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A German Linkage Between Criminal Law and Law of Nations as Academic Disciplines

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Abstract

Starting in the 18th century, some law professors at German universities taught both criminal law and the law of nations. Here, the focus is on how the new disciplines appeared in the university curricula during the 18th and 19th centuries. This configuration of professors teaching both subjects (whether at the same time or consecutively) is specific to Germany and provokes certain questions. How did these new disciplines emerge at German universities? Why were some professors asked to teach both subjects during their careers? Does this linkage between the two produce scientific outcomes that likely explain particular characteristics and features of criminal law and the law of nations in German legal science?

Keywords: Criminal law, law of nations, German universities, Franz von Liszt, Hans Kelsen

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A German Linkage Between Criminal Law and Law of Nations as Academic Disciplines

The association of criminal and international law within a German historical context would normally only seem to concern post-1945 law and the path from the Nürnberg trial to the Rome Statute of the International Criminal Court.[1] But the point of departure of this study is different and comes at the end of the 18th century: it is the matter of German professors who taught both criminal law (*Strafrecht*) and the law of nations (*Völkerrecht*). While Franz von Liszt (1851–1919) is certainly the best known both inside and outside Germany, Ernst-Ferdinand Klein (1744–1810), August Wilhelm Heffter (1796–1880), Franz von Holtzendorff (1829–1899) and, for the lesser part of their careers, Hugo Hälschner (1817–1889), Richard Schmidt (1862–1944), Ernst Beling (1866–1932), Carl Schmitt (1888–1985) and Georg Dahm (1904–1963) all taught both subjects. Moreover, other German professors and philosophers have written about criminal and international law, something rather uncommon in other countries. This surprising association between two subjects that are now separated among different specialists is something particular to Germany, and this phenomenon is likely to be linked with the blossoming of the German-speaking literature about norms and sanctions, including the Vienna School of Law. Whereas criminal law appeared as the model of sanctioned norms, dependent on efficient penalties, the law of nations was for a long time controversial because its norms seemed unsanctioned or imperfectly sanctioned through war. War itself triggered discussions about a period in which some murders – those of the enemies – were licit, whereas other forms of behaviour toward adversaries were considered crimes against the law of nations.

The hypothesis is that there could be fruitful explanations concerning the historical relationships between this configuration of professorships and the doctrinal development of concepts that are to this day fundamental for the understanding of criminal and international law. Without pleading for a strict determinism between teaching structures and theoretical writing, this study takes its place among the research on discourses, courses and epistemic communities as tools and pillars constituting a legal field in which legal doctrines are enshrined.[2] Is not the cartography of legal disciplines a good clue to understanding how legal sciences were developed and framed in modern concepts?[3] Did not the group of German professors teaching both penal and international law encourage a deepening thought about the efficiency of legal norms as well as about the characteristic features of positive law as opposed to natural law? After analysing this linkage between criminal law and the law of nations in professorships and careers, especially through a selection of *Vorlesungsverzeichnisse*,[4] I propose to consider the fruitful outcomes of this encounter in the German-speaking science of law (*Rechtswissenschaft*).

I. Professorships and careers

It is well known that the process associated with the increasingly specialised law professorships represented a significant departure from the previous configuration of law faculties centred around civil and canon law, in accordance with the Bologna model established in the Middle Ages. Based on the explanations of the Roman and canonical *Corpus* (*juris civilis* and *juris canonici*), for a long time, the

1 Pasquier (2012) for another trajectory concerning international rather than penal law from Geneva to Nuremberg.

2 Halpérin (2015).

3 Schröder (2010), notably 375–389 about the use of *Vorlesungsverzeichnisse*.

4 The selection concerns a dozen law faculties (Leipzig, Göttingen, Heidelberg, Berlin, Bonn, Breslau, Marburg, Tübingen, Königsberg, Gießen and the Bavarian Faculties of Ingolstadt, Landshut and München) from the end of the 18th to the end of the 19th century.

teaching of law at universities did not take into consideration that there were other branches belonging to the tree of legal science. The notion of »discipline« was itself foreign to the mentality of doctors *in utroque jure* as well as later *Professoren des Rechts* or *der Rechte*. There was room for only two kinds of law: civil and canon law; a further partitioning of legal matters beyond the different books of both legal corpuses was simply not possible.[5] While there were professors focusing on the Pandects, the Institutes, the Decret or the Decretals, there were no such chairs of feudal, public or penal law, even if it would have been possible to lecture on the 48th Book of the Digest or the 9th Book of the Code concerning penalties.[6] Furthermore, the participation of scholars on jury courts within the universities (*Schöppenstuhl*) meant that criminal case files were, through the *Aktenversendung* process, transmitted to professors.[7] The great »criminalist« Benedict Carpzov (1595–1666) was professor of canon law and offered lectures on the Decretals in Leipzig, but he was able to further his *Practica Nova Imperialis Saxonica rerum criminalium* thanks to his experience as a judge in the *Schöppenstuhl*.

A. *The institutionalisation of the teaching of criminal law*

The first lectures devoted to criminal law as such were offered in Italy during the 16th century. Eight professorships of criminal law were created in Bologna (the first in 1509, with Ippolito Marsili as the inaugural holder of the chair, and the second one in 1594), Padua, Pisa, Ferrara, Perugia, Turin, Rome and Pavia.[8] Even if these chairs were sometimes interrupted, they nevertheless constituted a unique case in Europe – and quite some time before Beccaria appeared on the scene (who was never a professor of criminal law). During the 18th century, extraordinary courses (those outside the normal curriculum) of criminal law were offered at Torino, and the Austrian *Studienplan*, incorporating a course on criminal law in Vienna in the third year of the curriculum in 1753, inspired the Habsburg reform in Pavia in 1771 with the creation of a professorship of criminal law. It is not easy to explain this Italian trend towards an early specialisation of professorships in criminal law: among the great Italian »criminalists« of this period, like Giulio Claro and Prospero Farinacci, only Tiberio Deciani was first a professor of criminal law in Padua before receiving the more prestigious chairs of civil and (later) canon law. And given that the chair in Bologna had been established prior to the *Constitutio criminalis Carolina* (1532), this link appears at best highly doubtful. Within the Holy Roman Empire, some examples of courses on criminal law began to appear during the 16th century.[9] In Ingolstadt, for example, a course on criminal and feudal law had been offered since 1586.[10] In Tübingen and Jena, courses devoted to the Roman sources of criminal law were offered.[11] In Rostock, Godelmann lectured on feudal and criminal law at the end of the 16th century.[12] In the first half of the 18th century, German and Latin books devoted to criminal law or *jurisprudentia criminalis* continued to comment on the *Carolina*.[13]

As this depiction makes evident, it is difficult to speak of permanent professorships devoted to criminal law prior to the second half of the 18th century. In Bamberg, for example, a new professorship of penal law was created in 1745, and Johann Heinrich Bocris was endowed to teach criminal law at the same time as Roman law.[14] However, Bocris switched to Vienna to become professor of public law in 1753, and the teaching of criminal law instituted by the Empress Maria Theresa at the University of Vienna was offered by Banniza von Bazan. Whereas the four professorships in Halle were not really specialised and lectured on different matters according to the semesters, the teaching of criminal law was assigned to the same professorship over the course of several years at the newly established University

5 Coing (1977) II/1, 33.
6 Andrea Alciato, whose *Responsa* about the 9th Book of the Code (published in Venice, 1566) contained developments on criminal law, was just such a case.
7 Oestmann (2008) col. 128–132.
8 Grendler (2011) 472.
9 Stintzing / Landsberg (1880) 1, 635.
10 Prantl (1872) I, 311.
11 Wächter (1844) 96.
12 Krabbe (1854) 700.
13 Schmidt (1965) 161.
14 Boehm (1997) 1160; Spörlein (2004) 1160.

of Göttingen: Gottfried Mascov from 1734 to 1736 (using Johann Samuel Friedrich Boehmer's book *Elementa jurisprudentiae criminalis*),[15] then Christian Claproth, Georg Luwig Böhmer, Christian Friedrich Georg Meister and, after 1782, his son Georg Jakob Friedrich Meister, whose lectures were attended by Savigny.[16]

This institutionalisation of the teaching of criminal law corresponded to the diffusion of Latin textbooks about this subject: Gärtner's *Institutiones juris criminalis* (Leipzig, 1729); Böhmer's *Elementa juris criminalis* (Halle, 1733); Engau's *Elementa juris criminalis germanico-carolini* (Jena, 1738); Meister's *Principia juris criminalis Germaniae communis* (Göttingen, 1755); Koch's *Institutiones juris criminalis* (Jena, 1756); Zacharias Richter's *Institutiones juris criminalis* (Lemgow, 1763); and Püttmann's *Elementa juris criminalis* (Leipzig, 1779). This literature modeled on the *Institutiones* made criminal law an academic subject worthy of instruction as one part of the German common law based on the *Carolina*.

In the 1770s and 1780s, the lectures on *peinliches Recht* were featured in *Vorlesungsverzeichnisse*, including mention of handbooks, some of them even published in German. At Leipzig, four professors lectured on the subject in the same semester: Biedermann (using Koch's handbook), Lehmann (teaching Böhmer's work), Püttmann (utilising Zacharias Richter's book), and Zoller (making use of Gärtner's text).[17] At Heidelberg in 1784, Gambsjäger (professor of civil and ecclesiastical law) and Müller used Koch's textbook for a lecture on *peinliches Recht*.[18] At that time, criminal law was taught by Meister in Göttingen, using his own handbook. At the end of the 18th century, authors like Westphal (professor at Halle) and Koch (professor at Gießen) are good indicators of the use of German books of criminal law: the former wrote *Das Criminalrecht, in wissenschaftlich geordneten, und mit praktischen Ausarbeitungen bestärkten Abhandlungen und Anmerkungen über dessen wichtigste Gegenstände* (Leipzig, 1785, a book, contrary to the title, that was more a collection of remarks than a systematic ordering of the matter), and the latter wrote *Anfangsgründe des peinlichen Rechts* (Leipzig, 1790). The German formulations *peinliches Recht* and *Criminalrecht* took the place of the Latin *jus criminalis*.

B. From the jus naturae et gentium *to the positive European Law of Nations*

The teaching of *Völkerrecht* appears to have been connected with the professorships of natural law (*Naturrecht*).[19] As is well known, the first such professorship was created for Samuel Pufendorf at the University of Heidelberg in 1661. However, Pufendorf taught in the Faculty of Philosophy and he later switched to Lund in 1672.[20] The first law professor of natural law was Samuel Rachel, who was explicitly designated *Professor des Natur- und Völkerrechts* in Kiel in 1665 and whose 1676 *De jure naturae et gentium dissertationes* was more open than Pufendorf to a law of nations established by conventions and customs.[21] Rachel was succeeded by Alexander Carock in Greifswald and Johannes Heisenhart in Helmstedt, but neither of them seems to have taught *Völkerrecht*. In Tübingen, Scheinemann – after a failed attempt in 1688 and heavy resistance from other professors – was nominated professor of *Natur- und Völkerrecht* in 1695.[22] At this time, Christian Thomasius was professor at the newly established University of Halle and taught natural law there, including the law of nations (with the refusal of a *jus gentium positivum*, like Pufendorf, in his 1705 *Fundamenta juris naturae et gentium*) and criminal law (through the *Codex Justinianus* and the *Carolina*). The lectures offered in Halle, however, were divided amongst the four law professors not according to specific subject matters, but rather according to the sources to be studied: there was no dedicated chair for natural or criminal law.[23] From 1709–1710, Gundling was also professor in Halle, and some of his lectures

15 Göttingen, Catalogus praelectionum publice et privatim in Academia Georgia Augusta … habendarum, 1736.
16 Schaffstein (1987) 11–31.
17 Verzeichniß der diesen Sommer über 1773 auf der Universität Leipzig angekündigten Vorlesungen.
18 Anzeige der Vorlesungen, welche in diesem akademischen Jahre … werden gehalten werden, Wintersemester 1784/1785.
19 Grewe (1984) 408–414; Ziegler (2007) 154 and 163.
20 Schröder (2010) 299.
21 Nieder (2011) 126.
22 Ibidem, 130–133.
23 Steinberg (2005) 73.

were on *Natur- und Völkerrecht*, culminating in a handbook published in 1728 (*Jus naturae et gentium*).[24] Since its establishment in 1734, the University of Göttingen taught the law of nations as part of natural law: Schmauss, in the 1730s and 1740s, referred to Grotius, Pufendorf, Cumberland and Coccejus (more so, it seems, regarding the law of nature than the law of nations);[25] later both Treuer (one of Thomasius' pupils) and Kahle continued to lecture on the law of nations as part of the law of nature; finally Achenwall developed starting in 1752 the orientation towards true lectures of *jus gentium universalis* or *jus gentium Europaei practici*.[26] In 1753, the reform of the curriculum of the law faculty in Vienna established a course on *Völkerrecht* in the fourth year.[27] At the end of the 18th century, many law faculties in Germany had courses on *Natur- und Völkerrecht* (for example, Gambsjäger and Wedekind in Heidelberg or Biedermann, Breuning and Biener in Leipzig, the latter offering separate courses on the law of nations, law of ambassadors and the European law of nations in 1782 and 1783), and the professors used textbooks written by Wolff, Gundling or Achenwall. Georg Friedrich Martens, professor in Göttingen from 1783–1784, lectured on the European law of nations (*jus gentium Europaearum positivum*, especially on customs) and used the French language of diplomacy in his courses.[28] He published a Latin book in 1785 (*Primae lineae juris gentium Europaearum practici*), a French book in 1789 (*Précis du droit des gens moderne de l'Europe*), and a work in German in 1796 (*Einleitung in das positive europäische Völkerrecht*). Among the first textbooks in German on the European Law of Nations, one should also mention the 1790 *Einleitung in das praktische europäische Völkerrecht* by Köhler, who was a professor in Mainz.[29] In 1817, in a book entitled *Neue Literatur des Völkerrechts seit dem Jahre 1784*, von Kamptz published a list of 32 German writers who had dealt with *Völkerrecht* since 1784, most of them law or philosophy professors (Kant was added to the list).[30] Given all these lectures and books, the law of nations was beginning to separate itself from natural law and increasingly considered part of positive law from a European perspective.

C. *The points of contact between the teachings of criminal law and law of nations*

Everyone writing about natural law eventually ended up dealing with both criminal law and the law of nations: this held true for Grotius, Pufendorf, Thomasius, Wolff and finally Kant, who taught natural law 12 times and used Achenwall's textbook. Besides his major contribution to the *jus belli*, Grotius devoted the 20th chapter of the second Book of *De Jure Belli ac Pacis* to criminal law: he defended a rather revolutionary conception of penalties linked to prevention, amendment and the common good. Pufendorf's distinction between law and moral theology (as well as its insistence on constraint) also opened up new avenues for criminal law. Thomasius is well known for his reformatory works on bigamy, witchcraft and torture. Wolff was one of the first to define crimes infringing on the rights of others in terms of an *Unrecht*, whereas he was the proponent of the *civitas maxima*.[31]

A significant portion of the lectures at philosophy and law faculties dealt with natural law,[32] and it became a vehicle to support criminal law reforms in the age of codification. Between the introduction of the 1751 Bavarian criminal code, the first code specifically devoted to this subject and which broke with previous laws,[33] and the 1794 *Allgemeines Landrecht*, title XX of the second book of which contained more than 1,500 articles concerning criminal law, the debates concerning criminal law played a central role in the development of the Enlightenment in legal matters. The German translation of Beccaria's *Dei delitti e delle pene* (based on Morellet's French translation, which altered both

24 Stolleis (1988) 298–304.
25 Göttingen, Catalogus praelectionum publice et privatim in Academia Georgia Augusta … habendarum, 1736, 1740, 1750.
26 Zieger (1987) 32–51. In the Catalogus praelectionum, the lecture offered in the summer semester 1774 dealt with *jus gentium universalis*, and the lecture in the following winter semester treated the *Notitia politica rerumpublicarum Europae*.
27 Wahlberg (1865) 8.
28 Göttingen, Catalogus praelectionum publice et privatim in Academia Georgia Augusta … habendarum, Wintersemester 1784 and Sommersemester 1789.
29 The 1777 *Grundriß eines europäischen Völkerrechts* was written by the archivist Karl Gottlob Günther. The 1785 *Litteratur des gesammten sowohl natürlichen als positiven Völkerrechts* was written by the judge von Ompteda.
30 Kamptz (1817) 8–13.
31 Aichele (2018) 285.
32 Schröder (2010) 301.
33 Cartuyvels (1996) 124–125.

the original text and its structure) was published in 1766 and was republished with annotations by Karl Ferdinand Hommel, professor of public and feudal law in Leipzig from 1750 to 1781.[34] Hommel also dealt with *Natur- und Völkerrecht* in his 1747 *Propositum de novo systemate iuris naturae et gentium ex sententia veterum iurisconsultorum*. It is not surprising that Klein, one of the major drafters of the criminal part of the ALR and Nettelbladt's successor in Halle, taught criminal law, natural law and the law of nations in a faculty devoid of specialised professorships. During this time, Klein lectured on *Strafrecht* 20 times and *Völkerrecht* three times.[35] As a freemason and a member of the *Mittwochsgesellschaft* in Berlin, Klein was in close contact with the enlightened reformers – from Mendelssohn to Kant. He established two review journals, the *Annalen der Gesetzgebung* (1775) and the *Archiv des Criminalrechts* (1798), together with Kleinschrod, professor of Roman and criminal law in Würzburg. Kleinschrod was the author of one of the first books in German on criminal law, the 1794 *Systematische Entwickelung der Grundbegriffe und Grundwahrheiten*. It was probably during this period that lectures on criminal law and the law of nations transitioned from Latin to German. Klein was by no means the exception to the rule: Biederman, Breuning and Biener in Leipzig could all teach, depending on the semester, either criminal law or the law of nation. At a time when there was no external pressure to teach penal law and / or the law of nations, the limited number of professors was not the motivation for some scholars to practise the two subjects.

D. Towards a stricter separation between two subjects of positive law?

Some years later, Feuerbach and Grolman, both born in 1775, were the flagships of a new generation of scholars writing about criminal law in Germany and directing the *Bibliothek für die peinliche Rechtswissenschaft und Gesetzkunde*, which published three volumes between 1797 and 1800. Educated in Jena, first studying philosophy and later law, Feuerbach was so inspired by Kant's legal doctrine that he quoted him in his 1798 *Anti-Hobbes* and specialised in penal law early on. As a *Privatdozent* in Jena, he taught criminal law, first using Koch's Latin book and later his own *Lehrbuch* published in two volumes (1799–1801). Extraordinary *Professor der Rechte* in Jena, he changed to Kiel as professor of feudal law (1802), before switching to Landshut to teach civil and criminal law from 1804 to his resignation in 1805. It is worth noting that within this short period of time, Feuerbach offered 24 hours of lectures per week on Roman law, hermeneutics and criminal law.[36] Cases such as those of Grolman, Schmalz (professor at Göttingen, Königsberg and Halle), Malblanc (professor at Erlangen and Tübingen) and Kleinschrod – the latter having taken part in the contemporary debates on the idea of prevention in criminal law – show that professorships had not yet been specialised.

The reorganisation of the University of Heidelberg in 1803 and the foundation of the University of Berlin in 1810 were landmark events for a clearer definition of professorships. In Heidelberg, five professorships were rearranged such that they offered a rather flexible distribution of matters. Criminal law was taught during the summer semester in a complementary capacity (*Nebenamt*) by professors like Janson (1803, using Meister's textbook), Paetz (1804, using Feuerbach's textbook), Gambsjäger and Zachariae (1807, using Feuerbach's textbook).[37] The latter, well known for his lectures and textbook on French civil law, taught both criminal law (completing Feuerbach's textbook with elements of French law) and *Völkerrecht* during the same time period (1816–1820), before Mittermaier's arrival in 1821. It is worth noting that Feuerbach's textbook served as the reference work in the faculty where Thibaut and Zachariae taught, whereas Wedekind taught Kant's legal doctrine in 1803 and Klüber *Europäisches Völkerrecht* in 1807 (before participating in the Vienna Congress and publishing *Droit des gens moderne de*

34 Cattaneo (1993) 77.

35 Berndl (2004) 330. At the same time, Ludwig Heinrich von Jakob taught natural law at the Faculty of Philosophy in Halle and also dealt with penal law.

36 Radbruch (1957) 68.

37 Vorlesungsverzeichnisse der Universität Heidelberg 1784–1941, Küper (1986) 4.

l'Europe in 1819). In the same year, 1807, Gönner also taught the European law of nations at the University of Landshut.

With the creation of the University of Berlin, the question regarding the curriculum became quite important. After Humboldt's decision to make Savigny professor of Roman law, the faculty's small staff was completed with Schmalz, an old professor from Halle, to cover the lectures on *Staatsrecht* and *Völkerrecht* and Friedrich August Biener, a young colleague from Leipzig (the son of Christian Gottlob who taught criminal law and law of nations), to cover criminal law.[38] Schmalz worked together with Klüber to orient the teaching of law of nations towards the explanation of the European order linked with the Vienna Congress through the publication of his 1817 book, *Das europäische Völkerrecht*. Biener used Feuerbach's textbook and wrote several texts on the history of criminal law and criminal process. As the Berlin example shows, while both criminal law and the law of nations had a secondary status, they were nevertheless considered necessary subjects alongside the dominant Roman law.

And even though not all German law faculties outside of Prussia had adopted the Berlin model during the *Vormärz* period, the professorships devoted to criminal law had. Examples include Christian Gottlieb Gmelin in Tübingen (often referred to as »Criminal Gmelin« to distinguish him from his cousin who was a professor of Roman law), Marezoll in Giessen, Philipp von Schmidtlein in Munich, Eduard Henke in Bern and later in Halle. As the co-director (together with Kleinschrod and Konopak) of the *Neues Archiv des Criminalrechts* since 1816, Mittermaier was the »conductor« of a strong group of about 20 professors of criminal law, a number that was far more important than the corresponding group in France (where the same professors taught criminal law, criminal procedure and civil procedure) and triggered the publication of numerous textbooks.[39] However, despite his propensity towards comparative law and the interest in this field with the works by Foelix and Lieber concerning international law, Mittermaier did not teach the law of nations.[40] Moreover, the success of Feuerbach's *Lehrbuch* was very important: until the middle of the 19th century, it was used in Marburg, Bonn, Halle, Tübingen and even Berlin.

At the same time, the law of nations was not taught everywhere: in Halle (before the arrival of Kalterborn in the 1840s), in Königsberg, in Würzburg, in Marburg, in Breslau, or in Tübingen, a number of years went by without a single lecture on *Völkerrecht* being offered. There simply were not that many professors teaching *Völkerrecht*, and in some cases, the subject was offered by professors teaching penal law. This was the case for Anton Bauer in Göttingen (teaching *Criminalrecht* as well as *Natur- und Völkerrecht* in 1823–1824); for Ahlwardt in Greifswald (in 1823, but with no courses in either criminal law or the law of nations in 1825/1826); for Sylvester Jordan offering lectures on *Völkerrecht* and *Criminalrecht* in Marburg (1824–1825); for August Wilhelm Heffter, who taught both subjects in Berlin (from 1833 onward), published a *Lehrbuch des gemeinen deutschen Criminalrechts* (1840), and another textbook entitled *Das europäische Völkerrecht der Gegenwart* (1844); for Maurenbrecher in Bonn (1840–1843); and from the 1850s to the 1870s for Hugo Hälschner in Bonn.[41] John's lectures on these two subjects in Königsberg (1861–1866) are also worth noting. It should be remembered, however, that in such situations the primary cause of this thematic breath to be covered by the scholars was due to the small number of professors at these faculties. While Klüber's handbook was indeed the most popular, it was not as great a success as Feuerbach's *Lehrbuch*.

With the introduction of the *Habilitation* – a qualification to become *Privatdozent*, then extraordinary and ordinary Professor – more and more young scholars sought to be »habilitated« in several subjects in order to increase their chances of being recruited by a faculty.[42] This did not imply, however, that they wanted to teach different subjects at

38 Kraus (1999) 153.

39 Schmidt (1965) 283; Kesper-Biermann (2009) 102.

40 Riemer (2005) 67–70.

41 Besides his textbook on *Preußisches Strafrecht* (1855–1858 with developments in the second volume concerning conflicting criminal laws), Hälschner published an article entitled *Zur wissenschaftlichen Begründung des Völkerrechts* in the *Zeitschrift für volksthümliches Recht* in 1844 (referring to Pütter and Hegel in order to link the foundation of international law with the recognition of modern nations). He also wrote in 1871 about the German-French War and its relationship to the law of nations.

42 Wollgast (2001) 135.

the same time, and with the process of specialisation that occurred during the Reich period (1871–1918), specialists of criminal law and the law of nations tended to gravitate away from the other subject. Some professors of *Strafrecht* also taught German private law, ecclesiastical law (*Kirchenrecht)* or legal philosophy like Beseler, Merkel and Binding. Many professors of *Völkerrecht* were also professors of *Staatsrecht*, for instance, Bluntschli (professor in Munich (1848) and later in Heidelberg (1861)), Bulmerincq (professor in Dorpat starting in 1858, then later in Heidelberg), Bierling (professor in Greifswald from 1873 onward), Fricker (professor in Tübingen starting in 1875), Bergbohm (also professor in Dorpat starting in 1884, later in Marburg and in Bonn). Richard Schmidt began his career as professor of procedural, public and international law in Freiburg in 1891, but he taught criminal law in the ensuing years.[43] Ernst Beling was *Privatdozent* of criminal procedure and of *Völkerrecht* in Breslau (1893) as well as published on the law of embassies and Heilborn's *System*,[44] but he later went on to specialise in criminal law.

E. Two cases of personal union between penal law and the law of nations

However, the »internationalisation« process of the debates on criminal law (especially regarding prisons and criminology) meant that some contact between specialists of criminal and of international law had been maintained.[45] For Holtzendorff and Liszt, it was a personal decision to be simultaneously professors of criminal law and international law. The former, in close contact with Mittermaier and Bluntschli, was for a long time (1860–1873) extraordinary professor[46] and had to teach the two subjects, which he also published important textbooks on: *Das europäische Völkerrecht* (1870) and the *Handbuch des deutschen Strafrechts* (1871). Liszt, professor of penal law in Giessen (1879), Marburg (1882), Halle (1889) and Berlin (1899), began teaching international law in 1890 (as Brunnenmeister's successor, who also taught both subjects in Halle)[47] and published his *Völkerrecht* in 1898. These two main contributors to criminal and international law were the last German professors to associate both subjects simultaneously in their teachings and their books. After World War I, the process of specialisation was noticeable in the creation of research institutes for international law such as the 1926 *Kaiser-Wilhelm-Institut für ausländisches öffentliches Recht und Völkerrecht*. Only a few professors changed the main subject of their research and teaching over the course of their careers. Carl Schmitt is just such a case, who wrote his doctorate under Fritz von Calker, a disciple of Liszt, and taught penal procedure after his *Habilitationsschrift* in 1916, before abandoning this avenue in favour of international and public law. Georg Dahm's career trajectory is linked to his Nazi commitment during Hitler's regime:[48] this criminal law specialist taught international law in Pakistan just after World War II and, upon returning to Germany with a professorship in Kiel, penned a renowned textbook on *Völkerrecht* (1958–1961). Contingent change of specialisation was the last chapter in the stories of these careers before the more recent development of *Völkerstrafrecht* in Germany.[49]

At the end of the day, it appears that a dozen law professors taught both criminal law and the law of nations over the course of 100 years. A variety of different factors contribute to the explanation of these atypical careers: the low number of law professors in the respective faculties and their involvement in different subjects, the common natural law basis that inspired both the lectures on criminal law and the law of nations during the second half of the 18th century, and finally the scholars' interest in two new fields of positive law within an increasingly Europeanised context. Does this mean that, for these scholars, there were points of contact and a circulation of ideas pertaining to the content of penal law and the law of nations?

43 Duve (1998) 36.
44 Beling (1896).
45 Henze (2007) 60.
46 Holtzendorff (2015) 65.
47 Hermann (2001) 48.
48 Halpérin (2015) 311; Jouanjan (2017).
49 Neubacher (2005) 31 on the importance of the works of Hans-Heinrich Jescheck (1915–2009) as the founder of this discipline of *Völkerstrafrecht*, a term used by Beling and Dahm.

II. Common concepts and fruitful outcomes

The German linkage during the 18th and the 19th centuries between criminal and international law was something exceptional in the European academic landscape. For example, penal law was combined with civil law and procedure in France, where it is today still a part of the »private law« academic body. In England, criminal law was not present in the curriculum of the faculties of law prior to the 20th century (despite some developments in the works of Hale or Blackstone about »wrongs«), whereas international law was taught earlier in Oxford, Cambridge and London. This mapping of disciplines is not just about the structuration of legal teaching; it produced original works that linked the two subjects in Germany and led to various outcomes in different periods. Using the same terms in a contemporaneous context, German professors of *Strafrecht* and *Völkerrecht* have developed common concepts that appear to be generating fruitful outcomes in the legal theory of norms.

A. *The philosophical backgrounds of criminal law and the law of nations*

Diethelm Klippel has shown how the science of criminal law (*Strafrechtswissenschaft*) was conceived in early 19th-century Germany as a philosophical subject tied to natural law theories.[50] The fact that the great writers in natural law (Grotius, Pufendorf, Thomasius, Wolff, Kant), whose works were taught in German universities, also dealt with criminal law explains how natural law theories – like the social contract – served as an anchor, if you will, to explain and to reform a criminal law that was spread among different and not always concordant sources (Roman Law, the *Carolina*, the *Landrechte*). Grotius' utility-oriented thought about the finality of punishment deviated from the traditional scheme associating sin and its redemption through the punishment. With Pufendorf's distinction between moral theology and law, then with Thomasius' audacious propositions concerning the decriminalisation of bigamy and witchcraft, one can speak of a »secularised doctrine« of criminal law that was based on *Vernunftrecht*, even if this doctrine maintained the prohibition of atheism and the defence of religion.[51] This doctrine was well adapted to the religious and political context of Germany in the final century of the Holy Roman Empire, with its religious and legal diversity. Natural law, and even the appeal to *Völkerrecht*, was used to support the ideas of a universal criminal law (regarding the finality of punishment), of a common German criminal law (about the penal procedure through the *Carolina*), and of a variety of territorial statutes concerning offences. The debates triggered by Beccaria's work reinforced this intellectual linkage between criminal and natural law. If the concept of a positive law of nations was rejected by Pufendorf and Grotius, Wolff's plea for a *civitas maxima* and its critical reinterpretation in a more concrete way through his pupil Vattel created a bridge within Enlightenment thought between the reformation of criminal law and the progress of the law of nations. This bridge was exemplified in Kant's 1787 *Rechtslehre* through the concepts of human dignity, liberty and legal state (*juridischer Zustand*).[52] If Kant's retributive and absolutist theory broke with all utilitarian conceptions of criminal law (not to mention in the area of cosmopolitan law with the right of hospitality he ascribed to foreigners in his *Zum ewigen Frieden*), he stimulated the philosophical debate around these questions, from Fichte to Hegel and Schopenhauer.[53]

At a time when natural law was more often taught in philosophy faculties than in law faculties, these philosophical discussions did not leave the criminal law professors indifferent: Feuerbach and Zachariae were deeply influenced by Kant, whereas Abegg, Köstlin and Hälschner followed Hegel's theory of *Unrecht*.[54] For a significant part of the first half of the 19th century, criminal law in Germany was thought of as a subject based on universal and philosophical principles (with an extraordinary production of more than 120 papers between 1780 and 1850),[55] which was not the case in other countries, notably in France where the focus was on a codified penal law of 1791 and 1810. At the same time, German teachers of *Völkerrecht* were primarily interested in maintaining an equilibrium

50 Kesper-Biermann / Klippel (2007) 211.
51 Steinberg (2005) 185.
52 Hüning (2013) 467.
53 Vormbaum (1993).
54 Schmidt (1965) 295–301.
55 Kesper-Biermann / Klippel (2007) 216.

within Europe in accordance with the Vienna treaty that was linked with the 1815 Final Act creating the German Confederation. This situation explains the focus on the teaching of *europäisches Völkerrecht*, which began toward the end of the 18th century. In both subjects, the impact of the German Historical School was rather limited, facilitating the distribution of lectures concerning criminal law and the law of nations to those who did not teach Roman law. The teaching of the *Encyclopaedia des Rechts*, another uniquely German phenomenon, led to the early identification of »disciplines« and the recognition of both *Strafrecht* (within *öffentliches Recht*) and *Völkerrecht*.[56] Mittermaier's refusal of any general theory and his attention to the variety of criminal codes and statutory laws throughout the world constitutes a significant exception.[57]

B. The turning point towards a positivist perspective in criminal law and the law of nations

After the failures of the 1848 Revolution, the time of *Isolierung* and *Quietismus* during the 1850s and the 1860s corresponded to a turning point for the intellectual relationships between criminal law and the law of nations. Beseler orientated one part of the criminal doctrine towards the commentary (that he himself wrote) of the 1851 Prussian Penal Code. No significant work had been carried out in *Völkerrecht* prior to Bluntschli's *Das moderne Völkerrecht* in 1867–1868. At roughly the same time, Jhering published his *Schuldmoment im römischen Privatrecht*. Aside from the famous sentence regarding the continuous change towards the abolition of penalty, Jhering's text considered criminal law to be a historical expression of the people.[58] Jhering extended the particularistic principles of the German Historical School to criminal law and rebuilt ties between penal and civil law regarding the concept of fault. This initial step towards a positivist version of criminal law, disconnected from natural law and *Völkerrecht* through a kind of nationalisation, led Jhering ten years later to formulate firmer positions in his 1877 *Zweck im Recht*. In this major work, Jhering defined law as the essential (*Inbegriff*) group of norms according to which constraint was exercised within a State.[59] This meant that law was the »politics of force«, that legal rules were norms of constraint (*Zwangsnormen*) and that the State was the only (direct or indirect) source of law. While in some sense *Völkerrecht* would have been more appropriate as the model for legal positivism, its inability to effectively exert constraint was problematic, and criminal law went on to serve in this capacity.[60] Jhering, however, did not deny *Völkerrecht* the quality of law, arguing based on the common language and acceptance of international law. Moreover, he encouraged continued reflection regarding the existence of legal norms deprived of constraint in constitutional law as well as in international law.

Whereas Bluntschli promoted a *Völkerrecht* based on customs, practices and scientific works, notably in humanitarian law (*Menschenrecht*),[61] Holtzendorff had defended a positivist vision of criminal and international law since the 1870s. He saw no place for natural law within criminal law; instead, there was only room for a positive and national law. Consequently, the science of criminal law was not a source of the law, especially in its philosophical dimension.[62] Holtzendorff extended this clear rupture with natural law, and even with jurists like Feuerbach, to *Völkerrecht*: he also denied the existence of a natural or universal *Völkerrecht*. The attention traditionally paid to the European law of nations (the title of Holtzendorff's development in his *Encyclopädie der Rechtswissenschaft* was *Das europäische Völkerrecht*) was used to say that the law of nations was not the same everywhere. The practices of the individual States were more important than treaties and philosophical debates should be rejected.[63] Holtzendorff considered that the mere »conviction« regarding a rule connected with the law of nations was no more than a remote *Wasserader* and not a source of law.[64] War was the way of using constraint within the context of the law of nations.[65] *Internationales Recht* was defined,

56 For example, Pütter (1846) 194 and 313.
57 Vormbaum (2011) 122.
58 Jhering (1867) 3.
59 Jhering (1877) 318.
60 Jhering (1884) 326.
61 Bluntschli (1868) 18.
62 Holtzendorff (1871) 7.
63 Holtzendorff (1870) 766 and Holtzendorff (1885) 27.
64 Holtzendorff (1885) 82.
65 Holtzendorff (2015) 551.

according to the German translation of Bentham's »international law«, as a set of rules larger than the law of nations (*Völkerrecht*) that included private and criminal law in international relationships between individuals.[66] Without directly influencing Jhering, Holtzendorff converged with him towards a parallel »positivisation« of criminal law and law of nations. While sanctions were not identical in these two parts of law, they were necessary and present.

C. *The analysis of the formal character of legal norms*

For legal theory, the final third of the 19th century was decisive. Binding's work *Die Normen und ihre Übertretung* (first edition in two volumes 1872–1877, second edition in one volume and some changes in 1890) was a seminal analysis of norms, and it focused on criminal law that Binding taught (together with legal philosophy) in Freiburg, then in Strasbourg and later in Leipzig. The point of departure for Binding's reflection on norms was that the offender did not »break« or »violate« the penal code; instead, he / she achieved or executed the penal law. Using an idea already suggested by Grolman, then by Hepp in the 1840s and 1850s, before later being taken up by Jhering,[67] Binding conceived of the criminal law as addressed to the judges or to the whole of the people.[68] Consequently, the criminal norms were separated from the statements in statutory law regarding crimes and penalties: these norms were orders or prohibitions (according to the model of the Decalogue) that were often implicit rules. Taking the form of general orders or prohibitions, like »You must not kill«, the criminal norms were – according to a positivist point of view identical to Jhering's conception of the penalty as a »pure question of social policy«[69] – also likely to change to reflect the rulings of the lawgiver. According to Binding, penalties were sanctions of an act of disobedience towards the State.

His new conception of criminal norms had several consequences for and a significant impact on the German science of law. Once, however, this simple link (in the same rule) between the order and the sanction was contested, and as norms were disconnected from legal statements, the way was finally paved for admitting norms without sanctions (interesting for international law) and for conceiving norms as abstract judgements. This latter point was further developed by Zitelmann in 1879, with the conception of the legal order as a hypothetic judgment,[70] and later taken up by Kelsen. During the 1880s and 1890s, the debates among German specialists of criminal and international law did not focus on this question of the conception of legal norms. It is noteworthy that this issue did not emerge in the *Schulenstreit* between Liszt and Binding. The two prominent figures were opposed about the finality of punishments, the role of personal liability and the place of sociology. But Liszt, who was not as aggressive as Binding and welcomed his papers in his journal (the *Zeitschrift für die gesamte Strafrechtswissenschaft* he founded together with Dochow in 1880), adopted some aspects of Binding's theory of norms. Liszt made *Norm* and *Rechtsgut* the two basic concepts of the law. Only in a footnote did he mention that Binding's theory led to a too formalist (and probably static) conception of the delict as disobedience towards the State and did not take account of the living conditions (*Lebensbedingungen*) that were protected by criminal law.[71] In his 1898 textbook on *Völkerrecht*, Liszt distinguished international offences (*Völkerrechtliche Delikte*) from offences against international law committed by nationals, for example, attacks against foreign sovereigns or ambassadors. At the same time, Liszt compared international offences with crimes committed within the context of a national legal order: both represented injuries of a legally protected interest (e. g. that of the State in international law) and were punishable by different forms of sanctions. Of course, the international »penalties« were adapted to the characteristics of the States: these penalties included financial compensation or – as *ultima ratio* – war.[72] As positive rules, criminal and international norms were functionally comparable: they had a social goal (according to Jhering's conception and Liszt's 1889 Marburg Programme), they protected a legitimate interest and they were sanctioned by penalties. One aspect of

66 Holtzendorff (1885) 8–9.
67 Jhering (1893) 334.
68 Binding (1872) 7.
69 Jhering (1877) 480.
70 Zitelmann (1879) 203–208.
71 Liszt / Schmidt (1927) 5.
72 Liszt (1898) 125–130.

Binding's theory, namely the disconnection between the statement (in a code or in a treaty) and the norm, could be used to say that there were international norms that States had to respect in accordance with customs and conventions. The section accorded to offences towards foreign sovereigns or ambassadors in penal codes, like the German *Strafgesetzbuch*, were interpreted as a kind of bridge between national and international law. Through these offences, the State recognised the existence of international law, and through international delicts, the international law was provided with legal sanctions (legally limited by the laws of war), even if no court existed to apply these sanctions.

The publication of Triepel's book *Völkerrecht und Landesrecht* in 1899 weakened this bridge between criminal law and international law. Triepel was not a scholar of penal law, but he was a pupil of Binding, to whom he dedicated his book. Triepel's dualism was based on a double opposition between national and international law: a difference concerning the relationships that were framed by these two kinds of law, and a distinction between the sources of these two separated legal orders. Whereas domestic law ruled the relationship between the State and individuals (corresponding to Binding's scheme of disobedience / penalty), international law concerned the relationships between equal States, which meant that there was no possibility of a State being »disobedient« towards another State. The differing sources of the two legal orders was based on Triepel's well-known concept of *Vereinbarung*: an agreement in which the respective State parties wanted the same thing (unlike private contracting parties) and could establish a common rule. This second distinction did not prevent the possibility of adopting penal rules (common to two or more States) through treaties, but there was no real example in that time. The so-called crimes against the law of nations, organised by national laws, were offences against the State and parts of domestic law, thus they had no points of contacts with international law.[73] While Triepel did not deal with the question of war in terms of penal sanction, one might suggest that his radical monism tended to sever ties between criminal and international law. At the same time, the works of von Bar (*Lehrbuch des internationalen Privat- und Strafrechts*, Stuttgart, 1892) and Beling (*Die strafrechtliche Bedeutung der Exterritorialität*, Breslau, 1896) were the first steps toward recognising the existence of an international criminal law.

D. Kelsen's dual heritage

During the 1900s, the German debates on norm theory focused either on criminal or public law, whether discussing questions concerning Bierling's conceptions of recognition (*Anerkennung*) or whether to replace Binding's notion of disobedience by referring to cultural norms, as Mayer does in his book *Rechtsnormen und Kulturnormen* (1903).[74] In his 1911 dissertation, the *Hauptprobleme der Staatrechtslehre*, Kelsen devoted a great deal of space to these theories of norms in order to defend his own vision of the norm (*Rechtssatz* as distinguished from the legal statement, to use Binding's vocabulary) as an abstract judgment (and not an imperative order)[75] obliging the State and, in some cases, the subjects.[76] Kelsen only made a brief reference (then quoted in Liszt's textbook) to the link between rule and penalty.[77] At this time, Kelsen had not yet dealt with international law. In his 1920 book, *Das Problem der Souveränität und die Theorie des Völkerrechts*, he criticised Triepel's dualism and defended a strong monism; and while he considered the comparison between war and penalty to be a peripheral issue, he nevertheless devoted a few pages to discussing Liszt's theories.[78] In his following texts, Kelsen focused on war as the sanction of international law, but not as a penalty, which is a concept presupposing individuals – not the State – as its objects.[79]

The question concerning the punishment of Nazi criminals led Kelsen to take a fresh look at the relationships between criminal and international law. Considering that a war of aggression (and not a just war as a reaction to a suffered wrong) was an offence against international law, and that it was possible (as in the case of pirates) to

73 Triepel (1899) 331–335.
74 Mayer (1903).
75 Kelsen (1911) 256, using Zitelmann's vocabulary.
76 Kelsen (1911) 346–405.
77 Kelsen (1911) 270.
78 Kelsen (1920) 216–220 and 266.
79 Kelsen (2010) 1351 (edition of his 1924 text about the theory of three powers and the functions of State).

punish individuals who completely controlled a State (like the Nazi leadership), Kelsen affirmed the existence of international crimes.[80] This vision of an international criminal law – one first discussed after World War I and that triumphs today – resurfaced in some of Liszt's ideas and reintroduced in a monist conception a link between criminal and international law.

Conclusion

With a point of departure in the factual repetition of situations in which the same German professors taught criminal law and the law of nations, I have tried to look for both the reasons and outcomes of this original linkage. Finding a general correlation – or even a simple explanation – linking these two (new) disciplines at German universities is no straightforward matter. The difficulty lies not in the lack of connection, but rather it involves a multiplicity of smaller points of contact, some of which arise toward the beginning of the 18th century and others more toward the end of the 19th century. Within such a context of academic liberty, and lacking the imposition of standard curricula like in France or Austria, it was entirely up to the professors whether or not they wanted to venture into these two relatively peripheral fields. In some instances, the decisive factor leading scholars to teach both subjects – whether each year or every other – was the small number of professors within a given faculty. Perhaps, in some cases, the content of these lectures did not conflict with one another. But, in recursive sequences, this intellectual encounter represented a fruitful environment that stimulated the publication of books like those written by Heffter, Holtzendorff and Liszt. By offering examples both in penal law and in the law of nations, from the time of Jhering to that of Kelsen, German legal theorists took advantage of this comparison in order to develop a very specific way of thinking legal norms. Through the convergence of criminal law and the law of nations, the blossoming of the theory of norms was also the legacy of a special relationship built by generations of German jurists between two subjects that were so different in appearance. A contingent configuration of combined careers produced fruitful concepts that were more firmly anchored in legal theory than in any other country.

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80 Kelsen (1943) 544–554.

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