

Policing Interpol: The Commission for the Control of Interpol's Files and the Right to a Remedy

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Abstract

The impact of Interpol's work on the lives of private individuals has come under increased human rights criticism and scrutiny of late. In response, Interpol has strengthened the position of the Commission for the Control of Interpol's Files as an independent, remedial body. The Commission has been charged with the task of ensuring that Interpol meets its human rights obligations, particularly the right to an adequate and effective remedy. This article charts the Commission's historical evolution and critically situates it within Interpol's institutional landscape, with a view to assessing the scope and limits of the Commission's powers. While its status as an independent, remedial body has indeed been strengthened, a holistic appraisal of the Commission's powers against rapidly crystallizing standards of IO accountability highlights a number of shortcomings and the need for further steps to be taken.

Keywords

Interpol, the Commission for the Control of Interpol's Files, historical evolution, human rights obligations of international organizations, the individual's right to an adequate and effective remedy

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I. Introduction

Interpol has come a long way from its humble beginnings in 1923.¹ In its earlier days, the organization was described as a “policeman’s club” and was even once classified by the UN as a non-governmental organization.² Today, it boasts a membership of 188 “member countries,” a rapidly growing General Secretariat, and formal cooperation agreements with various international organizations (hereinafter IOs).³ It has adopted increasingly

¹ In 1914, an International Police Conference was organized by the Prince of Monaco. In 1923, the Police Chief of Austria organized a more formalized second International Police Conference. Pursuant to discussions and decisions taken at this conference, an International Bureau was established in Vienna. Delegates at these two conferences were predominantly from European countries. See Malcolm Anderson, *Policing the World: Interpol and the Politics of International Police Co-operation* (Clarendon Press, Oxford, 1989), pp. 38–40. Academic literature on Interpol remains relatively scarce. See generally Rutsel Martha, *Legal Foundation of Interpol* (Hart Publishers, Oxford, 2010); Mario Savino “Global Administrative Law Meets ‘Soft’ Powers: The Uncomfortable Case of Interpol Red Notices” 43:2 *New York University Journal of International Law and Politics* (2010); Bettina Schondorf-Haubold, “The Administration of Information in International Administrative Law: The Example of Interpol” 9:11 *German Law Journal* (2010); Cheah Wui Ling, “Mapping Interpol’s Evolution: Functional Expansion and the Move to Legalization” *Journal of Police and Policing* (2009). Also see generally Michael Fooner, *Interpol: Issues in World Crime and International Criminal Justice* (Plenum Press, New York, 1989); Mathieu Deflem, *Policing World Society: Historical Foundations of International Police Cooperation*, (Oxford University Press, Oxford, 2002).

² During the 1940s, Interpol sought to develop closer and more formal ties with the UN as part of its general push to increase the organization’s visibility and legitimacy. It therefore applied to the UN for consultative status as a non-governmental organization. This application was first rejected but subsequently accepted by the UN. In 1971, upon Interpol making an application to the UN to be recognized as an intergovernmental organization, the UN ‘upgraded’ Interpol’s status to an intergovernmental organization. See Anderson, *supra* note 1, pp. 51–52.

³ The organization’s membership consists of “member countries” with independent police authorities rather than States. Interpol’s main institutional organs are its General Assembly, Executive Committee, General Secretariat and its network of National Central Bureaus. The General Assembly is Interpol’s plenary organ. The Executive Committee is elected by the General Assembly and is responsible for, among others, supervising implementation of the General Assembly’s decisions and overseeing the work of the General Secretariat. The General Secretariat is the administrative body of the organization and is responsible for the organization’s day-to-day functions. Each Interpol member is to nominate a National Central Bureau to serve as a liaison point between the organization, the member and other police authorities within the member’s territory. See Articles 8, 26 and 32, Interpol Constitution, available at <www.interpol.int>.

broad interpretations of its constitutional mandate to combat “ordinary crime[s]” and taken on crimes previously avoided in its early days, such as terrorism and war crimes.⁴ In its execution of this mandate, the organization facilitates and coordinates a wide range of policing activities, maintains a global communications network, operates a variety of police databases, and disseminates a variety of police ‘alerts’ or notices.⁵ It also organizes training courses and dispatches Incidence Response Teams, which assist its members in security or disaster matters.⁶

⁴ Article 3 of Interpol’s Constitution prohibits the organization from getting involved in “any intervention or activities of a political, military, religious or racial character.” In a 1951 resolution, Interpol’s General Assembly clarified that Article 3 did not prohibit the organization from getting involved in any political, military, religious or racial matter as long as it was “predominantly” of an ordinary criminal nature. *See generally* AGN/20/RES/11. In 1984, the General Assembly adopted further guidelines on this. *See generally* AGN/53/RES/7. In a 1994 resolution, the Interpol General Assembly confirmed that organization and its members could cooperate in “serious violations of international humanitarian law.” *See generally* AGN/63/RES/9. However, in 2010, the General Assembly noted an “increase in the number of requests forwarded through INTERPOL channels concerning genocide, crimes against humanity and war crimes,” and concerns that such requests may at times contravene “Article 3 of the Constitution” or result in “the proliferation of disputes between member countries.” As a result, the General Assembly has procedurally limited the types of requests to be processed by the organization. *See generally*, AGN/79/RES/10. Resolutions available at <www.interpol.int>.

⁵ Interpol’s global communications network is more commonly referred to as ‘I-24/7’. Using this network, members can communicate with each other and access a wide variety of databases maintained by Interpol, such as the stolen travel documents database, the DNA profiles database and the fingerprints database. Interpol also maintains a Command and Co-ordination Centre, which operates on a twenty-four hour basis at the General Secretariat and provides coordination and liaison assistance to members. A wide variety of notices are published and disseminated by the organization. The Red Notice seeks the arrest or provisional arrest of specific individuals with a view to extradition. The Blue Notice requests additional information regarding a specific individual’s identity or activities in relation to a crime. The Green Notice provides warnings regarding individuals who have committed crimes and are likely to reoffend. The Yellow Notice requests assistance to locate missing persons, particularly minors and those unable to identify themselves. The Black Notice requests assistance in identifying unidentified bodies. The Orange Notice warns police, public entities and other international organizations regarding serious threats from disguised weapons, parcel bombs and other dangerous materials. The INTERPOL-United Nations Special Notice is published against individuals and entities targeted by UN sanctions against Al Qaeda and the Taliban. For a more comprehensive account of Interpol’s facilities and services, *see generally* 2008 Interpol Annual Report.

⁶ *Ibid.*, p. 5.

Interpol's rapid growth brings with it the increased risk that any abuse of its facilities will have particularly serious consequences for the individuals concerned. Like all IOs, the organization has come under increasing scrutiny and has faced attempted lawsuits by individuals.⁷ This question of IO responsibility is much-debated today as IOs increasingly take on tasks that substantially impact individuals, such as the administration of territories and the imposition of administrative sanctions.⁸ It seems only fair that individuals affected by IO wrongdoing are able to obtain a remedy against the IO concerned.⁹ However, this proposition is not without controversy. On the one hand, as creations of their Member States, IOs are to consider Member States as their primary stakeholders. On the other hand, as subjects of the international legal order, IOs have legal responsibilities to other members of the international community beyond their Member States. Due to their Janus-faced nature, IOs may find themselves faced with conflicting duties. The interest of an IO's Member State may conflict with that of an individual adversely affected by an IO's decision. However, given the well-accepted obligation of IOs to respect international human rights law, such conflicts of interest should be resolved in favour of the individual when it involves a human right.

While it is well-accepted that IOs have human rights obligations, the enforcement of these obligations is problematic. Domestic courts are generally unable to hear individual claims against IOs. This is because an IO's immunity from suit is usually secured in treaties or otherwise recognized by customary international law.¹⁰ Such immunity from suit prevents IOs

⁷) For an account of such lawsuits, see Martha, *supra* note 1, pp. 93–94 and 99; William Slomanson, "Civil Actions Against Interpol: A Field Compass" 57 *Temple Law Quarterly* 553 (1984).

⁸) This article focuses solely on illegal actions that may be clearly attributed to IOs as independent entities rather than its members. The line separating both is complicated and beyond the scope of this article. For an overview of these issues, see Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press, Cambridge, 2002), pp. 306–319.

⁹) The topic of international organizational responsibility has received much attention in recent years. The ILC is currently engaged in a new study on the responsibility of international organizations. See International Law Commission, *Draft Articles on the Responsibility of International Organizations*, 61st Session, 2 June 2009, A/CN.4/L.743.

¹⁰) For a general overview of the legal immunity of IOs from jurisdiction, see generally Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (Martinus Nijhoff

from being subject to improper pressure exerted via a State's courts. An IO should not be held hostage by a single State. However, domestic and regional courts have increasingly demonstrated a willingness to ignore IO immunity if this is necessary to provide individuals with a remedy against the IO concerned.¹¹ Courts have justified doing so in order to comply with the State's own obligation to afford individuals with a right to a remedy. When a State decides to grant legal immunity to an IO, this deprives individuals of their right to obtain domestic judicial remedies against the IO concerned. While courts have recognized that States may grant immunity to IOs to secure the latter's independence, such a grant should not completely deprive individuals of their right to a remedy against the IO concerned. Alternative remedial procedures should exist. For example, the IO may be required to establish a remedial body that hears the claims of individuals affected by the IO's activities. If no such alternative remedial body exists, domestic courts may decide to ignore an IO's immunity from suit so as to provide an individual with a remedy against the IO concerned.

With this in mind, Interpol has invested much into developing the Commission for the Control of Interpol's Files (hereinafter the Commission) as an independent, remedial body.¹² Interpol is not alone in doing so; other IOs with policing or counter-terrorism functions have developed similar review procedures. Europol has established the independent Joint Supervisory Board (hereinafter JSB) that reviews individual requests for

Publishers, Leiden, 2003), pp. 1021–1027. *See also* August Reinisch and Ulf A. Weber, "In the Shadow of Waite and Kennedy: The Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement" 1 *International Organizations Law Review* 59 (2004).

¹¹ Many of these cases were employment-related and held in favour of the IO concerned because the IO had put in place remedial procedures. *See generally*, Chittharanjan F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge University Press, Cambridge, 2005), pp. 320–328. The approach of these courts generally defers to the IO concerned.

¹² Interpol's Rules relating to the Control of Information and Access to Interpol's Files (hereinafter RCI), adopted by General Assembly Resolution AG-2004-RES-08, available at <www.interpol.int>. Sheptycki has studied the question of Interpol's accountability in detail. This paper takes a position that differs from his observation that Interpol is only subject to "its own internal accountability regime." *See* James Sheptycki, "The Accountability of Transnational Policing Institutions: The Strange Case of Interpol" 19:1 *Canadian Journal of Law and Society* 123 (2004).

data access and data correction.¹³ After facing much criticism, the UN Security Council has developed an ombudsman procedure, by which individuals may directly challenge their inclusion in the 1267 Committee's "consolidated list" of "Usama Bin Laden and individuals and entities associated with him."¹⁴

This article assesses the extent to which the Commission enables Interpol to meet its human rights obligations. By situating the Commission within Interpol's legal and institutional order, and by applying human rights standards in a flexible and holistic manner, I will highlight a number of shortcomings that affect the Commission's ability to serve as an independent remedial body. These shortcomings reflect the tension between obligations owed by Interpol to its Member States and that owed by Interpol to individu-

¹³) For an overview of Europol, see Mathieu Deflem, "Europol and the Policing of International Terrorism: Counter-Terrorism in a Global Perspective" 23:2 *Justice Quarterly* (2006). Based on Council Decision of 6 April 2009, Europol is charged by EU Member States with "preventing and combating organised crime, terrorism and other forms of serious crime." Article 3, Council Decision, 6 April 2009, 2009/371/JHA (hereinafter Europol Decision). The Joint Supervisory Board (hereinafter JSB) is an independent body charged with ensuring that Europol's activities do not violate "the rights of the individual." See Article 34.1, Europol Decision. Within the JSB is an appeals committee that receives and reviews individual requests for access and correction. Individuals should first apply to Europol, and if their requests are denied or if they have not received a response from Europol in three months, the said individual can apply to the JSB for their request to be considered. See Articles 30.1 and 32.1, Europol Decision. The JSB is authorized to adopt procedural rules (hereinafter JSB Rules).

¹⁴) In 1999 and 2000, the UN Security Council passed Resolutions 1267 and 1333 that effectively imposed a travel embargo, arms embargo and froze the assets of "Usama bin Laden and individuals and entities associated with him." A committee was established to administer a "consolidated list" of these individuals and entities. In its earlier years, the only way that an individual or entity could request for de-listing was to apply to the UN Security Council through the particular State of residence or citizenship. After much criticism, the UN Security Council established a "focal point" within the UN Secretariat to which listed individuals could directly apply for de-listing. For an evolutionary overview of Committee 1267's procedure as well as challenges to its legality, see generally: *Addressing Challenges to Targeted Sanctions: An Update of the 'Watson Report'*, October 2009 (hereinafter Watson's Report); Johannes Reich, "Due Process and Sanctions Targeted against Individuals pursuant to UN Resolution 1267" *Yale Journal of International Law* (2009), pp. 506–507. At the end of 2009, the UN Security Council established an ombudsman procedure. The ombudsman will study individual requests for de-listing and submit comprehensive reports to the 1267 Committee, which will then take a final decision on the de-listing request. For an overview of this procedure, see <www.un.org/en/sc/ombudsperson/index.shtml>.

als affected by its activities. For example, the Commission is charged with reviewing individual complaints and ensuring that Interpol facilities are used in compliance with relevant legal rules. However, the Commission's power to release data to individuals is severely limited by member sovereignty, data ownership, and policing concerns. In critically assessing how this tension impacts the Commission's ability to provide individuals with a remedy, this article will make comparative references to the remedial procedures of other IOs engaged in policing and counter-terrorism activities, namely, the UN Security Council's 1267 Committee and Europol's JSB. While Interpol has made many improvements to the Commission, a holistic institutional appraisal of the Commission's existing powers against rapidly crystallizing standards of IO accountability demonstrates the need for further steps to be taken.

2. Interpol in an Era of Global Policing: Facilitating Police Cooperation through Data Processing

The nature of Interpol's activities is often misunderstood. In works of fiction, Interpol agents are often depicted as spies or special agents. In reality, Interpol and its agents are not authorized to initiate any investigations or execute any arrests. As set out in Article 2 of its Constitution, Interpol's role is to "ensure and promote the widest possible mutual assistance between all criminal police authorities," and to "establish and develop all institutions likely to contribute effectively to the prevention and suppression of ordinary law crimes."¹⁵ Therefore, Interpol is only mandated to facilitate cooperation between the police authorities of different countries. When members take coercive police action in response to requests transmitted through Interpol channels, authority for such action is based on the requested member's domestic law rather than Interpol's rules. Interpol's Constitution recognizes this by noting that the organization's activities are to be conducted "within the limits of the laws existing in the different countries."¹⁶

However, the impact of Interpol's activities on private individuals should not be ignored or minimized. Its main activities lie in the area of data processing, which has the ability to impact the lives of private individuals

¹⁵) Article 2, Interpol Constitution, *supra* note 3.

¹⁶) *Ibid.*, Article 2.2.

in a number of significant ways. This section first provides an overview of Interpol's various data processing activities. It then considers their impact on individuals and Interpol's regulation of these activities through various rules.

2.1. *Interpol's Core Data Processing Function: Communications, Databases, and Notices*

As mentioned above, Interpol maintains a global telecommunications network that members may use to exchange data with each other and the General Secretariat. Data exchanged through Interpol channels range from simple requests for information to requests for an individual's provisional arrest with a view to his or her extradition. In addition, the General Secretariat maintains a variety of databases. While data ownership remains with the respective member country, depending on the database involved, data may be entered by the General Secretariat on behalf of members or directly by members themselves. Members have the right to specify the level of data access to be given to their data. These databases may be accessed by members instantaneously. For example, immigration police authorities positioned at check-points may instantaneously access Interpol's Stolen Travel Documents database to check for stolen travel documents.¹⁷

The most well-known of Interpol's data processing services is the variety of notices published by the organization at the request of Interpol members. These notices are requests directed to all Interpol members. They are requests, rather than directions, and their domestic legal effect is determined by the domestic law of each member country.¹⁸ Interpol's most famous notice, the Red Notice, is a request for an identified individual's provisional arrest with a view to his or her extradition. Members may choose to act, or not act, on the basis of these notices. Often, a member's decision to respond to an Interpol notice depends not only on its domestic laws, but also on its relationship with the particular requesting member. However, this does not absolve Interpol of its responsibility as an IO. While data provided by "a National Central Bureau, an authorized national institution, or authorized international entity" is to be considered "a priori, to be accurate and relevant," the General Secretariat

¹⁷) See <www.interpol.int/public/FindAndMind/Default.asp>.

¹⁸) For details on the respective Interpol notices, see Article 37.a, Implementing Rules for the Rules on the Processing of Information for the Purposes of International Police Co-operation (hereinafter Implementing Rules), available at <www.interpol.int>.

still has an obligation to ensure that data processed through Interpol channels conforms to Interpol's rules.¹⁹ Interpol's rules require members to ensure that any data submitted for processing through Interpol channels complies with Interpol's rules.²⁰ However, the rules also hold the General Secretariat responsible for reminding members of their legal obligations.²¹ In other words, there is an overlapping of responsibilities between the General Secretariat and Interpol members who own the data concerned.

2.2. Regulating the Impact of Interpol's Data Processing Activities: Adopting Rights-Sensitive Data Processing Rules

Data processed through Interpol channels may impact individuals in a number of ways. An individual who is the subject of a request transmitted through Interpol channels may be arrested by national police authorities responding to the request. This has implications on an individual's right to bodily integrity, especially if there has been an abuse or improper use of Interpol's facilities. Individuals may be wrongfully detained, imprisoned, or have their freedom of movement restricted. For example, members exchanging data through Interpol channels may inadvertently fail to specify what police action is being sought in relation to a named individual.²² Police authorities responding to such a vague request may take inappropriate or disproportionate action against the individual concerned. In the past, individuals sought on the basis of Interpol Blue Notices – which merely request the location and not the arrest of identified individuals – have, nevertheless, complained of their arrest by national authorities.²³

Even if a requested member chooses not to act on a request transmitted through Interpol channels, it may decide to take this information into account when deciding on other matters. For example, a country's immigration authorities may decide to deny visas or entry permits to individuals named

¹⁹⁾ Rules on the Processing of Information for the Purposes of International Police Cooperation (hereinafter RPI), adopted by General Assembly Resolution AG-2003-RES-04, Article 10.1.b, Article 4.1.a.1 and Article 4.1.a.2, available at <www.interpol.int>.

²⁰⁾ Article 5.3.b, RPI.

²¹⁾ Article 5.1, RPI.

²²⁾ *Summary of the Work of the Commission for the Control of Interpol's Files* (hereinafter 2003 CCF Report), CCF/55/S01.04, paras. 5.10 and 5.7.

²³⁾ *2008–2009 Annual Activity Report of the CCF* (hereinafter 2008–2009 CCF Report), CCF/74/12/d232, para. 6.6.

in requests that are transmitted through Interpol channels. This impacts an individual's freedom of movement. Apart from these more obvious consequences, Interpol's processing of personal data has the potential to affect the reputation and private lives of individuals.

Over the years, Interpol has adopted data processing rules to regulate the increase in its data processing activities. In 2003, the General Assembly adopted a comprehensive set of data processing rules, namely, the Rules on the Processing of Information for the Purposes of Police Co-operation (hereinafter the RPI).²⁴ The General Assembly then adopted the Implementing Rules for the Rules on the Processing of Information for the Purposes of International Police Co-operation (hereinafter the Implementing Rules), which elaborated on the RPI's data processing principles. These rules make various references to the rights of individuals. For example, Article 2 of the RPI requires any data processing through Interpol channels to be conducted "with due respect for the basic rights of individuals." In another example, Article 10.I.d. of the RPI requires the General Secretariat to respect "the basic rights of individuals the information concerns" when taking "all appropriate steps" to prevent any prejudice to members and the organization. Apart from these specific data processing rules, Interpol's data processing activities also need to comply with Interpol's Constitution. Article 2 of Interpol's Constitution specifically requires the organization's work to be conducted "in the spirit of the 'Universal Declaration of Human Rights'."²⁵

3. The Commission for the Control of Interpol's Files

Despite the existence of numerous rights-sensitive provisions in Interpol's legal order, the organization's awareness of its human rights obligations is relatively recent. This may be due to the historical perception and characterization of Interpol's functions as technical and administrative in nature. The organization has, however, become more aware of its human rights obligations as more IOs are being sued for illegal action before national and regional courts. More importantly, Interpol has faced a number of lawsuits launched by private individuals. Given these developments, the organization has become increasingly concerned that its decisions may one day be successfully challenged before domestic or regional courts. In

²⁴) RPI, *supra* note 19.

²⁵) Article 2, Interpol Constitution, *supra* note 3.

response to these concerns, Interpol has sought to develop the Commission as an independent remedial body.

This section examines the historical origins and evolution of the Commission. It then ascertains the scope and limits of the Commission's power by examining Interpol's Constitution, rules, and practice. While Interpol is fundamentally governed by its Constitution, in order to understand how the organization has interpreted its Constitution, reference needs to be made to the rules and practice of the organization. Indeed, with respect to the Commission, Article 37 of Interpol's Constitution expressly states that the Commission's composition and functioning "shall be subject to specific rules to be laid down by the General Assembly."²⁶ An example of such "specific rules" would be the Rules relating to the Control of Information and Access to Interpol's Files (hereinafter RCI), most recently amended and affirmed by the General Assembly in 2009.²⁷ In addition to examining rules that govern the Commission's work, this section will also examine the Commission's relationship with other Interpol organs.

By reconstructing the Commission's powers based on a close analysis of Interpol's legal and institutional order, the aim of this section is *descriptive* in nature. The next section pursues a *normative* analysis that evaluates the Commission's ability to deliver an adequate and effective remedy to individuals.

3.1. *Charting the Commission's Evolution: From French Concession to Independent Remedial Body*

Though Interpol was founded in 1923, it was only in 1982 that the organization established the Commission, then known as the Supervisory Board. Up until the 1970s, Interpol continued to maintain its data records

²⁶) In taking this approach, this author's suggested interpretative framework differs slightly from that of Rutsel Martha, who argues based on Article 36 that the General Assembly has entrusted the Commission with delivering binding interpretations of the organization's rules. I suggest that such an interpretation of the Commission's role cannot be based on Article 36 of Interpol's Constitution alone, as Article 37 of the Constitution holds that the Commission's functions are to be governed by specific rules adopted by the General Assembly, such as the RCI. I do however agree with Martha's distinction between "findings" of the Commission and "recommendations" that go to implementation. I more fully develop this argument in Part 4 of this article. For Martha's arguments, see generally Martha, *supra* note 1, pp. 104–105.

²⁷) See General Assembly Resolution AG-2009-RES-13 that amended Articles 2.a and 2.b of the RCI.

in “cards, sheets and folders.”²⁸ In 1972, the organization started using electronic processing as a method of data record-keeping.²⁹ During this same period, many countries started adopting national data processing laws, including Interpol’s Host State, France. The French government demanded Interpol’s databases to be subject to French data processing and protection laws.³⁰ After much negotiation, the French government agreed to exempt Interpol’s databases from French domestic laws if Interpol would establish its own data protection procedures.³¹ This compromise was reflected in the 1982 Headquarters Agreement and the accompanying Exchange of Letters concluded between Interpol and the French government.³² According to the 1982 Headquarters Agreement, “all documents” of Interpol “shall be inviolable, wherever they are located.”³³ This confirmed that the French government would not have the power to access Interpol’s databases or regulate data processed through Interpol channels. Instead, the Exchange of Letters requires Interpol’s data to be “subject to internal control exercised by the Organization.”

The 1982 Headquarters Agreement and accompanying Exchange of Letters built in a significant amount of French influence into the Supervisory Board’s structure. This reflected the historical fact that the Supervisory Board was established in response to French demands. While the 1982 Exchange of Letters recognized that Interpol’s data processing was to be governed by Interpol rules rather than French law, it entrenched a privileged role for the French government regarding the selection of Supervisory Board members. Specifically, the French government was charged with selecting one member of the Supervisory Board. In addition, by incorporating “internal control” rules into the 1982 Headquarters Agreement and Exchange of Letters concluded between Interpol and the French government, any future change to these rules could potentially be resisted by the French government even if Interpol, as an organization, supported such change.

²⁸) Fooner, *supra* note 1, p. 136.

²⁹) *Ibid.*, p. 136

³⁰) *Ibid.*, p. 78; Anderson, *supra* note 1, pp. 64–65.

³¹) Fooner, *supra* note 1, pp. 78–79; Anderson, *supra* note 1, pp. 65–66.

³²) 1982 Headquarters Agreement, 3 November 1982; Exchange of Letters (hereinafter 1982 Exchange of Letters), appended to 1982 Headquarters Agreement, 3 November 1982.

³³) Article 7, 1982 Headquarters Agreement.

Following the adoption of the 1982 Exchange of Letters, the General Assembly adopted the 1982 Rules on International Police Co-operation and on the Internal Control of INTERPOL's Archives (hereinafter RIPC), which set out the Supervisory Board's procedure and powers in greater detail.³⁴ In 2003, the General Assembly adopted the RPI, a comprehensive set of data processing rules that consolidated and updated earlier sets of data processing rules.³⁵ The RPI specifically recognized that "the procedure for verifying conformity with the present Rules ... and access by persons and legal entities to the Organization's rules should be laid down in a set of rules relating to the Control of Information and Access to Interpol's Files."³⁶ Consequently, in 2004, the organization adopted the Rules relating to the Control of Information and Access to Interpol's Files (RCI), which abrogated most provisions of the RIPC and renamed the Supervisory Board as the Commission.³⁷ It is noteworthy that Interpol was then unable to abrogate certain RIPC provisions that implemented the 1982 Headquarters Agreement and Exchange of Letters.

In the past two years, Interpol has further developed the Commission to strengthen its status as an independent remedial body of the organization. Prior to 2008, the Commission was not formally recognized in Interpol's Constitution. As mentioned above, the Commission's existence was secured instead in the 1982 Headquarters Agreement and Exchange of Letters between Interpol and the French government. This changed when Interpol concluded a new Headquarters Agreement with France in 2009. This new Headquarters Agreement replaced the earlier 1982 Headquarters Agreement and Exchange of Letters.³⁸ During negotiations, both Interpol and the French government agreed that the Commission would not be governed by the new Headquarters Agreement. Instead, the Commission would be

³⁴) 1982 Rules on International Police Co operation and on the Internal Control of INTERPOL's Archives (hereinafter RIPC), adopted by General Assembly Resolution AGN/51/RES/1, available at <www.interpol.int>.

³⁵) RPI, *supra* note 19.

³⁶) *Ibid.*, Article 25.

³⁷) RCI, *supra* note 12.

³⁸) Article 26, 2009 Headquarters Agreement, September 2009.

governed solely by Interpol's legal order, confirming the Commission's status as an organ of Interpol and its independence from the French government.³⁹

Upon securing this new understanding from the French government, the General Assembly amended Interpol's Constitution to expressly recognize the Commission as a constitutional organ of Interpol.⁴⁰ Article 36 of the Constitution expressly recognizes the Commission as "an independent body" that "shall ensure that the processing of personal information by the Organization is in compliance with the regulations the Organization establishes in this matter."⁴¹ The Constitution also recognizes that the Commission is to provide Interpol with "advice about any project, operation, set of rules or other matter involving the processing of personal information" and "process requests concerning the information contained in the Organization's files."⁴² It should be noted that the Constitution does not detail how the Commission shall "ensure" Interpol's compliance with its data processing rules. In addition, Article 37 of the Constitution goes on to state that the Commission's "composition and its functioning shall be subject to specific rules to be laid down by the General Assembly"⁴³ In other words, the Commission's exact role and powers are further defined in the rules and decisions adopted by the General Assembly, such as the RPI and the RCI. In the same year, the Commission adopted and publicly published a new set of operating rules (hereinafter the Operating Rules).⁴⁴

3.2. *Describing the Commission: Role, Powers and Institutional Relationships*

As mentioned above, to ascertain the Commission's powers, it is necessary to examine applicable rules and decisions adopted by the General Assembly. In addition, reference should be made to the Operating Rules adopted by the Commission. These Operating Rules are adopted by the Commission

³⁹) Laurent Grosse, "International Criminal Police Organization (INTERPOL)," *Reports on International Organizations* (Winter 2010), <www.asil.org/rio/interpol.html>.

⁴⁰) Articles 36 and 37, Interpol Constitution, *supra* note 3.

⁴¹) *Ibid.*, Article 36.

⁴²) *Ibid.*, Article 36.

⁴³) *Ibid.*, Article 37.

⁴⁴) Operating Rules of the Commission for the Control of Interpol's Files (hereinafter Operating Rules), available at <www.interpol.int/Public/ccf/default.asp>.

pursuant to General Assembly authorization and reflect the Commission's own understanding of its role.⁴⁵

The RCI repeats the Commission's functions as set out in Interpol's Constitution. It recognizes that the Commission has the overall function of ensuring that Interpol's data processing activities conform to "all the relevant rules adopted by the Organization" and "do not infringe the basic rights of the people concerned, as referred to in Article 2 of the Organization's Constitution, which refers in turn to the Universal Declaration of Human Rights, or the general principles of data protection."⁴⁶ In implementing this overall function, the Commission is "to provide the Organization with any advice about any project, operation, set of rules or other matter involving the processing of personal information." It is also to "process requests for access to Interpol's files," "reply to requesting parties," and upon request, "make the list of Interpol's files available to any national or permanent resident of a Member State of the Organization."⁴⁷

In assessing the Commission's powers, close attention should be paid to its relationship with other Interpol organs. The Commission's review process involves a number of different Interpol organs. Upon receiving an individual's request for access, the Commission conducts a preliminary study to check if the request falls within its area of competence.⁴⁸ If so, the Commission may request the General Secretariat to conduct a "preliminary study" of the request.⁴⁹ The General Secretariat is constitutionally charged with maintaining the organization's databases and data processing activities. Specifically, it is to "put into application the decisions of the General Assembly and the Executive Committee."⁵⁰ This includes ensuring that the data processing rules adopted by the General Assembly are complied with. Therefore, when the Commission has any compliance concerns, it may request the General Secretariat to check if the data's processing complied with the data processing rules adopted by the General Assembly.

⁴⁵) Article 5.d, RCI, *supra* note 12.

⁴⁶) *Ibid.*, Article 1.a.

⁴⁷) *Ibid.*, Article 1.c.

⁴⁸) Article 5, Operating Rules, *supra* note 44.

⁴⁹) *Ibid.*, Article 16.1.

⁵⁰) Article 26.a, Interpol Constitution, *supra* note 3.

Upon completing its “preliminary study,” the General Secretariat is to report to the Commission on the legality of the data’s processing and any corrective steps taken.⁵¹ The Commission may disagree with the General Secretariat’s “preliminary study” and conduct a further review to arrive at its own conclusion. During its review, the Commission is empowered to request additional information from the individual concerned, the data source, or the General Secretariat.⁵² As the General Secretariat is responsible for maintaining Interpol’s data processing facilities, it is well-placed to explain to the Commission how the data was processed through Interpol channels. However, it should be noted that at no time during the review process is the Commission permitted to release information to the requesting individual unless it obtains consent from the data source.⁵³ As will be further explained in Part 4 below, this has detrimental implications for an individual seeking to exercise his or her right to a remedy.

When the Commission has “received sufficient information to reach a decision,” it is to “draw reasoned conclusions” and issue “recommendations.”⁵⁴ The Commission’s decisions must be reasoned and based on sufficient information. Upon arriving at its final decision, the Commission forwards its report and recommendations to the General Secretariat. According to Interpol’s rules, the General Secretariat is generally only permitted to delete or amend data in Interpol’s databases with the consent of the data source.⁵⁵ However, the RPI states that “if there is any doubt” as to whether the data has been processed in an appropriate manner, the General Secretariat may “take all other appropriate steps” to ensure the data’s legal processing.⁵⁶ Such “doubt” would necessarily arise upon receipt of the Commission’s recommendations for amendment or deletion.

The RCI expressly recognizes that the General Secretariat may decide that “it is unable to follow one of the Commission’s recommendations.”⁵⁷ If it does so, the General Secretariat must, nevertheless, take “appropriate

⁵¹) Article 16.6, Operating Rules, *supra* note 44.

⁵²) Article 5.e.3 and 5.e.4, RCI, *supra* note 12; Article 17.2, Operating Rules, *supra* note 44.

⁵³) Article 11.a, RCI, *supra* note 12.

⁵⁴) *Ibid.*, Article 18.1.

⁵⁵) Article 15.1.a, RPI, *supra* note 19.

⁵⁶) *Ibid.*, Article 10.1.c.

⁵⁷) Article 6.b, RCI, *supra* note 12.

steps” to ensure compliance with Interpol’s data processing rules.⁵⁸ It must also explain its decision to the Commission.⁵⁹ By adopting these RCI provisions, the General Assembly has expressly recognized and provided for the possibility of disagreement between the Commission and the General Secretariat. The RCI further recognizes that if the Commission disagrees with the General Secretariat’s decision not to follow its recommendations, the Commission “may” inform the Executive Committee.⁶⁰ The RCI does not require the Commission to report all such instances of “disagreement” to the Executive Committee. The Executive Committee “may, if necessary” take “appropriate measures.”⁶¹ In other words, even when the Commission reports a “disagreement” to the Executive Committee, the Executive Committee is not obligated to act. If it does hold in favour of the Commission, the Executive Committee may direct the General Secretariat to implement the Commission’s recommendations based on its constitutional supervisory powers over the Secretary General.⁶² If the Executive Committee chooses not to act when faced with such “disagreement,” this gives effect to the General Secretariat’s decision that is in “disagreement” with the Commission. In conclusion, the General Assembly does intend for the Commission to have a say in ensuring the organization’s compliance with its data processing rules. However, by adopting the RCI, the General Assembly has also provided for the Commission’s over-ruling.

4. Assessing the Commission: Meeting the Individual’s Right to an Adequate and Effective Remedy

The right to an adequate and effective remedy for human rights violations is recognized in numerous international instruments.⁶³ This right has a

⁵⁸⁾ *Ibid.*, Article 6.b.1.

⁵⁹⁾ *Ibid.*, Article 6.b.2.

⁶⁰⁾ *Ibid.*, Article 6.c.

⁶¹⁾ *Ibid.*

⁶²⁾ Article 22.e, Interpol Constitution, *supra* note 3.

⁶³⁾ Universal Declaration of Human Rights, Articles 8 and 10; International Covenant on Civil and Political Rights, Article 2.3.

procedural and substantive dimension.⁶⁴ In terms of procedure, complainants should have reasonable access to an independent and impartial body of decision-makers.⁶⁵ The review procedure should also provide individuals with a fair hearing.⁶⁶ Substantively, the review mechanism should deliver remedies that fully address the harm suffered by the individual concerned.⁶⁷ Depending on the facts of the case, remedies for wrongful data processing may go beyond data correction. Restitution, compensation, satisfaction, rehabilitation, or guarantees of non-repetition may be necessary to fully address and remedy the harm suffered by an individual.⁶⁸

Strictly speaking, the right to a remedy as articulated in human rights treaties applies only to States Parties rather than IOs. The exact contours of an IO's obligation to respect the right to a remedy remain unclear.⁶⁹ Domestic and regional courts, which have had to consider whether an IO's immunity should be upheld given the IO's establishment of an alternative

⁶⁴) Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press, Oxford, 2nd ed., 2006), p. 7.

⁶⁵) *Ibid.*, p. 8.

⁶⁶) *Ibid.*, p. 8.

⁶⁷) *Ibid.*, p. 9.

⁶⁸) *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (hereinafter UN Basic Principles), 16 December 2005, Part IX, p. 18. Note that while these principles apply to serious violations of human rights, they set out remedial principles applicable to human rights violations in general.

⁶⁹) Shelton, *supra* note 64, p. 157. Shelton observes that there are “major obstacles” in terms of procedure for individuals seeking to obtain remedies from IOs. Fassbender argues that the human rights related to due process that has developed at customary international law applies mainly to States and does not provide “sufficiently clear rules” with respect to IOs. However, Fassbender also recognizes that certain due process rights amount to general principles that would apply to IOs when they exercise “governmental” authority over individuals. Drawing on the practice of various States, he notes that international law does seem to provide for a “universal minimum standard of due process.” First, everyone has the right to be heard before affected by a governmental decision. Second, a person claiming a violation of his rights to an effective remedy before an independent and impartial tribunal. Bardo Fassbender, *Targeted Sanctions and Due Process*, Study commissioned by the United Nations, 20 March 2006 (hereinafter *Fassbender Report*), para. 1.17. See also *Statement by Martin Scheinin, Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, 63rd Session of the General Assembly, Third Committee, 22 October 2008, para. 3.

remedial procedure, have not elaborated on the requirements of such a procedure. For example, in the cases of *Waite & Kennedy v. Germany* and *Beer & Regan v. Germany*, the employees of the IO concerned argued that the legal immunity granted by Germany to the IO should not be recognized and, accordingly, they should be permitted to sue the IO concerned before German courts.⁷⁰ The ECtHR held that “a material fact” in determining whether a grant of IO immunity is permitted and in line with individual rights under the ECHR is “whether the applicants had available to them reasonable alternative means to protect effectively their rights.”⁷¹ The ECtHR then simply acknowledged the existence of such a remedial body established by the IO concerned, without critically examining the powers or procedure of this body.⁷²

Despite this relative uncertainty, there is a gradually emerging consensus on how IOs should observe the right to a remedy. In the 2008 case of *Kadi & Al Barakaat*, the ECJ indirectly criticized the UN Security Council’s “consolidated list” regime and prohibited the EU from implementing this list. The ECJ found that the UN Security Council’s “consolidated list” regime failed to respect the individuals’ “rights of defence,” “right to be heard” and “right to an effective legal remedy.”⁷³ In a study commissioned by the UN, Professor Fassbender observed that the effectiveness of an IO’s remedial procedure would depend on a number of procedural “criterion”: its “accessibility,” the remedial body’s independence and impartiality, the procedure’s timeliness, the procedure’s ability to afford an individual with a fair hearing, the “quality” of the review body’s decision-making, and the “follow-up” powers of the review body.⁷⁴

This section assesses the Commission’s powers and procedure against these emerging standards, highlights certain problematic areas, and suggests how they may be addressed through rule interpretation or rule amendment. My assessment of the Commission is based on a flexible application of these

⁷⁰ *Waite & Kennedy v. Germany*, 18 February 1999, European Court of Human Rights, No. 26083/94; *Beer & Regan v. Germany*, 18 February 1999, European Court of Human Rights, No. 28934/95.

⁷¹ *Waite & Kennedy v. Germany*, *ibid.*, para. 68; *Beer & Regan v. Germany*, *ibid.*, para. 58.

⁷² *Waite & Kennedy v. Germany*, *ibid.*, para. 73; *Beer & Regan v. Germany*, *ibid.*, para. 59.

⁷³ *Kadi & Al Barakaat International Foundation v. Council & Commission* (hereinafter *Kadi & Al Barakaat*), Joined Cases C-402 & 415/05P, [2008] ECR I-6351, paras. 348–349.

⁷⁴ *Fassbender Report*, *supra* note 69, para. 12.10.

emerging standards. I propose that these standards should be applied with sufficient sensitivity to the organization's legitimate interests as well as the individual's right to a remedy. For example, there are legitimate operational reasons why IOs engaged in policing functions adopt strict confidentiality rules. To counter the detrimental impact of these confidentiality rules on the individual's right to a remedy, the Commission should adhere to stricter procedural standards of independence and fair hearing, particularly if such an adherence does not compromise on the organization's legitimate interests.⁷⁵ This ensures that the Commission, as a whole, substantially guarantees the individual's right to a remedy.

Upon identifying the Commission's shortcomings, I will suggest how its rules may be interpreted to bring it in line with the right to a remedy. However, when a plain reading of these rules is inconsistent with the right to a remedy, I suggest that there is a need for rule amendment. Clear and transparent rules are needed to provide sufficient guidance to those seeking to exercise their right to a remedy.

4.1. *The Commission as an Independent and Impartial Decision-Making Body*

Based on dispute resolution practice, decision-makers should be independent and impartial in nature.⁷⁶ Guarantees of independence seek to ensure that decision-makers are insulated from external pressures that may influence their decision-making. The duty of impartiality requires decision-makers to make their decisions based on the relevant facts and law of a case, instead of on his or her preference of a particular outcome or disputant.

Interpol's rules expressly recognize the Commission's independence from the organization's other organs. For example, the RCI declares that the Commission is to be "completely independent in the exercise of its duties."⁷⁷ The RCI also confirms that Commission members are required to neither "solicit nor accept instructions from any persons or bodies."⁷⁸

⁷⁵) Thanks much to Peter Tague for discussions that led to a clearer conceptualization and articulation of this idea.

⁷⁶) Christopher Larkin, "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis" 44:4 *American Journal of Criminal Law* (1996), p. 609.

⁷⁷) Article 5.a, RCI, *supra* note 12.

⁷⁸) *Ibid.*, Article 5.a and Article 5.e.i.

In recent years, Interpol has made significant changes to the Commission's composition and selection process to increase its independence. Prior to concluding the new 2009 Headquarters Agreement, the Commission's selection process was governed by an older set of rules, namely the RIPC.⁷⁹ The Commission then consisted of three experts, a member of the Executive Committee, and an electronic data processing expert.⁸⁰ One of these three experts was to be selected by Interpol and another expert was to be selected by the French government. These two experts would then jointly appoint the third expert, who would serve as the Chairperson of the Commission.⁸¹ As mentioned above, this privileging of the French government in the selection of Commission members is inappropriate if the Commission is to function as an independent remedial body of the organization. This has changed since Interpol's adoption of its new 2009 Headquarters Agreement. Also, prior to 2009, the Commission included a member of the Executive Committee. This was problematic with respect to the Commission's independence. In reviewing individual requests and providing advice, the Commission may find itself having to decide on policies or decisions taken by the Executive Committee. However, in 2009, the General Assembly amended the RCI to replace the Executive Committee member on the Commission with an "expert with recognized international experience in police matters, in particular international police co-operation."⁸² Four members of the Commission are now directly appointed by the General Assembly.⁸³ The Chairperson is then jointly appointed by the other four members.⁸⁴

Based on the RCI, the General Secretariat is to provide the Commission with a secretariat that assists the Commission in administrative and liaison matters.⁸⁵ The General Secretariat is also required to provide the Commission with the "necessary budget."⁸⁶ This may be problematic because the General Secretariat's data processing decisions will oftentimes come

⁷⁹) Articles 15–18, RIPC, *supra* note 34.

⁸⁰) *Ibid.*, Article 16.

⁸¹) *Ibid.*, Article 17.2.

⁸²) Article 2.a and b, RCI; AG-2009-RES-13.

⁸³) *Ibid.*, Article 2.b.

⁸⁴) *Ibid.*

⁸⁵) *Ibid.*, Article 7.a.

⁸⁶) *Ibid.*, Article 8.

under the Commission's scrutiny. The RCI attempts to ameliorate this by emphasizing that the secretary appointed by the General Secretariat "shall be completely independent of the General Secretariat in the exercise of the assigned duties."⁸⁷ This independence is further emphasized in the Commission's Operating Rules which states that the Commission's secretariat is to receive directions "only from the Commission or from its duly empowered members."⁸⁸ Despite such explicit declarations of independence, the *de facto* double-role played by the Commission's secretariat may be problematic. In assessing the independence of the Commission, a holistic approach should be taken. As a singular fact, the double-role played by the Commission's secretariat may not conclusively demonstrate the Commission's non-independence. However, assessing this fact in light of the Commission's history and its institutional position may cast doubt on the Commission's independence. More importantly, a strict adherence to standards of independence and impartiality is necessary to offset the Commission's limited ability to release information to the individual, a limitation that is further explained below. It would be more appropriate for the Commission to appoint its own secretariat. The RCI directly authorizes the Commission to have "free and unlimited access" to all data processed by the organization.⁸⁹ The Commission, therefore, does not need to be assisted by staff from the General Secretariat in order to access data processed by the organization.

As mentioned above, decision-makers should also be impartial in nature. While Interpol's rules contain various provisions seeking to ensure the Commission's independence, it does not expressly guarantee or secure the Commission's impartiality. The concept of impartiality could be seen as subsumed under the broader notion of independence. It would however be useful to expressly recognize impartiality as a requirement. Decision-makers may be seen to be impartial or bias if they have a concrete interest in the outcome of the decision. Such an interest may arise due to the decision-makers' professions or outside activities. Recognizing this, Europol's JSB rules state that members of the JSB Appeal Board are prohibited from engaging in "any activity during their term of office which is incompatible with their independence and impartiality as members of the Committee

⁸⁷) *Ibid.*, Article 7.a.

⁸⁸) Article 33, Operating Rules, *supra* note 44.

⁸⁹) Article 5.e.2, RCI, *supra* note 12.

or with the required availability for service on the Committee.”⁹⁰ If there is no actual interest present, decision-makers may still be accused of apparent bias if they are seen to favour one party over the other. Europol’s JSB rules specifically state that “where a conflict of interest arises, the person concerned shall declare that interest and withdraw from taking part in the discussion and the decision on the matter.”⁹¹ A member who has a conflict of interest “may, where necessary, be excluded by a majority of the votes cast in a secret ballot by the delegations attending the meeting.”⁹²

4.2. *The Ability of the Commission to Secure a Fair Hearing: Access, Timeliness, and In-Person Representation*

Ensuring reasonable access to remedial procedures is an important aspect of the right to a remedy.⁹³ The RCI guarantees that requests for data access to the Commission are to be free-of-charge.⁹⁴ Requests may only be made by “persons who may actually be the subject of such information” or “the duly authorized or legal representations of such persons.”⁹⁵ An additional number of admissibility conditions are imposed in the Commission’s Operating Rules. Individual requests must be accompanied by “reasons,” a “summary of arguments,” a signed letter, and a copy of the individual’s identity document.⁹⁶ Legal representatives may make requests on behalf of the individuals concerned, but these must be accompanied by original copies of the power of attorney.⁹⁷ These admissibility conditions are relatively reasonable given the sensitive nature of police data. Arguably, given that these admissibility conditions are established by the Commission, the Commission would also have the discretion to make an exception to these conditions if such an exception is necessary to be fair to an individual. For example, a lawyer may be unable to gain access to a detained or imprisoned client.

⁹⁰) Article 14.1, JSB Rules, *supra* note 13.

⁹¹) *Ibid.*, Article 14.2

⁹²) *Ibid.*

⁹³) Shelton, *supra* note 64, p. 125; *Fassbender Report*, *supra* note 69, para. 12.10.

⁹⁴) Article 9.a, RCI, *supra* note 12.

⁹⁵) Article 9.c, RCI.

⁹⁶) Article 10.a and g, Operating Rules, *supra* note 44.

⁹⁷) *Ibid.*, Article 10.d.

The review process should be structured to provide individuals with a fair hearing and a fair opportunity to present their case.⁹⁸ Individuals may resort to legal representation when making requests to the Commission. The ability to use legal representation makes a significant difference to the individual's case, especially given the technicalities of data protection. Indeed, during his 2009 speech to the General Assembly, the Commission's Chairperson noted that legal representatives were becoming increasingly sophisticated in arguing their client's cases.⁹⁹ Based on the Operating Rules, representation and communication during the review process is foreseen to take place largely on the basis of "position papers" submitted by the individual. The review is to be generally conducted through correspondence.¹⁰⁰ However, Article 22 of the Commission's Operating Rules recognizes that, "in exceptional circumstances," the Commission may decide to meet requesting individuals or their legal representatives. Europol's JSB rules recognize that the "parties shall be heard by the Committee should they so request."¹⁰¹ Such in-person hearings may be necessary for remedial bodies to obtain a better understanding of the facts.

Most individuals submitting a request to the Commission would know that some kind of data against themselves has been processed by Interpol. This may be obvious due to their arrest, detention, or restriction of movement. However, individuals may not know the exact details of the data processed through Interpol channels. The RCI generally prohibits the Commission from releasing data to individuals unless it has obtained the consent of the data source.¹⁰² In light of this, the Commission will need to play a robust investigatory role and not depend solely on arguments presented by the individual. Data confidentiality is seen as necessary to preserve the integrity of police investigations. Source consent is required

⁹⁸) A claimant should have the proper opportunity of having his claim heard and tested with a view to obtaining redress. See Shelton, *supra* note 64, p. 125; *Fassbender Report*, *supra* note 69, para. 12.10.

⁹⁹) *Speech delivered by the Chairman of the Commission to Interpol's General Assembly, 78th General Assembly (Singapore, 11–15 October 2009)* (hereinafter *2009 CCF Chairperson Speech*), p. 2.

¹⁰⁰) The CCF Operating Rules foresees the CCF's examination of a request to be based on "position papers." See Article 17.2, Operating Rules, *supra* note 44.

¹⁰¹) Article 22, JSB Rules, *supra* note 13.

¹⁰²) *Ibid.*, Article 14.

prior to any data release because Interpol's data processing rules expressly recognize that data ownership resides with the data source even when processed through Interpol's channels. While such data confidentiality rules are necessary for legitimate policing purposes, a balance should be struck between investigation needs, data ownership, and the individual's right to a remedy. Interpol's data processing rules recognize that the data source's consent may be dispensed with if the requesting individual "has provided sufficient evidence" demonstrating that he or she knows that "there is information about him/her in Interpol's Files."¹⁰³ This exception should be interpreted generously rather than restrictively. An individual should only be required to demonstrate a general knowledge, as opposed to detailed or exact knowledge, of the data concerned.

There is also a need for the review process to be timely and transparent. There should be no unreasonable delay, and the individual should be kept notified of the review's progress. The Commission has committed itself to specific deadlines in its Operating Rules. For example, the Commission is required to acknowledge receipt of an individual request within one month of receiving the request.¹⁰⁴ The Commission also needs to inform the requesting individual that it has completed its review within one month of its decision becoming final.¹⁰⁵ The Commission may set deadlines when requesting information from the data source or the General Secretariat.¹⁰⁶ If the deadlines set by the Commission are not met, and upon the requested entity being "duly informed," the Commission may decide that the entity does not object to its data being released to the requesting individual.¹⁰⁷ The importance of timely response was emphasized by the Commission's Chairperson in his 2006 speech to the General Assembly. The Commission's chairperson announced that if requested members fail to abide by the Commission's deadlines, the Commission may "recommend" to the General Secretariat that the data concerned be deleted on the basis that

¹⁰³) Article 14.5, Operating Rules, *supra* note 44.

¹⁰⁴) *Ibid.*, Article 6.1.

¹⁰⁵) *Ibid.*, Article 18.

¹⁰⁶) *Ibid.*, Article 40.

¹⁰⁷) *Ibid.*, Article 15.

there is “insufficient evidence to support their continued storage.”¹⁰⁸ These deadlines and practice go some way to ensuring that the Commission’s review of an individual’s request proceeds at a reasonable pace. However, the rules do not set limits on the number of information requests and exchanges that may take place between the Commission, the General Secretariat, and the data source. A requested entity may be able to delay the review process by slowly releasing pieces of information instead of immediately providing the information requested in its entirety. In such cases, the Commission could arguably recommend data deletion pending the receipt of the requested information.

4.3. *The Commission’s Ability to Design and Deliver Binding Remedies*

At the end of the review process and if a violation is found to exist, the individual should be entitled to a substantive remedy that fully rectifies the effects of the violation concerned. To design and deliver such a remedy, the Commission needs to be equipped with sufficient discretion and authority. At first sight, the Commission’s powers appear to be rather limited in terms of what it may communicate to the individual at the end of the review process, the kind of remedy that it may design, and the non-binding nature of its “recommendations.”

The Operating Rules adopted by the Commission requires it to notify the requesting individual within one month of completing its review that “it has carried out the required check.”¹⁰⁹ The RCI, however, limits the kind of information that the Commission may communicate to the individual when indicating its completion of review. Article 11.(b) of the RCI specifically states that “[s]ubject to the agreement of the source ... the Commission may communicate to the requesting party the information which Interpol may have about him and which has been supplied by the said source.” In other words, the Commission cannot release any additional information to the individual concerned unless it has obtained the consent of the data source. The Commission may only “disclose the results of its work” if it

¹⁰⁸) *Speech delivered by the Chairman of the Commission to Interpol’s General Assembly, 75th General Assembly (Rio de Janeiro, Brazil, 19–22 September 2006) (hereinafter 2006 CCF Chairman Speech).*

¹⁰⁹) Article 18.4, Operating Rules, *supra* note 44.

obtains the consent of the data source.¹¹⁰ If not, the Commission is simply limited to informing the individual that it has concluded its assessment. Given this, the Commission may not be able to explain to the individual the kind of violation that took place or the remedial steps that have been taken. With such limited information, the individual is often unable to verify if the Commission's recommendations have been complied with. In some instances, the release of such data may be necessary to ensure the individual's physical safety or to prevent a serious and imminent violation of the individual's rights.¹¹¹ In contrast, Europol's JSB decisions are public in nature. Specifically, JSB decisions are required to set out "the operative part of the decision," "a brief presentation of the facts of the case," and "the reasons for the decision."¹¹²

The RCI notes that upon concluding its review, the Commission is to inform the General Secretariat of its "investigations" and "recommendations."¹¹³ These "recommendations" will probably in most cases include data processing instructions. It is not clear if the Commission may include costs or reparations in its "recommendations." In most cases, the error or abuse would be directly attributable to the data source and Interpol may not itself be responsible for any illegality. The individual will thus have a claim against the national data source. However, there may be instances where the wrongful action concerned is attributed to Interpol's own mistake or wrongful exercise of discretion. In such instances, the Commission should be able to direct Interpol to make reparations to the individual concerned.

As mentioned in Part 2 above, Article 36 of Interpol's Constitution authorizes the Commission to "ensure" Interpol's data processing complies with its rules.¹¹⁴ However, Article 37 of the Constitution goes on to note that the Commission's functioning is subject to "specific rules to be laid down by the General Assembly"; these rules would include the RCI.¹¹⁵ As rules passed by

¹¹⁰⁾ *Ibid.*, Article 18.4.

¹¹¹⁾ The General Secretariat is authorized to release information without data source consent in "urgent" situations but this seems primarily targeted at the release of information to NCBS rather than individuals. *See* Article 17.c.2 and Article 22.b, RPI, *supra* note 19.

¹¹²⁾ Article 26.4, JSB Rules, *supra* note 13.

¹¹³⁾ Article 6, RCI, *supra* note 12.

¹¹⁴⁾ Article 36, Interpol Constitution, *supra* note 3.

¹¹⁵⁾ *Ibid.*, Article 37.

the General Assembly, the RCI also applies to the General Secretariat, which is constitutionally required by Article 26.(a) of the Constitution to “put into application the decisions of the General Assembly and the Executive Committee.”¹¹⁶ Article 6.(a).1 of the RCI authorizes the Commission to inform the General Secretariat of its “investigations” and “recommendations” so that its “decisions and opinions may be notified to the entities and persons concerned” and “indeed implemented.”¹¹⁷ However, Article 6.(b) of the RCI goes on to plainly authorize the General Secretariat to decide if “it is unable to follow one of the Commission’s recommendations.”¹¹⁸ In other words, the General Assembly has decided, in adopting the RCI, to recognize the possibility for the General Secretariat to disagree with the Commission. In contrast, the decisions of Europol’s JSB are considered “final” and binding.¹¹⁹

This does not mean that the Commission’s “recommendations” will never be implemented when disagreed upon by the General Secretariat. As explained in Part 3 above, the RCI authorizes the Commission to inform the Executive Committee if it disagrees with the General Secretariat’s refusal to comply with its recommendations.¹²⁰ Upon considering the Commission’s position, the Executive Committee may decide to instruct the General Secretariat to adopt the Commission’s findings. Therefore, even though the Commission’s findings may be disagreed upon and therefore non-binding *per se*, they may be ultimately given effect by the Executive Committee. However, it is the Executive Committee, rather than the Commission, that has the final say in the matter. As Interpol’s executive and policy-making body, the Executive Committee cannot be considered independent or impartial with respect to the assessment of individual requests. An individual request may directly challenge a policy adopted by the Executive Committee.

An alternative interpretation regarding the impact of the Commission’s pronouncements has been suggested by scholars, such as Rutsel Martha, and is indeed possible.¹²¹ The RCI notes that the General Secretariat may

¹¹⁶) *Ibid.*, Article 26.a.

¹¹⁷) Article 6.a.1, RCI, *supra* note 12.

¹¹⁸) *Ibid.*, Article 6.b.

¹¹⁹) Article 9, Article 26.4, JSB Rules, *supra* note 13.

¹²⁰) Article 6.c, RCI, *supra* note 12.

¹²¹) I would like to thank the editor for the useful suggestion made on this point. Martha, *supra* note 1.

decide not to follow one of the Commission's recommendations, but it does not define the nature of such "recommendations." Under the RCI, the Commission is empowered to issue a variety of statements, including "recommendations," "findings," "decisions," and "opinions."¹²² The Operating Rules refers to the Commission's making of "reasoned conclusions" and "recommendations."¹²³ The General Secretariat is only expressly permitted to refuse to follow "recommendations" of the Commission. A distinction could be made between statements of a normative nature and statements of a technical nature recommending how the former are to be implemented. The General Secretariat may only disagree on the latter. Given the General Secretariat's constitutional role in ensuring "the efficient administration" of the organization and technical expertise, it is authorized to consider different ways by which the Commission's legal holdings are to be implemented through data processing.¹²⁴ Reading such a distinction into the RCI would authorize the General Secretariat and the Executive Committee to disagree with the Commission's recommended measures of implementation but not with its legal interpretation of a particular data processing rule. The Commission's normative holdings would therefore be binding on the organization. Such an interpretation, which recognizes the binding nature of the Commission's normative holdings, may be more reflective of how the Commission is viewed by Interpol member countries. In a 2009 decision, an Israeli domestic court recognized the binding nature of the Commission's findings, noting that if the Commission's "findings determine that a notice was published in negation to the Organization's rules, this notice will be removed."¹²⁵

5. Conclusion: The Commission as a Work-in-Progress

Interpol has increasingly developed the Commission to serve as an independent and expert body that provides individuals affected by Interpol's activities with an adequate and effective remedy. However, this Commission's ability to serve as a remedial body continues to be limited by concerns of member

¹²²) Article 6, RCI, *supra* note 12.

¹²³) Article 18.1, Operating Rules, *supra* note 44.

¹²⁴) Article 26.d, Interpol Constitution, *supra* note 3.

¹²⁵) See discussion of this case in Martha, *supra* note 1, p. 99–100.

sovereignty and data ownership. This need to constantly negotiate between member interests and human rights obligations stems from the Janus-faced nature of IOs. On the one hand, IOs are created by Member States. On the other hand, IOs are also subjects of the international community. IOs are thus faced with demands for accountability from multiple constituencies, and a careful balance needs to be drawn.

Interpol perceives the Commission in largely pragmatic terms. As mentioned above, the Commission is intended to preserve Interpol's immunity before domestic courts by providing individuals with an avenue to challenge and obtain remedies for any illegal action by Interpol. At the 2009 General Assembly, the Commission's Chairperson warned Interpol members that the organization will need to ensure that its activities conform to legal requirements to "protect the legal immunity of Interpol" in a way that "does not leave itself exposed to legal challenge."¹²⁶ If the Commission is to play a role in preserving Interpol's legal immunity from suit before domestic and regional courts, it will have to provide individuals with an adequate and effective remedy. While Interpol has made many improvements to the Commission, further clarifications and changes are needed. This article has argued for a flexible, holistic approach that gives sufficient consideration to legitimate organizational interests while securing the individual's right to a remedy as a whole. In doing so, it has suggested a number of rule interpretations and amendments.

While preserving Interpol's immunity before domestic and regional courts is an important objective, it is not the only reason to support the work of the Commission. There has been a general move in global governance towards legalization, the rule of law, and accountability.¹²⁷ Against these developments, an IO's legitimacy hinges on its observance of fundamental human rights standards, including the individual's right to an adequate and effective remedy. The Commission, thus, plays an important role in preserving Interpol's legitimacy and status as an IO.

¹²⁶) 2009 CCF Chairman Speech, *supra* note 98, p. 2.

¹²⁷) For an international relations perspective, see generally Kenneth W. Abbott *et al* "The Concept of Legalization" 54 *International Organization* 401 (2000). For an administrative and legal perspective, see generally Benedict Kingsbury *et al* "The Emergence of Global Administrative Law" 68 *Law and Contemporary Problems* 15 (2005).