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**About the concept of the ‘dangerous individual’  
in turn-of-the-century penal reform:  
Debates on recidivism, *état dangereux*, indeterminate sentencing, and  
civil liberty in the International Union of Penal Law, 1889-1914**

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**Abstract**

Alluding to Michel Foucault’s famous article on the “concept of the ‘dangerous individual’ in 19th-century legal psychiatry” in the title,<sup>1</sup> this article provides an overview of the founding of the International Union of Penal Law (IUPL), its penal reform agenda and major activities, before turning to a detailed examination and analysis of the IUPL’s debates, at its congresses from 1889 to 1913, on a central topic: special measures to be taken against so-called “incorrigible habitual criminals” or “dangerous” recidivists (the terminology varied over time). By analyzing recurring patterns of argumentation as well as their development over time, the article pursues three goals. First, it reveals the IUPL’s failure to live up to its own demand that penal policy should be based on empirical criminological and penological research; second, it elucidates the role of civil liberty concerns within the IUPL by demonstrating that prominent critical voices objected to subjective criteria for “dangerousness” and to indeterminate sentencing as threats to individual freedom; third, by tracing the role of the three founders in these debates, it offers a fresh comparison of the penal reform agendas of Liszt, van Hamel, and Prins.

**Keywords**

International Union of Penal Law, Union Internationale de Droit Pénal, Internationale Kriminalistische Vereinigung, transnational penal reform, habitual criminals, recidivism, incorrigibility, dangerousness, *état dangereux*, indeterminate sentencing, security measures, mental deficiency, social defense, modern school, positivism, Franz von Liszt, Adolphe Prins, and Gerard Anton van Hamel

**Summary:** 1. The founding of the IUPL. 2. The three founders: Liszt, van Hamel, and Prins. 3. The IUPL’s reform agenda. 4. The first phase (1889-1894): IUPL debates on recidivism, habitual criminality, indeterminate sentencing, and civil liberty. 5. The second phase (1905-1913): IUPL debates on *état dangereux*, security measures, and individual liberty. 6. Conclusions.  
Bibliographical References

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<sup>1</sup> Foucault, M., “About the Concept of the ‘Dangerous Individual’ in 19th-Century Legal Psychiatry,” *International Journal of Law and Psychiatry* 1 (1978), pp. 1–18.

## 1. The founding of the IUPL

On 17 September 1888 three professors of criminal law – Franz von Liszt, Adolphe Prins, and Gerard Anton van Hamel – founded the Union Internationale de Droit Pénal (UIDP) or Internationale Kriminalistische Vereinigung (IKV; in English: International Union of Penal Law or IUPL), which became the most important forum of transnational exchange in the field of penal reform in the quarter-century from its founding until the outbreak of the First World War. Van Hamel, professor of criminal law at the University of Amsterdam, had sought out contact with Liszt in Germany a few years earlier, after being impressed by Liszt’s programmatic article “Der Zweckgedanke im Strafrecht”.<sup>2</sup> Liszt and Prins, professor of criminal law in Brussels, had come into contact after Liszt had published a positive review of Prins’s 1886 book *Criminalité et répression*.<sup>3</sup> After all three founders recruited members among their colleagues across Europe, the IUPL became an active association on 1 January 1889, with seventy-five members.<sup>4</sup>

The IUPL was not the first international venture in the field of criminal justice.<sup>5</sup> Prison reformers had organized a first international congress in Frankfurt in 1846 and, starting in 1872, international prison congresses were organized by the International Penitentiary Commission (IPC) at regular intervals, about every five years. The IPC consisted of official government representatives, usually the heads of the national prison bureaux; although IPC congresses attracted a variety of penal experts (including judges, prosecutors, attorneys, and law professors), the majority of attendees consisted of practitioners of prison administration (prison directors, bureaucrats, and prison staff).<sup>6</sup> When the international penitentiary congress met in Rome in 1885, Cesare Lombroso and his supporters organized an alternative event, the first International Congress for Criminal Anthropology, which gave rise to a sequence of seven international congresses before the first world war. While the criminal-anthropological congresses were attended by a variety of experts in criminal justice, they were mainly a forum for medical professionals, especially psychiatrists, who were interested in criminological research.<sup>7</sup> The International Union of Penal Law (IUPL), which forms the subject of this article, differed from both organizations in at least two ways. First, whereas the IPC congresses focused on prison reform and the anthropological congresses focused on criminological research, the IUPL was primarily interested in reforming the criminal law.

<sup>2</sup> Hamel, G.A. van, “Zur Erinnerung und zum Abschied,” *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 21 (1914), pp. 440–45.

<sup>3</sup> Liszt, F. von, “Der strategische Ausgangspunkt im staatlichen Kampfe gegen das Verbrechen. Eine Stimme aus Belgien,” *Zeitschrift für die gesamte Strafrechtswissenschaft* 7 (1887), pp. 179–86.

<sup>4</sup> Liszt, F. von, “Die Entstehung der internationalen Kriminalistischen Vereinigung,” *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 21 (1914), pp. 1–20.

<sup>5</sup> For an overview, see Henze, M., “Crime on the Agenda: Transnational Organizations 1870–1955,” *Historisk Tidsskrift* 109 (2009), pp. 369–417.

<sup>6</sup> Henze, M., “‘Important forums [...] among an increasingly important penological community’: Die internationalen Gefängnis Kongresse 1872–1935,” in *Die Internationalisierung von Strafrechtswissenschaft und Kriminalpolitik (1870–1930): Deutschland im Vergleich*, ed. S. Kesper-Biermann and P. Overath, Berlin: Berliner Wissenschaftsverlag, 2007, pp. 60–84.

<sup>7</sup> Kaluszynski, M., “The International Congresses of Criminal Anthropology: Shaping the French and International Criminological Movement, 1886–1914,” in *Criminals and Their Scientists: The History of Criminology in International Perspective*, ed. P. Becker and R.F. Wetzell, Cambridge/New York: Cambridge University Press, 2006, pp. 301–16.

Second, even though the IUPL's membership included some prison administrators and medical doctors, the bulk of its members were professors and practitioners of criminal law.<sup>8</sup>

All three IUPL founders endorsed what is variously called the “modern”, “sociological”, “positivist”, or “social defense” approach to criminal justice, which they defined in the IUPL's initial statutes along the following lines. The IUPL, the statutes' first article stated, “takes as its point of departure the conviction that crime and punishment must be examined as much from a sociological as from a legal standpoint” and “defines as its task to promote recognition of this approach and the resulting conclusions in science and legislation.”

The initial statutes' second article listed nine theses that spelled out a more detailed agenda: (1) “the purpose of punishment is the fight against crime as a social phenomenon” (an endorsement of social defense, rather than retributive justice, as the primary purpose of punishment); (2) “the penal sciences as well as penal legislation therefore ought to take into account the results of anthropological and sociological research” (a commitment to basing penal policy on empirical research); (3) punishment must not be “removed from the context of other means of combating” and preventing crime (which was meant to call attention to alternative measures and treatments, for juveniles or mentally deficient offenders, for instance, but also to social policy as a tool for crime prevention); (4) the “distinction between occasional and habitual criminals is fundamental in both theory and practice and must serve as the foundation for penal legislation” (a key tenet); (5) the current “separation between penal administration and criminal justice is incorrect and counterproductive” (a call for criminal jurists to pay more attention to what happened to offenders after the verdict); (6) the association would “pay special attention to efforts to improve prisons and related institutions”; (7) “the [IUPL] considers the replacement of short-term prison sentences by alternative sanctions of equal effectiveness possible and desirable” (a call for the introduction of suspended sentencing); (8) “In the case of long-term prison sentences, the duration is to depend not only on the results of the criminal trial but also on the results of [the offender's] imprisonment” (a call for relatively indeterminate sentences); (9) “penal legislation ought to incapacitate incorrigible habitual criminals for as long as possible, even if it is a case of a repetition of minor offenses” (a concrete policy proposal, which, as we shall see, gave rise to a series of major debates).<sup>9</sup>

The nine theses articulated in the original 1888 statutes are of interest for a number of reasons: because they reflect the consensus of the three founders; because they show what kinds of penal reform demands could be articulated across national boundaries despite

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<sup>8</sup> On the IUPL, see Kesper-Biermann, S., “Die Internationale Kriminalistische Vereinigung: Zum Verhältnis von Wissenschaftsbeziehungen und Politik im Strafrecht 1889-1932,” in *Die Internationalisierung von Strafrechtswissenschaft und Kriminalpolitik (1870-1930): Deutschland im Vergleich*, ed. S. Kesper-Biermann and P. Overath, Berlin: Berliner Wissenschaftsverlag, 2007, pp. 85-107; Kitzinger, F., *Die Internationale Kriminalistische Vereinigung: Betrachtungen über ihr Wesen und ihre bisherige Wirksamkeit*, Munich: Beck, 1905; Radzinowicz, L., *The Roots of the International Association of Criminal Law and Their Significance*, Freiburg: Max-Planck-Institut für ausländisches und internationales Strafrecht, 1991; Bellmann, E., *Die Internationale Kriminalistische Vereinigung, 1889-1933*, Rechtshistorische Reihe, v. 116, Frankfurt /New York: P. Lang, 1994; Hans-Heinrich Jescheck, “Der Einfluß der IKV und AIDP auf die internationale Entwicklung der modernen Kriminalpolitik,” *Zeitschrift für die gesamte Strafrechtswissenschaft* 92 (1980), pp. 997-1020.

<sup>9</sup> “Satzungen der internationalen kriminalistischen Vereinigung,” *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 1 (1889), pp. 1-3.

differences among legal systems; because they outline the agenda that the founders had set for the new association; and, finally, because it allows us to address the question whether, at the time of its founding, the IUPL was envisaged as an organization representing the “social defense” approach or as a neutral ground on which classical and modern schools of criminal law could meet.

Beginning with the last question, I would argue that, even though the three founders sent out invitations to join to the widest possible circle of colleagues, the nine theses show that the founders conceived the IUPL as an organization that would promote the agenda of the what was called the modern, sociological, positivist or “social defense” school of criminal law. This should not, however, be considered synonymous with representing the ideas of the Italian positivist school, especially the criminal anthropological ideas of Lombroso, of which Prins and Liszt were quite critical; van Hamel somewhat less so. Contemporary reactions demonstrate that the IUPL was perceived as representing the “modern school” by members of the “classical school” of criminal law such as the German law professor Karl von Birkmeyer, who declined Liszt’s invitation to join because, as a firm believer in retributive justice as the primary purpose of punishment, he objected to article 2’s first thesis, which insisted that the purpose of punishment was “the fight against crime as a social phenomenon”.<sup>10</sup> At the outset therefore, it is hard to maintain that the IUPL was conceived as a neutral ground for cooperation among the “classical” and “modern” schools in those countries (including Germany and Italy), where the schools were at odds, which was, of course, not the case everywhere.

However, it is also true that as the IUPL’s membership expanded both in total numbers of individual members and geographically, to include more and more countries, the social defense agenda articulated in the nine theses increasingly failed to reflect the consensus of all members. Recognizing this, the IUPL’s executive committee (*Bureau Central*) decided in August 1896 to propose a revision of the statutes which included striking the nine theses of article 2 entirely, a change that was unanimously approved at the IUPL’s 1897 Congress in Lisbon.<sup>11</sup> The only substantive article in the revised statutes comprised the statement that “crime as well as the means for combating it must be examined not only from the legal but also from the anthropological and sociological standpoint.”<sup>12</sup>

## 2. The three founders: Liszt, van Hamel, and Prins

Although the 1888 statutes reflected a far-ranging consensus among the three founders, each was an eminent scholar in his own right, with his own distinctive contributions to scholarship, penal policy, and public life in his home country. All three were roughly of the same generation

<sup>10</sup> Birkmeyer letter quoted in: Liszt, “Die Entstehung der internationalen Kriminalistischen Vereinigung,” pp. 18–19.

<sup>11</sup> “Bureau de l’Union Internationale de Droit Penal: Procès Verbal de la Seance du 25 aout 1896,” *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 6 (1897), pp. 69–70; “VIIe Session de l’Union Internationale de Droit Penal tenue a Lisbonne les 21 -23 avril 1897,” *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 6 (1897), pp. 459–537.

<sup>12</sup> “Statuts de l’Union Internationale de Droit Penal (Arretes par la Session de Lisbonne 1897) / Satzung der Internationalen Kriminalistischen Vereinigung (Nach den Beschlussen der Lissaboner Versammlung 1897),” *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 7 (1898), pp. 1–2.

-- van Hamel was born in 1842, Prins in 1845, and Liszt in 1851 -- and started their academic careers at approximately the same time: Prins was appointed professor of criminal law at the Free University of Brussels in 1876; Liszt became professor of criminal law at the University of Gießen in 1879 (moving on to Marburg, Halle, and in 1899 to Berlin); van Hamel took up his professorship of criminal law at the University of Amsterdam in 1880.

Among the three, Adolphe Prins was probably the one who had the most profound impact on criminal justice and penal legislation in his own country. Serving as Inspector General of Prisons from 1884 to 1917, Prins cultivated close working relationships with a succession of Belgian ministers of justice that allowed him to exert a powerful influence on Belgian penal legislation, including the 1888 law on conditional release and conditional sentencing, the 1891 law on suppressing vagrancy and begging, and the 1912 Child Protection Act.<sup>13</sup> By comparison, Liszt's influence on penal legislation in Germany was much more indirect. Since Liszt quickly established himself as the leader of what in Germany was called the "modern" or "sociological school" of criminal law and frequently attacked the retributivist "classical school," Germany's justice ministry (Reichs-Justizamt) considered him a controversial figure, and therefore did not appoint him to any of the official penal reform commissions that were formed, starting in 1906, to revise the penal code. Nevertheless, there is no doubt that the work of the commissions and the 1909 draft code reflected the influence of Liszt's ideas; in 1911, together with colleagues he produced an alternative draft penal code, which in turn influenced the 1913 draft penal code.<sup>14</sup>

If his impact on German penal legislation was only indirect, Liszt exerted a powerful, lasting influence on the academic study of criminal law in German-speaking Europe and beyond (in Russia and Japan, for instance). An indefatigable writer, organizer, and networker, he founded a "Kriminalistisches Seminar" (a criminal law institute) with a research library, which served as the training ground for a distinguished group of students, and started a new journal of criminal law, the *Zeitschrift für die gesamte Strafrechtswissenschaft*, which quickly became the most important journal of criminal law in German-speaking Europe. The founding of the IUPL was thus a natural outgrowth of Liszt's transnational networking activities.<sup>15</sup> Although Prins's publications, written in French, undoubtedly exerted an influence beyond Belgium, in the French legal community, their influence was not as far-reaching as that of Liszt in the German-speaking world.

Van Hamel came to criminal law and to university teaching relatively late, compared to Prins and Liszt, assuming his professorship only at the age of 38, having first had a career in civil law, as a lawyer, prosecutor, and civil servant. But he too, was an active organizer, having a hand in the founding of the Nederlandse Juristenvereniging (Dutch Legal Association) in 1870, and a new journal, the *Tijdschrift voor Strafrecht*, in 1886. Like Liszt, who entered the German Reichstag as a liberal deputy (Freisinnige Partei), van Hamel was also active as a

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<sup>13</sup> On Prins, see Yves Cartuyvels's article in this issue, as well as: Cornil, P., "Adolphe Prins et la défense sociale," *Revue internationale de droit pénal* 22 (1951), pp. 177-89; Tulkens, F., "Un chapitre de l'histoire des réformateurs: Adolphe Prins et la défense sociale," in *Généalogie de la défense sociale en Belgique*, Bruxelles: Story-Scientia, 1988, pp. 17-46.

<sup>14</sup> On Liszt, see Karl Härter's article in this issue, as well as Koch, A. / Löhnig, M., eds., *Die Schule Franz von Liszt: Sozialpräventive Kriminalpolitik und die Entstehung des modernen Strafrechts*, Tübingen: Mohr Siebeck, 2016.

<sup>15</sup> See the third section of Karl Härter's article in this issue.

liberal deputy, as a member of the provincial parliament from 1892 to 1917, and a member of the Dutch national parliament, for the centrist “Liberale Unie” from 1910 to 1917.<sup>16</sup>

As far as their publication strategies are concerned, Prins was best known for publishing books outlining his critique of current penal policy and his vision for penal reform in a writing style accessible to the educated public, including *Criminalité et Répression: Essai de science pénale* (1886) and *La défense sociale et les transformations du droit pénal* (1910).<sup>17</sup> Liszt and Van Hamel, by contrast, did not articulate their penal reform agenda in books, but primarily in articles and lectures;<sup>18</sup> both of them also wrote influential textbooks of criminal law.<sup>19</sup> As we already noted, the original statutes of the IUPL reflected a wide-ranging consensus regarding penal reform among the three founders. Teasing out the subtler differences between their visions of penal reform is a difficult task, which this article will approach by analyzing the three founders’ policy positions in the IUPL debates about the treatment of “dangerous” recidivists in the later sections of this article.

### 3. The IUPL’s reform agenda

Initially, professors of criminal law were strongly overrepresented in the IUPL, making up about 30% of the membership, but over time their percentage sank to about 15%. The majority of members were legal practitioners: judges, public prosecutors, government officials, private lawyers, prison officials as well as a few medical doctors. In later years, as IUPL Congresses became prominent events, these congresses were also attended by government officials. The participation of different nationalities was uneven. Initially the German members represented about a third, later about a quarter of the membership; the Germans also formed the second-largest national chapter (Deutsche Landesgruppe der IKV), which was quite active and held no fewer than fifteen national meetings between 1890 and 1912. Prins and Van Hamel organized strong Belgian and Dutch participation. France was also well represented, with well-known professors of criminal law such as Emile Garçon, René Garraud, and Gabriel Tarde, but the French national chapter was much less active only met a handful of times. Switzerland and Austria were also strongly represented.<sup>20</sup> During 1890s Russian participation grew so much that Russia formed the largest national chapter; in 1902 the IUPL congress was held in St. Petersburg. Italian participation was rather limited because the Italian positivist school around Cesare Lombroso, Enrico Ferri, and Raffale Garofalo was primarily engaged in organizing the criminal anthropological congresses mentioned above. Garofalo, however, did make occasional appearances at IUPL congresses. There were very few British members from the outset, and later Britons were entirely absent from the IUPL, an absence probably best

<sup>16</sup> On van Hamel, see John Vervaele’s article in this issue, as well as Vrij, P. “Pour commémorer le pionnier G. A. van Hamel et pour combler une lacune,” *Revue internationale de droit pénal* 22 (1951), pp. 361–93; Liszt, “G. A. van Hamel († 1. März 1917),” *Zeitschrift für die gesamte Strafrechtswissenschaft* 38 (1917): 553–83.

<sup>17</sup> Prins, A., *Criminalité et répression*, Bruxelles: C. Muquardt, 1886; Prins, A., *La défense sociale et les transformations du droit pénal*, Bruxelles: Misch et Thron, 1910.

<sup>18</sup> Liszt, F. von, *Strafrechtliche Aufsätze und Vorträge*, Berlin: J. Guttentag, 1905; Gerard Anton van Hamel, *Verspreide opstellen*, Leiden: Brill, 1912.

<sup>19</sup> Hamel, G.A. van, *Inleiding tot de studie van het nederlandsche strafrecht*, Haarlem: Erven F. Bohn, 1907; Liszt, F. von, *Lehrbuch des deutschen Strafrechts*, 2nd ed., Berlin: J. Guttentag, 1884.

<sup>20</sup> On Swiss participation in the IUPL, see Germann, U., *Kampf dem Verbrechen: Kriminalpolitik und Strafrechtsreform in der Schweiz 1870–1950*, Zurich: Chronos, 2014.

explained by Britons' preference for a pragmatic approach to penal policy over the continental European penchant for academic and theoretical approaches.<sup>21</sup>

In the twenty-five years between 1889 in 1914 the IUPL organized twelve international congresses, amounting, on average, to a congress every other year. In actuality, the IUPL held congresses in all but one of its first six years, thereafter every 2 to 5 years. In addition to the international congresses, the national chapters were encouraged to hold their own national meetings. As mentioned, the German national chapter was without doubt most active one. For each international Congress the executive committee (*Bureau Central*) of the IUPL, which initially consisted of the three founders and was then enlarged to include representatives of the different national chapters, chose two to four topics for the agenda. The executive committee then chose so-called *rapporteurs* to produce written reports on these topics, which were published in the IUPL's *Bulletin* or *Mitteilungen* (published bilingually, in German and French) or otherwise circulated before the congress. One or all of the *rapporteurs* then usually introduced the discussion of their topic at the Congress.

If one reviews the topics discussed at these congresses in the twenty-five years of the IUPL's existence, it is noticeable that criminal procedure was almost entirely absent. This is not surprising since questions of procedure are even more closely tied to national criminal law than the principles of substantive criminal law. Nevertheless, it is notable that the IUPL was clearly much more interested in substantive criminal law than in criminal procedure. Although the IUPL did spark some projects in comparative law,<sup>22</sup> it should also be noted that its international congresses rarely dealt with topics of international criminal law; the few exceptions were topics such as international crime, "white slavery", and extradition.

Most remarkable is the fact that the IUPL's international congresses hardly addressed criminological research. Thus a discussion of the topic "The influence of criminal-sociological and anthropological research on the fundamental concepts of criminal law", which was on the official agenda of the fourth IUPL Congress in Paris in 1893, was postponed to a future date but was never taken up again. The only matter of empirical research in which the IUPL showed substantial interest was improving the statistics on recidivism, a concern that arose from debates on the treatment of habitual criminals and recidivists.<sup>23</sup> The almost complete absence of criminological research on the agendas of its congresses suggests that we should be wary of the IUPL's claim -- articulated in the original statutes and often repeated -- that the organization sought to base its penal policy recommendations on the results of criminal-sociological and criminal-anthropological research.<sup>24</sup> Although speakers at the congresses often made rhetorical references to criminal-sociological and criminal-anthropological "facts",

<sup>21</sup> Kesper-Biermann, "Die Internationale Kriminalistische Vereinigung," pp. 89-92. The IUPL's journal, *Mitteilungen der Internationalen Kriminalistischen Vereinigung*, published annual membership lists.

<sup>22</sup> Radzinowicz, *The Roots of the International Association of Criminal Law and Their Significance*, pp. 22-25; Kitzinger, *Die Internationale Kriminalistische Vereinigung*, pp. 18-20.

<sup>23</sup> Kitzinger, *Die Internationale Kriminalistische Vereinigung*, pp. 44-50; Bellmann, *Die Internationale Kriminalistische Vereinigung, 1889-1933*, pp. 44-47.

<sup>24</sup> On the history of criminology, see Debuyst, C. / Digneffe, F. / Pires, A., eds., *Histoire des savoirs sur le crime et la peine. Tome 2: La rationalité pénale et la naissance de la criminologie*, Ottawa/Bruxelles: Les Presses de l'Université de Montréal & Université d'Ottawa & De Boeck, 1998; Becker, P. and Wetzell, R.F., eds, *Criminals and Their Scientists: The History of Criminology in International Perspective*, New York: Cambridge University Press German Historical Institute, 2006; Cyrille Fijnaut, *Criminology and the Criminal Justice System: A Historical and Transatlantic Introduction*, Cambridge: Intersentia, 2017.

in reality the penal reform recommendations articulated at these congresses were almost never based on reliable empirical data generated by criminological research, a theme to which we shall return.

Equally notable is the fact that the IUPL showed little interest in questions of penal administration or prison reform. This is even more surprising because one of the three founders, Prins, was Inspector General of Belgian Prisons, and because the original statutes explicitly stressed the importance of prisons. To be sure, the IUPL's lack of interest in prison administration might be explained by the fact that this topic was considered the bailiwick of the International Penitentiary Commission. But this lack of interest in prison reform also highlights another gap between rhetoric and practice. Even though two of the reformers' key demands stipulated that punishments should not depend on the crime but on the criminal (i.e. on the future danger that the criminal posed) and that the purpose of punishment was to protect society from crime by preventing the individual offender from committing future crimes (by either deterring, rehabilitating or incapacitating them), the reformers showed remarkably little interest in how exactly the rehabilitation of "corrigible habitual offenders" or the incapacitation of "incurable" habitual offenders was supposed to be implemented. Their main focus was on reorienting substantive criminal law away from retributive justice (focused on the offense) to social defense (focused on the offender) through a revision of penal codes. The implementation of new types of prison regimes and new types of penal sanctions was of secondary importance, at least as long as the fight for revising the penal codes continued. The IUPL admitted as much when, in 1914, it placed the topic "system of punishments, sentencing, and penal administration" on the agenda of topics to be studied in the future, which was cut short due to the outbreak of the first world war.<sup>25</sup>

One last prominent omission from the IUPL's agenda has to be noted: the absence of the death penalty from the agendas of its congresses over the entire twenty-five years, even though its abolition was hotly debated in a variety of countries at this time.<sup>26</sup> On the one hand, this omission undoubtedly derived from a concern that capital punishment was a controversial topic to be kept off the agenda in order to avoid a split in the association. On the other hand, however, the IUPL's failure to discuss the subject demonstrates that the founders did not consider its abolition a priority. To be sure, capital punishment had been abolished in the Netherlands in 1870 and, even though the Belgian Penal Code of 1867 included the death penalty, a policy of automatic commutation introduced in 1865 insured that no executions took place in Belgium until 1918. But even if the abolition of the death penalty was not an urgent domestic concern for Prins or van Hamel, the matter was different for Liszt. In Imperial Germany, capital punishment remained on the books and, after the death, in 1878, of William I, who had commuted all Prussian death sentences, the number of executions reached an average of 15-25 per year up to 1914. With regard to Liszt, in particular, the omission of the death penalty from the IUPL's agenda thus strongly suggests that humanitarian concerns played at most a minor role in his penal reform agenda. But for Prins and van Hamel as well, it is clear that they had little interest in an international campaign against the death penalty.

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<sup>25</sup> "Das neue Arbeitsprogramm der IKV. Auszug aus dem Protokoll der Sitzung des Zentralvorstandes vom 4. Januar 1914," *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 21 (1914), pp. 449-50.

<sup>26</sup> Radzinowicz, *The Roots of the International Association of Criminal Law and Their Significance*, pp. 26-31.

Most of the topics that were discussed at the IUPL's international congresses concerned penal policy, with a focus on four issues: (1) the replacement of short-term prison sentences with other measures, especially suspended sentencing; (2) juvenile crime and juvenile justice; (3) the question of how to treat mentally deficient offenders, who were considered simultaneously less responsible (and therefore eligible for reduced responsibility) and more dangerous (and should therefore be subjected to stronger security measures); (4) and, finally, the treatment of recidivists and "habitual criminals", especially "incorrigible" habitual criminals, and the related questions of security measures and indeterminate sentencing. With the exception of mentally deficient offenders, all these topics already appeared on the agendas of the first two international congresses, in 1889 in 1890; and all of them were discussed at regular intervals.

The first question on which the IUPL reached a consensus was the introduction of suspended sentencing (*condamnation conditionelle*), which was recommended in a unanimous resolution adopted at its first international congress, which took place in Brussels in 1889.<sup>27</sup> The ease with which this consensus was reached undoubtedly had to do with the fact that suspended sentencing had already been adopted in several countries: in the United States in the 1870s, in the United Kingdom in 1887, and in Belgium in 1888. In the years following the IUPL's resolution, France introduced suspended sentencing in 1891 (*loi Bérenger*), and in 1895 several German states, including Prussia and Saxony, introduced suspended sentencing as an administrative measure.

Regarding juvenile justice, the most important resolutions were adopted at the IUPL's second Congress in 1890 in Bern. These resolutions included the recommendations, first, to increase the age of criminal responsibility to fourteen; second, for juvenile offenders above the age of fourteen, to replace the current question of "discernment" (whether or not the juvenile was able to distinguish right from wrong) with a new criterion: the question whether the juvenile might be better served by correctional education rather than imprisonment; third, that both the punishment of juvenile delinquents as well as the treatment of wayward children must follow the principle of individualization.<sup>28</sup> Once again, the IUPL's ability to reach a consensus on the treatment of juveniles already at its second Congress reflected the fact that a number of countries had already begun to set up "juvenile justice" systems that separated juvenile delinquents from the workings of regular criminal justice.

The IUPL's deliberations on the treatment of "mentally deficient" (*Minderwertige* in contemporary German usage, *défectueux* in French) offenders were much more complicated and drawn out, and are not easily summarized. They were also closely intertwined with the debates over the treatment of habitual criminals, many of whom were considered mentally deficient; it is on these debates that I will concentrate in the remainder of this article.

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<sup>27</sup> "Erste Jahresversammlung der internationalen kriminalistischen Vereinigung, gehalten zu Brüssel am 7. und 8. August 1889," *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 1 (1889), pp. 177-84.

<sup>28</sup> "Zweite Jahresversammlung der internationalen kriminalistischen Vereinigung, gehalten zu Bern am 12. bis 14. August 1890," *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 2 (1891), pp. 108-18.

#### 4. The first phase (1889-1894): IUPL debates on recidivism, habitual criminality, indeterminate sentencing, and civil liberty

Of all the debates at the IUPL congresses, most central to the social defense approach promoted by the three founders were those on the treatment of recidivists, “incorrigible habitual criminals” or “dangerous” criminals (as we shall see, the terminology varied over time), which gave rise to debates over indefinite security detention and indeterminate sentencing as the preferred remedies, which in turn raised the issue of civil liberty with particular starkness. Debates on this question occupied the association from its first international congress in 1889 to its last one in 1913. Chronologically, the course of these debates can be divided into two phases: a first phase of vigorous but inconclusive debate from 1889 to 1894, which was followed by a decade during which the topic was omitted from congress agendas; and a second phase of intense debate from 1905 to 1913.<sup>29</sup>

At the IUPL’s first Congress, which took place in Brussels in 1889, debate on this set of questions took place under the heading “What are the defects of the system currently followed by most legislations for combating recidivism?” The debate was introduced by van Hamel, who had submitted a written report. The current system aggravating the punishments of recidivists, he argued, made sense only for corrigible delinquents guilty of violent offenses that revealed a significant criminal energy. However, the current system made no sense at all for two groups of offenders: first, for *incorrigible* habitual delinquents, who should be subject to absolutely indeterminate sentences (that is, sentences without any maximum duration being set in advance); second, for *corrigible* habitual delinquents guilty of small offenses against property, begging or vagrancy, who should be subject to relatively indeterminate sentences (that is, sentences with a minimum and maximum set in advance).<sup>30</sup> Thus, from the very outset of these debates, van Hamel made clear his support for absolutely indeterminate sentencing, a position to which he held until the end of his career. At this first Congress, however, the founders seem to have been aware that it would be unwise to press for an endorsement of indeterminate sentencing. After brief discussion, the assembly adopted a fairly modest resolution, noting that the primary weaknesses of the current system for combating recidivism were “the lack of classification and the equal treatment of habitual and occasional offenders”.<sup>31</sup>

At the next Congress, meeting in Bern the following year, the question was taken up again, but this time the term “incorrigible habitual criminal” was used in the formulation of the question, which read: “How should the law define the concept of the incorrigible habitual criminal and which measures are to be recommended against this group of criminals?” After two reports that recommended deportation or indefinite detention for incorrigible habitual criminals, this time the discussion was far more critical. Several speakers – including the

<sup>29</sup> For the broader context of European and American debates about indeterminate sentencing from the 1870s to the 1930s, see Pifferi, M., *Reinventing Punishment: A Comparative History of Criminology and Penology in the 19th and 20th Century*, Oxford: Oxford University Press, 2016.

<sup>30</sup> Hamel, G.A. van, “Quelles sont les déficiences du système suivi aujourd’hui par la plupart des législations pour combattre la récidive?,” *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 1 (1889), pp. 92-103.

<sup>31</sup> “Erste Jahresversammlung der internationalen kriminalistischen Vereinigung, gehalten zu Brüssel am 7. und 8. August 1889,” pp. 194-99.

director of the Swiss Federal Statistical Office as well as two professors of criminal law from Moscow and St. Petersburg -- voiced serious doubts about the existence of incorrigible offenders and raised the question of whether, if prisoners were leaving prison without being rehabilitated, this might not be the fault of ineffectively organized prisons, rather than a sign of the prisoner's incorrigibility; a criticism that was to recur throughout the debates of the coming years. As a result of these reservations, the majority resolution that was adopted was vague. Omitting any mention of incorrigibility or indeterminate sentencing, it merely called for "special measures" for recidivists who appeared to be either degenerate (*entartet*) or habitual criminals, and deferred further deliberations to the next Congress.<sup>32</sup>

The question formulated for the next congress, in Kristiania (now Oslo), Norway, in 1891, made a gesture toward collecting empirical data: "Does experience allow establishing the kind of infraction most commonly committed by delinquents who are generally referred to as incorrigibles?" The report was once again presented by van Hamel, who analyzed the statistics on recidivism from several countries but found them severely wanting.<sup>33</sup> He therefore proposed a resolution asking the executive committee to produce a memorandum calling on national governments to improve and standardize the collection of statistics on recidivism, which was adopted with near unanimity.<sup>34</sup> The empirical question that had been raised was thus disposed of by calling for better statistics. In a second resolution, also adopted, van Hamel proposed that in criminal trials of recidivists the sentencing phase be decoupled from the criminal verdict in order to allow an "investigation of the delinquent, his past, and his behavior during a probationary period" before the sentence was determined, in a complicated formulation that hinted at indeterminate sentencing without using the term.<sup>35</sup>

This question was addressed at the following Congress, in Paris in 1893, which explicitly placed the question of "indeterminate sentencing" on its agenda. Once again, van Hamel produced a written report, in which he recommended indeterminate sentences for criminals "whose documented inclination presents a continuing danger to society", his paraphrase for "incorrigible" criminals. This time he addressed the objection that indeterminate sentences presented a danger to civil liberty and sought to counter it by offering procedural guarantees: continued detention should be subject to periodic reviews by a judicial (rather than administrative) authority, which must follow regular judicial procedures (including a defense attorney for the detainee); van Hamel explicitly mentioned that his proposal differed from Liszt's (made in another context), who had proposed that these decisions be made by a hybrid judicial-administrative commission.<sup>36</sup>

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<sup>32</sup> "Zweite Jahresversammlung der internationalen kriminalistischen Vereinigung, gehalten zu Bern am 12. bis 14. August 1890," pp. 96-103, 116-18.

<sup>33</sup> Hamel, G.A. van, "Troisième Question [L'expérience permet-elle d'établir les espèces d'infractions le plus fréquemment commises par les délinquants auxquels on donne assez généralement la dénomination d'incorrigibles?]," *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 3 (1892), pp. 295-305.

<sup>34</sup> The subject of standardizing recidivism statistics was discussed further at the next congress, see "Vierte allgemeine Versammlung der Vereinigung. Paris, den 26. bis 28. Juni 1893," *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 4 (1894), pp. 354-67.

<sup>35</sup> "Dritte Jahresversammlung der Internationalen Kriminalistischen Vereinigung, gehalten zu Kristiania am 25. bis 27. August 1891," *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 3 (1892), pp. 287-95.

<sup>36</sup> Hamel, G.A. van, "Vierte Hauptversammlung 1893. Gutachten. Zweite Frage [Die unbestimmten Strafurteile]," *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 4 (1894), pp. 287-305.

For the first time, Prins, too, submitted a written report on this question, in which he squarely contradicted van Hamel by firmly opposing indeterminate sentencing with two arguments. First, he pointed out that in the United States, which had originated the idea of indeterminate sentences, this measure was only applied to young, reformable offenders, who were interned in special establishments that provided an environment of education and rehabilitation without rival. If one went by the American example, therefore, it made no sense to apply this measure to incorrigibles. Second, Prins objected to indeterminate sentences because they posed a threat to individual liberty since they would “deliver the most precious good of the citizen, individual liberty, to the whims of inferior agents, the subaltern personnel of a prison ... The detainee would become the slave of the guard”. In Prins’s opinion, van Hamel’s proposal to involve judicial authorities in the periodic review of indefinitely detained prisoners did not solve the problem since judges would always be dependent on the information provided by prison authorities. Furthermore, he wrote in an eloquent passage, judges must pronounce fixed punishments because “the determination of punishment is the guarantee of individual liberty, the foundation of modern public law, the obstacle to abuse, the efficacious instrument of control, [and] the shield of the weak against the passions, biases or errors of the powerful.” The only concession he made at the end of his report concerned welfare measures (*bienfaisance*). Just as one interned the insane for an indefinite period, so a case could be made that beggars, vagrants, and juvenile delinquents might be interned in houses of refuge, workhouses or institutions of correctional education for indefinite periods of time. But this was possible only because these were welfare measures rather than penal sanctions.<sup>37</sup>

In the discussion at the 1893 Paris congress, prominent French and Russian members – Senator René Bérenger, the author of major French penal legislation introducing conditional release and parole and honorary president of the French Société générale des prisons, as well as J. Foinitzky, professor of criminal law in St. Petersburg – sided with Prins and strenuously objected to indeterminate sentencing because of its threat to civil liberty. The discussion thus demonstrated that there was substantial resistance to indeterminate sentencing, and no formal resolution was adopted.<sup>38</sup>

The discussion of indeterminate sentencing continued at the IUPL’s next congress, its fifth, which was held in Antwerp in 1894. The question was again tweaked: “To which category of detainees could the system of indeterminate sentences be applied?” Prins again presented a written report, in which he opposed indeterminate sentences as incompatible with civil liberty and in violation of “droit public moderne” (modern public law). Instead, Prins proposed imposing long sentences on habitual criminals and offering the possibility of conditional release as a way of making their duration flexible. The only measures for which he would contemplate an indefinite duration were welfare or medical measures, for those disinclined to work ( *paresseux*), insane, and alcoholics. Offenders falling into these categories might, after serving a fixed prison sentence, be detained indefinitely or even in perpetuity in a workhouse. Here Prins was effectively proposing a dual track system, without using this

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<sup>37</sup> Prins, A., “Session de Paris 1893. Rapports. Deuxième question (La sentence indéterminée),” *Bulletin de l’Union Internationale de Droit Pénal* 4 (1894), pp. 287-95.

<sup>38</sup> “Vierte allgemeine Versammlung der Vereinigung. Paris, den 26. bis 28. Juni 1893,” 325-35; “Quatrième Session de l’Union tenue à Paris les 26, 27 et 28 juin 1893,” *Bulletin de l’Union Internationale de Droit Pénal* 4 (1894), pp. 366-76.

terminology.<sup>39</sup> He did not see a civil liberties issue with perpetual detention a workhouse because it was not a *penal* regime but a welfare measure; moreover, conditional liberation would always remain possible.<sup>40</sup> The second report, by the Genevan criminal law professor Alfred Gautier, also opposed indeterminate sentencing.<sup>41</sup> The debate in Antwerp was once again inconclusive and no resolution was reached.<sup>42</sup>

Over the first five years of the IUPL's existence, the question of how to treat recidivists or "incorrigible habitual criminals" had gradually been turned into the question of indeterminate sentencing. This question had polarized the organization's founders: van Hamel supported it, Prins opposed it; Liszt stayed on the sidelines on this question (even though he had endorsed the indefinite detention of incorrigible habitual criminals in his writings). It had also polarized the general membership, with the strongest objections to indeterminate sentencing as a threat to civil liberty coming from French and Russian members, a pattern that was to continue, as we shall see below. Faced with this split in opinion and clearly not moving toward any kind of consensus, after the 1894 congress the IUPL abandoned the topic for a full decade.

### 5. The second phase (1905-1913): IUPL debates on *état dangereux*, security measures, and individual liberty

It was Prins who proposed bringing the subject of how the legal system should treat recidivists back onto the IUPL's agenda at the May 1904 meeting of the Union's Bureau Central by approaching the question from a new angle, namely, by introducing the concept of the criminal's *état dangereux* (dangerousness, literally: dangerous state). Drawing on this concept, Prins formulated the following question for the agenda of the next congress: "How can the concept of *état dangereux* be substituted for the concept of the criminal act for certain categories of recidivists?"<sup>43</sup> The executive committee agreed and the question was placed on the agenda of the IUPL's tenth congress, to be held in Hamburg in 1905.

Since he had proposed the question, it was only natural that Prins served as *rapporteur*, introducing the deliberations on this item at the 1905 Hamburg congress with a lengthy report. Prins's point of departure was the observation that judges were already taking an individual's *état dangereux* into account when they were judging beggars, vagabonds, pimps or alcoholics -- but not when they were dealing with regular recidivist delinquents, in which

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<sup>39</sup> On the dual track system, see Germann, U., "Zweispurige Verbrechensbekämpfung. Kriminalpolitik und Gesetzgebung im transnationalen Diskurs: Franz von Liszt, die schweizerische Strafrechtsreform und die Zweispurigkeit von Strafen und Massregeln," *Rechtsgeschichte - Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte* 14 (2009), pp. 84-121.

<sup>40</sup> Prins, "3me Question: A quelles catégories de détenus le système des sentences indéterminées pourrait-il être appliqué? 2me Rapport présenté par M. A. Prins," *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 5 (1896), pp. 76-84.

<sup>41</sup> Gautier, A., "3me Question: A quelles catégories de détenus le système des sentences indéterminées pourrait-il être appliqué? 2me Rapport présenté par M. Alfred Gautier," *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 5 (1896), pp. 62-76.

<sup>42</sup> "Bericht über die fünfte Hauptversammlung der I.K.V. zu Antwerpen, vom 25. bis 30. Juli 1894," *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 5 (1896), pp. 213-26, 260-65.

<sup>43</sup> "Réunion du Bureau Central [7 mai 1904]," *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 12 (1905), pp. 50-52.

cases they still focused on the criminal act committed rather than the individual's *état dangereux*. Instead, he argued, "our goal must be a legislation regarding recidivists that considers essential not the act committed but the *état* of the delinquent and that treats recidivists as a separate category." Such legislation would introduce a tripartite classification of delinquents and sanctions: (1) regular prison for corrigible offenders only; (2) a regime of care (*régime de préservation*) for mentally deficient (*défectueux*) offenders; (3) for everyone else: prolonged internment (*internement prolongée*) "not in the regular penitentiary regime with all its luxuries" but in workhouses (*maisons de travail*) with severe discipline.

Regarding the crucial question how one would determine whether a delinquent presented an *état dangereux*, and how, in particular, one would avoid "arbitrariness and injustice", Prins reverted to recidivism (a set number of previous convictions) as the criterion, proposing the following as model legislation: "When a delinquent who has two previous convictions for crimes is once again convicted, he will be interned in a workhouse for at least fifteen years; depending on the gravity of the offense the internment could also be perpetual." For misdemeanors, rather than crimes, five previous convictions would be required and internment should last between seven and fifteen years. In summary, first, Prins sought to shift the crux of the debate to replacing the judges's focus on the criminal act with a new focus on the offender's dangerousness; second, after having introduced the concept of *état dangereux*, which seemed to suggest an assessment of the individual offender's mental disposition by the trial judge, he reverted to insisting that *état dangereux* must be defined by law in terms of a set number of previous convictions, in order to avoid arbitrariness; finally, as an opponent of indeterminate sentences, he wanted the trial judge to fix the length of detention but proposed a very harsh minimum (15 years) and even recommended lifetime detention in the case of serious offenses.<sup>44</sup>

In the ensuing discussion, Liszt raised lots of questions, rather than offering his own solutions. First, unlike Prins, he did not want to see dangerousness equated with recidivism; dangerousness should be determined on an individual basis. Second, he called for more discussion of what kinds of measures were to be imposed and explicitly placed the question of indeterminate sentencing back on the agenda. Third, he raised the question of what kind of decision-making body would make the determination of *état dangereux* (the German word used was *Gemeingefährlichkeit*): should it be a regular court (van Hamel's previous recommendation) or a hybrid commission (Liszt's position)?<sup>45</sup> Van Hamel, for his part, made a radical proposal. Since dangerous offenders were most often mentally deficient, he suggested the following procedure: if a judge considered a defendant dangerous (*gemeingefährlich*), he should refer him for a medical "examination by a doctors, who should have the final word".<sup>46</sup>

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<sup>44</sup> Prins's lengthy oral report is found in "Verhandlungen der X. Internationalen Versammlung der Internationalen Kriminalistischen Vereinigung [Hamburg, September 1905]," *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 13 (1906), pp. 426–32. See also the much briefer written version: Prins, "Congrès de Hambourg 1905. Question: Extension pour certaines catégories de récidivistes de la notion de l'état dangereux du délinquant substituée à la conception trop exclusive de l'acte poursuivi," *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 13 (1906), pp. 78–80.

<sup>45</sup> "Verhandlungen der X. Internationalen Versammlung der Internationalen Kriminalistischen Vereinigung [Hamburg, September 1905]," pp. 436–40.

<sup>46</sup> "Verhandlungen der X. Internationalen Versammlung der Internationalen Kriminalistischen Vereinigung [Hamburg, September 1905]," pp. 453–58.

The congress thus revealed crucial differences between the three founders: whereas Prins wanted to define *état dangereux* by a fixed number of previous convictions, Liszt wanted an individual assessment of the offender; van Hamel, finally, suggested that judges refer delinquents for a medical examination. One of the key problems in the lengthy debate in Hamburg was the ambiguity in the meaning of *état dangereux*: Did the term mean that the offender was likely to break the law again (even minor offenses) – or that the offender posed a major threat to society? Furthermore, did recidivism automatically prove *état dangereux* or was an individual evaluation necessary? And, if so, based on which criteria? Since the discussion was inconclusive, the topic was referred to the next congress, which, it turned out, did not take place until five years later, in 1910.<sup>47</sup>

When, in April 1909, the preparation of the next congress was discussed at a special meeting in Amsterdam of the IUPL's Bureau Central, which included representatives from most of the IUPL's national chapters, it became clear that Prins's proposal to shift sentencing criteria from the gravity of the offense to the dangerousness of the offender -- which was really the crux of the social defense approach – faced significant pushback from IUPL members who were concerned about the threat this shift posed to individual liberty. At the Amsterdam meeting this pushback was spearheaded by Émile Garçon, professor of criminal and comparative law at the Sorbonne and president of the IUPL's French national chapter,<sup>48</sup> who submitted a report recommending that the question “To what extent should the criminal law preserve an objective character in order to guarantee individual liberty?” be placed on the agenda of the upcoming 1910 congress. In this report, he insisted that any effort to define a special legal treatment for recidivists considered *en état dangereux* must respect the principle that all crimes and punishments must be defined and fixed by law.<sup>49</sup> After Garçon's presentation, the enlarged executive committee gathered in Amsterdam decided to combine debate of the civil liberty issue with the issue of *état dangereux* by placing the following question on the next congress's agenda: “In which cases can the concept of the *état dangereux* of the delinquent be substituted for that of the delinquent act being prosecuted and under which conditions is it [this concept] compatible with the guarantees for individual liberty?”<sup>50</sup>

The written reports on this question for the next congress, which met in Brussels in August 1910, was firmly in the hands of two defenders of civil liberty, the aforementioned Émile Garçon and the Russian jurist Vladimir Nabokov. In his eloquent report, Garçon explained why he thought that the new concept of *état dangereux*, which was said to manifest itself not solely in recidivism but in a “mental or social state,” had troubling implications for individual liberty, potentially leading to “theories and practices which one had thought definitively condemned and abandoned since the French Revolution”, namely, “the principle

<sup>47</sup> For the entire discussion, see “Verhandlungen der X. Internationalen Versammlung der Internationalen Kriminalistischen Vereinigung [Hamburg, September 1905],” pp. 425–70.

<sup>48</sup> On Garçon, see Donnedieu de Vabres, H., “Le professeur Emile Garçon (1851-1922) et l'union internationale de droit pénal,” *Revue internationale de droit pénal* 22 (1951), pp. 191–200.

<sup>49</sup> Garçon, E., “Rapport sommaire sur la nécessité de maintenir le point de vue objectif en droit pénal pour garantir la liberté individuelle,” *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 16 (1909), pp. 356–67.

<sup>50</sup> “Procès-verbal de la séance du Bureau Central élargi, à Amsterdam les 26 et 27 avril 1909,” *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 16 (1909), pp. 453–57.

of legality, which is the essential basis of the constitution of all free peoples”.<sup>51</sup> Garçon was willing to introduce “the most energetic measures of social defense against recidivists” but only on condition “that the law determines the regime of this punishment and the conditions of its application”. Concretely, this meant that the law would have to define *état dangereux* by the gravity of the offense and the number of previous convictions; there could be no individual assessment of *état dangereux* by a judge, let alone a judicial-administrative commission; there could be no indeterminate sentences; the penal sanction for offenders *en état dangereux* must to be fixed by law. Garçon also reported that, at its recent meeting in Rennes in May 1910, the French national chapter, over which he presided, had recognized the existence of individuals *en état dangereux* but had unanimously agreed that “the individual *en état dangereux* must not be deprived of the guarantees of individual liberty. It is the law that must determine the conditions of this *état dangereux* and it can do this only by taking into consideration the repetition or the objective gravity of the criminal act”.<sup>52</sup>

The second report, submitted by the liberal Russian jurist Vladimir Nabokov – professor of law in St. Petersburg, president of the IUPL’s Russian chapter, a liberal deputy in the first Russian Duma, and editor of the liberal Russian daily *Rech* – was no less articulate in making the case that the concept of *état dangereux* posed a serious threat to civil liberty.<sup>53</sup> If Garçon’s defense of civil liberty reflected the legacy of the French Revolution, Nabokov’s reflected the reality of arbitrary rule under the Russian autocracy, against which the Russian liberals were agitating.<sup>54</sup> “We Russians”, he wrote, “know the concepts of ‘unreliability’, of ‘persons who are detrimental to public order’ ... We only know too well what can become of preventive measures against people whom some government office considers ‘dangerous’.” In this matter, he argued, a “legal conception” of punishment was in conflict with a “police conception”. “Sacrificing” the principle of *nulla poena sine lege* “for the sake of social defense would mean undermining the foundation on which the sacredness of the rights of the individual” rested.<sup>55</sup>

If the two written reports were authored by staunch defenders of civil liberty against the encroachments of social defense, the two oral reports at the 1910 Brussels congress were presented by von Liszt and van Hamel, both partisans of aggressive social defense untroubled by civil liberty concerns.<sup>56</sup> In his report, Liszt challenged the very premise of Garçon’s report: “I want to permit myself the question: in our modern state, can we still function according to the principle that individual liberty can only be constrained if a specific, legally defined act of the person concerned justifies intervention, can we function with this principle of

<sup>51</sup> Garçon, E., “Congrès de Bruxelles, 1910. Rapport sur la question: Dans quels cas, déterminés par la loi, la notion de l’état dangereux du délinquant peut-elle être substituée à celle de l’acte délictueux poursuivi et dans quelles conditions est-elle compatible, au point de vue des mesures de défense sociale, avec les garanties de la liberté individuelle?,” *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 17 (1910), pp. 186.

<sup>52</sup> Garçon, *ibid.*, pp. 185–202.

<sup>53</sup> I am using the standard English transliteration of his name; his name was spelled “Wladimir Nabokoff” in the German transliteration used in IUPL publications.

<sup>54</sup> For the broader context, see Beer, D., *Renovating Russia: The Human Sciences and the Fate of Liberal Modernity, 1880–1930*, Ithaca, NY: Cornell University Press, 2008.

<sup>55</sup> Nabokoff, W., “In welchen vom Gesetz zu bezeichnenden Fällen kann der Begriff der Gemeingefährlichkeit des Täters an die Stelle des Begriffs der verfolgten Tat gesetzt werden, und in wie weit kann diese durch Sicherungsmassnahmen geschehen, ohne dass dadurch die zu gewährleistende Freiheit des einzelnen gefährdet wird?,” *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 17 (1910), pp. 324–41.

<sup>56</sup> Oral reports by von Liszt and van Hamel, in “Assemblée générale de Bruxelles, 1910,” *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 17 (1910), pp. 423–51.

unconstrained individual liberty?” And he gave his answer by distinguishing between an “old” and a “new” kind of liberalism: “It is the world historical achievement of the old liberalism, as it originated in the time of the French Revolution, to have sharply articulated the thesis of individual liberty. Today, however, we face a strong antithesis, the statement that the community stands above the individual, and that the individual has to accept limits on his personal freedom in the interest of the community. ... The task facing the present is ... to unite the two vantage points, to guarantee the freedom of the individual against the power of the state and, on the other hand, to recognize the needs of the collectivity, if necessary at the expense of the individual.”<sup>57</sup>

Against Garçon, Liszt insisted that judges ought to have more, not less, discretion in determining sentences in each case; and that “dangerous” recidivists must be subject to detention of indefinite duration (he was indifferent as to whether it took the form of an indeterminate sentence or a fixed sentence followed by an indefinite security measure).<sup>58</sup> That said, Liszt also made a point of positioning himself as more moderate than Prins, whose book *La Défense sociale et les transformations du droit pénal*, in which he laid out his proposal for criminal justice to shift focus from the criminal act to the delinquent’s *état dangereux* in detail, had appeared earlier that year.<sup>59</sup> Unlike Prins, Liszt noted, he was not willing to call for social defense measures against mentally deficient persons we had not committed a crime.<sup>60</sup> Van Hamel reiterated his support for indeterminate sentences and proposed a definition of *état dangereux* on a combined basis: a legal definition of a certain number of previous convictions plus an individual assessment by the judge (or a hybrid judicial-administrative commission) of the probability of future recidivism.<sup>61</sup>

Prins’s interventions at the 1910 congress reflected a transformation in his attitude toward civil liberty concerns and toward indeterminate sentencing. Fifteen years earlier, at the congresses of 1893 and 1894, he had stressed his concern about the threat that indeterminate punishments posed to individual freedom. In his 1910 book, *La défense sociale et les transformations du droit pénal*, he devoted a section to addressing civil liberty concerns, but in a way that indicated that he had overcome his own reservations about the indeterminate sentence.<sup>62</sup> “From the moment that one admits that the detention [of recidivists *en état dangereux*] will be prolonged (and on this point everyone is agreed),” he wrote, “doesn’t one have the right to affirm that there are more guarantees for individual liberty in many successive deliberations [periodic reviews of indefinite detention] rather than one isolated deliberation [the trial judge pronouncing a fixed sentence]?” “The main thing to remember,” he wrote, “is that the reform of the criminal law is closely linked to the reform of the administrative and penitentiary apparatus; the indeterminate sentence [is linked] to the way in which its execution

<sup>57</sup> “Assemblée générale de Bruxelles, 1910,” pp. 445–46.

<sup>58</sup> On the evolution of Liszt’s views on this subject, see Germann, “Zweispurige Verbrechensbekämpfung. Kriminalpolitik und Gesetzgebung im transnationalen Diskurs: Franz von Liszt, die schweizerische Strafrechtsreform und die Zweispurigkeit von Strafen und Massregeln.”

<sup>59</sup> Prins, *La défense sociale et les transformations du droit pénal*, pp. 70–98.

<sup>60</sup> “Assemblée générale de Bruxelles, 1910,” pp. 441–44. Liszt was referring to Prins’s statement that one could “recognize an *état dangereux* even where there is not yet a delinquent, and a right of state intervention even where there is neither crime nor misdemeanor.” Prins, *La défense sociale et les transformations du droit pénal*, p. 141.

<sup>61</sup> “Assemblée générale de Bruxelles, 1910,” pp. 449–51.

<sup>62</sup> Prins, *La défense sociale et les transformations du droit pénal*, pp. 99–140.

is conceived; we are talking about an ensemble of measures that have to be conceived as a whole, and *then the fears of arbitrariness will lose their force.*"<sup>63</sup> In short, Prins was confident that well conceived judicial reforms would banish the danger of arbitrariness, a point he reiterated at the Paris Congress. The question of special measures against delinquents *en état dangereux*, he argued there, was not a matter of the "fundamental principles of *droit public*" or of civil liberty but simply a "question of technique", of "constructing establishments and regimes". Clearly, his previous concerns about civil liberty had now taken a backseat to his push for more aggressive measures of social defense.<sup>64</sup>

The extensive and wide-ranging discussion at the 1910 Brussels congress reflected a division between, on the one hand, van Liszt and Van Hamel, who called for individual assessments of *état dangereux* and indefinite detention, and, on the other hand, Garçon and Nabokov, who opposed both as violations of civil liberty and the rule of law.<sup>65</sup> Since no agreement on specific measures could be reached, the discussion ended with a general resolution, unanimously adopted, that "[t]he law should establish special security measures against delinquents who are dangerous by reason of: either their state of legal recidivism, or their habits of life, or their hereditary and personal antecedents as manifested by a crime or misdemeanor that the law determines." And the question was referred to the next congress.<sup>66</sup>

This precise formulation of the 1910 resolution – for the first time the term "security measures" was used -- was indeed adopted as an agenda item for the next congress, held in Copenhagen in 1913. When the IUPL's Bureau Central met in Paris in April 1912 to prepare the congress, Prins gave a short talk, in which he highlighted the concept of "security measures" as representing a "new stage" in the IUPL's work and argued that "jurists, so far invested with an exclusive monopoly, must, more and more, call for the cooperation of psychiatrists." According to Prins, security measures were to be applied mainly to two types of delinquents. First, "[mentally] inferior [*inférieurs*] persons, comprising all the infinite nuances of degeneration, mental and moral defects, chronic alcoholism, hysteria and epilepsy." For this category, security measures were to take the form of "intermediate regimes" that would combine discipline and psychiatric care. The second category to be targeted by security measures consisted of "dangerous persons comprising recidivists and professionals who reveal a penchant for criminality and vagrancy." This category was to be "removed from society as long as possible" and even in, in some cases, "eliminated from social life." In discussing this category of delinquents, Prins used the term "monsters" -- dehumanizing language rarely found in IUPL discussions -- even though he did so with a rhetorical distancing device. After quoting Anatole France's dictum that "for scholars [*savants*] there are no monsters," Prince said: "But humanity is not only composed of scholars. It is composed of a crowd of decent people who are not scholars and who do consider as monsters those who threaten their lives, their possessions, and their quiet rest. The legislator must take care of these decent people and guarantee them order and peace."<sup>67</sup>

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<sup>63</sup> Prins, pp. 135, 137. Emphasis added.

<sup>64</sup> "Assemblée générale de Bruxelles, 1910," pp. 491-95.

<sup>65</sup> "Assemblée générale de Bruxelles, 1910," pp. 423-96.

<sup>66</sup> "Assemblée générale de Bruxelles, 1910," pp. 495.

<sup>67</sup> "Session du bureau central élargi, Paris, les 21 et 22 avril 1912," *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 19 (1912), pp. 343-48.

As far as the discussion of security measures at the next congress was concerned, the enlarged Bureau convened in Paris decided to divide the targets of security measures into three categories: (1) recidivists; (2) alcoholics and “defectives of all sorts”; (3) beggars and vagrants. For each category, the reports were to address the question of how to define the *état dangereux* for each category, which measures of social defense to take, and which authority should be empowered to impose them.<sup>68</sup>

This task was taken up by three reports published in preparation of the 1913 Copenhagen congress. Visoiu Cornateanu, professor of law in Bucharest, focused on the category of mentally defective offenders, which ended up not being discussed at the congress.<sup>69</sup> René Garraud, professor of law in Lyon, and a member of the IUPL’s executive committee, wrote a broader report which sought to provide procedural guarantees for individual liberty but still recommended that security measures be of indefinite duration (something Garçon considered antithetical to individual liberty).<sup>70</sup>

By far the most comprehensive report, and the one with the strongest influence on the debate, was once again written by Vladimir Nabokov, the liberal Russian jurist. If his report for the 1910 congress had provided an eloquent defense of the rule of law as the foundation of civil liberty, Nabokov’s report for the 1913 congress undertook the earnest effort of crafting legislation targeting certain types of dangerous recidivists in a way that would provide maximal safeguards for civil liberty. First, regarding the definition of the category of offenders subject to security measures, Nabokov recommended a hybrid system, which combined the formal criterion of recidivism (number of previous convictions to be defined by law) with a subjective assessment, by the trial judge, whether the defendant was to be considered “dangerous.” In this respect Nabokov recommended article 98 of the 1911 German “Alternative Draft” Code (co-authored by Franz von Liszt) as a model, according to which security measures could be imposed only on a criminals who, in addition to five previous convictions, committed a new crime that made them “appear as a professional or habitual criminal is dangerous to the legal order.”<sup>71</sup> Second, Nabokov advocated that security measures should not replace but follow the punishment (in what became known as the dual track system) and must be limited in duration. Third, Nabokov recommended that the question whether a recidivist defendant fulfilled the criteria of being a recidivist *en état dangereux* who could be subject to security measures should be presented to the jury to determine; if the jury answered in the affirmative, then, after the defendant had completed his prison sentence, the question whether (and which) security measures were to be imposed would be decided by a “Strafvollzugskommission” (penal commission) composed of representatives of the prison

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<sup>68</sup> “Session du bureau central élargi, Paris, les 21 et 22 avril 1912,” pp. 348–50.

<sup>69</sup> Cornateanu, V., “Congrès de Copenhague. Rapport,” *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 20 (1913), pp. 221–30.

<sup>70</sup> Garraud, R., “La loi doit établir des mesures de sécurité sociale contre les délinquents dangereux ... Rapport,” *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 20 (1913), pp. 231–42.

<sup>71</sup> Kahl, W., et al., *Gegenentwurf zum Vorentwurf eines deutschen Strafgesetzbuchs*, Berlin: Guttentag, 1911, pp. 32–33.

system, the judiciary, the public prosecutor's office, as well as doctors, clergy, and laypersons.<sup>72</sup>

Finally, Nabokov proposed banning the imposition of security members against political criminals explicitly and making the introduction of special security measures in any country dependent on the following conditions: "The application of special security measures, as far as they are justified by the ineffectiveness of normal punishments, is dependent on the following: (a) that the existing system of punishments is up to current standards and can be called effective; (b) that society does not impose insurmountable obstacles to those released from prison that deprive them of gaining an honest living; (c) that those released from prison benefit from organized welfare support."<sup>73</sup> This was Nabokov's way of reminding everyone of an objection that had been raised repeatedly in past debates, namely, that if too many criminals left prisons unreformed (and therefore went on to reoffend), this might not be the fault of the criminals but the fault of prison regimes that were not effective at rehabilitating prisoners; and that therefore, every country should first make sure that prisons offered effective rehabilitation regimes before introducing special security measures for recidivists. This particular thesis, however, was not put up to a vote at the meeting.

Because the category of mental defectives, on which Cornateanu had reported, was excluded from the discussion and Garraud was absent, the course of the discussion at the Copenhagen congress focused on the report presented by Nabokov.<sup>74</sup> While many participants voiced support for most Nabokov's proposals, van Hamel reiterated his support for indeterminate sentencing, although he indicated that he was willing to accept relatively indeterminate sentences.<sup>75</sup> Baron Raffaele Garofalo, Advocate General at the Superior Court of Rome and a famous member of the "Italian school," too, expressed his support for indefinite security detention.<sup>76</sup> As an indication of the direction in which opinion was shifting, several participants who had previously been opponents of indeterminate sentencing -- including the German penologist Moritz Liepmann and the Croatian law professor Josip Silovic -- indicated that they had changed their mind and had come around to endorsing indeterminate sentencing.<sup>77</sup>

The most important pushback against several of Nabokov's proposals came from the congress's local host, Carl Torp, professor of criminal law at the University of Copenhagen. Remembering Nabokov's report at the previous congress, Torp correctly identified the main motivation behind Nabokov's attempt to rein in security measures as a fear of "arbitrary state power." This, Torp suggested was a peculiarly Russian concern: "I believe that he [Nabokov] is here, consciously or unconsciously, at least in part influenced by the peculiar public law situation of his fatherland. This might be a natural and justified reason for him, but cannot be decisive for other situations; and I am convinced that, if we create the right agencies for

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<sup>72</sup> Nabokoff, W., "Schutzmassnahmen gegen Rückfällige. Bericht für die Kopenhagener Versammlung, 1913," *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 20 (1913), pp. 163-93.

<sup>73</sup> Nabokoff, pp. 173-77.

<sup>74</sup> "XII. Internationaler Kongress zu Kopenhagen, vom 27. bis 31. August 1913," *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 20 (1913), pp. 400-522, 539-40.

<sup>75</sup> "XII. Internationaler Kongress zu Kopenhagen, vom 27. bis 31. August 1913," pp. 498-501. Gerard Anton van Hamel's (brief) intervention in the Copenhagen debate must not be confused with the (longer) intervention of his son, J.A. van Hamel, who also attended.

<sup>76</sup> "XII. Internationaler Kongress zu Kopenhagen, vom 27. bis 31. August 1913," pp. 449-52.

<sup>77</sup> "XII. Internationaler Kongress zu Kopenhagen, vom 27. bis 31. August 1913," pp. 467, 476.

decisions about security measures and their discontinuation, then these concerns [about threats to civil liberty] have no *raison d'être* in most central and western European countries." Having thus disposed of concerns about civil liberty, Torp proposed a counter-resolution on two key points: instead of Nabokov's dual track system (with security measures following punishment), Torp recommend a single track system, in which security measures would replace punishment; and, instead of Nabokov's insistence on limited duration, Torp recommended that the security measures be of indefinite duration (with a review every two years).<sup>78</sup>

When the resolutions came to a vote, the assembly of about forty IUPL members endorsed Nabokov's mixed system of defining *état dangereux*, combining the formal criterion of a certain number of previous convictions, defined by law, with a subjective assessment, by the trial judge, of whether the defendant was to be considered "dangerous." The assembly also endorsed the ban on applying security measures to political criminals. On the question of whether security measures should replace or follow punishment, the assembly's vote was evenly split (twenty versus twenty). In a defeat for Nabokov and all those who had articulated civil liberty concerns, the assembly did, however, endorse indeterminate sentencing, (although it is not recorded by what margin) in this sense: "The judge should pronounce against the dangerous recidivist a security measure or a punishment of which the minimum is fixed but the maximum rests indeterminate."<sup>79</sup>

The 1913 Copenhagen congress was the IUPL's last. The following year, in January 1914, a select group gathered in Berlin for a celebration of its twenty-fifth anniversary. But the outbreak of the first world war in the summer of 1914 shattered international scholarly cooperation, and the IUPL fell victim to the enduring hostility between the two sides after the end of the war. The German national chapter of the IUPL resumed its meetings in the 1920s but the IUPL was dead. In 1924, the Association internationale de droit pénal (AIDP) was founded as a successor organization under French leadership but it excluded Germans and Austrians from participation. In the early 1930s there were some efforts to bring the Germans back into the fold, but they were cut short by the Nazi seizure of power.<sup>80</sup>

## 6. Conclusions

Since the printed proceedings of some of the individual debates discussed here ran to as much as a hundred printed pages, the preceding account cannot do justice to the range and complexity of these debates. Nevertheless I have sought to reconstruct the debates in some detail in order to reveal recurring patterns of argumentation, to recover critical voices, to identify changes in language and terminology, and to trace the sometimes subtle shifts and transformations that took place in these debates over time. Last but not least, I have paid special attention to the interventions of the three founders in these debates in order to arrive at a better sense of their concrete penal policy positions, which should allow us to compare them better.

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<sup>78</sup> "XII. Internationaler Kongress zu Kopenhagen, vom 27. bis 31. August 1913," pp. 444-45.

<sup>79</sup> "XII. Internationaler Kongress zu Kopenhagen, vom 27. bis 31. August 1913," pp. 510-22, 539-40.

<sup>80</sup> Kesper-Biermann, "Die Internationale Kriminalistische Vereinigung," pp. 97-107.

### 6.1. Van Hamel, Prins, and Liszt: The three founders compared

Even after following the three founders closely through twenty-five years of debates, it is by no means easy to arrive at a conclusion as to who might be considered the most radical or the most moderate reformer among them, in other words, to array them on a spectrum.

A good case can be made that van Hamel was the most radical among the three<sup>81</sup> because, from the outset, he endorsed indeterminate sentencing and because he pushed the medicalization of criminal justice further than anyone else, when, in the 1905 debate, he recommended that the criminal courts refer the final decision on whether an offender was *en état dangereux* to medical doctors. On the other hand, in 1893, he sought to address civil liberty concerns by insisting that, if indeterminate sentencing was adopted, the regular reviews of continued detention should be in the hands of a judicial authority rather than a commission of prison administrators or a hybrid judicial-administrative commission. In the later debates however, in which civil liberty concerns were prominently voiced by Garçon, Nabokov, and others, there is no record of van Hamel sympathizing with these concerns.

In some respects, Prins appears as the most moderate among the three founders. The main evidence for this assessment is that he opposed indeterminate sentencing because of civil liberty concerns and that, for the same reason, he advocated defining *état dangereux* (of mentally normal offenders) in terms of a legally defined number of previous convictions (rather than an individual evaluation of the offender). But this assessment of Prins as a moderate reformer concerned about civil liberty and committed to the legality principle is greatly complicated by three considerations: First, his opposition to indeterminate sentencing was narrowly focused; what he opposed was a system in which a criminal judge pronounced indeterminate penal sanction because he regarded this as incompatible with civil liberty and modern public law. His solution, however, was to have the judge pronounce a draconian sentence -- he recommended a minimum of fifteen years for offenders with two previous convictions, and he was willing to impose life sentences in some cases -- and then achieve flexibility by allowing conditional release.<sup>82</sup> While this solution formally avoided indeterminate sentences, the result was similar. Moreover, as we noted above, there is some indication in his 1910 book that his principled opposition to indeterminate sentencing was softening.<sup>83</sup> Furthermore, Prins was perfectly willing to tolerate indefinite detention, for mentally deficient offenders or vagrants, for instance, as long as that detention was considered a welfare or medical measure, rather than a punishment. Second, although Prins stressed civil liberty concerns as the grounds for his opposition to indeterminate sentencing in 1893, subsequently, and especially in the post-1905 debates, he downplayed the civil liberty concerns being articulated by his French and Russian colleagues. Third, as we have noted, Prins advocated the indefinite detention of mentally deficient persons considered *en état dangereux* even if they had not committed a criminal offense.<sup>84</sup> To him, these were welfare measures outside of the realm of criminal justice, so that the legality principle of *nulla poena sine lege* did not apply. In this respect, Prins was the most radical among the three founders.

<sup>81</sup> This is also the judgment of Vrij, "Pour commémorer le pionnier G. A. van Hamel et pour combler une lacune."

<sup>82</sup> "Verhandlungen der X. Internationalen Versammlung der Internationalen Kriminalistischen Vereinigung [Hamburg, September 1905]," pp. 431-32.

<sup>83</sup> Prins, *La défense sociale et les transformations du droit pénal*, p. 135.

<sup>84</sup> Prins, p. 141.

Neither Liszt nor van Hamel shared his support for the indefinite detention of mentally deficient nondelinquents. In sum, Prins's penal reform agenda comprised both moderate and radical aspects, with some indications that he became more radical over time.

In some respects, Liszt can be described as falling in the middle of the spectrum between van Hamel and Prins. Like van Hamel and unlike Prins, he supported indeterminate sentencing, although it would be more precise to say that he supported the indefinite detention of incorrigible habitual criminals; whether this indefinite detention was implemented as an indeterminate sentence (that is, as a penal sanction) or as a (non-penal) security measure did not matter to him. Like van Hamel and unlike Prins, he argued that *état dangereux* could not be defined by a set number of previous convictions but must be defined by an individual assessment; not as radical as van Hamel, however, he did not want to refer this assessment to medical doctors but leave it in the hand of a commission composed of judicial and prison officials. In another respect, however, Liszt appears more radical than his two colleagues: whereas at least initially both Prins and van Hamel sought to address civil liberty concerns, Liszt is not on record in the IUPL debates we have examined as expressing concern about the threat that the potentially vague concept of *état dangereux* or the indefinite detention of offenders considered *en état dangereux* posed to civil liberty; on the contrary, when he responded to Garçon, for instance, he clearly downplayed this threat. Liszt's lack of interest in the civil liberty concerns raised by others in the IUPL might seem surprising, given Liszt's famous dictum that the penal code was the *Magna Carta* of the criminal. But what one has to understand is that for Liszt civil liberty was guaranteed by the principle of *nullum crimen sine lege* (no crime without a law); regarding the second principle, *nulla poena sine lege* (no punishment without a law), he was, from the outset, willing to abandon fixed sentences in favor of indeterminate ones. Then again, as we have noted, as time progressed, van Hamel and Prins also became much less sympathetic to civil liberty concerns, so that Liszt became much less of an outlier in this respect.

## 6.2. Penal policy informed by empirical research?

The debates we have examined reveal several patterns. First, the target group, the category of offenders that were to be subject to special security measures, was never clearly defined. While some (including Garçon and Prins) wanted to define the target group simply as recidivists (a certain number of previous convictions), others (including van Hamel, Liszt, and Nabokov) insisted that only "incorrigible" habitual criminals or "dangerous" recidivists (*en état dangereux*) should be subject to the special measures, therefore calling for an individual assessment of the defendant by the judge. But if an individual assessment was necessary, this raised the question of what the criteria should be; and these were never clear. Was *état dangereux* a synonym for a high likelihood of reoffending? If so, how could one diagnose such a likelihood? While some suggested that most offenders *en état dangereux* were mentally deficient, which is why van Hamel suggested that the assessment of *état dangereux* be made by medical doctors, others wanted to draw a dividing line between regular recidivists (whom Prins wanted to see interned in workhouses with strict discipline) and mentally deficient offenders (whom he wanted to receive psychiatric care and hybrid institutions). As we have seen, the problems with defining the target group were regularly pointed out by participants in the debates. Time and again critical voices pointed out that if criminals were released from prison without having been rehabilitated, this might not be the fault of the prisoners but of

the institutions. Time and again critics pointed out that *état dangereux* was a vague category that presented a serious threat to civil liberty. Nevertheless, the confusion about who exactly the target group was persisted throughout these debates, until the end.

The continued uncertainty and confusion about the target group demonstrates the paradoxical fact that the reformers gathered in the IUPL, which had been founded on the principle that penal policy should take into account the results of criminological and sociological research, were actually remarkably uninterested in empirical research on the causes of crime or the typology of criminals. Apart from calling for better statistics on recidivism, the IUPL debates hardly engaged with empirical research regarding the category of offenders to be targeted by special security measures. To be sure, such research was limited; but the twenty-five years of the IUPL's existence were the take-off period of criminological research in several European countries.<sup>85</sup> It is remarkable how rarely the IUPL debates examined here make any reference to concrete results of this research. In short, the commitment to taking into account criminological research was largely rhetorical; when it came to discussing concrete penal reforms, the results of empirical criminological research were absent.

Second, the debates show that most participants showed little interest in what the content of the indeterminate sentences or security measures that were being called for would be. What they seemed most interested in was the incapacitation of recidivists whom they considered incorrigible and therefore highly likely to reoffend. But it was not even clear whether this incapacitation should consist of a harsher regime than regular prisons (Prins, for instance, considered regular prisons too "luxurious" and called for internment in workhouses with harsh discipline) or a more humane regime than regular prisons (as suggested by certain formulations by the late Liszt). What is more, all advocates of indefinite detention agreed that there would have to be periodical reviews assessing the inmate's *état dangereux*. This periodical assessment suggested that indefinite detention would include some rehabilitative measures, for otherwise how were the prisoners supposed to overcome their *état dangereux*? Moreover, if everyone was agreed that regular prisons failed to rehabilitate these offenders, then what novel methods of rehabilitation were the security measures supposed to apply? Most participants in the debates seemed remarkably incurious about this crucial question. Once again, the debates accentuate a paradox: that a reform organization whose statutes explicitly committed it to an interest in what happened *after* the verdict showed remarkably little interest in the current reality of imprisonment, in prison reform, in methods of rehabilitation or in the content of the security measures they were proposing.

As a result, the IUPL's penal policy debates examined here had a strangely formalistic, almost abstract quality. As the IUPL's first "historian," the German legal scholar Friedrich Kitzinger, who published a study of the IUPL in 1905, observed, this was ironic. After all, penal reformers such as Liszt had criticized the German "classical school" for engaging in *Begriffsjurisprudenz* -- a pejorative term, coined by Rudolf Jhering, for legal scholarship purely

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<sup>85</sup> Wetzell, R.F., *Inventing the Criminal: A History of German Criminology, 1880-1945*, Chapel Hill: University of North Carolina Press, 2000; Kaluszynski, M., *La République à l'épreuve du crime: La construction du crime comme objet politique 1880-1920*, Paris: LGDJ, 2002; Davie, N., *Tracing the Criminal: The Rise of Scientific Criminology in Britain, 1860-1918*, Oxford: Bardwell Press, 2005; Gibson, M., *Born to Crime: Cesare Lombroso and the Origins of Biological Criminology*, Westport, Conn.: Praeger, 2002.

focused on legal concepts, divorced from social reality.<sup>86</sup> And now the IUPL itself fell victim to what Kitzinger called, in a witty neologism, *Begriffskriminalpolitik*, penal policy focused on concepts, rather than empirical realities. Even though Kitzinger's book was published in 1905, and we know that Liszt read it at the time, his criticism is just as applicable to the post-1905 debates. Some evidence that the leaders of the IUPL recognized this shortcoming and wanted to remedy it can be found in the "Agenda for Future Work" that the Bureau Central assembled in January 1914, which, among nine agenda items that were supposed to guide the IUPL's future activities, listed "System of Punishments, Sentencing, and Prison Administration" as well as "Research into the Causes of Crime."<sup>87</sup>

### 6.3. Civil liberty

In his famous article "About the concept of the 'dangerous individual' in nineteenth-century legal psychiatry," Michel Foucault makes explicit reference to Adolphe Prins's introduction of the term *état dangereux* at the 1905 Congress of the IUPL and to Prins's *La défense sociale et les transformations du droit pénal*, published in 1910. Regarding Prins, Foucault stresses the transfer of civil law concepts of no-fault responsibility (*Causa-Haftung*) to criminal law, which did indeed play a role in Prins's work but was not reflected in the IUPL debates. The main thrust of Foucault's article, however, concerns the long-term development of the nexus between psychiatry and criminal law from the early to the late nineteenth century. Most relevant for our purposes are Foucault's concluding observations. Foucault closes his article with the statement that "it has taken nearly one hundred years for this notion of the 'dangerous individual' ... to be accepted in judicial thought. After one hundred years ... the law and the codes seem reluctant to give it a place ... Perhaps this indicates the foreboding of the dreadful dangers inherent in authorizing the law to intervene against individuals because of what they are: a horrifying society could emerge from that."<sup>88</sup> What I hope to have demonstrated in this article is something that Foucault's essay did not explore - that the threat he identified at the end of his article was articulated already *at the time* by participants in the IUPL debates.

The proposals for security measures against dangerous delinquents discussed in these debates essentially met with two main objections. First, the objection that it was not at all clear that "incurable" or "dangerous" criminals existed because, if criminals were released from prison unrehabilitated, this might well be because current prison regimes were bad at rehabilitating inmates; therefore, "incurability" or *état dangereux* might not be qualities of the individual offender but artifacts of poor penal policy. As we saw, different variations of this argument were made on a regular basis, culminating one of the theses proposed by Nabokov at the 1913 Congress. The second objection to these reform proposals was made more frequently, at greater length, and with more insistence, passion, and resonance. This was the concern, voiced by prominent speakers in many of the debates, that introducing indeterminate sentences and basing them on the criterion of *état dangereux* posed serious threats to civil

<sup>86</sup> Schröder, J., *Recht als Wissenschaft: Geschichte der juristischen Methodenlehre in der Neuzeit (1500-1933)*, 2nd ed., München: Beck, 2012, p. 396; Haferkamp, H.-P., *Georg Friedrich Puchta und die "Begriffsjurisprudenz"*, Frankfurt am Main: Klostermann, 2004.

<sup>87</sup> "Das neue Arbeitsprogramm der IKV. Auszug aus dem Protokoll der Sitzung des Zentralvorstandes vom 4. Januar 1914."

<sup>88</sup> Foucault, "About the Concept of the 'Dangerous Individual' in 19th-Century Legal Psychiatry," p. 18.

liberty. Although this concern was articulated by IUPL members from many different countries, including Germans, the most sustained case was made by prominent French and Russian members of the IUPL, including Emile Garçon, René Berenger, J. Foinitzky, and Vladimir Nabokov, who called attention to these threats and sought to rein them in by insisting on close adherence to the legality principle: by defining dangerousness exclusively by the number of previous convictions and by opposing indeterminate sentencing and indefinite detention.

It was no accident that these critical voices came from France and Russia. French jurists were steeped in the political culture of the Third Republic, in which the legacy of the French Revolution played a crucial role. They were committed to a liberal legal order that restricted judicial discretion for the sake of civil liberty. Furthermore, the French relegation law of 1885 had introduced the transportation of multiple recidivists to penal colonies, permanently removing them from metropolitan France.<sup>89</sup> As a result, the proposals for the indefinite detention of recidivists had little relevance for France. The Russian jurists in the IUPL, most of whom were part of the liberal movement in the czarist regime, were familiar with judicial arbitrariness as a tool of oppression. For them, the threat that indeterminate sentencing and vague terms such as *état dangereux* posed to individual freedom was not abstract but closely related to their lived experience.

By contrast, Liszt, van Hamel, and Prins showed comparatively little concern about the civil liberty implications of imposing new, more effective measures on supposedly dangerous recidivists. Of the three, Prins was the one who took these concerns most seriously, but over time became overly confident that he had successfully addressed them. Van Hamel's concern, which was never very great, waned over time. The most nonchalant about civil liberty concerns among the three founders was probably Liszt, who thought that "old liberalism's" belief in the primacy of individual freedom was out of sync in an age when a "new liberalism" saw itself as a mediator between the equally important claims of the common welfare and individual liberty.<sup>90</sup> By 1919 all three founders had died; they were therefore spared from witnessing Nazi Germany's demonstration of where special security measures imposed on supposedly dangerous criminals could lead.<sup>91</sup>

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<sup>89</sup> Nye, R., *Crime, Madness, & Politics in Modern France: The Medical Concept of National Decline*, Princeton, N.J.: Princeton University Press, 1984, pp. 49-96; Wright, G., *Between the Guillotine and Liberty: Two Centuries of the Crime Problem in France*, New York: Oxford University Press, 1983, pp. 129-52.

<sup>90</sup> "Assemblée générale de Bruxelles, 1910," pp. 445-46.

<sup>91</sup> Müller, C., *Das Gewohnheitsverbrechergesetz vom 24. November 1933: Kriminalpolitik als Rassenpolitik*, Baden-Baden: Nomos Verlagsgesellschaft, 1997.

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