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Addressing Genocide, Crimes against Humanity and War Crimes in INTERPOL's Practice: Historical Milestones and Recent Developments

Yaron Gottlieb*

14.1. Introduction

INTERPOL – the International Criminal Police Organization – considers the field of serious international crimes, namely genocide, crimes against humanity and war crimes,[1] as one of its major crime areas.[2] To assist the world community in combating these crimes, INTERPOL has published hundreds of INTERPOL notices[3] and has been working closely with both international tribunals and national investigative units specialising in this field of criminality. This year, INTERPOL's Secretary-General, Ronald K. Noble, announced the creation of a dedicated war crimes unit at its headquarters in Lyon, France.[4]

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1 Different terms such as "international crimes", "core crimes" or "universal crimes" have been used to describe this group of crimes (genocide, crimes against humanity and war crimes). For the purpose of this chapter, this category of crimes will be referred to as "serious international crimes".

2 INTERPOL's website at http://www.interpol.int/Crime-areas/War-crimes/War-crimes.

3 INTERPOL notices are international requests for co-operation or alerts allowing police in member countries to share critical crime-related information; see further discussion below in section 14.2.4.

4 INTERPOL, "'Closing the Impunity Gap' Focus of INTERPOL Genocide, War Crimes and Crimes against Humanity Meeting in Rwanda", 14 April 2014 (https://www.legal-tools.org/doc/b28d8b/).

This, however, has not always been the case. For four decades following the Second World War, INTERPOL chose not to engage in the fight against *génocidaires* and war criminals. This position derived from various policy and legal grounds. Notably, its primary legal foundation was the view that INTERPOL's assistance in the international search for war criminals would not be in conformity with Article 3 of the Organization's Constitution, which forbids it from engaging in matters of a political, military, religious or racial character. It was not until the mid-1980s that INTERPOL began to reconsider this position, and it was only following the creation of the International Criminal Tribunal for the former Yugoslavia ('ICTY') that it decided to enable collaboration in this field based on a more contemporary interpretation of Article 3. While this positive and welcome development led to successful co-operation with international tribunals and states, it also exposed the Organization to interstate disputes and the risk of being politicised. This necessitated another policy and legal adjustment, which has guided the Organization to this date in its assessment of requests for police co-operation concerning perpetrators of serious international crimes.

These dramatic changes in the practice of an international organisation resemble the swings of a pendulum, moving from one extreme (no co-operation at all) to the other (full engagement at the potential risk of compromising the Organization's neutrality) and then finally back to an equilibrium point, where co-operation is possible – indeed, encouraged – without drawing the Organization into political disputes.

This chapter tells the tale of the legal and policy transformations INTERPOL has undergone in the field of serious international crimes. It begins with a brief historical overview of INTERPOL, and continues with a discussion on two pertinent constitutional provisions: the prohibition embodied in Article 3 of the Constitution and the obligation to adhere to the spirit of the Universal Declaration of Human Rights.[5] It then proceeds to describe, in chronological order, "the pendulum movement", namely the developments in INTERPOL's practice and policy in this field of criminality.

[5] INTERPOL, Office of Legal Affairs, Constitution of the ICPO-INTERPOL, adopted by General Assembly, 1956, Art. 2(1) ('INTERPOL Constitution') (https://www.legal-tools.org/doc/07a066/).

14.2. INTERPOL: A Brief Historical Overview

14.2.1. The Creation of INTERPOL and Its Early Years

In April 1914 the first International Criminal Police Congress was held in Monaco. This meeting brought together police officers and judicial representatives from 24 countries to find ways to co-operate in solving crimes, notably with regard to arrest and extradition procedures, identification techniques and the idea of centralised criminal records. Participants at the Congress expressed 12 wishes for the future of international police co-operation.[6] Among them was wish number VIII which read:

> The First International Criminal Police Congress adopts the principle of creating centralized international records as likely to be examined by the authorities concerned, and requests that the matter be referred for closer examination to the Committee whose purpose, as decided in principle, is to create an international identification bureau.[7]

The outbreak of the First World War a few months later frustrated the good intentions expressed in the Congress. Nonetheless, the concept of establishing an international body to facilitate police work was not forgotten. In 1923 the second International Criminal Police Congress was convened in Vienna, Austria. This time the delegates were successful in creating a permanent body to support international police co-operation. Thus, the International Criminal Police Commission ('ICPC') was established, with a mandate to promote the widest mutual assistance between police authorities, a mandate that continues to guide INTERPOL's activities to this day.[8] The ICPC's headquarters were in Vienna and its first President was Johannes Schober, Chief of the Vienna Police and the driv-

6 INTERPOL, INTERPOL 1914–2014: 100 Years of International Police Cooperation (http://www.interpol.int/About-INTERPOL/History/1914-2014/INTERPOL-1914-2014/INTERPOL-1914-2014).

7 INTERPOL, 1st International Criminal Police Congress, Monaco (April 1914), Summary of the Wishes Expressed at the Sessions and Assemblies held on 15, 16, And 18 April 1914 (http://www.interpol.int/About-INTERPOL/History/1914-2014/INTERPOL-1914-2014/INTERPOL-1914-2014).

8 Statute of the International Criminal Police Commission, 1923, Art. 1. A copy of the Statute – as well as of all subsequent Statutes of the ICPC and ICPO-INTERPOL – is found in Rutsel Sylvester J. Martha, *The Legal Foundations of INTERPOL*, Hart Publishing, Oxford, 2010, pp. 203–25.

ing force behind the organisation of the 1923 conference that had led to the creation of ICPC.

Shortly after its creation, notices for wanted persons were published in the *International Public Safety Journal*. In 1927 the ICPC adopted a resolution on the establishment of a central point of contact within its police structure. The concept of national focal points exists to this day. The focal points are called National Central Bureaus ('NCB'), and in accordance with INTERPOL's current Constitution each NCB has a three-fold role: to liaise with the various national departments in the country; with NCBs in other countries; and with INTERPOL's General Secretariat.[9] In 1935 the Organization's international radio network was launched solely for the use of the criminal police authorities at the national level. Enabling direct, prompt and secure communication among police authorities remains an INTERPOL priority.

14.2.2. The Second World War and the Nazi Takeover

In 1938 the Nazi regime annexed Austria in what was known as the *Anschluss*. Shortly afterwards, the Nazis assumed control over the ICPC after deposing its President Michael Skubl. Most countries stopped participating in the Organization's activities and the ICPC effectively ceased to exist as an international organisation. In 1940 Reinhard Heydrich, the head of the German Gestapo, was appointed as the ICPC President. Two years later, the ICPC fell completely under German control and the Organization's headquarters were relocated to Berlin.[10]

14.2.3. The Recreation of INTERPOL after the Second World War

The fate of the ICPC during the Second World War did not discourage countries from continuing to pursue means to enhance international police co-operation. To that end, the ICPC was recreated anew following the war, with a new Statute and new headquarters in Paris, France.

In 1956 the ICPC General Assembly changed the Organization's name to the International Criminal Police Organization – INTERPOL – and adopted a new Constitution, which serves as the primary legal in-

[9] INTERPOL Constitution, Art. 32, see *supra* note 5.

[10] INTERPOL, History (http://www.interpol.int/About-INTERPOL/History).

strument governing its work to this day. Article 2 of the new Constitution defined the aims of the Organization as follows:

> 1) To ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the laws existing in the different countries and in the Spirit of the Universal Declaration of Human Rights.
> 2) To establish and develop all institutions likely to contribute effectively to the prevention and suppression of ordinary law crimes.[11]

This mandate reflects the previous one enshrined in the 1946 Statute, except for the important addition relating to the spirit of the Universal Declaration of Human Rights (which did not exist in 1946), and the fact that INTERPOL's aims – previously defined in one provision (Article 1 of the 1946 Statute) – were now split in two.

14.2.4. INTERPOL Today

Since 1956 INTERPOL has gradually expanded its membership and activities. Currently, the Organization has 190 member countries – practically universal membership. It supports police around the world in combating a variety of crimes, from more classic ones such as drug trafficking to relatively new threats posed by environmental, cyber or pharmaceutical crimes. INTERPOL hosts various criminal databases such as a DNA database and a database containing stolen and lost travel documents (SLTD). It has put in place modern tools, such as an internet-based communication system called I-24/7 which enables its membership to communicate directly, rapidly and securely.[12] No less important, while the creation of the Organization by chiefs of police raised doubts in the past over its legal status and nature, INTERPOL has progressively obtained recognition as an international organisation operating under international law.[13]

Among the Organization's best-known tools – and perhaps the most relevant for the discussion in this chapter – are INTERPOL notices. The notices are international requests for co-operation or alerts allowing police in member countries to share critical crime-related information. They are

[11] INTERPOL Constitution, Art. 2, see *supra* note 5.

[12] INTERPOL, Overview (http://www.interpol.int/INTERPOL-expertise/Overview).

[13] Martha, 2010, p. 4, see *supra* note 8.

published by INTERPOL's General Secretariat upon the request of a member country, sent via its NCB, or at the request of an international entity – such as an international tribunal – with which INTERPOL has concluded a co-operation arrangement. Noteworthy among the eight types of notices that currently form the system are the Red Notice, which is a request to seek the location and arrest of wanted persons with a view to extradition or similar lawful action, and the Blue Notice, which is a request seeking additional information about a person's identity, location or activities in relation to a crime.[14]

In addition to using the notices system, member countries and international entities connected to the I-24/7 system can also send diffusions, which are formatted messages sent directly by member countries and simultaneously recorded in INTERPOL's databases. Unlike the notices, which are circulated to the entire INTERPOL community, a diffusion may be sent on a more limited basis (for example, only to some regions or some countries).[15] Finally, requests or alerts may also be sent via INTERPOL's channels through messages, which are direct communications not recorded in INTERPOL's databases.[16] Accordingly, an NCB or an international tribunal that wishes to send a request for police co-operation concerning an individual sought for serious international crimes may do so using a notice, a diffusion or a message.

14.3. The Prohibition on Engaging in Certain Matters and the Obligation to Adhere to the Spirit of the Universal Declaration of Human Rights

14.3.1. The Prohibition on Engaging in Political, Military, Religious or Racial Matters

As an organisation dealing with police matters, INTERPOL was not created to accomplish political goals. The apolitical nature of INTERPOL was underscored in the opening address of the 1923 Congress, where Schober stated:

[14] INTERPOL, Notices (http://www.interpol.int/INTERPOL-expertise/Notices). The rules governing the publication and circulation of notices are INTERPOL's Rules on the Processing of Data ('INTERPOL RPD') (http://www.interpol.int/About-INTERPOL/Legal-materials).

[15] INTERPOL, Notices, see *supra* note 14; INTERPOL RPD, Art. 1(14), see *supra* note 14.

[16] INTERPOL RPD, Art. 1(15), see *supra* note 14.

> [T]he objective that we are pursuing [in setting up the Commission] rises above every day's political quarrels. It is an effort of pure civilisation, for we are addressing ourselves solely to the common enemy of all human society, the criminal of general law.[17]

This notion, however, was not reflected in the ICPC's Statutes before the Second World War. Against the background of the Organization's fall into the hands of the Nazi regime during the war, one of the tenets that guided the "refounding fathers" of the ICPC was ensuring its political neutrality. Indeed, at the conference held in June 1946 in Brussels, Belgium, which led to the re-establishment of the ICPC, the newly elected President, Florent Louwage, stated that by adhering to the principle of political neutrality the Organization "had succeeded in gaining the respect of administrative and judicial authorities in all member countries".[18] This principle was integrated into the ICPC Statute in 1948, when the phrase "to the strict exclusion of all matters having a political, religious or racial character" was added to the end of Article 1(1), a provision that defined the Organization's mandate.[19]

When the Organization changed its name and adopted a new Constitution in 1956, the prohibition in Article 1(1) of the previous Statute was incorporated into Article 3 of the new Constitution, with one addition (ban on activities of military characteristics). Article 3 therefore reads as follows: "It is strictly forbidden for the Organization to undertake any intervention or activities of a political, military, religious or racial character".[20]

The contemporary primary objectives of Article 3 are first, to ensure the independence and neutrality of INTERPOL as an international police organisation; second, to reflect established principles of international extradition law; and third, to protect individuals from persecution.[21]

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17 Johannes Schober, Chief of the Vienna Police, Opening Speech at the 1923 Conference that created International Criminal Police Commission (ICPC) (on file with author).

18 Florent Louwage, INTERPOL's President, Opening Speech at the 1946 Brussels Conference that re-established INTERPOL (on file with author).

19 INTERPOL, Neutrality (Article 3 of the Constitution) (http://www.interpol.int/About-INTERPOL/Legal-materials/Neutrality-Article-3-of-the-Constitution).

20 INTERPOL Constitution, Art. 3, see *supra* note 5.

21 Yaron Gottlieb, "Article 3 of INTERPOL's Constitution: Balancing International Police Cooperation with the Prohibition on Engaging in Political, Military, Religious, or Racial Activities", in *Florida Journal of International Law*, 2011, vol. 23, no. 2, pp. 135, 152.

Article 3 remains among the most fundamental constitutional provisions governing INTERPOL's work, and has successfully enabled it to promote international police co-operation among countries that have very different political structures, legal regimes and cultures. Nonetheless, as explained below, the interpretation and implementation of Article 3 served for many years as the primary reason – or, depending on one's view, as a pretext – behind INTERPOL's decision to refrain from any activity in the field of serious international crimes.

14.3.2. The Obligation to Adhere to the Spirit of the Universal Declaration of Human Rights

Among the innovative aspects of the 1956 Constitution was the explicit obligation to ensure that the Organization's activities were carried out "in the spirit of" the Universal Declaration of Human Rights ('UDHR').[22] The significance of this principle was also highlighted in the new set of rules, which entered into force in July 2012, concerning the processing of data via INTERPOL's channels. As provided in Article 2 of the Rules on the Processing of Data ('RPD'), the aim is

> to ensure the efficiency and quality of international cooperation between criminal police authorities through INTERPOL channels, with due respect for the basic rights of the persons who are the subject of this cooperation, in conformity with Article 2 of the Organization's Constitution and the Universal Declaration of Human Rights to which the said Article refers.[23]

The RPD include other important provisions that make an explicit reference to human rights and the spirit of the UDHR.[24]

Unlike Article 3, which conveys only a negative obligation (that is, a prohibition on engaging in certain activities), the reference to the spirit of the UDHR can be understood as imposing both negative and positive obligations on the Organization. In other words, this phrase in Article 2(1) of the Constitution should guide INTERPOL not only in refraining from

[22] INTERPOL Constitution, Art. 2(1), see *supra* note 5.

[23] INTERPOL RPD, Art. 2, see *supra* note 14.

[24] *Ibid.*, Arts. 11 and 34. Another noteworthy provision concerns the legal review by the General Secretariat of all Red Notices to ensure compliance with Articles 2 and 3 of the Constitution; *id.*, Art. 86.

supporting certain activities that might compromise individuals' rights but potentially also in taking steps – within INTERPOL's mandate as an international organisation dedicated to enhancing international police co-operation – to promote the rights enshrined in the UDHR. This interpretation can be of particular relevance in combating serious international crimes that result in the violation of the most fundamental human rights, such as the right to life and the right not to be subject to torture.

14.4. 1946–1985: No Co-operation in the Search for *Génocidaires* and War Criminals

14.4.1. The 1947 INTERPOL Article on "The Crime of Genocide and International Co-operation"

Among INTERPOL's past activities was the publication of the *International Criminal Police Review*, a periodic journal with articles related to police work. An article published in 1947 in this journal was written by Paul Marabuto, who served at the time as a Commissaire Divisonnaire and Rapporteur of the ICPC. It was entitled "The Crime of Genocide and International Co-operation",[25] and the position it expressed reflected that of INTERPOL for almost four decades.

Marabuto's article aimed at describing the nature of certain serious international crimes and ICPC's role in their repression. The impetus for his article was a number of studies published at the time on the crime of genocide and crimes against humanity. Notably, Marabuto reflected on two articles, the first published in November 1946 by Raphael Lemkin.[26] As described by Marabuto, that study showed "the necessity of a repression of the author of this crime on the international plan, since the facts which characterise it violate not only the laws of war, but wound the

[25] Paul Marabuto, "The Crime of Genocide and International Co-operation", in *International Criminal Police Review*, 1947, p. 23.

[26] Lemkin is known today as the person who coined the term "genocide". The study referred to by Marabuto was published by the Belgian Ministry of Justice as Raphael Lemkin, "Le crime de génocide" [The Crime of Genocide], in *Revue de droit pénal et de criminlogie*, 1946, vol. 17, pp. 371–86; see Marabuto, 1947, p. 23, see *supra* note 25.

whole of humanity".[27] The second study examined by Marabuto was an article titled "Le crime contre l'humanité" by Eugène Aronéanu.[28]

Marabuto's own article started by underlying that

> there can be no doubt as to the international nature of this crime [genocide]. […] Genocide must be considered as a crime against the Rights of Man and in this respect, it must be put under sanction by the way of an international co-operation.[29]

He further noted that the ICPC dealt with crimes "wounding universal conscience or putting the moral well-being of humanity in danger".[30] The list of crimes admitted by the Organization as "specially international crimes" included "piracy, the drug traffic, counterfeiting, white slavery of women and children, the slave trade and the traffic of obscene publications".[31] Marabuto continued by mentioning that the author of the crime of genocide could be punished "not only by the courts of the country where the crime was committed, but also by the jurisdictions of the country in which he could be arrested".[32] This assertion corresponds to the concept of universal jurisdiction, though without using this specific term. Marabuto concluded this part by stating:

> It would, therefore, only be necessary to admit that the legal status of genocide be assimilated to that of the crimes specified above [i.e. piracy, drug traffic, etc.]. Their gravity is such, that all the States should feel a great moral solidarity in order to bring the criminal before the justice of the country in which he was arrested.[33]

Had Marabuto stopped his analysis at that point, one would have assumed that the ICPC should and would actively engage in the pursuit of Nazi and

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27 *Ibid*.

28 Eugène Aroneanu, "Le crime contre l'humanité" [Crime against Humanity], in *Nouvelle revue de droit international privé*, 1946, vol. 13, pp. 369–413. Aroneanu wrote extensively about crimes against humanity and his compilation of eyewitness accounts of the horrors that took place in the Nazi concentration camps was used by the Nuremberg Tribunal.

29 Marabuto, 1947, p. 24, see *supra* note 25.

30 *Ibid*.

31 *Ibid*.

32 *Ibid*.

33 *Ibid*.

other war criminals – as it did with regard to perpetrators of the other international crimes listed by Marabuto.

Yet Marabuto's article continued on a different path. It went on to analyse Aronéanu's study, specifically with regard to the question of whether crimes against humanity could be viewed as "common law crimes". Marabuto appeared to accept the argument that crimes against humanity possess a character independent of the notion of an act of war.[34] He further mentioned that, following Aronéanu's study, the crimes could certainly be seen as "common law crimes" from the point of view of the victim whose rights were directly affected by these crimes. From the point of view of the criminal, however, Marabuto concluded that crimes against humanity "can no more be accommodated as common law".[35] This conclusion was based on Aronéanu's analysis and his proposed definition of crimes against humanity,[36] according to which such crimes were acts of state sovereignty, which, to be prevented, required laws limiting of this sovereignty. As noted by Marabuto, these limitations were included in the laws and customs of war, but not yet in peacetime laws.

In the last part of his article, Marabuto addressed the question of the potential involvement of the ICPC in the field. He began by recalling the ICPC's pre-war collaboration in applying conventions aimed at repressing certain serious acts wounding universal morality or conscience, such as those related to the above-mentioned crimes of slavery and drug trafficking. He further mentioned the ICPC's participation in the activities of the League of Nations in domains relating to such crimes, and the fact that the ICPC would continue to support the work of the United Nations when asked to do so.

It was at that juncture in the article, however, that Marabuto's analysis took a drastic turn that deviated from the path leading to cooperation. Marabuto offered a reminder that the ICPC "must remain faith-

[34] *Ibid*, p. 25.

[35] *Ibid*.

[36] Marabuto, *ibid.*, quoted Aroneanu's definition of crimes against humanity, which reads as follows:

> An international crime of common law by which a State renders itself guilty of attacks or a racial, national, religious or political character, against the liberty, the rights or the life of a person or group of persons not guilty of an infraction of common law or, in case of infraction, of attacks going beyond the punishment provided.

ful to its traditional line of conduct: the prevention and the criminality of *common law*".[37] Though he agreed that "the juridical discussions regarding the crime of genocide tend to allow this infraction to be admitted as a crime against common law",[38] he continued by stating that the "contribution which our organization, however, is able to bring, can be influenced by the very nature of the infraction and in its execution".[39] In that regard, he pointed to Aronéanu's view of the political motivation behind the crime (even if Aronéanu qualified it as a common crime), as well as to the fact that the "opposition to this crime is envisaged under the form of limitation to state sovereignty, therefore the exercise of the powers of a government, a political power".[40]

Bearing that in mind, Marabuto recalled the principle prohibiting the ICPC from intervening in questions of a political, religious or racial nature.[41] In addition, he argued that

> the repression envisaged is not directed against individuals but against collective groups, in the instance of a State, or groups of individuals within this, which increases the difficulties of the practical realization, even when the recognition of the characteristics of common law would bring the full and complete adhesion of the I.C.P.C.[42]

On this point, while he agreed that "in our time […] we seem to be orienting ourselves clearly towards the recognition of the direct penal responsibility of moral persons",[43] Marabuto added that the problem "still remains very debated in its very principle",[44] and stated that in "any case, it is on the practical plan of the enquiry and prosecution that the question interests us and we must recognize that it would be very difficult, if not impossible, to apply it".[45] Based on this analysis, Marabuto concluded as follows:

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37 *Ibid.*, p. 27 (emphasis in the original text).

38 *Ibid*.

39 *Ibid*.

40 *Ibid*.

41 The term "military" was added only later, namely in Article 3 of the 1956 Constitution, see *supra* note 5.

42 Marabuto, 1947, p. 27, see *supra* note 25.

43 *Ibid*.

44 *Ibid*.

45 *Ibid*.

> In this way, it seems to be sufficiently pointed out that the crime of genocide, both in its principle and its practical application, goes outside of the domain of common law, such as the I.C.P.C. has always traditionally considered it. Its participation with the U.N.O.,[46] therefore, will call for a certain prudence, no matter what may be the nobility of thought and the humane ideal on which it is founded. The I.C.P.C.'s domain of activity is sufficiently large, its co-operation with the U.N.O. in the various pre-war international problems remains whole, but it must stay the path which it has historically traced out for itself.[47]

The arguments put forward by Marabuto can be easily contested. In particular, his point concerning the envisaged repression of collectives rather than individuals clearly ignored the concept of individual criminal responsibility in the context of serious international crimes, embodied in Article 6 of the Charter that established the International Military Tribunal at Nuremberg ('IMT Charter'), according to which "leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan".[48] This provision served as the legal basis for addressing the role and culpability of individuals taking part in the criminal scheme of the Nazi machine, and laid out the foundations for the theory of joint criminal enterprise that would be integrated in the Statutes and jurisprudence of future international tribunals.[49] The collective versus individual argument is also unconvincing considering the jurisprudence of the International Military Tribunal ('IMT') prior to the publication of Marabuto's article,[50] and the fact the Tribunal already held individuals responsible for the heinous crimes committed on behalf of a collective (the Nazi regime).

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46 Marabuto referred to the United Nations as the U.N.O.

47 Marabuto, 1947, p. 27, see *supra* note 25.

48 Charter of the International Military Tribunal, Part of the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Agreement), 8 August 1945, Art. 6 ('IMT Charter') (https://www.legal-tools.org/doc/64ffdd/).

49 Michael P. Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments*, Cambridge University Press, Cambridge, 2013, pp. 68–85, discussing the contribution of the Nuremberg Trials to establishing the concept of joint criminal enterprise as customary international law.

50 The IMT issued its Judgment in the trial of the 22 Nazi leaders on 1 October 1946; International Military Tribunal, *Nuremberg Tribunal v. Goering et al*., Judgment, 1 October

The successful prosecutions before the IMT also put into serious question Marabuto's argument on the "practical plan of the enquiry and prosecution". On the other hand, one has to bear in mind that the legal regime governing serious international crimes was certainly not as clear as it is today. The Genocide Convention was still being negotiated and the terms "genocide" and "crimes against humanity" did not have agreed-upon definitions distinguishing one from the other, as was later introduced in the Statutes of the *ad hoc* international tribunals established in the 1990s. The focus of the IMT on prosecution of crimes committed during the war, and the link required between crimes against humanity and war crimes, did not add much clarity to the view of crimes committed in outside an armed conflict context, crimes which were traditionally of interest to the ICPC and later INTERPOL.

It is also noteworthy that in the post-war period, serious international crimes were not incorporated in many national laws. As noted by Paul Shapiro, Director of the Center for Advanced Holocaust Studies at the United States Holocaust Memorial Museum,

> [T]he failure to bring more Holocaust perpetrators to justice was not unavoidable, but at the time the law was not equipped to deal with crimes committed on such a monumental scale. It has taken decades of hard work to develop the law and legal precedents to fix this.[51]

One reported example of such a long-awaited change was the case of John (Ivan) Demjanjuk, who was convicted as late as 2011 by a German court as an accessory to the murder of all 28,060 people who died during the time he served at the Sobibor Nazi concentration camp. That ruling overturned a 1969 precedent that had required evidence linking suspects to a specific killing, and opened the way for more prosecutions of guards who served in camps.[52]

1946 (https://www.legal-tools.org/doc/45f18e/). Interestingly, Marabuto mentioned the Tribunal in passing (when he noted, on p. 25, that Aroneanu's study on concentration camps was deposited with the Tribunal), and also incorporated in his article one of the famous pictures taken at the Tribunal during the trials. He nonetheless chose not to mention at all the Tribunal's Judgment.

51 Melissa Eddy, "Chasing Death Camp Guards With New Tools", in *New York Times*, 5 May 2014.

52 *Ibid*.

Another possible explanation – also found in Marabuto's article – was INTERPOL's focus on combating "common law crimes". Though, as Marabuto himself admitted, crimes such as genocide can be viewed as "common law crimes" from certain aspects (such as that of the victim), it cannot be contested that such crimes have not been considered – certainly not at that time – as classic common law crimes. In that regard, when defining the Organization's mandate, the 1946 Statute of ICPC made – for the first time – a specific reference to the concept of combating "common law crimes".[53] It should be recalled, however, that in 1956, when a new Constitution was adopted, the Organization's aims were split in two and the term "ordinary law crime" was linked only to the second aim.[54] The first aim – to "ensure and promote the widest possible mutual assistance between all criminal police authorities" – could have therefore also potentially accommodated activities that did not fall within the narrower scope of classic "common law crimes".

14.4.2. Secretary-General Sicot and the Position of the Executive Committee

The position espoused by INTERPOL did not go unnoticed. For example, in May 1961 the American Jewish Congress complained before the United Nations Economic and Social Council about the fact that

> governments are refusing to extradite war criminals on the ground that they are political refugees and that Interpol – the international criminal police organization – has, in harmony with this attitude, refused to cooperate in tracking down Nazis accused of crimes against humanity.[55]

A month later, the French section of the World Jewish Congress adopted a resolution that called upon INTERPOL to apprehend those Nazi war criminals who were still at large in the world.[56] The Jewish Congress later openly accused INTERPOL of failing to cooperate in the arrest of Nazi

[53] The previous Statutes of INTERPOL – from 1923 and 1939 – did not make an explicit reference to the concept of combating "common law crimes"; Martha, 2010, p. 42, see *supra* note 8.

[54] *Ibid*.

[55] "World Jewish Congress Complains to U.N. on Protection Given to Nazis", in *Jewish Telegraphic Agency*, 2 May 1961.

[56] "French Renew Assurances that Status of Algerian Jews Will Be Protected", in *Jewish Telegraphic Agency*, 21 June 1961.

criminals and requested J. Edgar Hoover, Director of the US Federal Bureau of Investigation, to support an amendment to INTERPOL's rules that would enable such co-operation.[57]

This criticism, however, did not persuade INTERPOL to change its position. In a book published that same year (1961), Marcel Sicot, the Secretary-General, argued that those criticising INTERPOL for protecting war criminals did not consider the negative implications for INTERPOL – and therefore for international public security – of its potential intervention in matters of this nature.[58] More specifically, Sicot contended that such interventions would not be effective unless an extradition treaty existed between the requesting and the requested countries, and only if the government of the requested country decided to carry out the extradition request. A request to locate a wanted individual and the possibility of obtaining his arrest and transfer to the requesting county were two distinct matters. To what end, Sicot asked, should we risk the very existence of the Organization when the potential results were so uncertain? Moreover, the governments of the countries that were most affected, notably Israel and West Germany, had perfectly understood the situation and did not insist on the matter despite their initial requests. Additionally, INTERPOL's position did not hinder direct collaboration between countries without INTERPOL involvement.

Later in his book, Sicot reverted to this topic and specifically to the public campaign of the Jewish Congress.[59] In response to their argument on the applicability of the 1949 Geneva Conventions as a legal basis for INTERPOL's involvement, he claimed that thus far no international court had been created to address criminal matters, not all countries had ratified the Conventions, and those that had were far from having taken the necessary measures to implement them. The various national laws did not have the same common principles, which remained difficult to enact. For example, genocide is a collective crime against humanity, which is not necessarily committed in the context of war. Crimes against humanity committed in the context of war constitute war crimes. Yet, Sicot contended that by then the notion of war had evolved and it would have been diffi-

[57] "Jewish Congress Accuses Interpol of Evading Capture of Ex-nazis", in *Jewish Telegraphic Agency*, 12 September 1961.

[58] Marcel Sicot, *A la barre de l'Interpol*, Les Productions de Paris, Paris, 1961, pp. 220–21. Sicot served as INTERPOL's Secretary-General from 1951 to 1963.

[59] *Ibid*., pp. 269–70.

cult to define it. Additionally, it would have been problematic to establish the responsibilities of those involved, namely that of the perpetrator and that of the person ordering the execution of the crimes. Military regulations, he further argued, required absolute obedience. To what extent could a subordinate refuse to execute the orders of a direct superior or a person of higher rank?

Furthermore, Sicot continued, at the centre of the debate was the fact that the victors – whether of an international or internal war – always imposed their wills and dictate laws. Of course, the vanquished side may be guilty, but the victor was sometimes responsible for starting the conflict and the loser might not be the only party to have committed war crimes. An international tribunal had to be an impartial institution, otherwise the notion of a war crime would lend itself to different interpretations and extraditions would continue to be refused. As things stood, INTERPOL had no decision-making power and, whether we liked it or not, a war crime – at least in relation to the Second World War – fell into the category of "activities of a political, military, racial or religious character", with which INTERPOL must not, under Article 3 of its Constitution, concern itself.

Sicot's argument regarding the lack of incorporation of appropriate national laws and procedure to effect arrest warrants against war criminals may have had, as explained above, some value. It should be recalled, however, that unlike the state of affairs in 1947, when Marabuto published his article, by 1961 a significant number of INTERPOL member countries had already ratified both the 1948 Genocide Convention and the 1949 Geneva Conventions. The rest of Sicot's arguments are even less persuasive. In particular, his points on total obedience to military orders, the question of command responsibility and the concept of victors' justice had all been addressed – and rejected – by the IMT.

A few months after the publication of the book, Sicot's position was presented and unanimously adopted by INTERPOL's Executive Committee.[60] The discussion, which took place at an Executive Committee meeting in May 1962, was triggered by the appeal of the Jewish Congress. Si-

[60] INTERPOL's Executive Committee sets the organisational policy and direction and supervises the work of the General Secretariat. It meets three times a year and is composed of 13 members, representing all four geographical regions of INTERPOL. The various functions of the Executive Committee are enumerated in INTERPOL Constitution, Art. 22, see *supra* note 5.

cot reiterated most of the arguments presented in his book, such as the lack of clear definitions of the crimes concerned, victor's justice, and the low prospects for successful co-operation even if INTERPOL intervened. The participants fully agreed and added their concern that if the topic were raised before the UN General Assembly, it might lead to arguments affecting Article 3. At the end of the discussion, Sicot also concluded that he had been authorised to reply that the Executive Committee was unanimously opposed to a public discussion of the problem of war criminals.

14.4.3. The Klaus Barbie Case

As far as INTREPOL was concerned, that last conclusion reached by Sicot indeed closed off public discussions of the matter. The general public, however, did not shy away from continuing to criticise INTERPOL and demanded its action in the pursuit of war criminals. One of the most noteworthy cases for which INTERPOL was criticised was that of Klaus Barbie, an SS officer nicknamed "the butcher of Lyon" for his heinous crimes – such as personally torturing prisoners – while heading the Gestapo in Lyon during the Second World War. After the war, he apparently escaped to Latin America. In December 1982 the French authorities reportedly requested INTERPOL to publish a Red Notice against Barbie.[61] In response, INTERPOL allegedly advised that this case was of a political character and that the circulation of a Red Notice would be contrary to Article 3 of the Constitution. The General Secretariat reportedly proposed that channels other than INTERPOL's be used in this case.[62] The French authorities apparently chose to do so and in January 1983, shortly after France's request to INTERPOL, Barbie was arrested in Bolivia and extradited to France, where he was convicted and sentenced to life imprisonment.

Thirty-five years had passed since Marabuto's article and 20 years since the decision taken by the Executive Committee to refrain from any co-operation in chasing Nazi criminals. In the meantime, a growing number of states had joined the Genocide Convention and governments as

[61] The author is unaware of any existing file at INTERPOL regarding the case. The description of the case in this article is based on sources external to INTERPOL's archives such as in Laurent Greilsamer, *Interpol: le siège du soupçon*, Alain Moreau, Paris 1986, pp. 91 ff.

[62] *Ibid.*, p. 92, and references at fn. 2, quoting the message of response sent by INTERPOL's General Secretariat.

well as non-governmental organisations continued to track down perpetrators of serious international crimes. Yet, more time had to pass for INTERPOL to change its position. The eventual change and the start of the pendulum's movement were brought about by a combination of a clear-cut case and new leadership at INTERPOL.

14.5. 1985: Mengele Case – The First Winds of Change

In March 1985 a request to publish a Red Notice against Josef Mengele was sent by the German NCB to INTERPOL's General Secretariat. Mengele was an SS officer and a physician who, *inter alia*, carried out experiments on human beings in the Auschwitz concentration camp and was among the most sought-after Nazi criminals. The facts, as provided in the Red Notice request, stated that Mengele was accused

> of having shot, having designated for killing by gas or having himself killed by gas a large number of persons between May 1943 and January 1945 in Auschwitz and the surrounding area, in his capacity as SS camp doctor, a position he held during that period in the district of the Auschwitz concentration camp. He was also accused of having caused the death of several persons in a cruel manner by injections and pseudo-medical experiments, of having attempted to commit such offences, and of encouraging others to do likewise.[63]

The request was examined by INTERPOL's Legal Department. In a note sent on 14 March 1985 to Raymond Kendall, INTERPOL's acting Secretary-General,[64] the Legal Department assessed the request in light of Article 3 of the Constitution.[65] It began by making a reference to an INTERPOL General Assembly resolution, adopted only a year earlier, which provided guidelines on the application of Article 3.[66] This resolution, together with another one adopted the same year,[67] paved the way for the

[63] The Red Notice is on file with the author. The full French version of the notice is quoted in *ibid.*, pp. 101–2.

[64] Kendall began his official duties as INTERPOL's Secretary-General only in October 1985. At the time the Mengele case was addressed (March 1985), he replaced André Bossard, who had served as the Secretary-General since 1978.

[65] "Note to the Attention of Mr. Kendall", 14 March 1985 (on file with author).

[66] INTERPOL, General Assembly resolution, Application of Article 3 of the Constitution, AGN/53/Res/7 (1984) ('1984 Resolution') (https://www.legal-tools.org/doc/77693a/).

[67] INTERPOL, General Assembly resolution, Violent Crime Commonly Referred to as Terrorism, AGN/53/Res/6 (1984) (https://www.legal-tools.org/doc/e0e14e/).

Organization's participation in the counterterrorism field.[68] As mentioned in the legal note, the 1984 resolution did not expressly take into consideration cases of individuals who committed crimes upon the order of governmental authorities. While the resolution referred to acts committed by politicians – concluding that such acts, if committed in the individual's official capacity, were covered by Article 3 – the legal note considered that this appeared to relate to the leaders rather than those executing their decisions. Thus, the existence of Article 3 benefited only the "intellectual" perpetrators of the crime, whereas in reality they were more responsible than those carrying out the crime upon their instructions.

The note found, however, that such a conclusion would be "simply astounding". A sounder solution could not stem from the position held by a person but rather should be based on the very nature of the crime perpetrated. In the case of Mengele, this crime was murder or, in the legal term adopted following the Second World War, genocide.

In that regard, the legal note mentioned the existence of the Genocide Convention to which approximately 80 states were party at the time. The note recalled Article VII of the Genocide Convention, according to which the crimes covered by the Convention should not be considered political crimes for the purpose of extradition. It noted that even if the crimes for which Mengele was charged were committed before the entry into force of the Convention, one could argue that, at that time, the vast majority of states considered these facts as acts of genocide. If there were a universal opinion as such on the subject of these crimes, one would be unable to say that such acts fell under Article 3, also considering that a large number of states party to the Convention were also members of INTERPOL. Finally, in support of the conclusion that Article 3 should not bar co-operation in this case, the note mentioned that Mengele did not act as a "simple executer of orders", but rather contributed to the atrocious decisions made by the governmental authorities by adding to his own atrocities in carrying out so-called medical experiments on human beings, which were none other than torture.

Kendall endorsed the legal analysis and the Red Notice was therefore published and circulated to INTERPOL member countries in April 1985. Kendall was later quoted stating: "The first thing I did when I came

[68] For further discussion of the 1984 resolutions, see Gottlieb, 2011, pp. 148–51, see *supra* note 21.

on board [as the Secretary-General] was to issue a wanted notice for Josef Mengele".[69] At the time when the Red Notice was published, however, Mengele was already dead, a fact confirmed by the Brazilian authorities a few months after its publication.[70]

From an institutional perspective, it is interesting to note that Kendall did not deem it necessary to consult with INTERPOL's decision-making organs – the Executive Committee and the General Assembly, the supreme organ[71] – on a matter thus far considered by the Organization as so sensitive as to prevent it from taking any action. One possible explanation for the confidence with which the decision was taken was the progress made on the international level in recognising genocide as an extraditable offence – a point mentioned in the note of the Legal Department. Since a Red Notice serves as a precursor for extradition, INTERPOL has traditionally followed developments in extradition law and adjusted its practice in light of such developments. It can also be assumed that the risk of member countries protesting against the decision to publish a Red Notice against such a notorious criminal, decades after the dust of war had settled, was perceived to be low.

Two years after the Mengele case, another request was sent by the German NCB, this time against Alois Brunner, another infamous Nazi criminal. Brunner was sought for being responsible for the deportation of thousands of Jews mainly to the Auschwitz concentration camp. The Red Notice was published and circulated as requested – apparently without any particular legal assessment. Brunner's precise whereabouts, however, were never found.[72]

Though the two Red Notices against Mengele and Brunner did not lead to concrete operational results, they nonetheless signalled a change in INTERPOL's view of its role in supporting member countries combating

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69 Alan Riding, "Lyons Journal; Interpol Regrets Shady Past, Vows Better Future", in *New York Times*, 22 February 1990.

70 Greilsamer, 1986, p. 103, see *supra* note 61; see also the description of Mengele's atrocities and the post-war pursuit of his whereabouts in the *Holocaust Encyclopedia* (http://www.ushmm.org/wlc/en/article.php?ModuleId=10007060), explaining that Mengele died in Brazil in 1979 and that in "1985, German police, working on evidence they had recently confiscated from a Mengele family friend […] located Mengele's grave and exhumed his corpse. Brazilian forensic experts thereafter positively identified the remains as Josef Mengele. In 1992, DNA evidence confirmed this conclusion".

71 INTERPOL Constitution, Art. 6, see *supra* note 5.

72 It is believed that Brunner escaped to Syria and may have died and been buried there.

these most heinous crimes. For this change to materialise as the Organization's new policy, however, almost another decade had to pass.

14.6. 1994: A Legal and Policy Turning Point

14.6.1. The 1994 General Assembly Report and Resolution on Co-operation with the ICTY

The creation of the ICTY was the impetus for the long-awaited policy change. Shortly after the decision of 22 February 1993 of the United Nations Security Council to create an international tribunal with jurisdiction over the crimes committed during the conflict in the former Yugoslavia,[73] a discussion was held between Boutros Boutros-Ghali, the UN Secretary-General, and Kendall, his counterpart at INTERPOL. Boutros-Ghali requested that INTERPOL consider providing assistance in the search for individuals sought by the tribunal once it was established.

In a letter dated 10 March 1993 Kendall followed up on the discussion.[74] He pointed to two possible difficulties in relation to the proposed co-operation. The first difficulty was of a legal nature, specifically the possible application of Article 3 of INTERPOL's Constitution. In that regard, the letter highlighted a number of aspects. First, it noted that if the statute of the proposed tribunal specified that the crimes subject to its jurisdiction were not considered as political or military crimes for extradition purposes, this would be a significant criterion in favour of the non-application of Article 3 and therefore the possible collaboration of INTERPOL with requests from the tribunal. In support of this point, the letter recalled Article VII of the Genocide Convention, according to which genocide and the other crimes listed in Article 3 of the Convention are not considered political crimes for the purpose of extradition.

In the absence of such a clear determination, the letter continued, the Article 3 analysis of the specific offences could lead to favourable results if the definitions of the crimes in the ICTY Statute pointed to the predominant ordinary law character of the crimes, even if politicians or military personnel committed them. With regard to the latter, the letter

[73] United Nations Security Council, resolution 808, 22 February 1993, UN doc. S/RES/808 (https://www.legal-tools.org/doc/513f7f/).

[74] Letter from INTERPOL's Secretary-General to the UN Secretary-General (on file with author).

also highlighted the difficulty arising from the involvement of both members of the regular army and militias in the acts committed in the former Yugoslavia. If, the letter explained, the perpetrators were considered military personnel, they could not be sought through INTERPOL's channels unless the crime for which they were sought was an ordinary law crime or was of a predominantly ordinary law character.

On a different point (but still in the context of the Article 3 discussion), Kendall noted that Security Council resolution 808 recalled that persons who committed or ordered the commission of grave breaches of the applicable Conventions (in particular the 1949 Geneva Conventions) were individually responsible in respect of such breaches. It was therefore presumed that this point would be integrated into the ICTY Statute in the spirit of Article IV of the Genocide Convention, which prescribes that "[p]ersons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals".[75]

By mentioning the hurdles posed by Article 3 of INTERPOL's Constitution, Kendall clearly aimed at encouraging the drafters of the ICTY Statute to consider the main legal concerns that could impede potential co-operation.

The second type of difficulty mentioned in the letter was an institutional one. Kendall noted that INTERPOL could not engage in any activity unless it was requested to do so by its member countries. Accordingly, INTERPOL would not be able to act on a direct request from the Tribunal and it would be necessary that one or more INTERPOL members expressly requested that the Organization intervene in the matter.

Whether a letter of response was sent to Kendall's letter is unknown to this author. The ICTY was created two months later via Security Council resolution 827, adopted under Chapter VII of the UN Charter. The same resolution adopted the ICTY Statute as proposed by the UN Secretary-General.[76]

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[75] United Nations General Assembly, resolution 260 (III) A, Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, Art. IV (http://www.legal-tools.org/doc/498c38/).

[76] Statute of the International Tribunal for the former Yugoslavia, adopted by United Nations Secruity Council, resolution 827, 25 May 1993, UN doc. S/RES/827 ('ICTY Statute') ((*https://www.legal-tools.org/doc/b4f63b/*).

On 13 December 1993 the President of the ICTY wrote to INTERPOL's Secretary-General requesting information about the Organization since he considered that INTERPOL's Constitution, in particular Article 3, was of great relevance to the Tribunal's work on its Rules of Procedure.[77] A few months later, the ICTY adopted its Rules of Procedure and Evidence.[78] Article 39 of the Rules stated that "in the conduct of an investigation, the Prosecutor may seek [...] the assistance [...] of any relevant international body including the International Criminal Police Organization (Interpol)".[79] The Tribunal therefore introduced the notion of co-operation with INTERPOL without expressing an opinion on how far INTERPOL would be competent in the matter.[80]

Consequently, INTERPOL had to define its position with regard to the general question on co-operation with the ICTY and the possible application of Article 3 of the Constitution to cases the Tribunal had to deal with.[81] To that end, and to also address the institutional aspect mentioned by Kendall in his 1993 letter to Boutros-Ghali, the matter was brought for the consideration of INTERPOL's Executive Committee and General Assembly in the course of 1994. Before the Executive Committee, INTERPOL's General Counsel presented the study conducted by the Legal Department, highlighting that INTERPOL's rules allowed the General Secretariat to process police information sent to it by an intergovernmental organisation and consequently allowed co-operation with the United Nations with respect to the ICTY. He further explained that the legal study had shown that the only case in which Article 3 of the Constitution would prevent such co-operation would be where persons had been forcibly compelled to serve in the forces of a hostile power.[82] Kendall then high-

77 See the introductory part of the INTERPOL, General Assembly Report, "Consequences of the Establishment of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991", AGN/63/RAP/13, Rome, 1994 ('INTERPOL, 1994 Report') (on file with author).

78 Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, adopted 11 February 1994, IT/32 ('ICTY, Rules of Procedure and Evidence') (https://www.legal-tools.org/doc/02712f/).

79 *Ibid.*, Art. 39.

80 INTERPOL, 1994 Report, Introductory Part, see *supra* note 77.

81 *Ibid*.

82 See further discussion below on the position adopted by INTERPOL's General Assembly regarding this crime.

lighted the importance of adopting a favourable approach. He stressed that if INTERPOL refused to co-operate, either the ICTY or the United Nations would have no option but to set up a new institution to carry out the role that they intended assigning to INTERPOL. He added that for the time being the situation was limited to the former Yugoslavia, but events could occur elsewhere that might also require INTERPOL's co-operation. Kendall therefore considered it absolutely vital for the Organization's international image to adopt a policy that could be applied in a manner appropriate to the circumstances.[83]

The position of the General Secretariat combined both legal and policy considerations. The first addressed the main legal hurdle that prevented co-operation in the past, namely the interpretation and implementation of Article 3 of the Constitution; the second focused on ensuring that INTERPOL remained relevant on the international level. Both types of consideration reflected not only the shift in the international community's view of dealing with serious international crimes but also the legal and policy positions that enabled the publication of the Red Notice against Mengele almost a decade earlier. The question was whether the Organization was ready to move from an *ad hoc* approach (such as in the Mengele case) towards adopting a general governing policy.

The Executive Committee endorsed the General Secretariat's position and the draft resolution to be submitted to the General Assembly. The matter was therefore brought before INTERPOL's General Assembly in its annual meeting of 1994. To facilitate the discussions, the study carried out by the Legal Department was presented in the form of a General Assembly report.[84] The report's title was "Consequences of the Establishment of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991",[85] and it was adopted via a General Assembly resolution entitled "Application of Arti-

[83] The description of the discussion before the Executive Committee in its 1994 meeting is based on the minutes of the meeting (on file with the author).

[84] Draft resolutions submitted to the General Assembly are typically accompanied by a General Assembly report, which provides pertinent background information on the draft resolution.

[85] INTERPOL, 1994 Report, see *supra* note 77.

cle 3 of the Constitution in the context of serious violations of international humanitarian law".[86]

As mentioned in the 1994 resolution, the General Assembly was "[c]onvinced of the need to facilitate the interpretation and application of Article 3 of the Organization's Constitution in the area of serious violations of international humanitarian law".[87] It endorsed the analysis and considerations contained in the report, and invited the Secretary-General as well as the NCBs – should their co-operation be requested in connection with investigations relating to serious violations of international humanitarian law – to follow the report's guidelines.[88]

14.6.2. The Interpretative Paradigm of the 1994 Report and Its Shortcomings

The 1994 report noted that INTERPOL's legal framework allowed the Organization to engage in co-operation with other international organisation for the purpose of promoting international police co-operation. In light of the rules applicable at the time, the report concluded that if the

> International Tribunal so wishes and if the States concerned, in conformity with their own laws, wish to co-operate through Interpol in the cases being dealt with by the Tribunal, the cooperation facilities set up within the context of Interpol may be used.[89]

The report continued by mentioning that despite the above general conclusion, INTERPOL could not become involved in the type of cases referred to in Article 3 of its Constitution. Considering that the ICTY Statute did not expressly determine that the crimes subject to the Tribunal's jurisdiction were not political or military for extradition purposes, a hope that had been expressed by Kendall in his letter of March 1993 to his UN counterpart, the report therefore turned to analyse the various offences in light of Article 3 of the Constitution. The purpose of this analysis was to determine the nature of each separate offence, namely whether the offence

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86 INTERPOL, General Assembly resolution, Application of Article 3 of the Constitution in the Context of Serious Violations of International Humanitarian Law, AGN/63/Res/9 (1994) ('1994 Resolution') (https://www.legal-tools.org/doc/d76a18/).

87 *Ibid*.

88 *Ibid*.

89 INTERPOL, 1994 Report, point 3, see *supra* note 77.

was of predominantly ordinary law character as opposed to a political or military one.

In doing so, the report provided some important general guidelines on the interpretation of Article 3, some of which departed from INTERPOL's previous policy. For example, the report concluded that the previous test – provided for in the 1984 resolution – which applied to assessing crimes committed by politicians, namely a test based on the distinction between acts committed in official capacity as opposed to those committed in private capacity, was "based on a faulty concept".[90] Specifically, the report stated:

> The fact is that political power can only be exercised within the limits of the law, and that includes international law. It has to be admitted that there are many areas in which the exercise of political power cannot be developed in legal form. It is, however, clear that in this respect, international penal law sets absolute limits. Consequently, the offences referred to in the Tribunal's Statute cannot have been committed in the exercise of political power; they can only have been committed outside of such power and the offender bears personal responsibility for them as the Statute states. Offences committed by politicians must therefore be assessed to determine whether the political or the ordinary criminal law aspect is predominant, in the same way as offences committed by other people.[91]

This point of the 1994 report corresponds to the legal note written almost 10 years earlier by the Legal Department on the Mengele case, which found that viewing politicians' orders to carry out heinous crimes as covered by Article 3 would be "astounding".[92]

The 1994 report further underscored that INTERPOL's practice with regard to the application of Article 3 had evolved considerably throughout the years, thereby also reflecting developments under international law. Notably, the direction of such developments had been to progressively restrict the application of provisions that could ensure that those who committed certain crimes were treated more favourably because of the political context of the act. In that regard, the report noted

[90] *Ibid*., point 5.2.1.

[91] *Ibid*.

[92] See the discussion above on the Mengele case.

that "genocide is now accepted as coming within INTERPOL's field of activities, from which it was originally considered to be excluded".[93] Thus, the position taken by the General Secretariat almost 10 years earlier in the Mengele case was finally endorsed as general policy by the Organization's supreme body.

Notwithstanding this positive approach and the noteworthy contribution of the 1994 report to INTERPOL's evolving practice in reference to Article 3, the interpretative paradigm of the report, namely the assessment of the elements of each offence enumerated in the ICTY Statute, presented a challenge with regard to certain crimes. Thus, for example, while concluding that the list of the crimes against humanity in Article 5 of the ICTY Statute included offences against ordinary criminal law (such as murder, rape or torture), the report found that in two offences – "persecutions" and "other inhumane acts" – the "relatively imprecise wording requires some knowledge of the facts in order to be able to detect the presence of violations of ordinary criminal law".[94] The report therefore did not provide a clear answer on the compatibility of these offences with Article 3; instead, it required a factual case-by-case analysis.

The report's assessment in light of the military element of Article 3 proved to be even more problematic. The report correctly determined that offences which comprised violations of ordinary criminal law and appeared unnecessary for military purposes were not "military offences" in the meaning of Article 3. Nonetheless, the report concluded:

> Compelling a prisoner of war or a civilian to serve in the forces of a hostile power (Article 2(e) of the Statute), an operation linked with the constitution of armed forces and therefore inextricably linked with military matters could be considered an essentially military offence; it therefore seems that Article 3 of the Constitution must be applied.[95]

This view derived from the traditional paradigm that governed an Article 3 analysis at the time, namely, the focus on an examination of the elements of a crime. Nonetheless, this approach and its underlying rationale raised difficulties not only concerning this particular crime but also when evaluating other serious war crimes that were ostensibly of "military" na-

[93] INTERPOL, 1994 Report, point 4.2., see *supra* note 77.

[94] *Ibid*., point 5.1.4.

[95] *Ibid.*, point 5.2.2..

ture, such as illegal conscriptions of child soldiers or unlawful use of certain weapons.

The position expressed by the 1994 report may have corresponded to the Organization's past practice, yet today it no longer appears sustainable. Among the objectives of Article 3 is to reflect principles of international law. Accordingly, the assessment of a particular offence in the context of Article 3 should consider the background for criminalising the act, as well as the stance of the international community with regard to that offence. Unlike pure military offences such as desertion, which are derived solely from military law and are therefore considered as non-extraditable offences,[96] the criminalisation under national law of serious international crimes reflects international conventions such as the Genocide Convention and such serious international crimes are frequently incorporated in the domestic ordinary laws or similar penal legislation.[97]

Furthermore, serious international crimes are considered extraditable offences in light of their heinous nature.[98] One cannot ignore developments in international law with regard to these offences and the clear recognition by the international community of the importance of bringing to justice perpetrators of these crimes.

INTERPOL's practice in the years that followed the 1994 report demonstrates that the Organization endorsed the view that the entire category of serious international crimes fell outside the ambit of Article 3. Indeed, INTERPOL has significantly increased its involvement in the field without distinguishing between the various crimes. Notably, INTERPOL's General Assembly resolution approving the co-operation agreement with the International Criminal Court ('ICC') clearly stated that the crimes that come within the jurisdiction of the ICC fell outside Article 3.[99] By adopting this resolution, the General Assembly acknowl-

[96] M. Cherif Bassiouni, *International Extradition: United States Law and Practice*, Oxford University Press, New York, 2007, pp. 732–34.

[97] See, for example, US War Crimes Act of 1996, 21 August 1996, 18 USC 2441.

[98] For example, the United Nations General Assembly, Model Treaty on Extradition, 14 December 1990, UN doc. A/RES/45/116 (https://www.legal-tools.org/doc/43b6b5/) excludes serious international crimes from both the political offence and the military offence exceptions to extradition. See United Nations Office on Drugs and Crime, Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters, part I, IM, pp. 45, 49.

[99] See INTERPOL, General Assembly, resolution, Co-operation Agreement with the International Criminal Court, AG-2004-RES-16 (2004) ('INTERPOL, ICC resolution')

edged the special status of serious international crimes, and in fact rejected, although without discussion or explanation, the underlying reasoning of the 1994 report and its conclusion with regard to the crime of compelling a prisoner of war or a civilian to serve in the forces of a hostile power,[100] and possibly similar war crimes that are ostensibly of "military nature". The resolution endorsing co-operation with the ICC should be considered as a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" within the meaning of the Vienna Convention on the Law of Treaties.[101]

INTERPOL's co-operation with the ICC further supports the position that, in practice, the approach of the 1994 report has been abandoned. INTERPOL has published a number of Red Notices upon the request of the ICC against individuals sought for crimes such as enlisting and conscripting of children under the age of 15 years, a crime whose elements could have been considered to be of "military" nature if the rationale of the 1994 report had been applied.[102] The publication of these Red Notices reflects a "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" under the terms of the Vienna Convention.[103]

Hence, in application of general principles of treaty interpretation, it can be claimed that the interpretative paradigm of the 1994 report regarding the assessment of the nature of serious international crimes in light of Article 3 is no longer applicable, and does not pose a *prima facie* obstacle for co-operation in requests concerning those crimes.

Finally, while the 1994 report analysed the question of co-operation in the field only through the prism of Article 3, the constitutional obligation of Article 2(1), requiring INTERPOL to carry out its activities in "the

(https://www.legal-tools.org/doc/69fa9b/). In the resolution, the General Assembly considered "that the crimes which come within the jurisdiction of the International Criminal Court also fall within the aims of the Organization as defined in Articles 2 and 3 of the Constitution".

100 This crime is listed in Rome Statute of the International Criminal Court, 17 July 1998, in force 1 July 2001, Art. 8(2)(a)(v) ('ICC Statute') (http://www.legal-tools.org/doc/7b9af9/).

101 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Art. 31(3)(a) ('Vienna Convention') (https://www.legal-tools.org/doc/6bfcd4/).

102 For example, the Red Notices issued by INTERPOL in 2006 against the leaders of the Lord's Resistance Army in Uganda sought by the ICC for, *inter alia*, the crime of forced enlisting of children.

103 Vienna Convention, Article 31(3)(b), see *supra* note 101.

spirit of the Universal Declaration of Human Rights", can further support an interpretation that permits – if not calls for – INTERPOL's engagement in combating serious international crimes. For example, the prohibition on conscription of child soldiers is enshrined in the Convention on the Rights of the Child.[104] Thus, a decision to publish a Red Notice against perpetrators of this crime can be based not only on the appropriate interpretation of Article 3 (as described above) but also in support of protecting children's rights in accordance with the "spirit of the Universal Declaration of Human Rights".

14.6.3. Co-operation with National Jurisdictions and the Principle of Primacy of the ICTY and ICTR

In resolution 827, which created the ICTY, the UN Security Council decided that "all States shall cooperate fully with the International Tribunal and its organs".[105] In addition, to avoid any interference with the Tribunal's attempts to exercise its jurisdiction, the ICTY Statute provided that the "International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal".[106] A similar approach was pronounced when the International Criminal Tribunal for Rwanda ('ICTR') was established via Security Council resolution 955.[107]

The duty to co-operate with the tribunals and the principle of primacy became relevant following the 1994 resolution and during the first stages of the co-operation between INTERPOL and the ICTY. While the 1994 report focused on co-operation with the ICTY, the 1994 resolution adopting this report addressed the matter in more general terms, as evidenced by the resolution's title (Application of Article 3 of the Constitution in the Context of Serious Violations of International Humanitarian Law) as well as by the resolution's recommendation to NCBs to follow

[104] United Nations General Assembly, resolution 44/25, Convention on the Rights of the Child, adopted 20 November 1989, entered into force 2 September 1990, UN doc. A/44/49 (1989), Art. 38 (https://www.legal-tools.org/doc/f48f9e/).

[105] ICTY Statute, see *supra* note 76.

[106] *Ibid.*, Art. 9(2).

[107] Statute of the International Tribunal for Rwanda, adopted 8 November 1994 by Security Council resolution 955, Art. 8(2) ('ICTR Statute') (*http://www.legal-tools.org/doc/8732d6/*).

the guidelines of the report should their co-operation be requested in connection with investigations relating to serious violations of international humanitarian law. Consequently, in addition to opening the way for co-operation with international tribunals, the 1994 resolution enabled member countries to use INTERPOL's channels for the purpose of circulating requests for police co-operation, for example, through the publication of Red Notices based on charges of genocide, crimes against humanity or war crimes. This approach was later reflected also in the 1997 General Assembly resolution on co-operation with the ICTR, which recommended that NCBs co-operate as well "with the Rwandan police and judicial authorities".[108]

INTERPOL's member countries therefore began using the Organization's channels to circulate requests related to serious international crimes. This included requests sent by countries that comprised the former Yugoslavia and in reference to crimes committed during the armed conflicts that took place in the region in the 1990s.

Such requests have apparently posed difficulties for the Tribunals' prosecutor and the matter was raised during a series of meetings that took place with Kendall.[109] As a result, on 18 August 1995 Kendall sent a circular letter to all heads of NCBs. The letter, entitled "Procedure related to notices concerning war criminals in the former Yugoslavia and Rwanda", began by stressing that following the adoption of the 1994 report the General Secretariat "bases its action on the widest collaboration with both the ICTY and the ICTR".[110] This was the first formal reference by the General Secretariat to the collaboration also with the ICTR. In light of this clear statement on broad co-operation with the Tribunals, the letter explained that each time an NCB requested that the General Secretariat circulates an arrest warrant, diffusion or notice against a person for war crimes, crimes against humanity or genocide that concerns either the former Yugoslavia or Rwanda, the General Secretariat would immediately forward a copy of the request to the Tribunal's prosecutor in order to ob-

[108] INTERPOL, General Assembly, resolution, Co-operation in Searching for Persons Accused of Serious Violations of International Humanitarian Law Committed in Rwanda and Neighbouring Countries between 1 October 1990 and 31 December 1994, AGN/66/RES/10 ('INTERPOL, Rwanda resolution') (https://www.legal-tools.org/doc/4cc9c6/).

[109] At that point in time, Richard J. Goldstone served as the prosecutor of both Tribunals.

[110] Circular letter of INTERPOL's Secretary General, 18 August 1995, Ref. No. 27.95/D.3/RELCO/960 (on file with author).

tain his confirmation that the request did not interfere with an ongoing investigation conducted by the Tribunal.

Accordingly, the letter continued, it would be best if all requests concerning suspects of the serious international crimes in the former Yugoslavia or Rwanda be addressed to the General Secretariat without being exchanged directly among the NCBs. Once the request was shared with the Tribunal, the prosecutor could choose either to allow the requesting country to pursue the criminal case or to seek the publication of a Red Notice on behalf of the Tribunal. In the latter case, and in accordance with the primacy principle enshrined by the Tribunal's Statute, the General Secretariat would give priority to the notice published at the request of the Tribunal over the request of the NCB. This, however, would not prevent the NCB from requesting that its own notice be maintained. Finally, if either of the Tribunals wished that the request from the NCB not be circulated or that it be postponed, the General Secretariat would contact the NCB to see if it agreed to suspend its request. It might also be the case that the prosecutor would engage via the appropriate diplomatic channels with the political authorities of the country concerned (that is, of the NCB that sent the request) to express his point of view.

The procedure laid out in the Secretary-General's letter therefore tried to strike a balance between the role of INTERPOL in supporting police work in its member countries, on the one hand, and the importance of facilitating the Tribunals' work, deriving from both the principle of primacy and the co-operation agreement, on the other.

14.6.4. Increased Co-operation with International and Hybrid Tribunals

INTERPOL's successful co-operation with the ICTY, which followed resolution 1994, opened the way for co-operation with other international and hybrid criminal tribunals. As mentioned, the Organization began collaborating with the ICTR and in 1997 INTERPOL's General Assembly formally approved that co-operation.[111] The co-operation with the ICTY and ICTR was also mentioned in another resolution adopted by the Gen-

[111] INTERPOL, Rwanda resolution, see *supra* note 108.

eral Assembly that year on co-operation with the United Nations.[112] In 2003 the General Assembly approved a co-operation agreement with the Special Court for Sierra Leone[113] and a year later with the ICC.[114] With regard to the latter, it is noteworthy that the possible use of INTERPOL's channels to circulate arrest warrants was explicitly mentioned in the Rome Statute of the International Criminal Court ('ICC Statute').[115] In 2009 a co-operation agreement with the Special Tribunal for Lebanon was approved by INTERPOL's General Assembly.[116]

INTERPOL's role in supporting the work of international tribunals was also recognised by the Security Council. Security Council resolution 1503 (2003) called on all states "to cooperate with the International Criminal Police Organization (ICPO-INTERPOL) in apprehending and transferring persons indicted by the ICTY and the ICTR".[117] Similarly, Securi-

[112] INTERPOL, General Assembly, resolution, Co-operation Agreement with the United Nations, 27 October 1997, AGN/66/RES/5 (https://www.legal-tools.org/doc/e2b0d3/). The agreement called for, *inter alia*:

> Cooperating, where appropriate, in the implementation of the mandates of international judicial institutions, such as the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 and the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, which have been or may be established by the United Nations

See Cooperation Agreement between the United Nations and the International Criminal Police Organization (INTERPOL), 8 July 1997, Art. 1(d) (http://www.interpol.int/About-INTERPOL/Legal-materials/International-Cooperation-Agreements).

[113] INTERPOL, General Assembly, resolution, Co-operation Agreement between the International Criminal Police Organization – Interpol – and the Special Court for Sierra Leone, 2003, AG-2003-RES-08 (https://www.legal-tools.org/doc/8f41c4/).

[114] INTERPOL, ICC resolution, see *supra* note 99.

[115] ICC Statute, Art. 87(b), see *supra* note 100, reads: "When appropriate […] requests [for co-operation] may also be transmitted through the International Criminal Police Organization or any appropriate regional organization".

[116] See INTERPOL, General Assembly, resolution, Draft Co-operation Agreement between the International Criminal Police Organization-INTERPOL and the Special Tribunal for Lebanon, 13 October 2009, AG-2009-RES-10 (https://www.legal-tools.org/doc/585720/).

[117] United Nations Security Council, resolution 1503, 28 August 2003, UN doc. S/RES/1503 ('UN Security Council, resolution 1503') (https://www.legal-tools.org/doc/05a7de/).

ty Council resolution 1940 (2010) on the situation in Sierra Leone called on "all States to cooperate with the International Criminal Police Organization (INTERPOL) in apprehending and transferring [to the Special Court of Sierra Leone] Johnny Paul Koroma, if he is found to be alive".[118] To date, the Red Notice issued against Koroma is still valid. As of March 2015, there are 22 Red Notices issued by INTERPOL and recorded in its databases upon the requests of international and hybrid tribunals.

14.7. INTERPOL's General Assembly Resolution of 2004 and Its Aftermath

14.7.1. The 2004 Resolution

As noted, circulation through INTERPOL's channels of requests for police co-operation in relation to serious international crimes based on national investigations began shortly after the adoption of the 1994 resolution, and has intensified following the introduction in 2003 of the INTERPOL I-24/7 system.

This period was also marked by the increased role of national investigations of serious international crimes and the creation of specialised investigative units both in post-conflict countries such as Rwanda and countries exercising extraterritorial jurisdiction (such as certain European countries). Consequently, a new challenge arose, namely the need to co-ordinate national investigations and avoid duplication of efforts.

To that end, in March 2004 INTERPOL hosted the first International Expert Meeting on War Crimes, Genocide, and Crimes against Humanity. The meeting adopted 12 recommendations including one on increasing the support of INTERPOL in co-ordinating national efforts.[119] One outcome of the meeting was the creation of a Working Group, which held its first meeting at INTERPOL's General Secretariat in July 2004. The Working Group's recommendations included an increased use of INTER-

[118] United Nations Security Council, resolution 1940, 29 September 2010, UN doc. S/RES/1940 (https://www.legal-tools.org/doc/3224b1/).

[119] Recommendations of the First International Expert Meeting on War Crimes, Genocide, and Crimes against Humanity, Lyon, 23–25 March 2004 (on file with author).

POL's databases, the preparation of best practice manual and identification of points of contact in member countries.[120]

Against this backdrop, a new resolution was adopted by INTERPOL's General Assembly in 2004 on Increased ICPO-Interpol support for the investigation and prosecution of genocide, war crimes and crimes against humanity.[121] The resolution recalled previous reports and resolutions and noted the creation of national specialised units, whose role is to investigate and prosecute cases of serious international crimes committed both within and outside national borders. The resolution further underscored the importance of international co-operation in this field, and recommended that

> within the limits of national and international law, ICPO-Interpol member countries co-operate with each other and with international organizations, international criminal tribunals, and non-governmental organizations as appropriate in a joint effort to prevent genocide, war crimes, and crimes against humanity, and to investigate and prosecute those suspected of committing these crimes.[122]

The resolution further asked the General Secretariat "to assist member countries in the investigation and prosecution of these crimes".[123]

The resolution therefore presented a broad approach, taking the uncommon step of emphasising co-operation not only among police authorities of member countries but also among police authorities and other stakeholders such as international tribunals and organisations, and, no less important, non-governmental organisations. It conveyed a strong message in support of a joint action in combating the most heinous crimes, which has indeed led to successful co-operation.

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120 See INTERPOL, General Assembly, Report, Increased ICPO-INTERPOL Support for the Investigation and Prosecution of Genocide, War Crimes, and Crimes against Humanity, AGN/73/RAP/23, 2004 (on file with author).

121 INTERPOL General Assembly, resolution, Increased ICPO-INTERPOL Support for the Investigation and Prosecution of Genocide, Crimes against Humanity, and War Crimes, AG-2004-RES-17 ('2004 resolution') (https://www.legal-tools.org/doc/a03f11/).

122 *Ibid*.

123 *Ibid*.

14.7.2. Successful Police Co-operation

Thus, shortly after the adoption of the 2004 resolution, INTERPOL officers on mission in Kigali, Rwanda, assisted the local Rwandan authorities in issuing 10 Red Notices against individuals sought for serious international crimes committed in the context of the Rwandan genocide. As noted by Noble, INTERPOL's Secretary-General, at the opening address of the sixth International Expert Meeting on Genocide, War Crimes and Crimes against Humanity, which took place in Rwanda in April 2014, these were the first of more than 140 Red Notices published at the request of NCB Kigali for genocide and crimes against humanity.[124]

Some of these Red Notices led to successful international co-operation. For example, in June 2009 INTERPOL issued a Red Notice requested by the NCB of Kigali for the arrest of Charles Bandora for genocide, complicity in genocide and crimes against humanity. He was alleged to have organised and participated in the killing of hundreds who had taken refuge in a church. On 7 May 2010 NCB Brussels, Belgium, informed INTERPOL and NCB Kigali of the arrival of Bandora at Zaventem airport. He was in possession of a forged Malawian passport which he had used to travel from Malawi to Belgium via Ethiopia. Bandora sought asylum in Belgium, but in June 2010 he travelled to Norway. The INTERPOL Red Notice, which was still in circulation, helped to provide NCB Oslo and Norway's National Criminal Investigation Service with a basis to arrest Bandora and later extradite him to Rwanda. Norway thus became the very first country to extradite an individual wanted for genocide and crimes against humanity to Rwanda.[125]

14.7.3. Interstate Disputes over the Publication of Notices and Diffusions Related to Serious International Crimes

The 2004 resolution has therefore led to successful international police co-operation. Yet, it also had one unintended outcome. Disputes between INTERPOL's member countries over the publication of Red Notices and circulation of diffusions related to serious international crimes.

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[124] Ronald K. Noble, INTERPOL Secretary General, Opening Address at the 6th International Expert Meeting on Genocide, War Crimes and Crimes against Humanity, Kigali, Rwanda, 14 April 2014 (https://www.legal-tools.org/doc/55c6c5/).

[125] *Ibid*.

In less than five years following the adoption of the 2004 resolution, INTERPOL's organs had to deal with no less than six disputes between member countries over requests relating to genocide, crimes against humanity or war crimes cases. Though the six disputes involved different countries and different situations, they all shared the same characteristics. They were all very complex and highly political, involving officials and former officials, sometimes at the highest level. The requests generated strong formal protests by the countries whose officials were sought via notices or diffusions. These disputes were not technical disagreements between INTERPOL NCBs; rather, they were interstate disputes for all intents and purposes.[126]

The proliferation of those highly political disputes carried with it negative implications for INTERPOL's work. Notably, they significantly increased the risk of the Organization being drawn into political debates, thus threatening its independence and neutrality and preventing it from carrying out its mandate as an international organisation dealing with police matters rather than political ones. It was therefore considered imperative to identify another policy change, one that would strike the appropriate balance between enhancing international police co-operation in this field of criminality, on the one hand, and preventing interstate disputes, on the other. To that end, the matter was brought before INTERPOL's Executive Committee in 2009 and then before the General Assembly in its annual meeting of 2010.

14.8. Striking a Balance: The 2010 Resolution

14.8.1. The Executive Committee's Interim Policy

The new policy, proposed by the General Secretariat, was first endorsed as an interim procedure by INTERPOL's Executive Committee in its meeting of June 2009. According to this procedure, co-operation relating to Red Notice requests based on war crimes charges would continue with international tribunals but would be excluded where a member country protested against a request submitted by another member country pertaining to a national of the protesting country. The interim policy was dis-

[126] Martha, 2010, p. 63, see *supra* note 8: "The careful drafting of Article 24 notwithstanding, it cannot mask the fact that disputes between NCBs are, ultimately, disputes between governments".

cussed by the Executive Committee at its October 2009 session and shortly afterwards by the General Assembly in its 2009 meeting. The implementation of the interim policy proved to be successful. From June 2009 to October 2010 it allowed for the publication of over 100 Red Notices based on charges of genocide, crimes against humanity and war crimes. During this test period, the interim policy led to the denial of Red Notice requests in only two instances, where, without the application of the new policy, the publication of the Red Notices would have quickly evolved into complex interstate political disputes.

14.8.2. The 2010 General Assembly Resolution

In light of the success of the interim policy, the matter was brought before the General Assembly in 2010 with a view to transforming the interim policy into a permanent one. The General Assembly adopted the proposed resolution on Co-operation with New Requests Concerning Genocide, Crimes against Humanity and War Crimes.[127] The resolution recalled previous General Assembly resolutions in this field, but also expressed concern over the increase in the number of requests for police co-operation that raised doubts over their compliance with Article 3 of the Constitution and that led to disputes. The General Assembly therefore decided as follows:

> […] in addition to the application of INTERPOL's general rules and regulations with regard to processing of requests for international police co-operation, the processing via INTERPOL channels of new requests concerning genocide, crimes against humanity and war crimes shall continue with regard to:
>
> 1. Requests submitted by international tribunals;
> 2. Requests submitted by entities established by the United Nations Security Council, subject to the specific arrangements agreed upon with regard to such requests;
> 3. Requests submitted by member countries, except in cases where the request concerns a national of another member country, and that other member country, upon being in-

[127] INTERPOL, General Assembly, resolution, Co-operation with New Requests Concerning Genocide, Crimes against Humanity and War Crimes, 11 November 2010, AG-2010-RES-10 ('2010 Resolution') (https://www.legal-tools.org/doc/cfce37/).

> formed by the General Secretariat of the request, protests against the request within thirty days.[128]

14.8.3. The Interpretation and Implementation of the 2010 Resolution[129]

The 2010 resolution did not aim at changing any substantive rules related to the processing of information via INTERPOL's channels. Rather, the objective of the new policy was to serve as a specific procedure in this crime area, adopted with a view to reducing the number of disputes between member countries. Thus, the new policy serves as a *lex specialis* rule governing potential disputes between member countries over the processing of data based on charges related to serious international crimes. Where the request for police co-operation concerns a national of another member country and that member country protests, the new policy will apply, instead of engaging in the standard procedure for settlement of disputes provided for in INTERPOL's rules.[130]

In light of the sensitive nature of the subject and considering the cases that have required consideration by the General Secretariat since the adoption of the resolution, the implementation of the resolution requires some clarification. The main points are as follows.

14.8.3.1. Scope *Ratione Materiae* and *Ratione Temporis*

The resolution applies to all types of requests for police co-operation (including notices, diffusions and messages) based on charges of genocide, crimes against humanity and war crimes, received at the General Secretariat after 9 November 2010 (the date of adoption of the resolution). The implementation of the resolution prevents publication of notices and registration of information if the request is submitted or circulated by a member country against a national of another member country and the

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[128] *Ibid*.

[129] I would like to thank Patricia Ramos Pinto, my former colleague, for her contribution on this part.

[130] INTERPOL RPD, Art. 135(1), see *supra* note 14, provides for a procedural rule in handling disputes between member countries, which reads as follows: "Disputes that arise in connection with the application of the present Rules should be solved by concerted consultation. If this fails, the matter may be submitted to the Executive Committee and, if necessary, to the General Assembly".

latter country opposes the request within 30 days of being informed thereof by the General Secretariat.

Hence, the resolution continues to allow publication of notices and registration of information in the following cases:

- the request is submitted by international tribunals;
- the request is submitted by entities established by the UN Security Council, for example, the United Nations Interim Administration in Kosovo,[131] subject to specific agreements concerning the conditions and treatment of such requests;
- the request is submitted by a member country against its own nationals;
- the request is submitted by a member country against a national of another member country and the latter does not protest against the request within 30 days of being informed thereof by the General Secretariat.
- the request renews a previous request submitted prior to the adoption of the resolution.

14.8.3.2. Multiple Nationalities

The resolution introduced a new procedure when a request concerns "a national of another member country". Accordingly, a question arises with regard to the implementation of the resolution where the individual concerned is a national of more than one country. In that regard, two scenarios have been identified.

Scenario A. The individual concerned is a national of the requesting country and of another country (or other countries). In such a case and as a general rule, the resolution should not apply. This conclusion is based on the following reasoning. First, the resolution refers to requests concerning "a national of *another* member country" (emphasis added). An individual who holds the nationality of the requesting country is not a na-

[131] The United Nations Interim Administration in Kosovo ('UNMIK') was created following the adoption of United Nations Security Council, resolution 1244, 10 June 1999, UN doc. S/RES/1244 (https://www.legal-tools.org/doc/80cf5a/). In 2002 a Memorandum of Understanding ('MOU') was signed between INTERPOL and UNMIK, granting the latter the rights accorded to an NCB, *mutatis mutandis*, including the possibility of seeking the publication of INTERPOL's notices (http://www.interpol.int/About-INTERPOL/Legal-materials/International-Cooperation-Agreements).

tional of another country but rather *also* a national of another country. In addition, the interpretation of the resolution should be made while bearing in mind the background for its adoption. As mentioned, the primary impetus for the new policy was the increase in the number of disputes between member countries related to this crime area. An examination of those disputes reveals that they all erupted where the individual concerned was a national of the protesting country and not of the requesting country. This finding also corresponds to the alleged illegal acts of the individuals concerned, which were often conducted in an official capacity (including politicians and military officers) of the country of nationality, hence further explaining the reason for the protest on behalf of the country of nationality. Notwithstanding the above general conclusion – namely the non-application of the resolution in scenario A – one cannot rule out the possibility of invoking it in certain circumstances involving an individual who is a national of the requesting country. For example, consideration should be given to a situation where the protest is raised by a UN administration of a territory that in the past was part of the requesting country and therefore the individual concerned is still a national of that country. Such situations should therefore be assessed on a case-by-case basis.

Scenario B. The individual concerned has multiple nationalities of countries other than the requesting country. In this scenario, the resolution should apply to all other countries of nationality since the rationale behind the resolution – namely avoiding potential disputes – exists in this scenario in the same manner it exists when the individual has only one nationality. Accordingly, in such a case all countries of nationalities are informed of the request and are given the opportunity to protest.

14.8.3.3. Requests from Countries that Receive the Case or Gain Jurisdiction from an International Tribunal

Aware of the fact that the *ad hoc* tribunals were established with a temporary purpose, the President of the ICTY drew up the so-called Completion Strategy, that is, a policy intended to conclude cases within a certain time frame and transmit the remaining and less serious ones to national jurisdictions. The UN Security Council supported this policy by means of resolutions 1503 (2003) and 1534 (2004), both adopted under Chapter VII of the UN Charter. In resolution 1503, the UNSC stressed that the ICTY and ICTR should focus on the "most senior leaders suspected of being most responsible for crimes" within their jurisdiction while "transferring cases

involving those who may not bear this level of responsibility to competent national jurisdictions".[132] In that resolution the UN Security Council also called on the international community "to assist national jurisdictions, as part of the completion strategy, in improving their capacity to prosecute cases transferred from the ICTY and ICTR" and to "intensify cooperation with and render all assistance" to the *ad hoc* tribunals.[133]

In light of the above, whenever a request is circulated by a member country that has gained jurisdiction via the transfer of proceedings or relinquishing of jurisdiction by an international tribunal in the context of the Completion Strategy, the request addressed against nationals of another country can be perceived as if it were submitted on behalf of that international tribunal or in application of its mandate and jurisdiction, thus falling under point (1) of the resolution (requests from international tribunals) rather than point (3). Indeed, a different conclusion may undermine the effort of countries to comply with obligations imposed under Chapter VII of the UN Charter. Accordingly, in such cases, the normal procedure for assessing requests shall apply rather than that of the new policy as provided for in point (3) of the resolution.

14.8.3.4. Requests from Hybrid Tribunals

In addition to the *ad hoc* international tribunals of the ICTY and ICTR, a second generation of tribunals of international character emerged. These tribunals are often referred to as "hybrid tribunals" since their nature is mixed, incorporating both international and national features. Examples of this kind can be found in Cambodia, East Timor, Kosovo, Lebanon, Senegal and Sierra Leone. These tribunals vary one from the other with regard to their composition and their applicable substantive and procedural rules.

INTERPOL has concluded a co-operation agreement with some tribunals, such as those for Sierra Leone and Lebanon. Requests from such tribunals are processed in accordance with the co-operation agreement. In general, these tribunals are considered to be "international tribunals" in the meaning of the resolution, that is, the special procedure requiring consultation with the country of nationality does not apply.

[132] UN Security Council, resolution 1503, see *supra* note 117.
[133] *Ibid*.

Requests from other hybrid tribunals are first assessed in light of the nature of the particular tribunal and to ensure no other concerns related to INTERPOL's rules arise. In that regard, it is also noteworthy that the reference to "international crimes" in the title or the statute of a particular tribunal does not make it an international tribunal in the meaning of the resolution. For example, if one of INTERPOL's member countries decided to establish an "international crimes tribunal" for the purpose of investigating and prosecuting suspects of the genocide committed in the country, this tribunal would be considered a national tribunal that does not possess an international character. Accordingly, requests from the tribunal submitted to INTERPOL via the NCB of the country are considered under point (3) rather than point (1) of the resolution.

Conversely, upon assessing a request sent from the NCB Dakar based on arrest warrants issued by the Extraordinary African Chambers, which were created in Senegal in 2013 to try the persons most responsible for genocide, crimes against humanity, war crimes and torture committed in Chad from 7 June 1982 to 1 December 1990, it was concluded that the Chambers are of international character in the meaning of the resolution and its requests should therefore be assessed under point (1). The Chambers were created following an international agreement between the African Union ('AU') and the Government of Senegal, and is composed of both Senegalese and other African judges, all appointed by the Chairperson of the AU Commission. The conclusion on the non-applicability of the new procedure provided for in point (3) of the resolution was also supported by the fact that Chad supports the work of the Chambers, a fact that reduces the risks of potential interstate disputes over the circulation of the request by NCB Dakar.

14.9. INTERPOL's Current Activities in Combating Serious International Crimes

Identifying the proper balance when addressing requests for police cooperation related to genocide, crimes against humanity and war crimes has enabled INTERPOL to focus its activities in this field on three main areas: operational support to national authorities and international justice institutions; training and development; and building partnerships.[134] The

[134] INTERPOL's website, available at http://www.interpol.int/Crime-areas/War-crimes/War-crimes, last accessed at 13 September 2015.

first pillar includes activities such as the publication of INTERPOL notices and assisting in tracing fugitives. Among INTERPOL's recent activities under that pillar was the creation of Project BASIC (Broadening Analysis on Serious International Crimes), which targets fugitives wanted for genocide, war crimes and crimes against humanity. Within this framework, INTERPOL co-operates with national authorities and international institutions to locate, arrest and develop information concerning individuals suspected of these crimes. Under the second pillar, INTERPOL plays a key role in enhancing capability among investigators of serious international crimes. This includes organising an annual intensive international training course, which brings together law enforcement and justice officials from various countries as well as international organisations to share best practices for successfully investigating heinous crimes. Finally, in the context of building partnerships under the third pillar, INTERPOL holds an annual activities International Expert Meeting on Genocide, War Crimes and Crimes against Humanity, which provides a forum for information and discussion among specialists.

14.10. Conclusion

In 2014 INTERPOL marked 100 years of international police co-operation, a journey that began at the first International Criminal Police Congress, which took place in Monaco on the eve of the First World War. The centenary coincided with the twentieth anniversary of the historic policy decision of INTERPOL's General Assembly regarding co-operation with the ICTY, which in turn paved the way for successful initiatives in combating serious international crimes in collaboration both with international tribunals and member countries. Admittedly, that policy change came decades too late and INTERPOL was rightly criticised for adopting a very conservative legal and policy position that may have played into the hands of Nazi and other war criminals. Certain obstacles persisted even after 1994, requiring the Organization to reconsider and adjust its policies to ensure the proper balance between promoting international police co-operation, on the one hand, and ensuring that INTERPOL would not be drawn into interstate political quarrels and thereby compromise its neutrality, on the other. While it might be premature to reach definitive conclusions, a five-year assessment of the recent change made to INTERPOL's policy demonstrates that the appropriate balancing

point may have been identified. The pendulum has finally found its equilibrium.

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Historical Origins of International Criminal Law: Volume 4

Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (editors)

This fourth volume in the series Historical Origins of International Criminal Law concentrates on institutional contributions to the development of international criminal law rather than taking a chronological (Volumes 1 and 2) or doctrinal (Volume 3) approach. It analyses contributions made by institutions such as the Nuremberg, Tokyo, ex-Yugoslavia and Rwanda tribunals, INTERPOL, the International Association of Penal Law, the Far Eastern and Pacific Sub-Commission, and internationalised fact-finding mandates. It considers the role played by some jurisdictional principles and work methods of international and national institutions. Part 4 also looks at wider trends in the development of international criminal law

The contributors include Wegger Christian Strømmen, LING Yan, Anuradha Bakshi, ZHU Wenqi, Volker Nerlich, David Re, LIU Daqun, Serge Brammertz, Kevin C. Hughes, Patricia Pinto Soares, Mareike Schomerus, Seta Makoto, Natalia M. Luterstein, Hilde Farthofer, Itai Apter, Md. Mostafa Hosain, Helge Brunborg, Mutoy Mubiala, Yaron Gottlieb, Mark A. Lewis, Marquise Lee Houle, Tina Dolgopol, Rahmat Mohamad, Barrie Sander, Furuya Shuichi, Chris Mahony, ZHANG Binxin and the editors.

In his foreword, Wegger Christian Strømmen notes that the four-volume project "draws our attention to the common legacy and interests at the core of international criminal law. By creating a discourse community with more than 100 scholars from around the world, [CILRAP] has set in motion a wider process that will serve as a reminder of the importance of the basics of international criminal law".

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