Challenging the Laws of War by Technology, Blazing Nationalism and Militarism: Debating Chemical Warfare Before and After Ypres, 1899–1925

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Abstract The German gas attack of April 22, 1915, took place immediately after intense efforts in international law to make war more civilized and to restrict poisonous weapons. Legal restrictions on war technologies reached a provisional peak at the Hague Conferences of 1899 and 1907. During World War I, the attitude of the German military became more radical, to the point of evading and denying international law. The silence in the face of the poison-gas attack was deafening, even among German scholars of international law. Older traditions from the history of ideas and collective mentalities played a crucial role in this, especially the idea of *raison de guerre* or military necessity, which were supposed to annul international law in case of military emergency. After the end of World War I, there was a lively international discourse on the legality of the German approach. Their debate was marked by a strong nationalist polarization of viewpoints. In subsequent agreements between states, the prohibition of poison gas was rewritten and strengthened.

1 Introduction: Chemical Weapons as the Subject of Juridification, Politicization, and Circumvention of Law

The story told in this essay has three phases and perhaps conceals a surprise. How much of a surprise it will be depends on the readers' expectations concerning historical international law around 1900 and the parties involved. Anyone who expects little will presumably not be disappointed; anyone who has high expectations of

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international law and the parties to it may find what happened—especially one central event and its consequences—sobering. This central event was the German chlorine gas attack in the Second Battle of Flanders near Ypres on April 22, 1915, which would become the subject of a highly controversial discourse on international law.[1]

The essay that follows is about the interaction of technology and law—more precisely, about the interaction of war technology and law of war. It will discuss the changing interdependencies between them, focusing on the creation and implementation of legal norms and especially on scholarship in international law at the time. The crucial turning points in the interaction were treaties on international law and declarations, technological innovations, the outbreak of the war in the summer of 1914, the aforementioned use of poison gas in April 1915, and finally the end of the war in 1918. The actual history of events of the German poison-gas attack of April 22, 1915, is, by contrast left out—in part because it is covered by the essay by Friedrich and James (in this volume).

The various phases of the international law approach to poison gas can perhaps be characterized by three terms: juridification, politicization, and circumvention of law. In my view, the discussion of international law around World War I followed this periodization, and for extended periods, at least, it held few surprises with unpredictable points. The years immediately following the use of poison gas in World War I were perhaps the exception—they bore surprises.

It is a contribution to the history of international law whose intention can by no means be judged ex post by the legality and illegality of the historical event (the legal arguments called on by the various parties will nevertheless be presented under 4.2). The goal instead is to reconstruct and analyze from the perspective of international law the events of that time, and especially the discussion of the parties involved and from scholars of international law.

The history of the German poison-gas attack is part of the history of international law, on the one hand, and of the general history of World War I, on the other. In the framework of the latter history, however, the aspects relating to international law have played an astonishingly minor role in numerous publications. One exception is Isabel V. Hull's book of 2014.

On the other hand, there exist strong lines of continuity, especially in legal studies, of historical regulations of international law to the applicable law of today. As a result, legal historians can, to an unusually large degree, fall back on detailed, high-quality historical accounts by scholars of international law (Bothe 1973; Jaschinski 1975; Marauhn 1994). The Saint Petersburg Declaration of 1868 as well as (at least) parts of the Geneva Protocol of 1925 are considered today to be customary international law (Marauhn 1994, 52; Stockholm International Peace Research Institute 1973, 99), the Gas Declaration of The Hague of 1899 is still a valid treaty law for the signatories and their successor states (Marauhn 1994, 47). They are therefore historical standards that are of enduring significance for international law today.

[1]See the contemporaneous bibliography in Kunz (1935, 85–88).

2 Codifying War Technologies in International Law Around 1900

Four sets of international regulations are particularly relevant to the discussion of the poison gas attacks near Ypres in 1915. Their historical genesis is characterized by comprehensive first steps to the transformation of the civilizing ambitions of the time into the legal regulation of war (Dülffer 1978). This process peaked in the Hague Conferences as forums of discourse and of multilateral agreements on limiting armaments and on the juridification of international conflicts by means of international arbitration and jurisdiction (Neff 2014, 323–28). They were intended as instruments for securing peace in the age of nationalism, internationalization, and imperialism (Dülffer 1978, 73–100).

The Hague Conferences were characterized by, among other things, political activism, which was supported by the pacifist movements together with some parts of the community of international law scholars. The public response was eminent, and it reflected the high expectations of international law at the time. This attitude was an expression of the optimism toward international law at the turn of the twentieth century. It was based on institutionalizations and a positivization of international law that was historically unprecedented. The nineteenth century produced more treaties than ever before. They were often multilateral; some of them even open for accession. Certain types of treaties functionally compensated for the lack of codification of international law, and they were therefore called "law-making treaties." This juridification of international relations culminated in a "treaty-making revolution of the 19th century" (Keene 2012). International law never had it as good as it did in the final years before World War I. It had taken on new tasks and new spheres of regulation, and their structures continue to shape international society even today: administration, technology, economy, public health, and time-keeping (Vec 2006, 1–164). International law was by no means merely a technocratic instrument in this process. Often one can even make out a decided "ethicizing" of international law: moral objectives become the focus of norm setting (Lovrić-Pernak 2013).

Simplifying considerably, this often reflected a juridification of international relations. This term is a thesis in legal sociology and political science that describes extension of law by means of increasingly dense and detailed regulations, by means of institutionalizations, and ultimately by means of legal resolution of conflicts. Some jurists around 1900 expressly articulated the hope for a global law in which the progress of international law of the nineteenth century would culminate.

Within this friendly sounding panorama, however, the law of war was a particularly touchy sphere. The use of violence was, on the one hand, restricted, but, on the other hand, legitimized, in that international law itself supplied a normative order to its employment (Simon 2016, 508). Different than economic and administrative regulation, the law of war concerned questions that were understood to be more delicate and more political. All of them addressed competencies of state sovereignty, but restrictions on the law of war were subject to clearer bounds than

those of the other fields of regulation. The evolution typically took the form of transforming customary law into international treaty law (e.g., the prohibition of poison in the law of war). There was also the regulatory problem that these legal standardizations around 1900, just as much as those of the twentieth and twenty-first centuries, were often challenged by new technologies. Hence it represented the problem of regulating technology by law, in which the law always seems to hobble along after the technology (in accordance with the classical "legal lag" theory). Debates in international law over the legality of the use of poison gas in World War I will underscore this problem.

2.1 Restrictions on the Means and Methods of Warfare: The Regulations in International Law of 1868, 1899, and 1907

The legal bases for restrictions on chemical weapons, the validity of which was debated in the context of the use of poison gas at Ypres and beyond, can be identified precisely. In this section, they will first simply be presented, in their original wording. The heated debates over their validity and interpretation will be addressed later.

2.1.1 The Principle of Humanity: The Saint Petersburg Declaration of 1868

The first of these legal bases was the Saint Petersburg Declaration of 1868, in full title "Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight" of November 29 (December 11), 1868. Its preamble reads:

> Considering:
>
> That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;
> That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;
> That for this purpose it is sufficient to disable the greatest possible number of men;
> That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;
> That the employment of such arms would therefore be contrary to the laws of humanity.
> The contracting parties engage mutually to renounce, in case of war among themselves, the employment by their military or naval troops of any projectile of a weight below 400 grammes [about 13 1/2 oz], which is either explosive or charged with fulminating or inflammable substances (Declaration 1868).

The declaration thus regulated and formulated not only the special, explicit prohibition of certain weapons but also general principles of the law of war. According to Thilo Marauhn (1994, 46), it prohibited specific types of weapons (projectiles), on the one hand, and, on the other hand, established the "fundamental obligation to avoid unnecessary suffering and referred to the laws of humanity." In Marauhn's assessment (1994, 46), this was not a direct prohibition of chemical (poison) weapons. Rather, it stated the first general principles of humanitarian international law from which a prohibition of certain chemical weapons can be derived indirectly. The British scholar T. J. Lawrence, who was for many years a lecturer at the Royal Naval College in Greenwich and at the Royal Naval War College in Portsmouth, saw it as "the application of the true principle, which measures the illegality of weapons, not by their destructiveness, but by the amount of unnecessary suffering they inflict" (Lawrence 1923, 529).

2.1.2 The Impotent Model: The Brussels Declaration on Land Warfare of 1874

This same principle was applied again in the "Project of an International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874", which in Article 13 included the following provision: "According to this principle are especially 'forbidden': (a) Employment of poison or poisoned weapons."

The Brussels Declaration on Land Warfare of 1874 never came into effect. It did, however, lead to analogous resolutions by the Institut de Droit International in 1880 in the form of the "Manuel des lois de la guerre sur terre" (Kassapis 1986, 10; Kunz 1927, 13), unofficially known as the "Oxford Manual," which in turn was the model for the later positive-law regulations of 1899 and 1907 (Mérignhac 1900, 197).

2.1.3 The First Poison Prohibition in International Treaty Law: The Declaration on the Use of Projectiles with Asphyxiating or Deleterious Gases and the Hague Convention on Land Warfare of 1899

On July 29, 1899, the concluding act of the First Peace Conference in The Hague followed. It included the Hague Declaration (IV, 2) concerning asphyxiating gases. The preamble states that the declaration had been "inspired by the sentiments which found expression in the Declaration of St. Petersburg of 29th November (11th December) 1868." The declaration proper is as brief as possible: "The contracting powers agreed to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases." (Carnegie Endowment for International Peace 1915b, V) It goes back to Article 13 of the draft declaration of the Brussels Conference of 1874. The wording of the Brussels Declaration on Land Warfare thus became part of the appendix to the Second Hague Convention of 1899 and of the Fourth Hague Convention. Although a prohibition of poison and

poisoned weapons already existed under customary international law, the Hague Declaration of 1899 was the first time international treaty law expressly referred to "poison" weapons (Marauhn 1994, 46).

The formulation of the single objective or the single goal was often a point of reference for German interpretations, which argued that projectiles whose effects included not only gas but also fragmentation were permitted. It was also controversial whether gases that were not deadly also fell under the prohibition (Jaschinski 1975, 32–34). Later, other, non-German jurists also pointed to problems of the existing version. Lawrence (1923, 531–532) found the regulation dubious in comparison to other weapons and possible uses and believed that the horror of death by asphyxiating gases was no less than that of the fate of sailors drowning. Moreover, according to Lawrence, the adjective "deleterious" was "vague."

In 1899, the Second Convention, the "Convention with Respect to the Laws and Customs of War on Land", was passed (Kunz 1927, 13). Section 2, "On Hostilities," Chap. 1, "On Means of Injuring the Enemy, Sieges, and Bombardments," Article 22 reads as follows: "The right of belligerents to adopt means of injuring the enemy is not unlimited." Definitions and specifications of what was prohibited in Article 22 followed in Article 23, in which the parties were expressly denied unlimited rights in the choice of means to harm the enemy. It reads in part:

> Article 23.
>
> Besides the prohibitions provided by special conventions, it is especially prohibited: –
> (a) To employ poison or poisoned arms;
> (b) To kill or wound treacherously individuals belonging to the hostile nation or army;
> […]
> (e) To employ arms, projectiles, or material of a nature to cause superfluous injury;

Articles 22 and 23 established minimum standards for humanitarian warfare under existing international law. On the one hand, Article 23 provided definitions for and specifications of Article 22. On the other hand, a general principle prohibiting the use of poison in a certain sector was codified by treaty.

The final act of the Second Hague Conference of 1907 contained in Article 22 of the Fourth Convention (with identical wording) and in 23 a, b, e of the regulation the almost identical definitions of the Hague Convention on Land Warfare of 1899. The minor changes were (in *italics*)[2]:

> (a) To employ poison or poisoned weapons [instead of arms]
> (e) To employ arms, projectiles, or material calculated to cause unnecessary suffering [instead of of a nature to cause superfluous injury].

[2]Synopsis in: Carnegie Endowment for International Peace. Division of international law. 1915a. Pamphlet No. 5. The Hague Conventions of 1899 (II) and 1907 (IV) respecting the laws and customs of war on lands. Washington, D.C.: Carnegie Endowment, 17.

2.2 No Notion of What Lay Ahead: The Intense Legal Discourse on the Hague Convention and Uncontroversial Interpretations of the Prohibition of Poison Prior to 1915

The Hague Conventions included regulations on the law of warfare, and today it is contrasted with the Geneva Conventions, which concern the treatment and protection of people who are not or are no longer participants of the combat operations (Kassapis 1986, 1). The Hague Conferences marked a new era in the history of international law on warfare. Following the gas attacks at Ypres in 1915, the definitions established therein would become the central points of reference in the discussion of the legality or illegality of the German actions.

This led to the aforementioned problem of the relationship between legal regulations in their abstract form and the concrete events of real life to which they are supposed to be subsumed. In the period that followed, the regulations were often referred to, cited, and interpreted. But at the time of their enactment, no one could have foreseen how effective a weapon poison gas would become in just a few years and in which form it would be employed on the battlefields of the war to come (Bothe 1973, 8). For that reason, Bothe (1973, 88) argues that the intentions of the norm creators are interesting but not truly helpful when it comes to interpreting Article 23(a).

However, for the years between the passing of the norms quoted above and the beginning of World War I and even up to the German gas attack near Ypres, a lively, widespread juridical discourse on the law of war can be documented. The first and formal feature is that a considerable number of treatises appeared that addressed various subjects from the large field of regulating new warfare technologies. Their authors included jurists and specialists in international law or the military, and so did their readership.

If one considers only this thematic subset of the discussion of international law in this period, it is noticeable that the prohibition of poison is mentioned repeatedly. Nowhere, however, is this discussion focused on poisonous gas in the sense of the later events. The facts of the prohibition of poison are rather typically related to other, what could be called classical, historically experienced military strategies and given a pass (Zorn 1902, 7). In what follows, the accounts of several European scholars in international law will be laid out as examples.

The German international law specialist Hans Wehberg, who had a reputation as a pacifist, published the volume *Die Abkommen der Haager Friedenskonferenzen, der Londoner Seekriegskonferenz nebst Genfer Konvention* (The Treaties of the Hague Peace Conferences and of the London Naval War Conference and the Geneva Convention) in 1910. It only reproduces the original wording of the norm; there are no explanations of it (Wehberg 1910). The Swiss-German jurist and partisan of peace Otfried Nippold mentions poison but does not interpret or expose the problems of the term (Nippold 1911, 10). The same is true of Ernest Nys (1912, 144), professor and historian of international law in Brussels and member of the Permanent

Court of Arbitration. The German international law professor Karl Strupp wrote an account of the international law on land warfare that was published in 1914, already during World War I. In it the prohibition of poison is associated with the pollution of rivers, wells, and water pipes by infectious materials (Strupp 1914, 58).

Very similarly, Henry Bonfils, a French professor in international law teaching at the Université de Toulouse, wrote in 1908: "de contaminer les puits, les aliments, les armes, est absolument proscrit dans les guerres modernes" (poisoning wells, food, and arms is absolutely prohibited in modern wars) (Bonfils 1908, 660). A similarly limited interpretation is found in the book *Les lois de la guerre continentale*, by the French military judge Robert Jacomet, which was reprinted several times: he considers it to refer to poisoning wells and the spread of contagious diseases in the enemy's country (Jacomet 1913, 58). In the third volume of his textbook on the law of war, the French international law scholar Alexandre G. Mérignhac has an entry that again enumerates merely a classical historical arsenal of acts of poisoning, while gas as chemical weapon is not mentioned (Mérignhac 1912, 261). Mérignhac was even more monosyllabic with regard to Articles 22 and 23 in his earlier account of 1900 (Mérignhac 1900, 197). The account in the manual by J. E. Edmonds and Lassa Oppenheim, published around 1913, is also extremely terse: the prohibition is repeated word for word without any additional commentary.

To my knowledge, Albrecht Tettenborn deviates most from this widespread brevity in such accounts; in his analysis "Richtungen der einzelnen Kriegsmittelbeschränkungen" (Trends of the Individual Restrictions on Weapons), he interprets the term "Gift" (poison) (Tettenborn 1909, 22–24). In this case, his intense preoccupation with the wording of the norm that takes up the term "Gift" leads to a discussion of possible regulatory gaps. They are filled by the traditional historical practice of broad interpretation. The *ratio legis* of weapon prohibitions is extended to other fields, resulting in an expanded protection by the law of war. The discussion by Frantz Despagnet (1905, 645), professor of international law in Bordeaux and a member of the Institut de Droit International, of the possibility of poisoning air with gas also draws an analogy to the poisoning of water.

In the final years before World War I, this sort of treatment that exposes the problems of the subject was the exception, despite the codification of the prohibition of poison in treaties. The hesitant discussions that would follow in 1915 are even less evident. In the years since the prohibition of poison had been passed, modern technology had not yet posed a challenge to international law and its protective regulations. If one compares the tone and style of the comments of scholars of international law, something other than their brevity is striking as well: Scholarship on international law was not very politicized. There were no nationalistic undertones, no accusations or stereotypical discussions when it came to the establishment and application of norms of the law of war.

On the one hand, all of that is to be expected and not very surprising. On the other hand, academics working in the area of international law after 1915 will take another look at the positions previously taken by their colleagues and interpret them in light of recent events. It was not just that norms were read anew in the face of the ongoing or recently occurred gas warfare; previous positions were cited as well.

The old interpretations were reinterpreted. They took on a new weight and became in turn not only arguments, but potentially sources of international law as well (Vec 2017).

3 Militarization and Circumvention of Law: Debates on International Law During the Continental War with Gas, 1915–1918

This impression of the brevity, even inadequacy, of international-law scholars' interpretations of the prohibition of poison, combined with the not very politicizing tone of jurists' interpretations, would change after April 22, 1915, with a slight delay but a lasting effect.

As suggested in the introduction, whether this change appears surprising depends on the expectation one brings to historical international law and specifically during wartime. The lack of specific statements in the sources is also the subject of these expectations. Nevertheless, with all due caution it seems fair to conclude that there was an astonishingly weak or nonexistent response from European and American international law scholars to the gas attack of April 22, 1915.

3.1 International Law: Alive, but not Kicking

The international law of these years was often intensely preoccupied with the events of World War I. Many academics in international law adopted passionate stances on the legality or illegality of specific actions; others behaved more guardedly. This only makes all the more interesting the comparatively tepid discussion of the attack near Ypres that led me to the thesis condensed in the heading.

3.1.1 Scholarly Publications on International Law During World War I

It should be recognized first that the panorama of publications on international law during World War I is quite rich. The conflicts between states fueled the discourse on international law, opening up new themes and offering controversial issues to debate, taken up equally by scholars and nationalists (Toppe 2008, 103). Based on the type of publication, the following observations can be made: Books on international law continued to be published, especially anthologies of texts with the relevant regulations on the law of war (Carnegie Endowment for International Peace 1915a; Pohl 1915). These anthologies of texts did not, however, comment on or even mention the ongoing gas warfare (Pohl 1915). The legal journals and scholarly journals on international law that already existed during World War I

published many essays and miscellanies on war and international law. The German *Zeitschrift für Völkerrecht*, for example, founded in 1906, reflected the new thematic trend in many ways (Hueck 1999). The changes in international law, the validity of specific norms, the subsumption of specific events to regulations under international law—all these issues now became the topic of intense debates among scholars of international law. It is interesting, however, that I was unable to find a single article in *Die Zeitschrift für Völkerrecht* concerning the subject of the gas attack. Monographs on international law also seem not to have mentioned gas warfare at all or at most very rarely. German scholars on international war seem to have been completely silent on the subject during World War I (Zecha 2000, 27). By contrast, poison gas was mentioned in A. A. Roberts, *The Poison War*, published in London in 1915 (Roberts 1915, 20). The statements of other international-law specialists from Allied countries will be addressed below (3.2).

3.1.2 Unclear Motives for and Few Scruples About the Use of Poison: Ex Post Justifications

The connection between the German decision in favor of the use of poison gas and international law also remained murky. According to Hull (2014, 232), the precise motive for the German employment of gas near Ypres is unclear. No documents can be found. Only subsequent justifications of the action with references to international law can be found. In these justifications the Germans argue that their use of poison gas was a reprisal for the French use. Modern scholars emphatically reject this justification as self-protection (Hull 2014, 233; Zecha 2000, 22). Instead, the Germans independently wished to employ poison gas. Nevertheless, the argument that the use of poison gas was supposedly a reprisal under international law shows that the Germans assessed its use based on the upstanding validity of the norm, since they asserted thereby that its use was a sanction for an injustice committed by the other side. That makes it clear that they assumed, at least ex post, that the use of poison gas violated international law. Other historical sources also suggest that the use on the part of the Germans had to overcome resistance that assumed it was illegal.[3] Fritz Haber (1924, 76), a chemist and the scientist responsible for the planning of German gas warfare, claimed in the 1920s that the military had conducted a legal review. Colonel General, head of the Generalstab (General Staff) and minister of war Erich von Falkenhayn had, according to Haber in a report to the investigating committee of the German Reichstag on October 1, 1923, "apparently personally reviewed the permissibility of gas weapons under international law." Haber stated: "He was convinced beyond any doubt that his orders in the area of gas warfare did not violate international law" (Bell and Schücking 1927, 13; Haber 1924, 76–77).

[3]Otto Hahn reports a conversation with Haber in Martinetz (1996, 104).

3.1.3 Was the German Employment of Poison Gas a Symptom of General Disdain for International Law?

The striking absence of evaluations based on international law or any other normative considerations raises questions. What does this say about the German attitude to international law? To what can it be traced back? Hull is very emphatic here:

> the pattern of decision making seems clear. Civilian leadership, which was chiefly in charge of applying legal considerations, faced especially strong undertow from military institutions: from the junior, and then quickly from the senior naval officer corps regarding submarines; from the war ministry, which had already bought flamethrowers without advance discussion; and from OHL [Oberste Heeresleitung], which had already bombed civilian targets from the air." (Hull 2014, 238)

In this view, international law was disdained by the very parties who made the military decisions during World War I and bore responsibility for them. Hull's verdict is even more harsh from a comparative international perspective: Germany is said to have expressed particular disdain for international law (see also Partridge 1917, 6). With regard to the legal history, it is not easy to determine from the available sources whether this was in fact the case. There are several sources, at least, in which the attitude of other states to the poison gas attacks and international law is expressed.

3.2 The Law Comes Later: The Weak Normative Discourse on Gas Warfare After the German Attack

A first approach would be to ask how the other European powers reacted to the German poison gas attack and to what extent international law played a role in that discourse. But my thesis is that considerations of international law continue to be largely absent. Legal assessments of the German use of poison gas are found only here and there: The English international law professor Coleman Philippson noted in 1915, in an addendum to his account of the law of war during World War I, that "[the Germans] diffused asphyxiating gases among their enemy; such conduct being not only unlawful under the international declaration made in 1899, but contrary to humanity and civilization." (Philippson 1915, 217). A similar verdict is also found in Hall and Higgins (Hall 1917, 569 n. 2). French law professor at the Sorbonne Antoine Pillet (1918, 218) wrote in a book published toward the end of World War I that the prohibition of gas in Article 23(a) applied only to fluid or solid poison, since the prohibition of gas had been regulated elsewhere. And the rules therein date from another era of war technology, Pillet argued, so the prohibitions should not be applied to the new German gas attacks (1918, 244–245). Several other non-German authors addressed gas warfare (e.g., Clunet 1915).

Hence the surprise that international law played hardly any role in the German decision continues to some degree with Germany's enemies as well. As will be demonstrated in what follows, there was hardly any normative discourse on gas warfare, whether among politicians or in the general public.

3.2.1 The Lack of Protest: Political Voices and Official Reports

One first point concerns the question of the extent to which political voices and official reports articulated protest over the German poison gas attack. This question has also been examined frequently in the scholarly literature thus far, and the findings are quantitatively sparse. Zecha observed in 2000 "that neither the warring nor the neutral countries, for example, the United States until 1917, protested the use of poison gas or chemical weapons" (Zecha 2000, 26).

In the period immediately following World War I, not only Haber (Martinetz 1996, 114) but also the Germans Johannes Bell and Walther Schücking (with apologetic intent) asserted with satisfaction that no warring or neutral power had protested at all (1927, 9). Jaschinski, by contrast, asserted (without specifics) that the United Kingdom had accused Germany of violating "the laws of war of civilized countries" but other Allied countries had not protested the first large use of chemical weapons. Jaschinski condensed this into the memorable formulation "the silence of the Allied forces" (1975, 115).

By contrast, Garner (1920, 284–285) mentions a charge from the British War Office dated April 21, 1915, that "Germans had violated the laws of civilized warfare during their recapture of hill 60 east of Ypres, by employing shells which emitted asphyxiating gases." Moreover, "the Belgian commission of inquiry investigated the use of asphyxiating gases at Ypres" (Garner 1920, 272). Both Garner and Kunz report that the British field marshal Sir John French (later Earl of Ypres) denounced the gas attack in a battle report: "the enemy … by the use of an entirely new war method, one contrary to engagements entered into by them at the Hague Convention" (abridged quotation in Kunz 1927, 3, 14; Palazzo 2000, 43, Zecha 2000, 27; with different wording in Garner 1920, 276). In the House of Lords, Lord Kitchener would have protested this kind of warfare on May 18, 1915 (Palazzo 2000, 43). *The Times* of London reported a number of times (Garner 1920, 275–276). Hull (2014, 235) in turn quotes four statements by politicians that express outrage at the use of poison gas weapons. These four statements were not, however, official protests but only personal remarks, which Hull cites as evidence of the authenticity of the outrage of those who made them.

The picture in France is similar. In contrast to Britain, where official protest with underpinnings in international law was supposed to have been articulated, no one would ascribe that to France. Olivier Lepick, the scholar with the best knowledge of this material (1998), responded to a request by the present author by saying that no

French protest could be found.[4] Hull (2014, 237) notes that there were no discussions worth mentioning in France of the legality of poison gas weapons. Interest focused on France's own capacities: to catch up with Germany and to deploy gas weapons.

In the end, official protest did not follow until near the end of World War I—albeit not by the countries involved but by the International Committee of the Red Cross (ICRC). On February 6, 1918, it appealed to the warring powers to renounce poison gas weapons (Jaschinski 1975, 60; Overweg 1937, 64).[5] The use of chemical warfare agents was said to violate international law. The ICRC evoked the risk of the escalation of gas warfare and proposed a treaty on the renunciation as a return to the Hague Convention (Jaschinski 1975, 60). In their reply to this note of protest, the Allied countries first referred to their own use of poison gas as a "reprisal." By doing so they implicitly admitted (as the Germans had previously) that the use of this weapon was illegal but justified it with reference to earlier violations of international law by the enemy.

The warring powers thus demonstrated their awareness of the abstract legal standard; several of them (including the United States) nevertheless employed this weapon to obtain military advantage (Jaschinski 1975, 116). It is even more interesting, of course, that the first use did not produce an official outcry that mobilized international law as a normative basis for a complaint against the enemy in question. International law was almost inaudible in the discourse between countries with regard to the years of World War I—at least in the context relevant here of poison gas. Other violations, such as that of Belgian neutrality, were publicly denounced much more strongly. The only official objection in the case of poison gas, by contrast, came not from a state and not from one of the powers involved in World War I but from the International Committee of the Red Cross. It came late, in any case much later than the first use of poison gas. Nevertheless, as a complaint it set in motion justifications from the parties who had employed this weapon. These late justifications, like the ICRC's complaint, were presented in the language of international law.

3.2.2 The Daily Press: Restraint, Disinformation, and Loud Silence

Another surprise is the almost complete lack of discussion in the daily press. Here too astonishingly few traces of and references to the poison gas attack can be found. Even when they did occur, they occurred with strange distortions. The daily newspapers of various countries reported little about their own use; sometimes

[4]Oral communication to the author on April 21, 2015 at Harnack-Haus in Berlin.

[5]Protest by the International Committee of the Red Cross, published in "Papers relating to the Foreign Relations of the United States. 1933." *1918, Supplement II: The World War*. Washington: US Gov. Print. Off., 779–781.

readers would first learn about it when the domestic press reacted to accusations from abroad or took positions justifying its own government.

Publication was subject to the conditions of wartime censorship. For that reason, it can be assumed that acts of the local government that seemed morally or legally dubious did not easily make it into the news. Those circumstances also explain why above all the possibly illegal actions in the form of the use of poison gas by one's own country were generally mirrored back via the detour of the enemy country's journalism. It remains surprising nevertheless that even the enemy's use of poison gas was not treated very prominently.

Several examples can be cited briefly for this assessment, and they are based on intense archival studies conducted by students in the summer semester of 2014–15 as part of a seminar on the history of international law in the Faculty of Law at the University of Vienna, held in Korneuburg in cooperation with the Österreichische Landesverteidigungsakademie ([Austrian] National Defense Academy) and the ABC-Abwehrschule "Lise Meitner" (Lise Meitner ABC Defense School) of the Austrian Federal Army.[6] According to these studies, the German use of gas weapons near Ypres was mentioned several times in the reporting on Ypres (Spitra 2015, 19). Often, however, the reader only learned about the use of gas from biased official reports from the Major Headquarters of the German Reich. It is even more curious that numerous reports refer first to French or English papers in order to reject their presentation of the facts or their legal views (Bischof 2015, 13–20). Moreover, such reports referred to official German announcements, according to which the enemies had been using such means for several months. In addition, there is a conspicuous silence where one would have expected reports. The first gas release by Austria-Hungary went unmentioned in the *Arbeiter-Zeitung*, the *Reichspost*, the *Neues Wiener Journal*, and the *Pester Lloyd* (Herzog 2015, 11). By contrast, there were lengthy reports on the attack on October 24, 1917, as part of the Twelfth Battle of the Isonzo; the victory was celebrated by the newspapers, but the gas that made it possible in the first place was not mentioned anywhere! The same was true of Austria-Hungary's last large gas attack as part of the Piave Offensive on June 15, 1918; no daily newspaper mentions gas.

But the poison gas attacks of the enemies also had a relatively weak journalistic response. The first English release of gas was not mentioned in any of the four Austrian-Hungarian newspapers studied. The same was true of the reporting one the first French release of gas on February 25, 1916, near Reims: the attack was not mentioned in any edition (February 21–28, 1916); nor was the attack using phosgene gas shells on February 21, 1915, near Verdun mentioned, even though this involved a new weapon (Herzog 2015, 11). In addition to the complaint of violations of international law, which by this time had become problematic, concerns about making one's own soldiers and nationals uncertain probably played the primary role in omitting such reports.

[6]Seminar "Giftgas im Ersten Weltkrieg: Völkerrecht, Diplomatie und chemische Kampfstoffe," hold by Colonel Dr. Wolfgang Zecha, Lieutenant Colonel Erwin Richter, and Miloš Vec.

3.3 *Possible Interpretations: Raison de Guerre as Its Own Form of Normativity?*

If we sum up the observations thus far, we can conclude that international law played an astonishingly peripheral role not only in the Germans' decision whether to employ poison gas but also in the public discourse. Justifications often followed only in response to opponents' accusations of illegality. The justifications were repeatedly based on demonstrably false information, in the cases both of the German and Austrian-Hungarian armies and of the Allied forces. In what follows I will attempt to explain this attitude, in particular on the German side. Three possible factors seem to me worth mentioning.

3.3.1 Older Traditions of Disregard for International Law

First, the disdain for international law during World War I in general can be traced back to older traditions. For example, international law became established as a scholarly discipline in the nineteenth century, having ascended important steps of institutionalization at the universities and achieved a certain autonomy in the scholarly discourse. Considerable steps toward positivization with regard to the normative order between countries can also be observed. Part of this success story is institutionalization between countries and multilateral treaties with the possibility of accession (see Sect. 2 above).

At the same time, international law had always been subjected to academic, political, and practical criticism. The keyword here is the so-called deniers of international law. This collective name brings together heterogeneous doubts about international law as a genuine normative order. On the one hand, the publishing market in Germany for international law flourished, especially in the form of textbooks and monographs. That fed on older traditions of the history of scholarship in which natural law, political science, and imperial public law had prepared the ground well already by the end of the eighteenth century (Koskenniemi 2011). On the other hand, Germany in particular produced prominent deniers of international law. The flipside of such denial was often a complementary overemphasis on the sovereignty of the nation-state. In this view, the normative order between states could be subordinated to national law and national interests. This mixed explosively with the interests of certain military and political figures, and precisely in the situation of military conflict it was able to become acute that certain regulations of behavior between states would be regarded as nonbinding. Hull comes to the following clearly contoured and sharp conclusion regarding the German attitude toward international law:

> The legal discussions of autumn 1914 inside Imperial Germany reveal no identification with international law and no sense that law might be, intrinsically, a good worth upholding or in Germany's interest to strengthen. On the contrary, it mostly appears either as an impediment to necessary action, or at most as a tool one might instrumentalize." (Hull 2014, 239)

In this view, traditions of dismissing and denying international law were particularly strong in Germany.

3.3.2 Normative Plurality and Renouncing International Law: The Nature of the Laws of War

The second factor that can be identified is a particular dismissal of international law on war that took the form of the German military circumventing the law. For example, Hull (2005) suspects there was a specifically German mentality that easily thrived in the ideological soil described above. It found its classical expression in the notorious text *Kriegsbrauch im Landkriege* (translated as *The Usages of War on Land*), which was published by the German General Staff in 1902. It states that *raison de guerre* permits any warring state to employ all means that make it possible to achieve the aim of the war. This was restricted only by "*customs, traditions, or manner of war,*" but not by international law (Großer Generalstab 1902, 2–3). This rejection of all attempts to regulate the means of war by law is justified historically: "Immersion in the history of war will protect the officer from exaggerated humanitarian views; it will teach him that war cannot do without certain hardships, that rather the only true humanity often lies in its ruthless application" (Großer Generalstab 1902, 2–3). It is hardly surprising that such publicly expressed positions caused outrage from Germany's enemies in war and were exploited for propaganda. The text was quoted critically by international law scholars (Westlake 1907, 91; Garner 1920, 280) and was translated into several languages (German General Staff 1914; Grand État-Major Allemand 1916). The Italian edition of 1915 (Grande Stato Maggiore Germanico 1915) had an eloquent title page illustration showing German soldiers using a vise to crush civilians against the backdrop of a burning city.

Andreas Toppe came to a similar conclusion, identifying a lack of implementation in the German military and a "radicalization of military doctrine" (Toppe 2008, 28, 30, 105). The systematic location of this thinking is the idea that war has its own mechanisms. They are in a position to annul law and especially international law. It is condensed in the phrase "Necessity knows no law." This very formulation makes one think of the analogy to *raison d'état*, which also permits the violation of law and morality in time of need. That is why we speak by analogy to *raison d'état* of *raison de guerre*. This term also occurs in historical sources: in an extreme case, *raison de guerre* can overturn (international) law.

Evidence of this normative stance can also be found here and there in the late nineteenth century. The results of research of recent years and decades has shown that military figures—not only in Germany—often rejected the limitations on their means of warfare that were sought or agreed on at international conferences on international law (Messerschmidt 1983, 240). The argument was that while humanity may be a feasible principle for modern international law on war, it is alien to the true nature of war (Dülffer 1978, 150). Other military figures argued that one could better pursue humanity by creating new, more effective weapons than by

prohibiting them (Dülffer 1978, 150). Finally, Fritz Haber's own dictum on the rapid poisoning effect of prussic acid (which was, of course, never a weapon of war) points in this direction: "One cannot die more pleasantly" (Cassar 2014, 31; Haber 1924, 81). That was formulated by comparison to ethyl bromoacetate, which had been employed by the French in August 1914 as the first (but not lethal) gas weapon, and according to Haber it caused a truly agonizing death. The legal assessment of various gases should therefore, in Haber's view, be considered in nuanced fashion. Some effective breathing poison could be breathed without a problem, while others were excruciating to breathe and were for that very reason were less likely to be effective as poison (Haber 1924, 81). Hence the limits should themselves be limited (Huber 1913, 359). Not international law but military utility should have the last word. Prohibitions in international law were therefore eyed with distrust because the military wanted to keep open the option of better weapons in the future (Dülffer 1978, 76). Interestingly, this attitude of criticizing or annulling international law is expressly shared by some experts in international law (Cybichowski 1912, 68–69; Lentner 1880, V). Even Hans Wehberg (1910, 14–15), who is regarded as a pacifist, writes: "In the extreme case […] every principle of the law of war can be breached."

Other, non-German scholar on international rights made comparable arguments (Rivier 1896, 241–242). Thus around 1900 there was an unholy alliance in which the military and international-law scholars placed the validity of the law for certain extreme cases under the proviso of necessity. It is hardly surprising that as the war continued, the aspect of the political utility of international law was emphasized more strongly (Koellreutter 1917/1918, 500).

3.3.3 Cruel, Unmanly, and Unchivalrous: The Military's Aversion to the Use of Poison

A third and last approach to explaining the absence of discourse on the use of gas as a weapon and its permissibility under international law is the discomfort in ethos of broad swaths of the military to poison gas. This argument focuses on the perception of this weapon and contrasts it with the disposition of military actors. Gas and poison were perceived as cruel, unmanly, and unchivalrous (Encke 2015, 2006, 197–218). All poison was considered a "womanish weapon," which is in keeping with the attribution of this way of killing to women in criminal law and criminology (Weiler 1998). Gas and poison were not used in man-to-man close combat; they did not cause bleeding wounds in physical battle. Rather, it was a weapon that only worked at a distance. This had already been an argument for considering medieval crossbows to be illegitimate or even illegal. All these elements underscore the asymmetry of the debate, in which they ran counter to a chivalrous ethos that preferred beating, stabbing, and shooting weapons (Encke 2015).

The depictions of poison gas in literature and art (see the essay by Kaufmann in this volume) underscore the problems that even parties of militaristic convictions had with this particular weapon. For example, pacifists and opponents of war

produced many works that have since become famous in art history denouncing the effects of poison gas, including those by Otto Dix, among others. In *Die letzten Tage der Menschheit* (translated as *The Last Days of Mankind*), Karl Kraus (1922, 337) also left no doubt about the ethical doubtfulness of poison gas. In that work he coined the pun of the "chlorious" offensive:

> For the one thing that remains inconceivable is what possible connection exists between some chemist's inspiration, in itself a disgrace to science, and heroism. How fame in battle can be attributed to a 'chlorious' offensive without choking in shame on its own poison gas." (Kraus 2015, 262)

On the other hand, revealingly, there are no mentions or descriptions of poison gas in the art and literature that glorifies or affirms war.

All this shows that poison gas was a subject above all in nonaffirmative, antiwar, and critical accounts of war. The military, by contrast, had little sympathy for this weapon, and that can be seen as another reason for its silence on the subject.

4 The Continuing Politicization of International Law: The Legal Assessment of War Crimes, 1918–1925

After the war ended in 1918, there followed a third phase in the discourse on international law concerning the use of poison gas weapons. It was an intense, retrospective debate on the legality of their use under international law. The not very surprising form taken by this third and final phase is characterized by stark nationalization and an irreconcilable polarization of the political and legal standpoints.

4.1 Crime and Argument: The Intense Discourse After the End of World War I

The intense discourse on the use of poison gas that followed the end of World War I was embedded in the general public assessments of the events of the war years. From the prehistory of the war to its outbreak and over its course up to the end: All the events were evaluated in terms of domestic and international law. The parties sought the tribunal of the public and tried to win over public opinion. Between the wars, especially, the subject of gas warfare reached a climax in the public debate.

Perspectives of history and of international law thus went hand in hand politically, and they were also associated with narratives of proper conduct. For that reason it is right to speak of "war innocence research" (Große Kracht 2004, 8). Already in the July crisis and the first months of war, the so-called "colored books" were published by official authorities or at least by sources close to the government. In these texts the various national standpoints were presented with a suggestion of

historical objectivity. The colored books of the enemy were in turn accused of distortions and omissions in their descriptions of historical events (Zala 2001, 27).

What had begun with the outbreak of the war continued over the course of the war with respect to events, with the intention of demonstrating the enemy's war crimes (Dampierre 1917; Niedner 1915). Because all sides were involved and making reciprocal accusations, it has rightly been called a "war of colored books" (Kuß 2010, 334). The public fight over the question of war guilt and the politically tinged legal discourse on war crimes followed the battle with weapons (Große Kracht 2004).

Gas warfare was also assessed in a number of publications after 1918. The major international scholarly works on international law published between the wars mention gas warfare frequently. Monographs, brochures, and essays devoted exclusively to poison gas were published (Ewing 1927; Eysinga 1928; Hanslian 1934, Kunz 1935, 85–88;). Some of these specialized monographs had a more scientific and technical tone (Endres 1928; Hanslian 1927, 2009; Meyer 1926; Woker 1925); other books focused on international law (Korovine 1929; Kunz 1927, Overweg 1937).

4.2 *Self-justifications: The Nationalist Polarization of International Law*

A number of such works were published in Germany, investigating the conduct of the war by Germany and other countries, some expressly discussing gas warfare. *Die deutsche Kriegführung und das Völkerrecht* (Deutsches Kriegsministerium und Oberste Heeresleitung 1919, 20–26) was published already in 1919; in the 1920s followed the five-volume *Werk des Untersuchungsausschusses* (Bell and Schücking 1927). The former work claims of the use of gas on April 22, 1915:

> *When updating the historical method of smoking out in a modern form with chlorine gas at Ypres, we neither used a more harmful material nor created a new means of combat.* The defining feature of our approach was simply that we brought to bear for the first time the *mass effect* of gas as a weapon, without which a military success in the field cannot be achieved with gas weapons. (Deutsches Kriegsministerium und Oberste Heeresleitung 1919, 23, italics original)

These lines contain the core of the German defense strategy in the debate on international law over the following years. The poison gas attack at Ypres was thus placed in historical and international contexts that were intended to relativize it. The specific claim of permissibility under international law resulted from additional arguments that the German authors presented to their readers with great care. Their conclusion defines the guilt and innocence of the parties to the war in a clear black-and-white schema:

> The factual and legal procedures in gas warfare are presented by applying the critical probe; they certainly justify the conduct of Germany, while to France falls the burden of having violated a global treaty. The reproaches made against us are thereby revealed to be part of the battle of lies by which the enemy league unceasingly strives to disparage us in the public opinion of the world. (Bell and Schücking 1927, 42)

Compared with that of the war years, this discourse on international law was intense and decidedly detailed. It is characterized by a nationalist polarization of standpoints. The attributions of guilt to the respective wartime enemy were expressed in the language of law and morality. The preferred politics of international law could often be derived simply from the nationality of the authors.

The Germans loudly and energetically defended themselves against what seemed to them a form of victor's justice and corresponding assessments of international law. They appealed to a number of counterarguments purporting to justify the use of poison gas. By contrast, the assertion that the use of poison gas was illegal could not be found in a single publication from Germany. The authors presented a whole arsenal of arguments for its legality under international law: The Hague Declaration of July 28, 1899, is said not to have applied (Kunz 1927, 20, 28; Meyer 1926, 296). The Hague Convention of 1907 was also said not to be applicable in World War I (Meyer 1926, 296–297). Alternatively, it was claimed that Article 23(a) was not relevant because gas is not a "poison" (Deutsches Kriegsministerium und Oberste Heeresleitung 1919, 24; Hanslian 1927, 5; Kunz 1927, 33; Meyer 1926, 298; Overweg 1937, 48–51). It was claimed that the Hague Declaration of 1899 did not apply to the "blue and yellow cross shells of the world war" or to artillery gas shells since "the spreading of poisonous gases is not their only purpose; rather, their main purpose was to render the enemy harmless" (Kunz 1927, 26; Strupp 1922, 201). Article 23(e) was also said not to be relevant because no "unnecessary suffering" was caused (Deutsches Kriegsministerium und Oberste Heeresleitung 1919, 24; Hanslian 1927, 5; Kunz 1927, 32; Meyer 1926, 298–299).

Furthermore, it was claimed in the alternative that the Hague Declaration of July 28, 1899, had been violated first by France; Germany merely followed suit and retaliated (Deutsches Kriegsministerium und Oberste Heeresleitung 1919, 23; Haber 1924, 83; Kunz 1927, 3–4; Meyer 1926, 301). It had been a case of a "state of emergency as recognized by international law" (Deutsches Kriegsministerium und Oberste Heeresleitung 1919). In general, it was claimed that the "Hague Accords had barely touched on the essence of gas warfare," since they had failed to recognize its humane essence (Meyer 1926, 302). The prohibitions of asphyxiating gas were said to have been annulled in the world war since both sides had made use of gas, claimed the international law scholar Josef Kohler in 1918; thus gas warfare had been legal (Kohler 1918, 212–213). The German international-law professors Julius Hatschek and Arthur von Kirchenheim claimed between the wars that the use of poison gas conformed to international law (Hatschek 1923, 316; Kirchenheim 1924, 405–406).

It is probably not oversimplifying too much to say that the standpoints of German jurists were primarily legitimizing, affirmative, defensive, and militaristic. One of the few exceptions was Mendelssohn-Bartholdy. He published a critical essay in 1927 with the revealing title "Kriegsnotwendigkeiten und Repressalien: Zwei Feinde des Völkerrechts" (The Necessities of War and Reprisals: Two Enemies of International Law) (Mendelssohn-Bartholdy 1927). In this text he expressed criticism of Haber and rejected the argument that the German use of poison gas had been a reprisal. He did, however, concede that the ambiguities of the rules had left many backdoors open.

The positions of academics in international law from Allied countries, by contrast, cannot be characterized so simply. There seems to have been a greater diversity of opinion and not so much thinking in camps. For example, there are French assessments in which poison gas as such is said to violate international law (but could be justified as a reprisal) (Rolin 1920, 326–327). The Allied use had been justified if and to the extent it had been reprisal (Hall 1924, 637, footnote 2; Garner 1920, 262, 271–292). The Archbishop of Canterbury and the Bishop of London (on May 16, 1915), by contrast, appealed to their government not to employ poison gas and descend to the level of the enemy (Garner 1920, 273, footnote 1). Articles 23(a) and 23(e) had been violated by the Germans to the extent that chlorine gas had been employed; by contrast, it was argued, other types of gas should be judged less harshly under international law (Lawrence 1923, 531).

Finally, there were positions not formulated by any of the countries that had been involved in the world war. It is presumably no coincidence that these positions tended to manifest principally antimilitary and pacifist features. In the polarized climate of politics and international law between the wars, it was all the more attractive for one side or the other to co-opt these to some extent neutral authors. Authors of such texts include Franz Carl Endres and Gertrud Woker. The latter published her book on behalf of the Women's International League for Peace and Freedom. Both authors emphasized not only that the German use of poison gas violated international law, but also the ongoing threat and the alarming role of a transnationally active armaments industry (Endres 1928, 38–39). Woker (1925, 16–19) frontally attacked Haber's argumentation, polemicizing against the "magnificent militaristic logic" she saw in the arguments that gas was effective and in conformity with international law.

4.3 Politicized Scholarship: No Mediation Possible

This controversy in scholarship on international law cannot be decided *ex post*, even if the arguments defending the German use of gas seem legally inconsistent and questionable to us today. To demonstrate this, a more detailed analysis would have to examine the arguments with an eye to contemporaneous theory about legal sources and about legal argumentation. Contrary to the later German objections that the Hague Treaty had not applied, for example, one need only point out the possibility that as positivizations of previous customary law they remained valid in the form of customary law as well; the fact that the Hague Treaty was reprinted in German World War I anthologies on military law also suggests it was believed to be valid (Kramer 2003, 281). Given the highly politicized climate and the intent to legitimize past actions, it was not to be expected the scholarly discourse would get closer to the subject matter, and in fact it did not. The camps remained hostile to each other, and there was no discernible mediation by third positions or even any softening of tone during the period between the wars. This thinking as part of a camp was particular stark in German scholarship on international law.

4.4 *Reforms as Affirmation of the Prohibition of Poison in International Law*

Thus the scholarly community in international law was not unified and did not come together on a view of past events. It was, however, better disposed to shaping such a view in the future. After the experiences of World War I, whether or not one judged certain past acts as in conformity with or as illegal under international law, all sides appeared agreed that poison gas should not be used in the future. Legal reforms and further standardization served to affirm the prohibition of poison under international law. Four stages should be identified here in conclusion.

4.4.1 Asymmetric New Paths: The Prohibitions of the Production and Possession of Weapons in the Paris Peace Treaties of 1919

First there were the Prohibitions of the Production and Possession of Weapons in the Treaties of Paris. The Treaty of Versailles set forth legal prohibition concerning the production and import for Germany:

> Article 171
> The use of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices being prohibited, their manufacture and importation are strictly forbidden in Germany.
> The same applies to materials specially intended for the manufacture, storage and use of the said products or devices.
> The manufacture and the importation into Germany of armoured cars, tanks and all similar constructions suitable for use in war are also prohibited.
>
> Article 172
> Within a period of three months from the coming into force of the present Treaty, the German Government will disclose to the Governments of the Principal Allied and Associated Powers the nature and mode of manufacture of all explosives, toxic substances or other like chemical preparations used by them in the war or prepared by them for the purpose of being so used. (Jaschinski 1975, 61)

Largely identical rules were laid out in the four other Treaties of Paris for the other countries that had lost the war: Article 135 in the Treaty of St. Germain; Article 82 in the Treaty of Neuilly; Article 119 in the Treaty of Trianon; and Article 176 in the Treaty of Sèvres (Marauhn 1994, 61, notes 110–113).

On the one hand, this legal regulation presumed an existing prohibition of use (Jaschinski 1975, 61). On the other hand, it took new paths beyond the prohibition of use and created a preventative sphere for the first time (Marauhn 1994, 63). In relation to poison gas, therefore, it represented a legal norm for the prevention of war. Admittedly, it expressed an asymmetry of power: the prohibitions applied only to those countries that had lost World War I. There was no reciprocal application to the victorious powers.

4.4.2 Pacifist Efforts: Initiatives by the League of Nations

The League of Nations was also active in the context of its arms control efforts (Schücking and Wehberg 1924, 414–416; Overweg 1937, 77–81; Jaschinski 1975, 72). These efforts were an attempt in peacetime to make the use of chemical weapons de facto impossible or at least minimize the likelihood of their use in a future war (Marauhn 1994, 72). The bodies involved were the Council, the General Assembly, the Disarmament Commission, the Nonpermanent Arms Commission, the Commission on Intellectual Cooperation, and a subcommittee. The Red Cross also made a special submission to the General Assembly about preventive measures (Schücking and Wehberg 1924, 415). The various sides pursued the limitation or prohibition of manufacture and laboratory experiments. Issuing an "appel aux savants" to all countries to publish their pertinent inventions in order to make their use in war impossible (Freytagh-Loringhoven 1926, 118) was considered (but rejected). Expert opinions and reports were commissioned and committees established. It was decided to publish a report on the horrors of a future gas war; it was intended to be distributed to as broad an audience as possible (Freytagh-Loringhoven 1926, 118). These activities of the League of Nation overlapped with those of the Washington Conference of 1922. In the end the question was raised whether the members of League of Nations should be encouraged to join the Washington Treaty. Nothing more came of this (Meyer 1926, 304). For its part, the Washington Treaty never came into effect. Nevertheless, the Fifth Assembly of the League of Nations concluded a resolution in 1924 in which gas weapons were described as a threat to civilization in future wars (Overweg 1937, 80–81).

4.4.3 An Expression of the General Opinion of the Civilized World: The Washington Treaty of 1922

At the Conference on the Limitation of Armament in Washington, which had opened on November 12, 1921, a unanimous resolution was concluded on February 6, 1922:

> The use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, having been justly condemned by the general opinion of the civilised world and a prohibition of such use having been declared in Treaties to which a majority of the civilized Powers are parties, the Signatory Powers, to the end that this prohibition shall be universally accepted as a part of international law binding alike the conscience and practice of nations, declare their assent to such prohibition, agree to be bound thereby between themselves and invite all other civilized nations to adhere thereto. (Lawrence 1923, 532)

The signatories were the United States, the British Empire, France, Italy, and Japan.

It was not just the wording that was controversial (Jaschinski 1975, 65; Overweg 1937, 74–75). It was criticized for not distinguishing between asphyxiating and harmful agents. The Washington Treaty was not ratified by the participating countries, however, and therefore never came into effect.

4.4.4 Reassuring One's Principles: The Geneva Protocol on Poison Gas of 1925

Finally, the Geneva Protocol of 1925 on poison gas provided a new positivized norm. Once again it was assumed that a prohibition already existed (Jaschinski 1975, 67; Marauhn 1994, 49). This was now affirmed in the Geneva Protocol but its scope was not significantly changed (Marauhn 1994, 49). On June 17, 1925, the Protocol was concluded with the following wording, closely following that of the Washington Convention:

> The Undersigned Plenipotentiaries, in the name of their respective Governments:
> Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilized world; and
> Whereas the prohibition of such use has been declared in Treaties to which the majority of Powers of the world are Parties; and
> To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations;
>
> Declare:
> That the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition, agree to extend this prohibition to the use of bacteriological methods of warfare and agree to be bound between themselves to the terms of this declaration. (Marauhn 1994, 49)

The general prohibition was in that sense a kind of self-reassurance and affirmation of the content of treaties and of customary law that had been valid prior to World War I but had often been breached in praxis between states during the war. Today the Geneva Protocol of 1925 is still valid and has been judged "probably the most significant special standard thus far prohibiting the use of chemical weapons" (Marauhn 1994, 47). In 1997, the "Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction" enhanced the prohibition of chemical and gas weapons and enforced the elimination of such weapons. Until today (February 2017), 192 states have signed the treaty.

5 Summary: Expectations Regarding International Law

The history of the struggle over international legal rules on the prohibition of the use of chemical weapons is thus far from over. On the contrary, countless violations of legal norms are etched into the history of the twentieth century. Time and again, new inventions have posed challenges to the prohibition as well. Nonetheless, the Geneva Protocol on Poison Gas seems a potential terminus for the narratives about the events of Ypres in 1915.

The prohibition of perfidious means and unnecessary suffering was violated many times in April 1915 and up until the end of the war in 1918, in the face of express agreements and despite the ongoing validity of customary international law. Even if one were to regard the detailed special prohibitions under international law as somehow inapplicable, there would remain the spirit of the norms as a further point of reference. After all, alongside the specific prohibitions there were also older general legal principles proscribing perfidious means and unnecessary suffering under international law deriving from the principle of humanity. That general principles of international law were disregarded to such an extent in the First World War relates to the particular moral values expressed in these principles. By this expression, legal principles can endow values with more vigor and prompt surprising decisions, but are also particularly fragile. It is no coincidence that certain legal disciplines in which the norm setting is not yet complete tend towards legal principles. The international law of the nineteenth century was one such area. Alongside the juridification of international relations, it relied heavily on general legal principles as well as on natural law (Vec 2012, 2017). The conflict surrounding poison gas in the law of war shows how fragile certain rules can become in practice. Under the conditions of the world war, under pressure from blazing nationalism and militarism, international law is drawn into the undertow of politicization, an undertow that weakened it so severely that one is inclined to speak of its almost total absence from certain areas of regulation in these years. Certain actors, including both military figures and international lawyers, practiced the circumvention or even denial of the law of war. Whether one is disappointed by this depends—as we have said—on the expectations of a contemporary reader contemplating the historical events of earlier epochs. The law of war in World War I was, especially when compared to other matters, a highly political area of regulation. In any event, the consideration of this time should always take into account the political circumstances and the larger context when it accentuates the *Realpolitik* and the relativism of this international law (Orakhelashvili 2011, 454–455).

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