter, which contains as follows:³⁹

1. That their country no longer conducts territorial expansion;
2. That every nation has the right to determine its destiny;
3. That every nation has the right to participate in international trade;
4. Creating world peace so that every nation can live free from fear.

The international community realized that the existence of the international body is essential to deal with issues concerning international

³⁸ The United Nations, “History of the United Nations”, published on <https://www.un.org/en/sections/history/history-United-nations/> accessed on July 4th, 2019 at 12:31 AM.

³⁹ Frank Donovan, 1996, *Mr. Roosevelt's Four Freedoms: The Story Behind the United Nations Charter*, New York, Dodd Mead & Company, p. 37, published on <http://hrlibrary.umn.edu/education/FDRjointdec.html> accessed on June 21st, 2019 at 7:12 PM.

peace and security. Due to this reason, it is very necessary to establish an international body that could specifically deal with issues related to the disruption against international peace and security. On April 25th 1945, the United Nations conference on international organizations began in San Francisco, attended by 50 governments and several non-governmental organizations involved in drafting the United Nations Charter. The United Nations was officially formed on October 24th 1945 for the ratification of the charter by five permanent members of the Security Council:

- a. China
- b. France
- c. Russian Federation
- d. The United Kingdom
- e. The United States

The following five member states have permanent membership status because of the victory which has been achieved from World War II. Therefore they are given a prerogative rights called Veto Right even though the term Veto itself is not contained in The United Nations Charter. This Veto Right was used to nullify a resolution that had been decided by the majority of the members of the United Nations Security Council. So, if one of the permanent member states of the United Nations Security Council uses its Veto Right to reject a decision agreed by other members, the decision itself cannot be enforced or implemented.

According to the United Nations Charter, the Security Council has several functions and powers as follows⁴⁰:

- a. Maintain the international peace and security under the principles and purposes of the United Nations;
- b. Investigate any dispute or situation which might lead to international friction;
- c. Recommend methods of adjusting such disputes or the terms of settlement;
- d. Formulate plans for the establishment of a system to regulate armaments;
- e. Determine the existence of a threat to the peace or act of aggression and to recommend what action should be taken;
- f. Call on Members to apply economic sanctions and other measures not involving the use of force to prevent or stop aggression;
- g. Take military action against an aggressor;
- h. Recommend the admission of new Members;
- i. Exercise the trusteeship functions of the United Nations in "strategic areas";
- j. Recommend to the General Assembly the appointment of the Secretary-General and, together with the Assembly, to elect the Judges of the International Court of Justice.

In solving a dispute, the Security Council usually will issue a decision in the form of an official text made by the Security Council called as the United Nations Security Council Resolution. All of the United Nations members, according to the United Nations Charter shall agree to accept and carry out the Security Council's decision.⁴¹

The Security Council may take steps to maintain or restore international peace and security. The action can be in the form of economic sanctions or other sanctions that do not involve the use of armed

⁴⁰ United Nations Security Council, "Functions and Powers", published on <https://www.un.org/securitycouncil/content/functions-and-powers> accessed on May 6th, 2019 at 10:41 AM.

⁴¹ Article 25 of the United Nations Charter.

forces for international military action.⁴² However, if the Security Council considers that these measures are inadequate, the Security Council will take more decisive action that may be carried out by the air force, navy or the ground forces that may be needed to maintain and restore peace and international security.

In carrying out its authority to prevent the threat of international peace, the Security Council is in charge in investigating any kinds of violations that occur against any regulations governing the procedures and provisions for the use of weapons in war, including the use of chemical weapons. The law governing about war is known as humanitarian law, which has two primary legal sources. Specific regulations regarding means and methods of warfare are mainly regulated in the Hague Convention 1899 which was later refined by the Hague Convention 1907.⁴³

The Hague Convention 1899 contained a Declaration which prohibits the use of bullets or ammunition which exploded, causing the spread of gas which caused a feeling of suffocation due to shortness of breath. This gas is called "Asphyxiating Gases."⁴⁴ This Hague Declaration of 1899 is the first international agreement which prohibits the use of chemical weapons.

The use of chemical weapons is indeed not a new thing used as means in warfare in this century. There were indications of the use of

⁴² Huala Adolf, 2012, *Hukum Penyelesaian Sengketa Internasional*, Jakarta, Sinar Grafika, p. 106.

⁴³ Haryo Mataram, 2005, *Pengantar Hukum Humaniter*, Jakarta, PT. Raja Grafindo Persada, p. 46.

⁴⁴ The Hague Declaration (IV,2) of 1899 concerning Asphyxiating Gases.

chemical weapons since World War I, World War II, and continued by the internal conflicts in Afghanistan. Many victims proved the effectiveness of chemical weapons as mass destruction. During the Second World War, Germany used a new type of chemical weapons which attacked the nervous system.⁴⁵ The chemical weapons were discovered from research on insecticides in the form of gases called "Ophosphorus Organ compounds." Also, the United States used "Mustard Hydrogen Cyanide" during the Second World War.

During the invasion of Laos in the 1970s, Vietnam also used chemical weapons which called the "Yellow Rain" which was made from poisonous fungus.⁴⁶ This poisonous vapor is very difficult to be detected that will cause many victims. The victim will encounter bleeding and end in death. In Afghanistan conflict, the Soviet Union also uses chemical weapons in more modern forms which causes nerve paralysis and killed hundreds of civilians.⁴⁷

Along with the technological developments, the development of this type of chemical weapons has now progressed rapidly. If during World War I poisons such as chlorine gas or mustard gas poison were

⁴⁵ Sean P. Giovanello, 2012, "Riot Control Agents and Chemical Weapons Arms Control in the United States", *Journal of Strategic Security*, Vol. 5 No. 4, United States of America, University of South Florida Board of Trustees, p. 4.

⁴⁶ Claudia Rosett, 1990, "The Forgotten Domino: Yellow Rain in Laos: New Reports", *The Wall Street Journal*, published on <https://www.centerforsecuritypolicy.org/1990/06/13/the-forgotten-domino-yellow-rain-in-laos-new-reports-2/> accessed on May 6th, 2019 at 8:05 PM.

⁴⁷ Nathania Riris Michico, 2018, "Jejak Penggunaan Senjata Kimia", published on <https://www.inews.id/news/internasional/jejak-penggunaan-senjata-kimia-dalam-perang/64632> accessed on May 6th, 2019 at 3:41 PM.

used, recently, various types of chemical weapons are known to attack various systems in the human body.

The massive use of chemical weapons in World War I and World War II emerged despite the implementation of the 1899 and 1907 Hague Convention, therefore, triggered the respond of the international community. In reaction to the widespread use of chemical weapons during World War I, Article 171 of the Versailles Peace Treaty declared that “the use of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices is being prohibited.”⁴⁸ Furthermore, as a response of the use of Chlorine, Phosgene, Choking Agents, and Mustard gas, the 1925 Geneva Conference was held and resulting the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare which commonly known as the 1925 Geneva Protocol.⁴⁹ This protocol regulates the prohibition of the use of chemical weapons in international armed conflict.⁵⁰

Hence, the 1925 Geneva Protocol has a fundamental weakness because this Protocol is only limited in regulating the use of chemical weapons without addressing the research, development, and stockpiling of

⁴⁸ Andreas Zimmermann and Meltem Şener, 2014, “Chemical Weapons and the International Criminal Court”, United States, *The American Journal of International Law*, Vol. 108 No. 3, Cambridge University Press, p. 437.

⁴⁹ Michelle Almary, 2018, “The Necessity for a Permanent Disincentive: Examining the Use of Chemical Weapons With a Focus on Syria’s Civil War”, *Southwestern Journal of International Law*, Vol. 24 No. 2, California, Southwestern Law School, p. 307.

⁵⁰ Bureau of International Security and Nonproliferation, 1925, Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (Geneva Protocol), published on <https://www.state.gov/t/isn/4784.htm> accessed on May 6th, 2019 at 8:13 PM.

the chemical weapons. Due to that, many states developed and produced the chemical weapons notwithstanding the enforcement of the 1925 Geneva Protocol.⁵¹ It is proved by the chemical weapons attack in China used by Japan in 1930 and Mustard gas used by Italy against Ethiopia in 1935.

England, together with the United States, developed chemical weapons during the cold war, and also the Soviet Union had the facilities in developing the chemical weapons.⁵² Further, mustard gas, sarin, and nerve agents also being used by the president of Iraq Saddam Hussein in 1980s during the war against Iran and its Kurdish population in 1991.⁵³

The history of the use of chemical weapons above clearly shows the urgency in implementing the more strict measures to ensure international peace and security. Therefore, a much broader framing was articulated in the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction which has commonly known as the Chemical Weapons Convention. The Convention was being enforced in 1997 and not only prohibiting the use of chemical weapons but also the development,

⁵¹ Sean P. Giovanello, *Op. Cit*, p. 5.

⁵² Victoria Utgoff, 1990, *The Challenge of Chemical Weapons: An American Perspective*, New York, St. Martin's Press, p. 42.

⁵³ Norm Dixon, 2004, "How Reagan Armed Saddam with Chemical Weapons", published on <https://www.counterpunch.org/2004/06/17/how-reagan-armed-saddam-with-chemical-weapons/> accessed on July 4th, 2019 at 1:11 AM.

production, and stockpiled of chemical weapons.⁵⁴ According to Article 1 of the Convention, all of the state parties are prohibited to:

1. Develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;
2. Use chemical weapons;
3. Engage in any military preparations to use chemical weapons;
4. Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under The Convention.⁵⁵

The Chemical Weapons Convention is a set of rules which carried out by the Organisation for the Prohibition of Chemical Weapons (OPCW). The OPCW is responsible for supervising the Convention, including the worldwide destruction of chemical weapons.



4.1 Organisation for the Prohibition of Chemical Weapons Headquarters⁵⁶

⁵⁴ Ramesh Thakur, 2006, *The Chemical Weapons Convention: Implementation, Challenges, and Opportunities*, Tokyo, United Nations University Press, p. 7

⁵⁵ Article 1 of the Chemical Weapons Convention.

Recently, the OPCW has 193 state parties including Syria which was entered into force on October 14th 2013.⁵⁷ In 2001, the Organisation for the Prohibition of Chemical Weapons and the United Nations formed a legally binding relationship and agreed to cooperate concerning their authority and to consult on the concerned matters and their common interests. The organization is authorized to investigate state parties, but in investigating the non-state parties, the OPCW must coordinate with the United Nations Secretary General. If the OPCW receives information from a state party regarding any conduct of violations against the Convention, the OPCW will inspect and monitor the facilities and also activities of the state party to ensure compliance.

B. The Use of Chemical Weapons in the Syrian Civil War

1. The Syria Conflict and Humanitarian Law Perspective

Syria or officially known as the Syrian Arab Republic is one of the state in Western Asia, which since April 2011 occurred a civil war between the government and opposition parties. A demand carried out by the demonstrators was initially due to democratic reforms.⁵⁸

⁵⁶ OPCW, “Origins of the Chemical Weapons Conventions and the OPCW”, published on https://www.opcw.org/sites/default/files/documents/Fact_Sheets/English/Fact_Sheet_1_-_History.pdf accessed on May 22nd, 2019 at 11:36 AM.

⁵⁷ OPCW, “Member States”, published on <https://www.opcw.org/about-us/member-states/syria> accessed on May 7th, 2019 at 1:20 PM.

⁵⁸ Anonymous, 2013, “Syria - Freedom in the World”, published on <https://freedomhouse.org/report/freedom-world/2013/syria> accessed on May 8th, 2019 at 11:49 AM.

The war had erupted since the Syrian President Bashar Al-Assad responding to the peaceful opposition toward the regime.⁵⁹ On the government side, the Syrian government has received military and other material support from Russia, Iran, and the militant group called Hezbollah, which based in Lebanon.⁶⁰ Russia has been supporting Assad's government since a long time ago. According to an expert, Assad is one of Russian President Vladimir Putin strongest allies in the Middle East.⁶¹ Meanwhile, the demonstrator has been supported by the United States, Saudi Arabia, Qatar, members of the European Union, and numerous military groups, including Al-Qaeda. There are several political reasons from the United States relating to their support for the opposition groups in the Syrian case to defeat the Assad regime. First, the collapse of the Assad government will strengthen Israel's position and its welfare has become the basis of United States policy.⁶² The fall of Assad regime will change the composition of political forces in Syria and will strengthen the position of the United States to establish

⁵⁹ Michael Becker, 2015, "When Terrorists and Target Governments Cooperate the Case of Syria", *Perspectives on Terrorism*, Vol. 9 No. 1, North Carolina, Terrorism Research Initiative, p. 95.

⁶⁰ Stacy Meichtry, 2014, "Russian Support of Assad Upends Peace Talks", published on <https://www.wsj.com/articles/no-headline-available-1392324287> accessed on May 8th, 2019 at 8:27 PM.

⁶¹ Amanda Erickson, 2018, "7 Basic Questions about the War in Syria", published on https://www.washingtonpost.com/news/worldviews/wp/2018/04/12/syria-explained/?noredirect=on&utm_term=.528f4c008450 accessed on May 27th, 2019 at 9:40 PM.

⁶² Nining Anggriani, 2015, "Sikap Amerika Serikat Terhadap Gerakan ISIS di Irak & Suriah", published on <http://repository.unhas.ac.id/bitstream/handle/123456789/15775/SKRIPSI%20REKTORAT.pdf?sequence=1> accessed on May 27th, 2019 at 10:18 PM.

a better relationship with Syria since at the previous time Assad regime was a figure who had clearly opposed the United States' domination.⁶³

With the support of Russia, the Syrian government continues to attack the opposition groups with high military power, which caused severe damage through the use of artillery, combat helicopters and aircraft, and missiles. Meanwhile, the Rebels fight mercilessly against the regime supported by the United States.⁶⁴



4.2 Protesters in Damascus⁶⁵

The armed conflict that occurred in Syria attracted the attention of international organizations, especially those related to human rights,

⁶³ Ibnu Zulian, 2017, "Elastisitas Politik Luar Negeri Amerika Serikat Terhadap Isu Iraq, Suriah dan ISIS", Medan, *Jurnal Power in International Relation*, Vol. 1 No. 2, Universitas Potensi Utama, p. 126.

⁶⁴ Ahmed S. Hashim, 2013, "On the Road to Damascus? Jihadists in the Syrian Civil War", *Counter Terrorist Trends and Analyses*, Vol. 5 No. 3, Singapore, International Centre for Political Violence and Terrorism Research, p. 11.

⁶⁵ Anne Barnard, 2012, "Damascus Puts on Pro-Assad Rally, but Protesters Won't Be Silence", published on <https://www.nytimes.com/2012/03/16/world/middleeast/syria-mass-damascus-rally-for-assad.html> accessed on May 22nd, 2019 at 11:40 AM.

and therefore the United Nations Human Rights Council assigned the Independent International Commission of Inquiry on the Syrian Arab Republic in investigating any violations against the human rights. Upon the investigation, there was a broad violation of human rights which were done by the military of Syria, governmental military, and also the security forces.⁶⁶ The war has resulted in 470,000 deaths with another 70,000 dying due to the inadequate health care and medicine. Furthermore, the war caused approximately 6 million people neglected within the state.⁶⁷

The war became more horrifying when there was an allegation upon the use of prohibited chemical weapons such as Sarin and Chlorine gas. This violation has been confirmed by the United Nations Human Rights Council-mandated Commission of Inquiry on Syria since March 2013 and March 2017.⁶⁸ The first chemical weapons attack reports are noted occurred in many regions of Syria, including Khan Al Asal, Saraqueb, Jobar, and Ghouta.⁶⁹

⁶⁶ Kelly McEvers, 2011, "Protesters Take to the Streets in Syria", published on <https://www.npr.org/2011/04/29/135846442/protesters-take-to-the-streets-in-syria> accessed on May 8th, 2019 at 1:38 PM.

⁶⁷ Simon Lewis, 2016, "The Death Toll From Syria's War Is Actually 470,000, New Research Claims", published on <http://time.com/4216896/death-toll-syria-war-470000/> accessed on May 8th, 2019 at 4:12 PM.

⁶⁸ Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 2014, published on https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session25/Documents/A-HRC-25-65_en.doc accessed on May 8th, 2019 at 5:24 PM.

⁶⁹ Dr. Robert J. Bunker, 2019, *Contemporary Chemical Weapons Use in Syria and Iraq by the Assad Regime and the Islamic State*, United States, Strategic Studies Institute (SSI) and U.S. Army War College (USAWC) Press, p. 24.

As Syria has become the Party to the Geneva Convention 1949, Syria should comply with the regulation contained in the Convention. The Geneva Convention 1949 is a Convention which has the main purpose in regulating war based on the balance between military necessity and humanity and protecting the victims of war both those who no longer involved in war and those who do not involve in war.⁷⁰

In line with the main purpose, the Convention regulates the specific prohibitions and restrictions upon the means and methods used in war. One of which is the prohibition in using chemical weapons by all parties involved in warfare. Therefore, the use of chemical weapons in Syria conflict has violate the basic regulation as related to several principles namely:

a. The Principle of Balancing Military Necessity and Humanity

In this principle, the conduct of hostilities which cause death and injury in defeating the enemy is permissible but the humanity principle balancing it with the limitation over the means and method used in the battlefield and require a humanely treatment upon victims of war.⁷¹ The use of chemical weapons in Syria cannot be categorized as humanely treatment because the effect of this weapons is felt inhuman causing death to the innocent civilians and continuous suffering.

⁷⁰ Nils Melzer, 2016, *International Humanitarian Law: a Comprehensive Introduction*, Geneva, International Committee of the Red Cross, p. 17.

⁷¹ *Ibid.*

b. The Principle of Distinction

The parties involved in warfare must distinguish between the civilians and the combatants, also between the civilian objects and military objects.⁷² It means the person who is not actively taking part in the war is protected by IHL and therefore, combatants are prohibited to attack or cause harm to the civilians who do not involve in war. Accordingly, this principle aims to avoid harm over the protected person and objects against any direct attack from the conflict. In the Syria conflict, the use of chemical weapons not only causing harm to the targets of war but also to the innocent civilians because a chemical weapons can attack through several forms both liquid and gases. Someone who is not directly attacked can be a victim of the use of chemical weapons.

c. The Principle of Precaution

All parties in warfare must do every possible measure to avoid the harm caused by the hostilities over the protected civilians. Such as choosing the means and methods of warfare in order to prevent the potential harm of the civilians over the attacks carried out by the combatants.⁷³ The use of chemical weapons in Syria conflict has violated this principle since the parties in the conflict intentionally use the chemical weapons without considering the potential impact over the civilians.

⁷² Ganesh Sitaraman, 2009, "Counterinsurgency, the War on Terror, and the Laws of War", *Virginia Law Review*, Vol. 95 No. 7, Virginia, Virginia Law Review, p. 1780.

⁷³ Nils Melzer, *Op. Cit*, p. 102.

d. The Principle of Unnecessary Suffering

This principle prohibits the means and methods used in the conduct of hostilities which causing excessive and unnecessary suffering towards both the targets of war and the protected civilians. Thus, the use of chemical weapons in Syria conflict is violating this principle considered by the excessive effect of the chemical agents over the civilians. The impact of chemical weapons is not only weakening the military forces of the enemy but also the innocent civilians.

One of the main purposes of International Humanitarian Law is to protect the person who does not involve in war and forbids the parties involved in the warfare to cause any unnecessary suffer and destruction. Therefore, the use of chemical weapons in warfare is proscribed, because it is not only causing harm to the targets of the war but also to the civilians

2. The Respond of International Community upon the Use of Chemical Weapons in Syria

Responding to the horrific phenomena of Syria conflict, in 2012, President Obama indicated the use of chemical weapons in Syria as crossing a “red line”⁷⁴ and therefore suggesting the United States

⁷⁴ Red Line is a phrase used by President Barack Obama in referring the forbidden use of chemical weapons in Syria which also agreed by the majority of states in the world. Published on <http://www.msnbc.com/morning-joe/obama-i-didnt-set-red-line-the-world> accessed on July 4th, 2019 at 11:28 AM.

military to intervene Syria.⁷⁵ The issue of Syria crossing a “red line” was proven a year later when the Secretary General received sixteen allegations regarding the use of chemical weapons and the investigation was pursued by the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic (U.N. Mission). In the end, the United Nations Mission concluded that the parties involved in the Syrian war used chemical agents as a means of war repeatedly.

The United States government immediately concluded a military force against the Syrian government but then Russia as the long allied state of Syria suggesting the Syrian government to join the Chemical Weapons Convention.⁷⁶ Syria ultimately agreed, and it became the party of the Chemical Weapons Convention in September 2013 and enforced in October.⁷⁷ Then, the United States, together with Russia, agreed to eliminate and destruct all of Syria’s chemical agents. Then, the Security Council issued a resolution which determined that the use of chemical weapons is a threat to international peace and security and therefore needs a full implementation of the Organisation for the Prohibition of Chemical Weapons. The resolution further stated “The Security Council specifically prohibited Syria from using,

⁷⁵ Anne Barnard and Michael R. Gordon, 2017, “Worst Chemical Attack in Years in Syria; U.S. Blames Assad”, published on <https://www.nytimes.com/2017/04/04/world/middleeast/syria-gas-attack.html> accessed on May 8th, 2019 at 6:09 PM.

⁷⁶ Michelle Almary, *Op. Cit*, p. 314.

⁷⁷ Dr. Robert J. Bunker, *Op. Cit*, p. 6.

developing, producing, otherwise acquiring, stockpiling, or retaining chemical weapons, or transferring them to other States or non-State actors, and emphasized that no party in Syria should use, develop, produce, acquire, stockpile, retain, or transfer such weapons”. In line with the determination by the resolution, in 2014 the Organisation for the Prohibition of Chemical Weapons destruct 24 of 27 Syria’s declared inventory and production facilities.

However, there is still a suspicion upon the undeclared chemical agents stockpiled by Syria. This is proven though the strong international response has been issued, the Independent Inquiry once again found evidence of the use of chemical weapons by the parties involved in the Syrian war.⁷⁸ In 2015, the Security Council mandated the Organisation for the Prohibition of Chemical Weapons to cooperate with the United Nations Joint Investigative Mechanism (JIM) to investigate all parties who involved in the use of chemical weapons in Syria. The investigation ended with the discovery of evidence that there were two chlorine attacked by the Syrian Air Force and the use of Mustard Gas by ISIS.⁷⁹ The Joint Mechanism then submitted the discovered evidence to the Security Council to determine a measure based on the evidence.

⁷⁸ Anonymous, 2015, “Government Attacks on Civilians, Indiscriminate Use of Weapons”, Human Rights Watch, published on <https://www.hrw.org/world-report/2016/country-chapters/syria> accessed on May 8th, 2019 at 9:26 PM.

⁷⁹ The United Nations Security Council, 2017, “Seventh report of the Organisation for the Prohibition of Chemical Weapons-United Nations Joint Investigative Mechanism” published on https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2017_904.pdf accessed on May 8th, 2019 at 10:03 PM.

Meeting of the United Nations Security Council was held and resulting in three drafts of resolution which referring the horrific situation in Syria to the International Criminal Court (ICC) for investigation. The resolution was fell to a double veto by Russia and China.⁸⁰ International Criminal Court is the first permanent international criminal court which was established by the Rome Statute in 1998 and begins to operate in 2003 in investigating and prosecuting any perpetrators who involved in the most serious international crimes. The use of chemical weapons in warfare is also classified as the most serious international crimes, but the International Criminal Court does not have any jurisdiction to exercise its authority upon Syria case since Syria is not becoming a state party to the Rome Statute. However, ICC would be able to exercise its jurisdiction over Syria under these following reasons:

- a) If the government of Syria ratifies the Rome Statute;
- b) If the government of Syria accepts the jurisdiction of the International Criminal Court through a declaration;
- c) If the United Nations Security Council submit the conflict in Syria to the International Criminal Court.⁸¹

⁸⁰ The United Nations Security Council, 2014, “International Law — The Responsibility to Protect — Draft Security Council Resolution Referring Syrian Conflict to the International Criminal Court Vetoed by Russia and China”, *Harvard Law Review*, Vol. 128 No. 3, United States of America, The Harvard Law Review Association, p. 1055.

⁸¹ Julia Brooks, *et. al.*, 2018, “Responding to Chemical Weapons Violations in Syria: Legal, Health, and Humanitarian Recommendations”, published on <https://dash.harvard.edu/handle/1/35014991> accessed on May 28th, 2019 at 10:02 PM.

Regarding the referral by the Security Council upon Syria Case to grant jurisdiction of International Criminal Court has been attempted but again it was blocked by the vetoes of Russia and China as the permanent members of Security Council. Thus, the veto used by Russia and China against the United Nations Security Council has prevented a decision in implementing the use of force to protect the civilians in Syria.

Despite the various mechanism of the United Nations Security Council created to collect evidence, the numerous effort done by the Organisation for the Prohibition of Chemical Weapons in destructing declared weapons of Syria, and repeated allegations upon the use of chemical weapons in Syria by all parties involved in the war, there is still no person accountable for the crimes. Furthermore, no prosecutions held for the individuals committing the crimes.⁸²

As one of the United Nations members, Syria is obliged to maintain international peace and security, which stated in article 1 of the United Nations Charter “to maintain international peace and security.” However, armed conflict occurs in Syria involving the use of chemical weapons has violated the provisions stated on the Charter, because the use of chemical weapons itself has threatened international peace and security.

⁸² Michelle Almary, *Op. Cit*, p. 316.

C. Factors causing the Lack of Law Enforcement in Syria Case

1. Enforcement in International Law

The question of whether international law is law has become an old question that still matters. Many objections made by scholars of international law argue that international law cannot matter in the way it must to be law because it lacks of compulsive enforcement mechanisms.⁸³

Scholars also made a conception called “Modern State Concept” by taking a modern legal system as an example to be compared with international law. The Modern State conception stated that regimes are a legal system only when they can dominate the use of force in a region and use this power to enforce their rules in that region. In a state, the dominance of this power is found in some interrelated organizations using intimidation and violence to enforce the law, such as the police and prosecution bodies. When compared, international law does not have an institution as mentioned above. International law does not have its own police force or army to enforce its rules.⁸⁴ In other words, the Modern State Concept requires legal systems to:

- a) Possess internal enforcement mechanisms;
- b) Enforced through a threat and implement a physical force.⁸⁵

⁸³ Oona Hathaway and Scott J. Shapiro, 2011, “Outcasting: Enforcement in Domestic and International Law”, United States, *The Yale Law Journal*, Vol. 121 No. 2, the Yale Law Journal Company, p. 256.

⁸⁴ *Ibid*, p. 257.

⁸⁵ *Ibid*.

International law is the product of its subject and its political system. In other words, International law is a construct of norms, principles, institutions, and procedure. The people who constitute international community are not acting as an individual human being but as a political entity representing a state concerning its interest. Usually, a state remains legally bound by a treaty as long as it contains the interest of such state. In that circumstance, the state usually obeys the provisions within the treaty.

Any violations against the international instrument have commonly occurred. Furthermore, if the violations related to criminal matters, it becomes the authority of the International Criminal Court, which owned the authority to investigate and prosecute any perpetrators involved in the most serious international crimes. According to the Rome Statute of 1998 concerning the International crimes, there are four classifications which include as international criminal crimes, namely:⁸⁶

a) Genocide

Defined as an action to destroy all or part of a group, ethnicity, race, or religion. Acts which categorized as genocide are as follows:

1) Killing certain groups.

⁸⁶ International Criminal Court, 2011, "Rome Statute of the International Criminal Court", Netherlands, *International Criminal Court*, Vol. 2187 No. 38544, published on <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> accessed on July 2nd, 2019 at 11.44 AM, p. 3-7.

- 2) Cause injury or mental harm towards members of the group.
- 3) Deliberately put the life of the groups towards physical destruction.
- 4) Actions intended to prevent births in certain groups.
- 5) Forcibly transferring children from the group to other groups.

b) Crimes Against Humanity

Defined as an act carried out as part of a widespread or systematic attack shown to a group of civilians, by torturing the body of people as a crime or other attacks. This action includes:

- 1) Murder
- 2) Destruction / extermination
- 3) Slavery
- 4) Heavy seizure of physical freedom by violating the basic rules of international law

c) War Crimes

In The Rome Statute, war crime refers to a certain act which carried out by the parties involved in a war against another party's rights or ownership. For example:

- 1) Intentional Kill
- 2) Inhuman torture or treatment
- 3) The desired action to cause internal suffering or serious health problem.

d) Crimes of aggression

This crime defined as the use of armed force by a state against the sovereignty, territorial integrity, or political independence of other states.⁸⁷

Before the International criminal court runs its authority to prosecute a perpetrator, there are several requirements which regulated in the Rome Statute that must be fulfilled such as territorial or personal jurisdiction and subject-matter jurisdiction. The court has fulfill the subject-matter jurisdiction in prosecuting kinds of international crimes such as genocide, crimes against humanity, war crimes, and crimes of aggression.⁸⁸ Territorial jurisdiction requirement is fulfilled if the crime is committed within the boundaries of a state party and personal jurisdiction is fulfilled if the perpetrator is a national of the state party. The court may adjudicate a conflict based on these following reasons:

- a) If there is a referral from the state party,
- b) If there is a referral from the United Nations Security Council, or
- c) If the ICC judges grant an application of the Prosecutor in a Pre-Trial Chamber to open an investigation on their initiative.

The adjudication of crimes defined in the Rome Statute does not have a limitation, but the jurisdiction of the court is not applicable

⁸⁷ Noah Weisbord, 2009, "The Crime of Aggression", *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 103, Cambridge, Cambridge University Press on Behalf of the American Society of International Law, p. 439.

⁸⁸ Article 5 of the Rome Statute of the International Criminal Court.

retroactively. It means that the crimes must occur after the Rome Statute came into force to be able to be prosecuted. Nevertheless, if a state became a party after the establishment of the court, the jurisdiction of the court can only be extended to the date of ratification.

Even though the International Criminal Court has not become part of the United Nations organization, the ICC has agreed to cooperate with the United Nations. When there is a conflict that occurs outside the jurisdiction of the court, the Security Council can refer the conflict to the ICC to authorize a jurisdiction of the court to prosecute such matter.⁸⁹ Then, the court's Prosecutor has the authority to decide whether to conduct an investigation. This function has been used by the Security Council in referring situations of non-Party States to the court in two previous occasions, namely, the case of Darfur, Sudan in 2005⁹⁰ and Libya in 2011.

Referring back to the Syrian civil war, even though Syria has ratified several international instruments which clearly prohibit the use of chemical weapons, the parties involved in the war are still engaged with the chemical weapons and all of the authorities of the treaties has made an effort in overcoming the violation, but the violation seems unstoppable. So regarding the referral by the Security Council upon

⁸⁹ International Peace Institute, 2013, "The Relationship between the ICC and the Security Council: Challenges and Opportunities", New York, International Peace Institute, published on http://www1.regierung.li/uploads/media/IPI_E-Pub-Relationship_Bet_ICC_and_SC_2_02.pdf accessed on 25th, 2019 at 12.46 PM, p.3.

⁹⁰ *Ibid.*

the Syria conflict to the International Criminal Court might becoming the solution to overcome the violations of chemical weapons. However, again, the approval by all five permanent members of the Security Council is needed whenever the Security Council issued a resolution to refer Syria case to the International Criminal Court. Thus, each proposal also has been rejected by Russia and China.

A brief description above raised an argument over the years that many parties have criticized the International Criminal Court as weak. A matter which affects the court's integrity is even though not all of the permanent members of the Security Council are not parties to the Rome Statute and the ICC, they have the power to intervene the jurisdiction of the court in referring other non-parties to the ICC for prosecution.⁹¹ However, if the Security Council referred the situation in Syria to the ICC, there would be many parties and individuals to be investigated and prosecuted regarding the violations, including the Syrian government, the governmental ground forces, and the oppositional groups. ICC has a limited resource since the ICC is a non-governmental organization, it lacks an enforcement body and therefore relies on the cooperation with other international community.

The use of chemical weapons should not be restricted only to the Syria conflict because it has long been banned as a general matter.

⁹¹ *Ibid.*

The political interest and issues of the Security Council should not have interfered international justice. Russia's and China's self-interested vetoes have failed to address the issues through a referral and have consequently blocked any necessary intervention for maintaining international peace and security.⁹²

The use of chemical weapons in the Syria conflict have clearly violated many international rules and norms, so there must be no doubt in referring the situation to the International Criminal Court.

2. The impact of Veto rights by the Security Council Permanent Members

Based on the Cambridge Dictionary, the word “veto” defined as an official power or right to refuse to accept or allow something.⁹³ Veto then defined as a vote that prevents or blocks decision-making. Based on the above definition, can be concluded that veto is a right as a negative vote that rejects that is specific in nature because it is not like rejecting votes in general whose total number will be considered by the total number of votes which agree (affirmative vote) to determine a decision. Since one veto is enough to nullify the implementation of a decision-making process without the need to continue the process of decision-making.

⁹² Ian Black, 2004, “Russia and China Veto UN Move to Refer Syria to International Criminal Court”, published on <https://www.theguardian.com/world/2014/may/22/russia-china-veto-un-draft-resolution-refer-syria-international-criminal-court> accessed on May 9th, 2019 at 11:20 PM.

⁹³ Cambridge Advanced Learner's Dictionary, 2008, Cambridge University Press.

In the United Nations Charter, veto right is contained in Chapter V Article 27 paragraph (3). Furthermore, article 27 stated as follow:⁹⁴

Article 27

1. Each member of the Security Council shall have one vote.
2. The Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.
3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

The sentence in paragraph 3 which stated "including the concurring votes of the permanent member." is what refers to the veto rights of the Security Council permanent members. Based on these sentences, the Council cannot make decisions concerning non-procedural matters if not all members express their consent, or in other words if there are permanent members who vote to reject. In practice, there are three possible exceptions to the regulation as follows:

1. First, regarding the type of vote. In a diplomatic conference, it is known that there are three types of votes that can be given by members of the conference, namely: vote to agree (affirmative vote), vote to reject (negative vote), and abstention (not vote). If one or more permanent members of the Council abstain, the member is considered not voting and will not be counted in

⁹⁴ Article 27 of the United Nations Charter.

decision making. Therefore, the member is not possible to be considered as giving veto just as it also could not be considered to give an affirmative vote.

2. Second, relates to the parties who engaged in the conflict. In accordance with the United Nations Charter Article 27 paragraph 3 which stated "..... in decisions under chapter VI and under paragraph 3 of Article 52, a party to dispute shall abstain from voting" then the member of the United Nations who is in conflict and the conflict is currently in the decision making process at the Security Council, is not permissible to participate in the decision making process at the Security Council.⁹⁵ The permanent member is considered absent in voting, and therefore it is also not possible to vote.
3. Third, related to physical presence. The permanent member state will be considered as not voting due to the absence of a representative of one or more permanent members of the Council. Therefore permanent members will not be included in the counting vote.

⁹⁵ Article 27 of the United Nations Charter.

The existence of this veto right is closely related to very broad powers and obligations of the UN Security Council. The powers include:⁹⁶

1. Maintain international peace and security with the principles and objectives of the United Nations.
2. Investigate any dispute or situation that might cause international friction.
3. Recommend methods for resolving such disputes or their settlement conditions.
4. Formulate plans for the establishment of a system that regulates weapons.
5. Determining the existence of threat against peace or acts of aggression and recommend what actions should be taken.
6. Call upon member states to implement economic sanctions and other actions, which do not involve the use of violence, to prevent or stop aggression.
7. Carry out military actions against aggressors.
8. Recommend the acceptance of new members.
9. Carry out the guardianship functions from the United Nations in strategic areas.
10. Submitting recommendations to the General Assembly regarding the appointment of the General Secretary and together with the assembly, electing Judges of the International Court of Justice.

Originally the use of veto was intended as a tool for the Security Council to have a sufficient power to carry out their obligations, but those privileges possessed by the permanent members of Security Council are in fact often manipulated to satisfy the national interests of powerful states. In some cases, resolutions made by the United Nations Security Council, which was intended to maintain international peace and security cannot be implemented because one or several powerful countries used the veto right against the

⁹⁶ United Nations Security Council, “Functions and Powers”, published on <https://www.un.org/securitycouncil/content/functions-and-powers> accessed on May 10th, 2019 at 2:51 PM.

resolutions. As a result, the privileges possessed by the permanent members of the Security Council, more often involve losses to the weaker states, rather than keeping the stability of the international system.

This issue is reflected by the case of Syria where the Security Council has several times formulated a Resolution which was intended to overcome the violations upon the use of chemical agents in the warfare and the Resolutions also, at the same time, failed due to the veto used by Russia and China. Since 2011, the Security Council has failed four times in implementing its authority upon the war which was occurred in Syria. In October 2011, a resolution was vetoed by Russia and China even though the Resolution was initially intended to reduce sanctions by a warning. In February 2012, Russia and China still rejected the resolution which aimed to held the Russian government accountable for the crime.⁹⁷ In July 2012, again Russia and China vetoed a third Resolution issued by the United Nations Security Council which threatens Syria with sanctions regarding the use of chemical weapons.⁹⁸

Until today, Russia is still becoming the power which has most significantly provided a diplomatic shield for the Syrian government

⁹⁷ Simon Adams, 2014, "Poison Gas and Diplomacy in Syria", *Security Challenges*, Vol. 10 No. 4, Australia, Institute for Regional Security, p. 1.

⁹⁸ The United Nations Security Council, 2014, "International Law — The Responsibility to Protect — Draft Security Council Resolution Referring Syrian Conflict to the International Criminal Court Vetoed by Russia and China", *Loc. Cit.*

and accommodates it with arms supplies. This issue poses an important question, why Russia has been so consistently maintained a contrary position in the Syria crisis? Why has Russia effectively shielded Syria over the United Nations Security Council and been so firmly maintain the legitimacy of Syrian rule under Assad despite the horrific abuses committed by his regime?

It is more likely that the Russian critique over the western interventions, in some matters has been clearly influenced by the rebellion case in Libya, the military intervention in Libya and the overthrow of Gaddafi's regime.⁹⁹ On March 17th, 2011 the United Nations Security Council issued Resolution 1973 which contained a no-fly zone over Libya. Russia and four other Security Council permanent members abstained in the important vote, and Russia was in a normative position.¹⁰⁰ However, since the end of March 2011, Russia starts questioning the implementation of the Security Council's military, mainly since the resolution clearly focuses on the overthrow of the Gaddafi regime and because there is a tendency overland operation. Russia has emphasize all kinds of interventions against Libya to overthrow the Gaddafi regime must be in accordance with

⁹⁹ Roy Allison, 2013, "Russia and Syria: Explaining Alignment With a Regime in Crisis", *International Affairs (Royal Institute of International Affairs 1944)*, Vol. 89 No. 4, Oxford, Oxford University Press on Behalf of the Royal Institute of International Affairs, p. 796.

¹⁰⁰ Security Council Press Statement on Libya SC/10180-AFR/2120, published on <https://www.un.org/press/en/2011/sc10180.doc.htm> accessed on May 18th, 2019 at 8:38 AM.

the Security Council resolution that has been issued in authorizing military intervention to protect civilians in Libya.¹⁰¹

However, Russia and China have accused Britain, France, and the U.S. of carrying out a number of violations of Resolution 1973 by taking sides in the conflict proven by the bombing of Gaddafi's convoy when he tried to escape, as disproportionate use of force resulting in the death of many civilian and targeting the infrastructure of the Libyan state and civilian sites.¹⁰² Russia is also preparing to oppose the West's challenge to the United Nations arms embargo on Libya and the possibility of land attacks by western states. Russia felt disadvantaged because Resolution 1973 cannot be used as a tool to limit coalition operations. Russia argued that the Security Council must examine the consistency of the mandate implied in Resolution 1973.¹⁰³ Thus far, Russia still questioned the authority of this body and remained doubted it.

Unlike in the Libya crisis, in the case of Syria, Russia tried to limit the involvement of the Security Council since the beginning. In June 2011, Russia claimed that the situation in Syria does not present a threat to international peace and security. The support of Russia has

¹⁰¹ Patrick Goodenough, 2011, "Russia, Angry about Libya, Won't Support Resolution on Syria", published on <https://www.cnsnews.com/news/article/russia-angry-about-libya-won-t-support-resolution-syria>, accessed on May 18th, 2019 at 9:27 AM.

¹⁰² Ria Novosti, 2011, "Response by Konstantin Dolgov, the Foreign Ministry's Commissioner for Human Rights, Democracy and the Rule of Law about the Human Rights Situation in Libya" published on http://www.mid.ru/en/foreign_policy/humanitarian_cooperation/-/asset_publisher/bB3NYd16mBFC/content/id/180198 accessed on May 18th, 2019 at 8:53 AM.

¹⁰³ Roy Allison, *Op. Cit*, p. 798.

remained unchanged that it will block any possible measure of the United Nations intervention and block even sanctions against Syria.

In fact, Syria is a state party to the Geneva Convention 1949 and Additional Protocol I, thus, Syria is legally bound by the provisions contained in both Convention and Protocol. Syria has violated the provisions frequently by involving a chemical agent as a means in non-international armed conflict and causing harm to the civilians who are not becoming the targets of war. The use of chemical weapons in armed conflict also has violated the basic rules in International Humanitarian Law such as the principle of humanity, distinction, precaution, unnecessary suffering. So, Syria's actions also justified as a violation of international humanitarian law.

The lack of enforcement mechanism in the international law system, especially in dealing with the Veto Right is becoming the main factors which causing the lack of law enforcement in the Syria conflict. Unlike state, the international law system also does not have an enforcement body to enforce its law. Furthermore, since Syria is not a Party to the Rome Statute, the ICC does not have a jurisdiction in adjudicating the use of chemical weapons in Syria conflict.