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A transnational police network co-operating up to the limits of the law: examination of the origin of INTERPOL

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ABSTRACT

INTERPOL was not created by a treaty, nor was it created by states. INTERPOL was developed by a group of diverse domestic police officers, who structured the international entity and designed its legal framework in order to co-operate within the limits set by the laws of their respective countries. As a product of the police environment, for many years INTERPOL was constituted in a way that made it look like a private police club, feeding the general confusion concerning the membership, the role, and the legal status of the organisation. Addressing many of the historical traits of INTERPOL provides a key for understanding the reasons behind the current configuration of central parts of INTERPOL's legal framework, as well as their past and present significance. For this purpose, this article explores the history of INTERPOL by presenting fragments of historical legal documents, which are then analysed and contextualised.

KEYWORDS INTERPOL; legal history; international organisation; police; transnational network

1. Introduction

Nowadays, international police cooperation takes place in furtherance of tackling transnational and international crime. Collaboration is often uninterrupted, and is regularly conducted through complex structures of cooperation (the likes of INTERPOL), regional bodies (such as Afripol or Europol), or even through less defined entities.¹ However, up until the twentieth century, international police cooperation had a different function and

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¹ Anthony L Sciarabba and Christopher G Sullivan, 'Transnational Crime and the Law: An Overview of Current Practices' in John A. Eterno and Dilip K. Das (eds), *Police Practices in Global Perspective* (Rowman & Littlefield Publishers 2010) 225–250; Bryn Hughes, Charles T Hunt and Jodie Curth-Bibb, *Forging New Conventional Wisdom Beyond International Policing: Learning from Complex Political Realities* (Brill 2013).

scope, having mainly been used as a way to track down political dissidents on behalf of governments.²

A shift occurred at the beginning of the twentieth century as police officers in Europe and beyond began to value belonging to a common network focused on the fight against ordinary crime.³ Eventually these values became so dominant among officers that at times cooperation on police matters occurred independently of, and in certain instances, in opposition to the will of their own countries of origin. This existing network provided the basis for the creation and development of the truly international, yet quite unique, system of cooperation that is the current INTERPOL.⁴ A product of the police environment, for many years INTERPOL was constituted in a way that made it look like a private police club,⁵ feeding the general confusion on the international scene regarding the membership, role, and legal status of the organisation.

Addressing the historical traits of INTERPOL is key to understanding the reasons behind the current configuration of fundamental parts of INTERPOL's legal framework, as well as their past and present significance. For this purpose, this article explores the history of INTERPOL by presenting fragments of historical legal documents, which are then analysed and contextualised.

The starting point for this analysis is the genesis of INTERPOL. INTERPOL was not created by a treaty, nor was it created by states.⁶ INTERPOL was developed by a diverse group of domestic police officers,⁷ who structured an international entity and designed its legal framework in order to enable cooperation within the limits set by the laws of their respective countries. The historical reasons behind the choice to create a complex structure of international cooperation through an unusual constitutive legal document rather than through a treaty will also be discussed. This discussion is meant to provide clarification on the consequences of this choice for the legal status of the organisation.

Following this discussion, the article explores the content of several historical legal documents, in order to analyse two different sets of legal provisions: those defining the aims of INTERPOL, and those defining the membership of INTERPOL. The way both sets of provisions were drafted, exemplifies the struggle of INTERPOL in searching to find a balance between efficiency

² Peter Andreas and Ethan Nadelmann, *Policing the Globe: Criminalization and Crime Control in International Relations* (Oxford University Press 2006).

³ Barnett Michael and Liv Coleman, 'Designing Police: Interpol and the Study of Change in International Organizations' (2005) 49(4) *International Studies Quarterly* 593.

⁴ *Ibid.*

⁵ *Ibid.*, 606.

⁶ Modern literature tends to view the rationale behind the creation of an international organisation as the aim of international actors (traditionally states) 'to create an entity that allows them to meet their ends'. See Jan Klabbers, *An Introduction to International Organizations Law* (Cambridge University Press 2015).

⁷ Cyrille Fijnaut, 'The International Criminal Police Commission and the Fight against Communism, 1923–1945' in Mark Mazower (ed), *The Policing of Politics in the 20th Century* (Berghahn Books 1997).

and independence in cooperation, and legitimacy in the eyes of the international community.

2. The Dawn of the modern era of international police cooperation

Concerted attempts by countries to tackle international criminal activity on the bilateral or multilateral level are certainly not a novelty on the international scene as they have taken place for thousands of years.⁸ If we examine the modern period, the first bilateral and informal agreements, specifically on matters of police cooperation, can be traced back to Europe and the seventeenth century.⁹ It is however in the nineteenth century that police cooperation truly began to flourish, if only at the European regional level.¹⁰ A brief chronological outline of the first attempts at cooperation is provided below.

The Treaty of Paris 1801 is one of the first examples of formal bilateral agreements on matters of police cooperation.¹¹ With this treaty, Napoleon I of France and Alexander I of Russia agreed to mutually engage in tackling the political dissidents inside their respective jurisdictions.¹²

Another key period in the history of international police cooperation was the intense activity of Clemens von Metternich.¹³ Metternich was the Austrian foreign minister for almost the entire first half of the nineteenth century. During his tenure, he fostered cooperation among police forces of several different states for the purpose of pursuing dissidents.¹⁴ Worth mentioning is that Metternich promoted a *modus operandi*, consisting *inter alia* of a constant exchange of information which provided a blueprint for the development of the more modern systems of cooperation in the following century.¹⁵

Starting in 1848, a wave of revolutionary movements began to shake the foundations of autarchic power structures across Europe. As a reaction to this, international police cooperation increased to keep track of dissidents both inside and outside borders. Such intense activity gave rise to the period of so-called '*international political policing*'.¹⁶ Significantly, the revolutionary movements caused several institutions to be restructured and

⁸ Andreas and Nadlemann, (n 2).

⁹ Mauro Romani, *Servizi di polizia internazionale, cooperazione giudiziaria e terzo pilastro dell'Unione europea* (CEDAM 2009).

¹⁰ Nadia Gerspacher, 'The History of International Police Cooperation: A 150-Year Evolution in Trends and Approaches' (2008) 9(1–2) *Global Crime* 169; Mathieu Deflem, 'International Police Cooperation—History of', in Richard A Wright and Mitchell J Miller (eds), *The Encyclopedia of Criminology* (Routledge 2005) 795–798.

¹¹ Andreas and Nadlemann, (n 2).

¹² *Ibid*, 65.

¹³ *Ibid*, 66.

¹⁴ *Ibid*.

¹⁵ Mathieu Deflem, *Policing World Society: Historical Foundations of International Police Cooperation* (Oxford University Press 2002).

¹⁶ *Ibid*, 47.

modernised, as states attempted to improve their law enforcement structures to counteract the political upheavals with more efficiency.¹⁷ This in turn led to a harmonisation of practices and standardisation of institutions and organisations dedicated to policing across the region, which in itself later became a useful asset for allowing further effective cooperation.¹⁸

In 1851, the political context proved to be fertile ground for the development of the *Polizeiverein*, literally ‘police association’,¹⁹ better known by the names ‘The Police Union of German States’ and ‘Police Union of the More Important German States’.²⁰ The Union was an initiative set up among German speaking countries, once again for the purpose of policing dissidents. Among its various functions, the *Polizeiverein* was developed as a tool to counteract the insurgence of communism, and in general to contain and prevent various types of subversive activities, such as the spreading of propaganda material or the organisation of illegal secretive meetings.²¹ The Union marked another step in the evolution of cross border police cooperation, albeit limited in its scope by operating solely in the German language and consisting of only seven countries of the German Confederation.²² As an openly political police organisation, it was also limited in scope in that it wilfully neglected the policing of ordinary crime.²³ The Union’s *modus operandi* consisted of organising conferences, spreading information among policing institutions, and circulating magazines with pictures of wanted individuals.²⁴ The start of the Austro-German War in 1866 ended this cooperation and led to the dismantlement of the Union.²⁵

Towards the end of the nineteenth century, anarchist movements were wreaking havoc across Europe. These movements tended to be transnational in nature, and thus posed unprecedented and significant challenges for police institutions. To tackle the issue, a conference titled ‘International Conference of Rome for the Social Defence Against Anarchists’ was organised in Italy in late 1898.²⁶ The conference lasted for almost a month, and attracted a notable number of dignitaries, diplomats, and police officers from more than 20 European countries.²⁷ Due to the results it produced, and even more importantly the results it strived to produce, the conference is worthy of further

¹⁷ Deflem, (n 15).

¹⁸ *Ibid.*

¹⁹ Fijnaut, (n 7) 108.

²⁰ Mathieu Deflem, ‘International Policing in Nineteenth-Century Europe: The Police Union of German States, 1851–1866’ (1996) 6(1) *International Criminal Justice Review* 42.

²¹ Fijnaut, (n 7).

²² Mathieu Deflem, ‘Bureaucratization and Social Control: Historical Foundations of International Police Cooperation’ (2000) *Law and Society Review* 739.

²³ Deflem, (n 20).

²⁴ *Ibid.*

²⁵ Fijnaut, (n 7).

²⁶ See Deflem, (n 15) 67 and Richard Bach Jensen, ‘The International Anti-Anarchist Conference of 1898 and the Origins of Interpol’ (1981) 16(2) *Journal of Contemporary History* 323.

²⁷ Deflem, (n 15) 67.

examination.²⁸ First, it stimulated the development of common techniques of policing. Among these techniques were the use of standardised methods of policing and the exchange of information among states.²⁹ In order to promote cooperation, countries were instructed to build ad hoc agencies for policing anarchist movements with the intention that those agencies would have the capability of directly exchanging information at the police level with corresponding police agencies in different countries, thus bypassing the cumbersome traditional use of diplomatic channels.³⁰ This was a significant innovation, adopted decades later by the International Criminal Police Commission (ICPC) and INTERPOL.³¹ Additionally, the conference focused on harmonising anarchy related offences (such as illegality of membership, possession of weapons or explosives, and various forms of assisting or promoting anarchist movements).³² However, it should be noted that these legislative measures, even if enthusiastically welcomed during the conference, bore little or no results once the delegates returned to their respective countries of origin.³³ Finally, the conference induced the creation of an agreement among countries to implement a clause in pre-existing extradition treaties called the *Belgian Clause*, or the *Attentat Clause*.³⁴ It allowed the extradition of individuals who had attempted or succeeded in attacking, murdering, or kidnapping a head of state or one of their family members.³⁵

In addition to the attempts at cooperation mentioned above, there were other efforts to foster collaboration. In most cases, international cooperation among countries with different political backgrounds tended to happen solely on a bilateral level and on a case-by-case basis, often due to spontaneous networking of police officers. Cooperation on a larger scale at a multilateral level took place only for short periods of time within a reduced scope and a narrower focus on specific crime areas.³⁶ As such, it is safe to say that in all these instances, international police cooperation lacked a systematic character.³⁷

²⁸ Deflem, (n 15).

²⁹ *Ibid.*, 67.

³⁰ Andreas and Nadelmann, (n 2) 84.

³¹ *Ibid.*; The points of significance in increasing direct communication among police services of different countries instead of other (diplomatic) channels are numerous and pose both practical benefits and complex legal challenges. See Giulio Calcara, 'Preventing the Misuse of Interpol: A Study on the Legal Safeguards of the Organization' (2018) 87(1) *Nordic Journal of International Law* 56 and Giulio Calcara, 'Rethinking Legal Research on Matters of International Police Cooperation: Issues, Methods and Raison d'Être' (2019) 40 *Liverpool Law Review* 95.

³² Deflem, (n 15) 67.

³³ Andreas and Nadelmann, (n 2) 84.

³⁴ *Ibid.*

³⁵ *Ibid.*; Deflem, (n 15) 68.

³⁶ Deflem, (n 22); Fijnaut, (n 7).

³⁷ Interestingly, the Police Union of German States is defined by legal historians as a semi-official organisation due to its unclear nature in respect to its legal status. See Herbert Reinke, 'Policing politics in Germany from Weimar to the Stasi', in Mark Mazower (ed), *The Policing of Politics in the 20th Century* (Berghahn Books 1997) 91–106.

3. Premier Congrès de police judiciaire internationale

On INTERPOL's website, 1914 is identified as a symbolic date for the organisation.³⁸ More specifically, the date marks the birth of the *idea* of creating a new complex system of international police cooperation.³⁹

This idea was presented in Monaco, where a meeting was organised by the chief of the local police to foster international police cooperation.⁴⁰ The meeting was titled *Premier Congrès de police judiciaire internationale*, and its main promoter was the Prince of Monaco, Albert I.⁴¹ It is hardly a coincidence that the monarch of such a small nation was interested in promoting international police cooperation on a large scale. Due to its geographical location, well-known wealth, and minute dimensions, Monaco was in fact ideal prey exposed to the transit of criminals and trans-border criminal activities.⁴²

The meeting in Monaco saw many significant proposals in the field of international policing. However, none of them ended up being implemented, as the advent of World War I abruptly cut off any hope for cooperation.⁴³

There are reasons to believe that even if the war had not taken place, the meeting would have failed to deliver the desired results.⁴⁴ The meeting was attended mainly by politicians, diplomats and legal experts.⁴⁵ All the relevant proposals reflected the participants' expectations of what the role of the police sector should be and barely took into account the actual wishes and expectations of police officers. For explanatory purposes, it is possible to make reference to some parts of the document produced at the meeting called *Summary of the Wishes Expressed at the Sessions or Assemblies Held on 15, 16, and 18 April 1914*.⁴⁶ It contained recommendations for countries to adopt specific legislation in order to foster cooperation, and listed several proposals divided per thematic area.

According to Section a) Paragraph 1, the aim of the congress was to increase cooperation among police institutions, as:

³⁸ INTERPOL, 'History' online: <<https://www.interpol.int/About-INTERPOL/History>> accessed 18 September 2019.

³⁹ *Ibid*; RE Kendall, 'International Co-operation – Extra Territorial Enquiries, Extradition and Surrender of Fugitives, Exchange of Information' (1988) 11(1) *Police Studies: The International Review of Police Development* 18.

⁴⁰ Andreas and Nadlemann, (n 2) 86.

⁴¹ *Ibid*; Deflem, (n 15) 102.

⁴² Andreas and Nadelmann, (n 2). Other reasons could have been cited as to why Albert took the promoting of international police cooperation to heart. See Fenton S Bresler, *Interpol* (Viking 1992).

⁴³ It is relevant that a follow-up meeting had been planned to take place in Bucharest, in order to continue the work started in Monaco. See Andreas and Nadelmann, (n 2) 87, and Deflem, (n 15) 103.

⁴⁴ Deflem, (n 22) 752–754. To validate Deflem's hypothesis, it can be noted that the organisation of the original meeting was indeed the product of the will of a prince, and not of a police agent.

⁴⁵ Rutsel Silvestre J Martha, *The Legal Foundations of Interpol* (Hart Publishing 2010).

⁴⁶ INTERPOL, *Summary of the Wishes Expressed at the Sessions or Assemblies Held on 15, 16, and 18 April 1914*, online: <https://www.interpol.int/content/download/614/file/Congress%20of%201914%20EN_LR.pdf> accessed 18 September 2019.

(a) General police matters

I. The First International Criminal Police Congress expresses the wish to see direct, official contacts between police forces of the different countries generalized and improved, so as to allow all investigations likely to facilitate the action of criminal justice.⁴⁷

However, once the general auspices are assessed in light of the document's concrete proposals, it becomes transparent how governments and other institutions had the capacity of intervening, or acting as intermediaries, in the cooperation process among police institutions. For instance, in section d) Paragraph IX and X, several recommendations were made in matters of extradition:

(d) Extradition

IX. The First International Criminal Police Congress expresses the wish for international-law and criminal-law associations to include, on the agendas of their meetings, the study of a model extradition treaty, and asks them to report back on the outcome of their deliberations at the next International Criminal Police Congress.

X. As an indication, and in order to expedite the procedure, the Congress expresses the wish for international treaties and the model treaty to allow the direct transmission of extradition requests between the appropriate judicial authorities, subject to the requirement that these authorities immediately inform the Ministry of Foreign Affairs for reference purposes and to allow the Government to exercise its prerogatives.⁴⁸

In this specific instance, the exchange of documents could not happen through police entities, but solely through judicial ones. Additionally, governments were supposed to maintain the prerogative of intervening at any given time during the processes. This was clearly at odds with the police mentality of the time as by the beginning of the twentieth century, several police institutions had already formed a technical and professional identity. As such, police officers willing to cooperate on the international level were attempting to detach themselves from strict national political ties.⁴⁹ More specifically, police officers appeared to be growing frustrated with the overly rigid legal approaches of the time, seen only as a hindrance to police work. For these reasons, it is possible to conclude that the meeting in Monaco proposed a state-centric type of cooperation in the field of international policing that was already outdated at the time of its proposal.

4. International criminal police commission

Moving forward a few but crucial years in time, it is possible to note how the international post-World War I scenario immensely differed from the pre-war

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ Deflem, (n 22) 754.

era. New borders had been drawn, and new sovereign states had been born inside a war-torn Europe. Additionally, in this period of transition, new forms of transnational criminality thrived and prospered.⁵⁰ As Bresler points out, there was a significant shift from the ‘international villainy of affluence’ to the ‘criminality of the poor, the hungry and the gullible—tinged with political violence and ruthlessness from militants on all sides’.⁵¹ All these circumstances made international police cooperation a priority.

The President of the Police of Vienna, Dr Johann Schober,⁵² who had played a part in organising the first conference in 1914, decided to arrange another meeting to revisit and update the ideas that had been put forth in Monaco.⁵³ The meeting ended up taking place in Vienna, in September 1923, and was called The International Police Congress.⁵⁴ Being a police officer himself, Schober had a clear understanding of both the *forma mentis*, the wishes and expectations of contemporary police officers, and the practical needs of police forces.⁵⁵ Thus, from the outset, the new meeting commenced under drastically different conditions than the one of 1914. Formal invitations were sent to 300 police chiefs worldwide, while a mere 30 invitations were sent to higher ranking national heads of police services.⁵⁶ Thus, the meeting turned out to be a congress of police officers from different countries, who mostly had a limited connection to the political and diplomatic realm, or national interests.⁵⁷ This had an effect on the outcome of the congress, which ended up focusing on the promotion and development of a police-centric approach to cooperation, rather than a state-centric one, as was the case during the 1914 conference.

4.1. The rationale behind the creation and the purpose of the ICPC

The International Police Congress laid down the basis for the development of an entity and a system of cooperation that has survived in different forms to this day.⁵⁸ It was in fact during the congress, on the 7th of September 1923,

⁵⁰ Bresler, (n 42).

⁵¹ *Ibid*, 15.

⁵² Bresler, (n 42) 16. Schober was at the time the former Chancellor of Austria and both the police chief of Vienna and the head of the state police force. See Encyclopaedia Britannica, ‘Johann Schober Prime Minister of Austria’ online: <<https://www.britannica.com/biography/Johann-Schober>> accessed 18 September 2019.

⁵³ Gerspacher, (n 10).

⁵⁴ Deflem, (n 15) 124.

⁵⁵ Deflem, (n 15); Bresler, (n 42).

⁵⁶ Bresler, (n 42) 17; Among those who heeded the call were delegates from the vast majority of Western European police forces, the Chinese police force (although they arrived at the end of the conference), the Egyptian police force, the Japanese police force, and the police force of the United States.

⁵⁷ Adam Masters, ‘INTERPOL: From Vienna to Canberra—The Evolution of Australia’s Relationship with INTERPOL (1923–1975)’ (2011) 65(2) *Australian Police Journal* 59.

⁵⁸ Deflem, (n 22).

that the ICPC was formed through a resolution. Included in the constitutive document was the *Statute of the Commission*, both in German and French.⁵⁹

To comprehend the legal basis and the foundations of the Commission, it is essential to expand on the rationale behind the creation of the ICPC. A translation by Fijnaut of an excerpt of the speech of Schober concerning the future role of the ICPC provides valuable insight on this matter:

From the proceedings of the Vienna congress we can see that many of the participants were imbued with the idea that they had a common mission to reinforce the commonwealth of civilised nations by fighting against the enemies of human society.⁶⁰

According to the chronicles of the time, the speech was met with approval and applause,⁶¹ illustrating Schober's successful engagement with the aforementioned police professional identity and sensibility of the time. More than that, there appeared to be a diffuse sense of belonging among police officers. This signalled the development of an independent, transnational police network,⁶² a network united by intention.

Logically, the growth of a common police culture found fertile ground in the gradual bureaucratic autonomy of domestic police institutions inside individual states.⁶³ This newfound autonomy was crucial on more than one level, as a certain degree of autonomy appears to be in general a necessary condition to achieve true international police cooperation.⁶⁴

For the sake of clarity, it should be specified that while feeling part of a network, and while enjoying independence in their working activities, police officers were still in tune with their own countries of origin. As Deflem points out:

Importantly, the acquired independence of police institutions participating in the ICPC did not imply a surrender of national sovereignty. On the contrary, the ICPC was set up explicitly—and INTERPOL still operates today—not as a supranational force but as an inter-national network enabling direct communications between police of different countries.⁶⁵

This duality of police officers working inside the Commission as independent members of a transnational network while simultaneously working in service

⁵⁹ INTERPOL, 'Resolutions du Congrès International de police à Vienne' (3–7 Septembre 1923), online: <<https://www.interpol.int/content/download/5667/file/1923-Resolutions.pdf>> accessed 03 May 2020.

⁶⁰ Fijnaut, (n 7) 112.

⁶¹ *Ibid.*

⁶² More information on the development of this police network can be found in the works of Deflem. See Deflem, (n 15).

⁶³ *Ibid.*

⁶⁴ Additional information can be found on this topic in the works of Deflem on bureaucratisation, especially in Deflem, (n 22), and Mathieu Deflem, 'Police (and Transnational History)' in Akira Iriye and Pierre-Yves Saunier (eds), *The Palgrave Dictionary of Transnational History* (Palgrave Macmillan 2009) 837–839.

⁶⁵ Deflem, (n 15) 136.

of their own countries has truly characterised the development of INTERPOL from its origin to present day.⁶⁶ This became particularly evident in the next phases of INTERPOL's history.

Due to its peculiar nature and importance, it is apt to elaborate on the origin, meaning and value of this transnational police network. This network likely has part of its roots in the international political policing units of the previous century.⁶⁷ Despite these shady origins, historians are lead to believe that at the time of the ICPC's creation, a large number of officers in this police network valued themselves as non-political, and shared a genuine interest in promoting cooperation against ordinary forms of crime.⁶⁸ The fact that individual countries had little to no involvement in the creation of the ICPC, made the depoliticisation of the police environment plausible.⁶⁹ Additionally, as previously mentioned, many police officers saw, at least since the beginning of the twentieth century, the involvement of states as an avoidable cause of impasse for effective cooperation.⁷⁰ All of the above affected the ICPC to be designed as a system of cooperation meant exclusively for police forces. The core of the cooperation was grounded on the principle of mutual assistance among police forces of different countries. The scope of cooperation revolved around 'ordinary crime', demonstrating the Commission's true neutrality and a clear detachment from the old practices of political policing.

On a practical level, cooperation was to take place through the sharing and exchange of information on individuals sought by police forces, and by providing know-how on police training. Various devices of communication, such as telegraphs, were used as a means of direct communication among police forces, with specific precautions taken to safeguard the secrecy of transmissions. Additionally, journals were published in various languages to share information on wanted people, criminal activities and so forth.

⁶⁶ Calcara, (n 31). It was impossible for this condition to come to fruition during the political policing of the nineteenth century. In the political policing cooperation activities, police officers acted in most instances as tools to maintain the *status quo*, particularly in relation to the forms of government of their own states. Such was the case for instances of the cooperation happening through the German Polizeiverin. See Fijnaut, (n 7) 108.

⁶⁷ Fijnaut, (n 7) 113.

⁶⁸ Barnett, (n 3). However, there is no consensus in this area. See Christopher David and Nicholas Hearn, *A Practical Guide to INTERPOL and Red Notices* (Bloomsbury 2018); Malcom Anderson, *Policing the World: Interpol and the Politics of International Police Co-operation* (Clarendon Press 1989). The interest in solely fighting forms of ordinary crime could also be merely opportunistic. Since 1914, there was a steep decline of relevance on the international scene of cases of anarchist terrorism, thus making the issue of political policing obsolete in the eyes of police services. Richard Bach Jensen, *The Battle Against Anarchist Terrorism: An International History, 1878–1934* (Cambridge University Press 2014) 357–358.

⁶⁹ Fijnaut, (n 7). Schober's opening speech describing police cooperation not as a political goal, but as a cultural one is a good example of this. See Nicola Langille and Frédéric Mégret, 'Red Notices and transnational police practices' in Mikkel Jarle Christensen and Ron Levi (eds), *International Practices of Criminal Justice* (Routledge 2018) 108–130.

⁷⁰ Barnett, (n 3) 603.

4.2. The legal framework of the ICPC

At the end of the congress, the participants enacted a document titled *Resolutions du Congrès International de Police à Vienne*. It was a collection of 14 resolutions, passed during the five days of the congress. The document consisted of 12 sections. The first section contained the statute of the ICPC, while the following 11 were resolutions dealing with different key areas of police matters. The content of the resolutions ranged from the promotion of the advancement and standardisation in policing techniques, to declarations of intent concerning the need for legal reforms and for the creation of relevant treaties to prompt cooperation.⁷¹

The entire document is a prime example of the influence of the previously mentioned *forma mentis* of the police sector at the congress. Firstly, the first resolution was the legal basis for the creation of the ICPC. As such, the Commission was created unconventionally in that it was not based on legal treaties between the member countries.⁷² At the time the argument for creating an international police entity consisting of several countries without a treaty, was indeed to facilitate the ICPC to operate free from legal restraints or obligations.⁷³ However, this would become a source of uncertainty for INTERPOL in the years following,⁷⁴ as it located the organisation in an ambiguous position within the international community regarding its legal status.⁷⁵ Additionally, several specific parts of the legal framework promoted significantly innovative police-centric approaches to cooperation. For explanatory purposes, a few examples will be provided, starting with the aims of the Commission, which were stated in Article 1 of the ICPC Statute. The aims were to favour mutual assistance among police authorities according to the laws of the states which they belonged to, and the creation and development of provisions and institutions capable of supporting the fight against crime.⁷⁶ What is interesting is how this assistance would have taken place in

⁷¹ It should be noted that other resolutions were adopted in the following meetings of the ICPC. See Deflem, (n 15).

⁷² Barnett, (n 3); Mathieu Deflem, 'Interpol' in Peter N. Stearns (ed), *The Oxford Encyclopedia of the Modern World* (Oxford University Press 2008) 198–199; Matti Joutsen, 'International Instruments on Cooperation in Responding to Transnational Crime', in Philip Reichel and Jay Albanese (eds), *The Handbook of Transnational Crime and Justice* (Sage 2014).

⁷³ *Ibid.*

⁷⁴ Michael Fooner, *Interpol: Issues in World Crime and International Criminal Justice* (Plenum Press 1989).

⁷⁵ James Sheptycki, 'The Accountability of Transnational Policing Institutions: The Strange Case of Interpol' (2004) 19(1) *Canadian Journal of Law & Society/La Revue Canadienne Droit et Société* 107; Rutsel Silvestre J. Martha, 'Challenging Acts of INTERPOL in Domestic Courts' in August Reinisch (ed), *Challenging Acts of International Organizations Before National Courts* (Oxford University Press 2010).

⁷⁶ '§ 1. Le but de la "Commission Internationale de la police criminelle" est:
(a) la garantie et le perfectionnement de la plus large assistance réciproque entre toutes les autorités de police selon les lois des divers états;
(b) la création et le perfectionnement de toutes les dispositions et organisations qui sont aptes à favoriser la lutte contre les criminels.' Statute of the International Criminal Police Commission (ICPC Statute 1923) art 1.

practice. As per Section II Article 1 of the *Resolutions du Congrès International de Police à Vienne*, the cooperation among police institutions of different states should have been direct, without the involvement of intermediaries.⁷⁷ This referred particularly to the intervention of diplomacy, but through a teleological interpretation of the precise wording of the article, the statute in general, and the attitudes of the time, it becomes apparent that the involvement of judicial entities was also to be avoided. Indeed, Section II Article 3 added a new layer to the type of police to police cooperation envisaged inside the ICPC. The article contained a declaration by the authorities present at the congress to establish mutual assistance among police services.⁷⁸ In such instances in which police services decided to aid each other, interaction had to take place within the limits of the law. This is of high significance, as ‘*dans la limite des lois*’ (within the limits of the law) is a formula which is pivotal in the history of INTERPOL, having survived, albeit in slightly different terms, up until today. The legal significance and consequences of the adoption of this method of cooperation will be discussed later in more detail.

In section VII, several recommendations were made for states to update the laws on extradition to simplify procedures. Unsurprisingly, the outcome of such proposals was meant to have a drastically different result than that of the ones proposed only nine years earlier at the *Premier Congrès de police judiciaire internationale*. This was visible in Article 1, where extradition processes were to be seen merely as a matter of judicial and police cooperation, and to be handled without the interference of other intermediaries in the process.⁷⁹ That was reiterated in Article 5, where the undesirability of diplomatic intervention was explicitly affirmed.⁸⁰ Moreover, in the same article, states were

⁷⁷ ‘1. Le congrès déclare qu’il est indispensable pour une fonction efficace de la police criminelle que les autorités de la sûreté publique de tous les états soient en relations directes et que chaque médiation surtout l’intervention diplomatique, soit évitée. Les gouvernements des divers états auraient à fixer les autorités autorisées à se mettre en ces relations directes. Le congrès charge les représentants des autorités de police d’agir auprès de leurs gouvernements pour l’admission et réalisation de ces principes par la voie des conventions internationales’. The International Police Congress ‘Resolutions du Congrès International de Police à Vienne’ Res (3–7 September 1923) s 2 art 1.

⁷⁸ ‘3. Les représentants des autorités de la sûreté publique apparus au Congrès déclarent, que les autorités remplacées par eux s’assisteront mutuellement. Elles s’engagent de même à aider aux autres autorités de police en cas de réciprocité, et à correspondre à toutes les réquisitions dans la limite des lois’. The International Police Congress ‘Resolutions du Congrès International de Police à Vienne’ Res (3–7 September 1923) s 2 art 3.

⁷⁹ ‘Le congrès déclare qu’il serait désirable 1. que la décision de l’extradition d’une personne soit laissée seulement aux autorités judiciaires et qu’il ne soit pas nécessaire, qu’elle soit agréée par une autorité administrative.’ The International Police Congress ‘Resolutions du Congrès International de Police à Vienne’ Res (3–7 September 1923) s 7 art 1.

⁸⁰ ‘5. que les états intéressés à la lutte efficace contre la criminalité internationale concluent un traité collectif concernant l’extradition des personnes fugitives imputées d’un crime de droit commun et poursuivies par un mandat d’arrêt. (...) De même il faudrait prendre en considération que la procédure soit simplifiée et abrégée autant que possible et que surtout la médiation diplomatique soit évitée’ The International Police Congress ‘Resolutions du Congrès International de Police à Vienne’ Res (3–7 September 1923) s 7 art 5.

called upon to simplify the procedures concerning extradition, by concluding treaties and conducting legal reforms.

4.3. The structure and membership of the ICPC

The ICPC was structured within the International Bureau in Vienna, which included the President, Vice Presidents, the Secretary General (this position was called the Secretary in the first years) and the Executive Committee.⁸¹ Starting from 1926, member countries were prompted to organise National Central Offices for the purpose of cooperation.⁸² Furthermore, the ICPC was meant to hold international meetings at least once a year in the form of the General Assembly.⁸³

In the first stage of its life, the umbilical cord uniting the ICPC with the Austrian police service was not entirely severed. The criminal records of the Austrian police became the basis of the ICPC's database and the headquarters of the ICPC were donated by the Austrian Police Service.⁸⁴ Additionally, the ICPC was mostly staffed by the Austrian police force, and carried out its activities with Austrian funding.⁸⁵ Part of the literature has gone as far as stating that the ICPC was merely an internationalised branch of the Austrian police force.⁸⁶ It is difficult to assess the accuracy of that supposition, however, it is realistic to presume that such a statement oversimplifies a complex state of affairs. The ICPC was purposely a hybrid, a semi-legal entity, something between a large police club operating on the payroll of the Austrian police force and an international independent entity promoting international cooperation on policing matters. It was only in 1930 that the ICPC reached the decision to become formally and substantially independent. From that moment on, it obtained the right to autonomously appoint its officers, instead of being under the control of the Austrian Police.⁸⁷

Another significant aspect that is worth reflecting on, is the membership of the ICPC, particularly the questions of who the original members of the ICPC were, and how states became members. Both questions elude straightforward answers. To find them it is necessary to step back and consider who in practice created the ICPC. As previously mentioned, the ICPC was created during the congress in 1923. However, a large number of the delegates, namely police officers who attended the congress, did not possess any form of governmental backing. For this reason, trying to find a connection between countries and police forces

⁸¹ Deflem, (n 15) 129.

⁸² Those would be the forerunners of the modern-day National Central Bureaus of Interpol's member countries. Deflem, (n 15) 130.

⁸³ Fooner, (n 74) 48.

⁸⁴ Bresler, (n 42) 18.

⁸⁵ Andreas and Nadelmann, (n 2) 90.

⁸⁶ Bresler, (n 42) 18.

⁸⁷ Fooner, (n 74) 48.

instituting the ICPC can become an artificial construction.⁸⁸ In light of the previous considerations on the legal status of the ICPC, ambiguity about the identity of the founding members might not be entirely coincidental.

Following the creation of the ICPC, police forces, or even private individuals who decided to sign up and pay, could become members.⁸⁹ Nevertheless, membership was still generally considered as being national,⁹⁰ as most of the members officially represented their countries.⁹¹ It was a convoluted system, explainable only by the uniqueness of the ICPC. By 1938 the Commission counted 34. While it was mainly a European entity, American and Asian countries had also joined.⁹²

4.4. The demise of the ICPC

The dramatic historical events leading to World War II had a direct effect on the young ICPC. A few years after its foundation, the Commission lost the capacity to properly function as a true police cooperation entity and became a *de facto* tool in the hands of the Nazi regime.⁹³ The questions of why and how this happened deserve some attention. Mathieu Deflem, one of the most prolific scholars specialising *inter alia* in the history of international policing, provides a compass to interpret these tumultuous years: ‘[I]t was the very independence of the ICPC as an expert bureaucracy of criminal policing that paved the way for its nazification and attempted use for political and nationalist purposes’.⁹⁴

This can also be explained from a different angle. The fact that the ICPC was striving so obstinately to steer clear from international law, made the organisation vulnerable and exposed. Being a purposely fluid entity, the ICPC did not possess legal safeguards, nor an internal system of checks and balances to prevent one police institution dominating the others.

The process of nazification was not immediate but gradual. It was long-planned, based on the Nazi authorities’ twofold strategy of ‘influence through participation’ and ‘command through control’.⁹⁵ It was in the first

⁸⁸ Bresler, (n 42) 19. According to Bresler, it is indicative of the case of France. A French delegate was present at the Congress of 1923, but France had signed up to the Commission in 1928. Doubts remain about which date the membership started on.

⁸⁹ *Ibid*; Those countries that were not represented at the original meeting in Vienna were once again asked to join the Commission by way of enrolling their police force or simply a police officer. See also Deflem, (n 15).

⁹⁰ Fooner, (n 74) 48.

⁹¹ Deflem, (n 15).

⁹² Fooner, (n 74) 48.

⁹³ Mathieu Deflem, ‘The Logic of Nazification: The Case of the International Criminal Police Commission (“Interpol”)’ (2002) 43(1) *International Journal of Comparative Sociology* 21.

⁹⁴ *Ibid*.

⁹⁵ *Ibid*, 27, 29.

half of the 1930s when Nazi officials became increasingly active in the ICPC, as part of the plan to control the Commission.

As a reaction to this unwelcomed participation, a resolution was passed to make the head of Vienna's police also the President of the ICPC.⁹⁶ The resolution was sponsored by those police institutions which strongly opposed the Nazi takeover. The rule was meant to safeguard the ICPC from falling completely into the hands of the Nazi regime.⁹⁷ This was an extreme remedy, as police institutions felt that being absorbed by a single country could prevent the ICPC falling under total control by the Nazis. That meant that most of the ICPC members wilfully gave up the independence obtained in 1930 so that they could continue their regular police cooperation activities. This turned out to be an unfortunate move. With the pivotal historical event of the *Anschluss*, the resolution made the worst-case scenario not only possible but, for obvious reasons, inevitable.⁹⁸ As Nazis gained control of Austria, they seized the Commission. Soon after, the Nazis moved the headquarters of the ICPC from Vienna to Berlin, precipitating the end of the ICPC as it was meant to be.⁹⁹

5. INTERPOL

It was only after the end of World War II that the ICPC could be revived. This new beginning was marked by the fifteenth ICPC General Assembly held in Brussels in 1946.¹⁰⁰ Symbolically, the number 'fifteen' was meant to erase the years of Nazi control of the ICPC, as the fourteenth General Assembly had taken place in Bucharest in 1938.¹⁰¹ Once again, the ICPC was brought to life out of necessity, as in the aftermath of World War II, Europe was plagued by transnational criminal activities. A new Constitution was quickly approved in 1946.¹⁰² However, it was extremely short-lived, as in 1956 a new Constitution was adopted, which has survived until present day.

The ICPC restarted its activities with the same pre-1938 spirit, even though it was surrounded by an increasingly tense political climate that was signalling the start of the Cold War.¹⁰³ The first clash between Eastern and Western European members was about the location of the new headquarters. In the

⁹⁶ Fooner, (n 74) 49.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ INTERPOL, (n 38). Formally the Commission continued working up until May 1945, until the headquarters in Berlin came under the control of the US Army. That was officially the end of the Nazi control over the Commission: Bresler, (n 42). However, it is unclear whether, how, and to what extent, the Commission was used from 1938 to 1945 as a means of carrying out policing activities and cooperation. Several researchers agree that the database of the ICPC was used by the Nazis to achieve the nefarious goals of their regime. A topic of wild speculation is the destiny of the archives of the ICPC following the demise of the Commission. See Deflem, (n 93).

¹⁰⁰ Bresler, (n 42) 84.

¹⁰¹ *Ibid.*

¹⁰² Fooner, (n 74) 50.

¹⁰³ Fooner, (n 74).

end, it was decided that France would host the entity.¹⁰⁴ If the ICPC had in the past been considered a product of the Austrian police service, it was now France that possessed this privileged role.¹⁰⁵

5.1. The beginnings of INTERPOL

The first 10 years after World War II were a hectic time during which the pillars of the *modus operandi*, typical of modern police cooperation, were built. For instance, in 1946, Jean Nepote, the future Secretary General of INTERPOL of the 1960s, developed a system of communication to be used for purposes of police cooperation among domestic police institutions that was based on the circulation of documents called notices. Notices with different colours signified the intention of sharing a specific type of information, or of requesting a specific kind of information. The system was in fact inspired by J Edgar Hoover from the FBI, who in the 1930s distributed the well-known ‘Wanted Man’ sheets to the old ICPC in order to extend the reach of the jurisdiction of the United States. The wanted notices were first published in 1936, in the official journal of the organisation.¹⁰⁶ The system of notices has continuously evolved over time and has become one of the most important tools for international police cooperation today.¹⁰⁷

It was only in 1956, that the International Criminal Police Commission became formally known as the International Criminal Police Organization ICPO-INTERPOL.¹⁰⁸ The transformation was envisaged in the new INTERPOL Constitution, which was approved through a resolution by its General Assembly.¹⁰⁹ Once again, no international treaty was signed among the member states.¹¹⁰ Furthermore, the document was not submitted for ratification to the governments of the member countries.¹¹¹ Consequently, while the ICPC changed its name to become the International Criminal Police

¹⁰⁴ Paris held the headquarters of the police organisation until 1989 when it was moved to Lyon. See INTERPOL, (n 38).

¹⁰⁵ However, this was destined to change once again in 1986, when the Anglo-American influence became increasingly significant. See Sheptycki, (n 75) 115–116. Interestingly, a study was delivered the previous year by the US Department of Justice, which specified how the American law enforcement community viewed the organisation as ‘an effective channel for access to international enforcement authorities’. See Michael Fooner, *A Guide to Interpol: The International Criminal Police Organization in the United States* (US Department of Justice, National Institute of Justice 1985).

¹⁰⁶ Fooner, (n 74) 153, 162.

¹⁰⁷ Red notices have also been cause for concern due to their ambiguous legal nature, their legal effects, and widespread misuse of the system by certain countries. See Mario Savino, ‘Global Administrative Law Meets Soft Powers: The Uncomfortable Case of Interpol Red Notices’ (2010) 43 *New York University Journal of International Law and Politics* 263.

¹⁰⁸ Bettina Schöndorf-Haubold, ‘The Administration of Information in International Administrative Law – The Example of Interpol’ in Philipp Dann, Matthias Goldmann, Rüdiger Wolfrum and Armin von Bogdandy (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010) 229–267, 241.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ Fooner, (n 74); Martha, (n 75).

Organization, it could not yet be considered a proper intergovernmental organisation. The change of name was thus only formal, not substantial.¹¹²

Over the course of the second half of the twentieth century, through a series of agreements with the United Nations and other official recognitions and agreements on the international level, INTERPOL gained what Sheptycki defined as ‘customary recognition in international law as an Intergovernmental Organisation (IGO)’.¹¹³ Expanding on this definition, Sheptycki refers to the fact that while INTERPOL was never based on a treaty, and had never been formally declared an IGO, due to its function, role, and legal recognition, there is nowadays a widespread consensus concerning its current legal status.¹¹⁴ These kinds of interactions and the signing of agreements, between INTERPOL and states or other international entities, were the catalyst for this recognition. At first, INTERPOL managed to apply and was subsequently recognised as a nongovernmental organisation (NGO) by the UN Economic and Social Council (ECOSOC) in 1947.¹¹⁵ In 1971, the UN Secretary General referred to INTERPOL as a former NGO, to be referred to as an IGO.¹¹⁶ Then, through a resolution, the ECOSOC formalised a special arrangement for co-operation between the United Nations and INTERPOL concerning matters of reciprocal interests.¹¹⁷ Other examples that show this progressive evolution of INTERPOL’s legal status include its recognition by the Customs Co-operation Council and the International Civil Aviation Organisation.¹¹⁸ While all of the above was probably sufficient to render INTERPOL a *de facto* full-fledged intergovernmental organisation,¹¹⁹ the Headquarters Agreements between INTERPOL and France finally crystallised the status of the organisation. Although several agreements were signed throughout the years between INTERPOL and France,¹²⁰ it was the second, signed in 1982 that granted INTERPOL extensive legal immunities, including full diplomatic immunity for the organisation and its personnel.¹²¹

It should nevertheless be noted that even considering all of the above, a minority of scholars, until very recently, still claimed that INTERPOL is an NGO.¹²²

¹¹² Organisations created by other means than treaty only had the possibility of being considered as NGOs according to the ECOSOC resolution: ECOSOC Res 1950/288 (X) (27 February 1950). See Sheptycki, (n 75).

¹¹³ *Ibid.*, 115.

¹¹⁴ Sheptycki, (n 75) 120.

¹¹⁵ Anderson, (n 68) 69.

¹¹⁶ *Ibid.*, 70.

¹¹⁷ *Ibid.* The ECOSOC resolution ECOSOC ‘Special arrangement for co-operation between the United Nations and the International Criminal Police Organization (INTER-POL)’ Res 1971/1579(L) (20 May 1971) online: <https://www.unodc.org/unodc/en/Resolutions/resolution_1971-05-20_4.html> accessed 03 May 2020. The arrangement object of the resolution was subsequently concluded between the interested entities later, in the very same year. Martha, (n 45) 143.

¹¹⁸ Sheptycki, (n 75) 120.

¹¹⁹ *Ibid.*

¹²⁰ Martha, (n 45).

¹²¹ Sheptycki, (n 75) 120–121.

¹²² Such is the case for example of Mathieu Deflem. See Mathieu Deflem, *The Policing of Terrorism: Organizational and Global Perspectives* (Routledge 2010) 112.

This is a testament to the previously fluid nature of the organisation, and the lack of a constitutive treaty.

Particularly revealing is the motivation behind the transformation of INTERPOL. It appears that the quest for INTERPOL to be recognised as an international organisation was not only motivated by the intention to cooperate with other international organisations on a higher level, but by a strategic choice.¹²³ The choice was to pursue independence from governments and member countries, while keeping the (perhaps unreasonable) privilege of not being limited by a mandate specified in an instituting treaty. In short, in order to be relevant as well as structurally and functionally independent on the international scene, INTERPOL pushed to become a qualified international organisation on par with the other international organisations.¹²⁴

The new Constitution introduced a period of legalisation and internal self-regulation that continues to this day.¹²⁵ The structure of INTERPOL was set in the Constitution, in Article 5. INTERPOL must include a General Assembly, an Executive Committee, a General Secretariat, National Central Bureaus (connection points between domestic police forces and INTERPOL), and Advisers.¹²⁶ Surprisingly, it has remained substantially the same since 1956, with only the addition of the Commission for the Control of INTERPOL's files in 2008.¹²⁷ Concerning the decision-making processes, INTERPOL's norms are based on a system of checks and balances to assure that no body of the organisation should prevail over another, at least not without a democratic process. This is illustrated by Articles 6–37 of INTERPOL's Constitution defining the competences of the various bodies of the organisation, and the other parts of the organisation's legal framework subsequently approved in the following years.¹²⁸

5.2. Defining the aims and scope of INTERPOL—Articles 2–3 of the Constitution

Currently, INTERPOL is actively involved in promoting cooperation in at least 18 different crime areas.¹²⁹ However, the range of activities has

¹²³ Barnett, (n 3) 606–607.

¹²⁴ Fooner, (n 74) 52.

¹²⁵ Cheah Wui Ling, 'Mapping INTERPOL's Evolution: Functional Expansion and the Move to Legalization' (2010) 4(1) *Policing: A Journal of Policy and Practice* 28.

¹²⁶ Fooner, (n 74) 67.

¹²⁷ Cheah Wui Ling, 'Policing Interpol: The Commission for the Control of INTERPOL's Files and the Right to a Remedy' (2010) 7(2) *International Organizations Law Review* 375.

¹²⁸ Which as of 2019 includes: the Constitution of the ICPO-INTERPOL; Financial Regulations; General Regulations; INTERPOL Rules on the Processing of Data; Rules of the Procedure of the Executive Committee; Rules of the Procedure of the General Assembly; Statute of the Commission for the Control of INTERPOL's Files. See INTERPOL, 'Legal documents' online: <<https://www.interpol.int/Who-we-are/Legal-framework/Legal-documents>> accessed 18 September 2019.

¹²⁹ David Higgins and Rob White, 'Collaboration at the Front Line: INTERPOL and NGOs in the same NEST', in Grant Pink and Rob White (eds), *Environmental Crime and Collaborative State Intervention* (Palgrave Macmillan 2016) 101–116.

significantly changed over the years, and the reasons for this are worth exploring. The limits for the range of activities to be undertaken by the organisation were established in Articles 2 and 3 of the Constitution.

Article 2

Its aims are:

- a) 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”;
- b) To establish and develop all institutions likely to contribute effectively to the prevention and suppression of ordinary law crimes.

Article 3

It is strictly forbidden for the Organization to undertake any intervention or activities of a political, military, religious or racial character.¹³⁰

Remarkably, both Articles have remained the same since 1956,¹³¹ except for a mere retitling of paragraphs (a) and (b) to (1) and (2) in Article 2 in 1964. The interpretation of these two Articles has however changed significantly over the years, thus compressing and expanding the functionality and scope of the organisation.¹³²

Before focusing on the content and normative significance of the Articles and their relative interpretations, there are some preliminary observations to consider. Article 2(a) was written in a particular construction which was, and still is, unusual in such a context.¹³³ In particular the formula that describes the function of INTERPOL as one ‘to ensure and promote the widest possible mutual assistance within the limits of the laws existing in the different countries’, can give rise to different interpretations.¹³⁴ The most encompassing one is that the organisation should provide avenues for domestic police forces to cooperate up to the point where laws are overtly breached. Instead, a softer interpretation is that the organisation is entitled

¹³⁰ Constitution of the ICPO-INTERPOL (Interpol’s Constitution 1956) art 2–3.

¹³¹ Interestingly, the older Constitution of 1946 was very similar to the one of 1956 concerning the aims of the organisation, which were stated in Article 1: ‘*La Commission Internationale de Police Criminelle a pour but d’assurer et de développer une assistance officielle réciproque la plus large de toutes les autorités de police criminelle dans le cadre des lois existant dans les différents Etats, d’établir et de développer toutes les institutions capables de contribuer efficacement à la répression des crimes et délits de droit commun à l’exclusion rigoureuse de toute affaire présentant un caractère politique, religieux ou racial*’. The Constitution of the International Criminal Police Commission (ICPC Constitution 1946) art 1. The main differences were thus the lack of reference to the Universal Declaration of Human Rights, which is understandable for historical reasons, and the lack of the *military* category as grounds of exclusion concerning the range of activities undertaken by Interpol.

¹³² Sheptycki, (n 75).

¹³³ Calcara, (n 31).

¹³⁴ Constitution of the ICPO-INTERPOL (Interpol’s Constitution) art 2.

to promote cooperation in a sort of legal void, which subsists up to the point where an activity of the organisation is in contrast with a domestic or international law. Whichever interpretation is adopted, it is evident how the ratio of the Article is closely reminiscent of the older ideas involving the original design of the ICPC. In particular, it mirrors the wishes of the transnational police network to create an entity that could operate as free as possible from any kinds of legal restraints or obligations.¹³⁵

The choice of creating Article 2(a) to define the aims of the organisation was vital for INTERPOL's growth on a long-term basis. From its inception, the ambition of INTERPOL was to operate internationally. In the following years, INTERPOL ended up connecting police forces and services of countries belonging to diverse legal traditions with different criminal justice systems.¹³⁶ A different approach, based for instance on the principle of promoting cooperation only on the basis of equivalence of laws of countries (such as uniformity in regulations concerning criminal offences), might have resulted in a total lack of effectiveness for INTERPOL.¹³⁷ By promoting this particular approach, INTERPOL has managed to foster cooperation among police institutions of countries that lack any diplomatic relations.¹³⁸

Further analysis of Article 2, brings to light how this provision produced significant changes in the international scenario, indirectly affecting the wider concept of national sovereignty. Traditionally, the administration of criminal justice was a cornerstone of states' sovereignty.¹³⁹ While spontaneous and informal transnational cooperation among police institutions of different states was not unheard of since the second half of the nineteenth century,¹⁴⁰ the administration of policing activities was still formally a monopoly of states. Through the gradual changes in practices initiated at the beginning of the twentieth century and crystallised through the legal framework of INTERPOL's Constitution of 1956, domestic police forces and services acquired the capacity of systematically initiating cooperation on police matters. This caused a historical shift, as initiating cooperation became in practice synonymous with discretion on whether to activate, continue or discontinue cooperation, with whom, and concerning what objective. For this reason, while it is traditionally said that INTERPOL was formally 'founded

¹³⁵ Deflem, (n 72).

¹³⁶ However, this rather hard approach to cooperation has put the organisation in uncomfortable and controversial situations. See Calcara, (n 31).

¹³⁷ *Ibid.*

¹³⁸ Meg Stalcup, 'Interpol and the Emergence of Global Policing' in William Garriott (ed), *Policing and Contemporary Governance: The Anthropology of Police in Practice* (Palgrave Macmillan 2013) 231–261.

¹³⁹ David Garland, 'THE LIMITS OF THE SOVEREIGN STATE Strategies of Crime Control in Contemporary Society' (1996) 36(4) *The British Journal of Criminology* 445.

¹⁴⁰ Deflem, (n 22).

on the recognition of, and respect for, national sovereignty',¹⁴¹ it is safe to say that the practice promoted by Article 2 marked on itself an erosion of national sovereignty.¹⁴²

Finally, the wording 'in the spirit of the "Universal Declaration of Human Rights"',¹⁴³ seems to purposely avoid the creation of a requirement of strict compliance with the Declaration concerning the activities of INTERPOL, as a way to allow additional room for police manoeuvring.

Concerning the scope of INTERPOL, the concept of ordinary law crime is mentioned in Article 2(b). The definition of ordinary law crime is the revolving axis around which it is possible to identify the organisation's possibilities for action. In order to understand what INTERPOL considers ordinary law crime, it is necessary to combine Article 2(b) with Article 3.¹⁴⁴ Once again, INTERPOL's legal framework has been construed not to provide a clear definition, but instead to lay out the legal limits of how a certain concept should be approached. Consequently, ordinary crime is every criminal offence that does not fit into the scope of Article 3;¹⁴⁵ this has naturally been interpreted differently throughout the years. In addition, the careful wording of Article 3, defining the neutrality of the organisation, is meant to protect INTERPOL from repeating tragic incidents such as the nazification of the old Commission.¹⁴⁶

What is worth expanding upon is one of the methods on which Articles 2–3 are applied in practice by INTERPOL. On this matter, INTERPOL passed a resolution in 1951¹⁴⁷ which established a method which relies on the so-called *theory of predominance*:¹⁴⁸

[N]o request for information, notice of persons wanted and, above all, no request for provisional arrest for offences of a predominantly political, racial or religious character, is ever sent to the International Bureau or the NCBs,

¹⁴¹ This quote belongs to Imhoff and Cutler, active participants of the US NCB, who wrote a panoramic on Interpol's role and evolution for the FBI Law Enforcement Bulletin at the end of the twentieth century. See John J Imhoff and Stephen P Cutler, 'Interpol: Extending Law Enforcement's Reach Around the World' (1998) 67 *FBI Law Enforcement Bulletin* 11. The publication remains a historic testament of the role of the organisation pre-2001, a year which for tragic reasons would see the organisation increase its relevance worldwide.

¹⁴² On the topic of international police cooperation and the impact on national sovereignty see: Didier Bigo, 'EU Police Cooperation: National Sovereignty Framed by European Security?' in Florian Geyer and Elspeth Guild (eds), *Security versus Justice Police and Judicial Cooperation in the European Union* (Routledge 2008) 91–108.

¹⁴³ Interpol's Constitution 1956, art 2.

¹⁴⁴ INTERPOL, 'Neutrality (Article 3 of the Constitution)' online: <<https://www.interpol.int/en/About-INTERPOL/Legal-materials/Neutrality-Article-3-of-the-Constitution>> accessed 05 March 2019.

¹⁴⁵ Yaron Gottlieb, 'Article 3 of INTERPOL's Constitution: Balancing International Police Cooperation with the Prohibition of Engaging in Political, Military, Religious, or Racial Activities' (2011) 23 *Florida Journal of International Law* 135.

¹⁴⁶ Langille, (n 69) 113.

¹⁴⁷ INTERPOL 'Request for international inquiries' Res AGN/20/RES/11 (10–15 June 1951).

¹⁴⁸ Martha, (n 45) 43.

even if in the requesting country the facts amount to an offence against the ordinary law.¹⁴⁹

Important consequences ensued from the adoption of this resolution. Among them is the principle that INTERPOL does not have to rely on how a specific country categorises a crime, instead it needs to evaluate on a case by case basis whether a criminal offence belongs to the realm of ordinary crime or not.¹⁵⁰

5.3. Expanding the scope of Article 3—eroding the network mentality?

In time, Article 3 has been subjected to alternative and at times contrasting interpretations within different historical, political, and legal contexts. This has been the case, for example, with terrorism.¹⁵¹ This is worth expanding on, as the relationship between INTERPOL and the crime area of terrorism has shaped the future of the organisation on more than one level.

For years, INTERPOL found that terrorism fell under the scope of Article 3. Terrorism was viewed to be potentially political in nature, mainly because of the difficulty in differentiating between terrorists and freedom fighters.¹⁵² As a consequence, for an extensive period the organisation almost completely shied away from such a divisive topic. This avoidance can be explained by the fact that INTERPOL was concerned with maintaining a neutral position with all members of the organisation.¹⁵³ To appreciate the extent and the implications of INTERPOL's position, it is worth referring to the tragic episode of 1972. During the incident, Israeli athletes competing in the Munich Olympic Games were killed in a vicious terrorist attack. Following what sadly became known as the Munich Massacre, the National Central Bureau of West Germany requested INTERPOL to provide information on potential suspects.¹⁵⁴ The organisation refused to cooperate, citing the impediments of Article 3.¹⁵⁵

The organisation's obstinacy in avoiding matters of terrorism caused a void on the international scene prompting certain countries to realise that some different form of cooperation had to be devised. This avoidance is ultimately

¹⁴⁹ INTERPOL, 'Repository of Practice: Application of Article 3 of INTERPOL's Constitution in the context of the processing of information via INTERPOL's channels. Second Edition – February 2013' online: <<https://www.interpol.int/content/download/12626/file/article-3-ENG-february-2013.pdf>> accessed 18 September 2019.

¹⁵⁰ Martha, (n 45) 43.

¹⁵¹ Other examples of past international crimes deemed to fall under the scope of Article 3 include war crimes, genocide, and crimes against humanity. Things drastically changed since 1994, the year Interpol passed the resolution INTERPOL 'Application of Article 3 of the Constitution in the context of serious violations of international humanitarian law' Res AGN/63/RES/9 (28 September – 4 October 1994). The resolution revisited the interpretation of Article 3 in order to allow the cooperation between Interpol and the International Criminal Tribunal for the Former Yugoslavia (ICTY). INTERPOL, (n 149).

¹⁵² Gottlieb, (n 145) 148.

¹⁵³ Barnett, (n 3) 610.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

one of the main reasons why today in Europe there are different regional bodies involved in international police cooperation.¹⁵⁶

In time, INTERPOL found itself caught between a rock and a hard place. As previously stated, the choice of INTERPOL to keep out of anything remotely political was dictated by the need for safeguarding the good will of its members in order to maintain its key role on the international scene.¹⁵⁷ On the other hand, the choice of not dealing with terrorist offences precipitated the development of several other forms of police cooperation, which started to expand and compete with INTERPOL.¹⁵⁸

It was only a gradual process starting in the 1970s which led the organisation to become involved in cases of terrorism. The General Assembly passed resolutions which progressively increased the competence of the organisation in this field.¹⁵⁹ In 1985 INTERPOL created an internal sub-directorate called 'Public Safety and Terrorism'. Ultimately, the choice of getting involved in cases of terrorism was upheld in 1998 by a formal 'Declaration Against Terrorism'.¹⁶⁰ Following the dramatic events of 9/11, INTERPOL became one of the key actors in the fight against international terrorism.¹⁶¹

¹⁵⁶ In 1975 the Trevi group was created by the member states of the old European Community to incentivise police cooperation by exchanging information and fostering mutual assistance mainly on matters of terrorism. Trevi, which stands for Terrorism, Radicalism, Extremism and International Violence, was the start of a series of initiatives that became progressively larger, both structurally and functionally, in order to activate parallel forms of cooperation within Europe. Examples of this are the Schengen Convention, OLAF (the European Anti-Fraud Office), and Europol. There are other reasons for the birth of alternative systems of cooperation in police matters at the European level. Firstly, there was a political motive, as in that period, the USA began seeking to establish a larger influence on the organisation. See Didier Bigo, 'Liaison Officers in Europe: New Officers in the European Security Field' in James Sheptycki (ed), *Issues in Transnational Policing* (Routledge 2000) 81–113. Furthermore, Interpol was viewed by some European States to be a too large and inefficient to be an avenue for cooperation. See Barnett, (n 3); Deflem, (n 122).

¹⁵⁷ Barnett, (n 3) 611.

¹⁵⁸ *Ibid.*

¹⁵⁹ Deflem, (n 122) 124. Particularly worthy of mention is the resolution INTERPOL 'Application of Article 3 of the Constitution' Res AGN/53/RES/7 (4–11 September 1984). The resolution promoted a different interpretation of Article 3 to allow the organisation to get involved in terrorist cases under specific circumstances. The resolution also addressed instances in which NCBs refuse to act on a request from another NCB. It therefore has vast ramifications on how Article 3 should be interpreted or applied, not only regarding matters of terrorism, but on a general level: The refusal of one or more countries to act on a request circulated by an NCB or by the General Secretariat (an extradition request, for example), does not mean that the request itself is invalid and that it automatically comes under Article 3 of the Constitution. However, if certain countries refuse extradition, this is reported to the other NCBs in an addendum to the original notice indicating that the offender has been released. When a person is arrested with a view to extradition the wanted notice remains valid, unless the requesting country decides otherwise, until the person concerned has been extradited'. INTERPOL 'Application of Article 3 of the Constitution' Res AGN/53/RES/7 (4–11 September 1984) online: <<https://www.interpol.int/en/content/download/6482/file/GA-1984-53-RES-7.pdf>> accessed 03 May 2020. See also Martha, (n 45).

¹⁶⁰ Mathieu Deflem, 'International Police Cooperation Against Terrorism: Interpol and Europol in Comparison', in Huseyin Durmaz, Bilal Sevinc, Ahmet Sait Yayla and Siddik Ekici (eds), *Understanding and Responding to Terrorism* (IOS Press 2007) 17–25.

¹⁶¹ Schöndorf-Haubold, (n 108) 232; Mathieu Deflem, 'Global Rule of Law or Global Rule of Law Enforcement? International Police Cooperation and Counterterrorism' (2006) 603(1) *The Annals of the American Academy of Political and Social Science* 240.

This expansion of the range of INTERPOL's activities had serious consequences for the organisation. According to some scholars, the increase in the competences of INTERPOL, particularly the ones of a political nature, had repercussions on the independence and autonomy of the organisation. Countries became unwilling to overlook INTERPOL and felt it necessary to become more directly involved in supervising and steering the organisation. On this issue, Barnett and Coleman noted:

INTERPOL's expansion into 'political' areas and state controls on INTERPOL appeared to move in lockstep, resulting in both a growing list of responsibilities and a reduction of autonomy. States were able to control INTERPOL's activities not only through financial levers but also by penetrating central points of decision making within the organization. INTERPOL's staff size grew and became more international, which erased its tightly knit, club-like atmosphere, diluted its organizational culture, and gave more access points to powerful states.¹⁶²

While this might signal an end or a reduction of the influence of the previously discussed police network mentality, it is crucial to reaffirm how the fundamental parts of the legal apparatus of the organisation have remained the same, with all its ambiguities and peculiarities. Consequently, there is reason to believe that INTERPOL will maintain, at least to a certain extent, its unique character and a genuine operative spirit.¹⁶³

5.4. The membership of INTERPOL

The question of membership remained unanswered even once the Constitution was enacted. As previously discussed, during the time of the ICPC it was a hard task to define the members of the Commission, and according to historical evidence, it appears that such ambiguity was a calculated choice. As the saying goes, old habits die hard. When the ICPC was resurrected, the Commission still opted to maintain all the ambiguities concerning membership from the pre-war era. The new legal framework of the ICPC allowed members of the Commission to be appointed and nominated by their respective countries, but at the same time it was ultimately the police forces or services which were the true members.¹⁶⁴ Articles 2(2) and 3 of the Constitution of 1946, exemplified this stance.¹⁶⁵ While Article 2(2)

¹⁶² Barnett, (n 3) 613.

¹⁶³ Ultimately, Interpol is and has always been an organisation devoted to the practice of policing and is composed mainly of police officers. See David J McClean, *International Co-operation in Civil and Criminal Matters* (Oxford University Press 2002).

¹⁶⁴ Barnett, (n 3) 606–607.

¹⁶⁵ ARTICLE 2

...

2. *Les services de police criminelle, membres de la Commission Internationale, mettent leur activité à la disposition de cette Commission et du Bureau Central International.*

ARTICLE 3

confirmed the fact that police services were the members of the organisation, two different categories of membership were devised in Article 3: *membres effectifs* (full members) and *membres extraordinaires* (special members). It should be noted that notwithstanding the difference among categories, membership had to have governmental backing, albeit of different types.

With the Constitution of 1956, things were destined to change, if only slightly. Needless to say, fierce internal debates took place from 1946 to 1956 within the Commission. Corroboration of this can be found within the first draft of the new Constitution, which took a definitive stance on the issue of membership, allowing only *states* to be part of INTERPOL. Yet, this specific provision was not destined to pass. Once again, the ultimate reason behind the scepticism in allowing states to be official members was the fear of potential loss of independence.¹⁶⁶ As the organisation strived for independence, it also wished for resources and official recognition. As states provided funding for the organisation, they desired more power and influence over it, thus eroding INTERPOL's independence. This put INTERPOL in a conundrum.¹⁶⁷ With a subtle move, INTERPOL adopted a strategic approach closely reminiscent of a famous quote from the notorious novel *Leopard*: 'If we want things to stay as they are, things will have to change'.¹⁶⁸ Consequently, two different sets of provisions were adopted. One was meant to regulate members who had joined the organisation before the Constitution of 1956, and another concerned new members wishing to join.

For the old members, the new Constitution of INTERPOL stated in Article 45:

All bodies representing the countries mentioned in Appendix I shall be deemed to be Members of the Organization unless they declare through the appropriate governmental authority that they cannot accept this Constitution. Such a declaration should be made within six months of the date of the coming into force of the present Constitution.¹⁶⁹

The wording of the Constitution was careful, as the word 'state' never appeared in the text. Instead, the drafters of the document opted to use the

1. *La Commission Internationale de Police Criminelle est composée:*

a) *des membres effectifs soit les membres délégués par leur Gouvernement auprès de la Commission. Ces membres ne sont pas soumis à élection;*

b) *des membres extraordinaires, soit les membres élus à la majorité des deux tiers des voix au cours d'une assemblée plénière. Ces membres devront toujours avoir l'approbation de leur Gouvernement.'* The Constitution of the International Criminal Police Commission (ICPC Constitution 1946) art 2–3.

¹⁶⁶ Barnett, (n 3) 607.

¹⁶⁷ *Ibid.*

¹⁶⁸ Giuseppe Tomasi di Lampedusa, *The Leopard* (Vintage Books 2007), 19. The book was originally published by Giangiacomo Feltrinelli Editore in 1958, with the title of 'Il Gattopardo'.

¹⁶⁹ Constitution of the ICPO-INTERPOL (Interpol's Constitution) art 45. A similar method was used in the previous Constitution of 1946, The Constitution of the International Criminal Police Commission (ICPC Constitution 1946) art 3(4): '*Les membres fondateurs élus par le Congrès International de la Police Criminelle en 1923 demeurent membres de la Commission, pour autant que leur Gouvernement n'y mette pas obstacle. La même remarque vaut en général pour les membres extraordinaires.*'

more general and neutral word ‘country’.¹⁷⁰ According to the majority of the literature on this topic, this was certainly not a coincidence.

It is also important to remember that the Constitution was not a treaty and that, in theory, states at that time may not have known that one of their own police institutions was a member of INTERPOL, accepting and creating significant obligations for the state. At the same time, INTERPOL was not concerned about assessing whether a certain state was aware of the obligations that were part of the Constitution. An explicit acceptance would have certainly been more appropriate for this kind of document.

Article 4 on the other hand dictated the procedure for becoming a new member of INTERPOL:

Any country may delegate as a Member to the Organization any official police body whose functions come within the framework of activities of the Organization.

The request for membership shall be submitted to the Secretary General by the appropriate governmental authority.

Membership shall be subject to approval by a two-thirds majority of the General Assembly.¹⁷¹

According to the letter of the law, police institutions are still to be considered the true members of the organisation. This is clearly at odds with the fact that several activities of INTERPOL ultimately affect areas which traditionally belong to the sovereignty of states.¹⁷²

Controversy and uncertainty surrounding this topic have persisted over the years. However, in 1984 this ambiguity was put to the challenge. At the time, the National Police Administration of Taiwan was representing the Republic of China in INTERPOL. That year the police service of Beijing in the People’s Republic of China channelled a request to join the organisation.¹⁷³ During the application process, the People’s Republic of China demanded to be accepted as the true and only representor of China.¹⁷⁴ INTERPOL accepted this application, leading the Republic of China, represented by Taiwan, to withdraw from the organisation as a sign of protest.¹⁷⁵ Unsurprisingly, this led to a period of tension inside the organisation. China’s seat had been given to the Taiwanese police in 1982, and the *ex post* removal of the position was deemed unconstitutional by the other members. Additionally, some of them implied that the act of vacating the membership from the Taiwanese police was due to political

¹⁷⁰ Barnett, (n 3) 607.

¹⁷¹ Constitution of the ICPO-INTERPOL (Interpol’s Constitution) art 4.

¹⁷² For a detailed exposition on this topic, see Calcara, (n 31).

¹⁷³ Fooner, (n 74) 67–68.

¹⁷⁴ *Ibid.*

¹⁷⁵ Michael Yahuda, ‘The International Standing of the Republic of China on Taiwan’, (1996) 148 *The China Quarterly* 1327.

pressure coming from both outside and inside INTERPOL.¹⁷⁶ Notwithstanding the controversial and heated political debate, which continues to this day,¹⁷⁷ this moment in the history of the organisation remains a topic of interest for scholars and historians, as it signalled a clear shift inside INTERPOL. At this moment it became clear that, despite the uncertainties and contradictory provisions, it is the countries, and not the police institutions, that are the true members of the organisation. Perhaps rightly so. More than that, this shift has likely spelled the end of INTERPOL as a purely police-centric entity.

6. Conclusion

This article was not meant to be an exhaustive account of the history of INTERPOL. It was not written with the intent of covering the history of the *modus operandi* or the technological advancements within the field of policing and international police cooperation. Instead, this article focused on the diverse attitudes and motives of countries and police institutions for participating in international cooperation throughout different phases of history, leading to the creation and subsequent development of INTERPOL and its legal framework. To this end, this article provided an analysis of a number of historical legal documents, including the constitutive documents of the ICPC, and the original Constitution of INTERPOL of 1956. Particular attention was given to those provisions defining the aims and the membership, first of the ICPC and later of INTERPOL.

Throughout the years, the cumulative presence of certain conditions has proven to be crucial to the existence, growth and functioning of the ICPC and INTERPOL. The first was the existence of an independent transnational police network.¹⁷⁸ The second was the capacity for such a network to cooperate independently within the limits of domestic and international laws, bypassing the traditionally cumbersome diplomatic hurdles. By analysing historical legal documents, it becomes apparent how the legal framework, first of the ICPC then of INTERPOL, was tailored in all its historical phases to address such needs, thus explaining its peculiarity in content and wording.

While the legal framework of INTERPOL has guaranteed a certain degree of functionality for the organisation throughout the years, it is undoubtedly true that such legal provisions have also given rise to significant legal issues,

¹⁷⁶ Fooner, (n 74) 67.

¹⁷⁷ During the last 34 years this issue has often been in the news. See: Kent Wang, 'Let Taiwan into INTERPOL' *The Washington Times* (Washington, 12 September 2017) <<https://www.washingtontimes.com/news/2017/sep/12/letter-to-the-editor-let-taiwan-into-in-385883742/>> accessed 18 September 2019; Sophia Yang, 'Gloomy Future for Taiwan as China to Lead Interpol Until 2020: China and Russia to Take the Helm of Interpol', *Taiwan News* (Taiwan, 11 November 2016) online: <<https://www.taiwannews.com.tw/en/news/3027431>> accessed 18 September 2019; Chris Horton, 'Blocked by China, Taiwan Presses to Join U.N. Agency's Meeting' *The New York Times* (New York, 8 May 2017) online: <<https://www.nytimes.com/2017/05/08/world/asia/taiwan-world-health-china-.html>> accessed 18 September 2019.

¹⁷⁸ Deflem, (n 15).

including a significant erosion in the sovereignty of states in matters of policing. More than that, the construction of the legal framework of INTERPOL is a true testament of the struggle of the organisation in balancing between functionality and legality.

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