

GLOBAL ADMINISTRATIVE LAW MEETS “SOFT” POWERS: THE UNCOMFORTABLE CASE OF INTERPOL RED NOTICES

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I. INTRODUCTION: INTERPOL AND PUBLIC LAW

Interpol is a dubious legal object.¹ With its 188 members, it is the second largest international entity after the United Nations. It plays a crucial role in facilitating the cooperation between national police forces and in supporting the global fight against transnational crime, terrorism included. Thanks to Interpol's efforts, in some countries it is already possible for a customs agent or a police patrol to check in real time whether a passport, a car or a precious canvas has been stolen. Doubtless, Interpol is contributing to making our world a safer place to live.

Despite its growing importance, Interpol is still structured in many respects as an informal network of national officials. It is established outside an intergovernmental convention. Part of its activities are informal and based on non-binding rules. The fundamental principle is voluntary participation and cooperation of its members. Judicial review is absent and political control is, at best, quiescent.² What is the rationale

1. See, e.g., Deirdre Curtin, *EU Police Cooperation and Human Rights Protection: Building the Trellis and Training the Vine*, in 2 SCRITTI IN ONORE DI GIUSEPPE FEDERICO MANCINI 227, 235 (A. Barav et al. eds., 1998) (labeling Interpol an “unidentified” international organization).

2. For an analysis of Interpol's legal and political accountability, see RUTSEL SILVESTRE J. MARTHA, *THE LEGAL FOUNDATIONS OF INTERPOL* (2010). See generally FENTON BRESLER, *INTERPOL* (1992); Malcolm Anderson, *Interpol and the Developing System of International Police Cooperation*, in *CRIME AND LAW ENFORCEMENT IN THE GLOBAL VILLAGE* 89 (William F. McDonald ed., 1997); MALCOLM ANDERSON, *POLICING THE WORLD: INTERPOL AND THE POLITICS OF INTERNATIONAL POLICE COOPERATION* (1989); MICHAEL FOONER, *INTERPOL: ISSUES IN WORLD CRIME AND INTERNATIONAL CRIMINAL JUSTICE* (1989); Cheah Wui Ling, *Mapping Interpol's Evolution: Functional Expansion and the Move to Legalization*, 4 *POLICING: J. POL'Y & PRAC.* 28 (2010); James Sheptycki, *The Accountability of Transnational Policing Institutions: The Strange*

behind the "de-formalization" of activities that, when performed domestically, are bound by strict legal requirements and exercised by command-and-control administration?

The most likely answer points to the governance ethos that inspires Interpol's institutional trajectory and police cooperation in general. In Europe, for instance, the first experience of police cooperation goes back to 1975, when an informal and remote network of national officials—the so-called Trevi Group—was established at the Community level. It took almost seventeen years to bring this organizational platform out of the shadow of informality³ and sixteen more years to subject it to the reach of the rule of law.⁴ As observed, "[l]es

Case of Interpol, 19 CAN. J. L. & SOC'Y 107 (2004); Charles R. Both, *International Police Force or Tool for Harassment of Human Rights Defenders and Political Adversaries: Interpol's Rift with the Human Rights Community*, 8 ILSA J. INT'L & COMP. L. 357 (2001).

3. Police cooperation was institutionalized at the E.U. level in 1992, when the Maastricht Treaty established the "third pillar," an area of intergovernmental cooperation which also included border control, visa and immigration control, and judicial cooperation in civil law and criminal law matters. For an analysis of the early evolution of the third pillar, see THE THIRD PILLAR OF THE EUROPEAN UNION: COOPERATION IN THE FIELDS OF JUSTICE AND HOME AFFAIRS (Joerg Monar & Roger Morgan eds., 1994); EILEEN DENZA, THE INTERGOVERNMENTAL PILLARS OF THE EUROPEAN UNION 63-84 (2002); STEVE PEERS, EU JUSTICE AND HOME AFFAIRS LAW 10-20 (Francis G. Jacobs ed., 2d ed. 2006). For examinations of police cooperation in particular, see MALCOLM ANDERSON ET AL., POLICING THE EUROPEAN UNION (2003); JOHN D. OCCHIPINTI, THE POLITICS OF EU POLICE COOPERATION: TOWARD A EUROPEAN FBI? 29-50 (2003).

4. With the entering into force of the Lisbon Treaty on December 1, 2009, the remaining part of the third pillar (already partially "absorbed" into the Community pillar following the 1997 Amsterdam Treaty) has been abolished; criminal law and police cooperation have become shared competences of the European Union. Nikolaos Lavranos, *The Entering into Force of the Lisbon Treaty*, 13 ASIL INSIGHTS 4 (Dec. 14, 2009), <http://www.asil.org/insights091214.cfm>; see also Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) 1; Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1. Thus, E.U. action in these fields is now bound by the European Charter of Fundamental Rights and is subject to the scrutiny of the European Court of Justice and to parliamentary oversight. See Consolidated Version of the Treaty on the Functioning of the European Union, arts. 67, 70, 85, 88, Sept. 5, 2008, 2008 O.J. (C 115) 47. As a result, the main traditional concerns with the third pillar—lack of transparency and democratic control, as well as the predominance of

policiers, hommes de terrain pragmatiques, recherchent avant tout l'efficacité."⁵

Law, in this governance perspective, is conceived as instrumental: its legitimacy rests on the ability to create or strengthen effective tools of governance. Therefore, if decision-makers (in the specific case, almost all the domestic police forces of the world) agree about the ends to pursue and the means to employ, then law becomes a secondary concern, superfluous and perhaps even damaging. Moreover, law is perceived as rigid, legal requirements as cumbersome, formalism as deleterious to the achievement of shared goals. In short, when law is not necessary to lead into the purposes of a certain institution, there is no reason to "legalize" that institution.⁶

Unsurprisingly, lawyers tend to reject this vision. Global governance conflates private and public phenomena, formal and informal rules, national and international institutional settings, making authoritative and non-authoritative powers virtually undistinguishable.⁷ To recover from such an unhealthy conflation that threatens the civilizing expansion of the rule of law beyond the state, legal scholars increasingly plead for the use of public law at the international level: its lenses, as carefully forged by domestic experience, make those dividing lines

the security logic over the protection of rights, see, e.g., Sionaidh Douglas-Scott, *The Rule of Law in the European Union - Putting Security into "The Area of Freedom, Security and Justice,"* 29 EUR. L. REV. 219, 235 (2004)—are now, in principle, overcome. See Estella Baker & Christopher Harding, *From Past Imperfect to Future Perfect? A Longitudinal Study of the Third Pillar*, 34 EUR. L. REV. 25 (2009).

5. Michel Richardot, *Interpol, Europol*, 102 POUVOIRS 77, 78 (2002); see also Nadia Gerspacher, *The History of International Police Cooperation: A 150-Year Evolution in Trends and Approaches*, 9 GLOBAL CRIME 169, 183 (2008) (affirming that "police officers have begun to adopt voluntarily a policy of mutual aid, using whichever mechanism is [most] likely to maximise their success").

6. See Martti Koskeniemi, University of Helsinki Lecture at Universität Frankfurt am Main: *Global Governance and Public International Law* (Feb. 9, 2004) (noting that "[a]fter all, international law is just a set of diplomatic compromises made under dubious circumstances for dubious objectives. We use it if it leads into valuable purposes. And if it does not lead us into those purposes—well—then that is all the worse for law").

7. See, e.g., Martin Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, 8 IND. J. GLOBAL LEGAL STUD. 369, 369-70 (2000).

again visible.⁸ While the governance mindset is skewed to the idea that the end can justify the means, legal scholars contend that this output legitimacy "is a weak legitimacy and sometimes none at all."⁹ To amend that vision, so the argument runs, public law can happily perform its traditional limiting function also on the global stage, by imposing its substantive and procedural standards, thereby checking international unilateral powers that affect individual liberties. The underlying belief is that law, and more accurately public law, is the most appropriate way to address normative concerns about the legitimacy of governance activities.¹⁰

Assessed against this backdrop, the case of Interpol is particularly problematic. If good outcomes—the good service Interpol renders to global security—legitimate questionable means only so far, the first question that arises is whether, in Interpol's armory, there are any such "questionable means." To put it in public law terms: does Interpol exert unilateral administrative powers that affect individual rights? In the negative, the quest for legal accountability would be simply misplaced. In the positive, that is, if Interpol does exert authorita-

8. For a strong call to redefine and enhance the role of public law at the international level, see Armin von Bogdandy, Phillip Dann & Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 GER. L.J. 1375, 1375 (2008) (encouraging "scholars of public law to lay open the legal setting of such governance activities, to find out how, and by whom, they are controlled, and to develop legal standards for ensuring that they satisfy contemporary expectations for legitimacy"); Armin von Bogdandy, *General Principles of International Public Authority: Sketching a Research Field*, 9 GER. L.J. 1909, 1914-15 (2008). For a skeptical view cautioning against the development of global administrative law, see Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT'L L. 187, 189 (2006). For a restatement of the global administrative law perspective on the concept of law, see Benedict Kingsbury, *The Concept of 'Law' in Global Administrative Law*, 20 EUR. J. INT'L L. 23, 27 (2009); Sabino Cassese, *Is There a Global Administrative Law?*, in *THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS* 761 (Armin von Bogdandy et al. eds., 2010).

9. J.H.H. Weiler, *The Geology of International Law – Governance, Democracy and Legitimacy*, 64 HEIDELBERG J. INT'L L. 547, 562 (2004).

10. The tendency of legal scholars to consider as international law anything with an international dimension is emphasized by D.J. Bederman, *What's Wrong with International Law Scholarship*, 1 CHI. J. INT'L L. 75, 76 (2000).

tive powers, the protection of citizens' rights would require the introduction of legal guarantees.

In the following pages, I argue that this all-or-nothing assumption is counter-productive. This analysis rather starts from the premise—lying at the roots of the global administrative law (GAL) project—that the governance perspective and the legal one are not radically at odds with each other. As GAL studies of international institutional reality confirm, there is a rich panoply of “hidden” administrative powers to be checked and a wide variety of techniques by which effectiveness and the rule of law may be (more easily) reconciled.¹¹ Some of those powers and instruments that do not belong in the comfortable category of “hard” law, being based on non-binding legal schemes, are hastily ascribed to the minor realm of “soft” law, which “is not much more than a slightly more elegant way of saying ‘underconceptualized law.’”¹² It is a “deformalized” twilight zone where consolidated public law concepts are seriously challenged. Most legal scholars prefer to skip this theoretical quicksand because it adds a further degree of complexity to the debate on the rule of law at international level.¹³

My purpose is to show that “soft” powers and corresponding “soft” instruments of accountability should be part of the ongoing debate on the rule of law in the global arena.¹⁴ I do

11. This is also one of the basic assumptions underlying the global administrative law project. See Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 15-16 (2005); Sabino Cassese, *Administrative Law Without the State? The Challenge of Global Regulation*, 37 N.Y.U. J. INT'L L. & POL. 663, 688 (2005); Stefano Battini, *International Organizations and Private Subjects: A Move Toward a Global Administrative Law?* 5 (N.Y.U. Inst. Int'l Law & Justice, Working Paper No. 2005/3, 2005).

12. Matthias Goldmann, *Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority*, 9 GER. L.J. 1866, 1869 (2008).

13. See Koskeniemi, *supra* note 6, at 6 (arguing that “deformalization,” together with the two concurrent developments of fragmentation and Empire, threaten the European idea that the world is progressing towards a rule of law).

14. On soft law as a global governance tool, see generally Kenneth A. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000); SOFT LAW IN GOVERNANCE AND REGULATION: AN INTERDISCIPLINARY ANALYSIS (Ulrike Morth ed., 2005); HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT, AND SOCIAL

this by examining Interpol's most publicly renowned, and yet scholarly neglected, power to issue red notices.¹⁵ In place since 1946 as an effective instrument of police cooperation, red notices are published and circulated worldwide through Interpol's sophisticated communication network. These "notices" indicate to foreign police organizations that a national arrest warrant is pending on an individual. From a public law standpoint, red notices are elusive administrative measures: albeit "soft" (non-binding warrants), they *de facto* impinge upon the fundamental right to personal freedom insofar as they are widely enforced by national police forces. Interpol's power to issue red notices is, thus, an anomalous administrative power, effective, yet "soft", and perhaps effective *because* "soft." How should the law treat such an atypical power? How appropriate is it to put it under the reach of the rule of law? I contend that these question can be properly answered *only if* one is willing to abandon a positivist stance and to accommodate the functional needs of global governance with the normative con-

GOVERNANCE (John J. Kirton & Michael J. Trebilcock eds., 2004); Jeremy J. Waldron, *The Rule of International Law*, 30 HARV. J.L. & PUB. POL'Y 15, 16 (2006). On the issue of the rule of law in the global arena, see generally Jeremy J. Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?* 7-9 (N.Y.U. Pub. Law & Legal Theory Working Papers, Paper No. 115, 2009) (rejecting the view that, given the absence of a world government and the impact of international law on states rather than on individuals, the rule of law would not be necessary at the international level). For a criticism of the simplistic assumption—associated with the idea of "immaturity" of international law—that global governance and the rule of law necessarily follow diverging paths, see Sabino Cassese, IL DIRITTO GLOBALE. GIUSTIZIA E DEMOCRAZIA OLTRE LO STATO 31-47 (2009). For other influential contributions, see Sabino Cassese, *The Globalization of Law*, 37 N.Y.U. J. INT'L L. & POL. 973, 992-93 (2005); David Dyzenhaus, *The Rule of (Administrative) Law in International Law*, 68 LAW & CONTEMP. PROBS. 127, 166 (2005); Gordon Silverstein, *Globalization and the Rule of Law: "A Machine that Runs of Itself?"* 1 INT'L J. CONST. L. 427 (2003); Martin Shapiro, *Globalization of Law*, 1 IND. J. GLOBAL LEGAL STUD. 37 (1993).

15. There has been no scientific study of the legal issues raised by Interpol red notices; however, partial analyses can be found in Bettina Schöndorff-Haubold's article, *The Administration of Information in International Administrative Law: The Example of Interpol*, 9 GER. L. REV. 1719 (2008), describing the legal differences surrounding red notices in different countries, and Rutel Silvestre J Martha's piece, *Challenging Acts of INTERPOL in Domestic Courts*, in CHALLENGING ACTS OF INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS 206 (August Reinisch ed., 2010).

cerns related to the protection of individual rights, along the lines suggested by the global administrative law project.

In Part II of the paper, I set the stage. First, I try to ascertain the nature of Interpol—is it an international organization or a transgovernmental network? (II.A) Then, I try to detect Interpol's main functional needs (II.B) and sources of accountability (II.C). In Part III, I address the question whether Interpol enjoys significant administrative powers. To this end, I analyze the most relevant instrument of Interpol's action, namely "red notices". Their potential will be illustrated through the examination of contentious cases. The answer will be neither black, nor white, but rather grey: I claim, in fact, that red notices represent a case of "soft" international administrative measures. The main problem sketched in this introduction, thus, will still be there: do Interpol's "soft" instruments deserve legal consideration at all? If administrative powers are not *formally* binding ("hard"), but only *substantially* so ("soft"), is there any real need to make them legally accountable? My answer, developed in Part IV, will be shaped in a "yes, *but*" mood. Yes, "soft" administrative powers require legal accountability, *but*, at the same time, their "softness" should be taken seriously: it urges equally "soft" mechanisms of accountability. By taking "softness" seriously, global administrative law paves the way for a pragmatic approach to legal accountability: an approach that aims to reconcile the functional needs vindicated by the governance ethos with the normative concerns raised by public international law scholars.

II. SETTING THE SCENE: INTERPOL'S MANDATE AND MECHANISMS FOR OVERSIGHT

A. *The Nature of Interpol*

In 1923, Heinrich Triepel was defending his dualistic theory of separation between international law and domestic law in these terms: "Certainly, it is possible that a future evolution may produce a new international law that recognizes some social groups within the current states as independent international subjects. . . . While we wait, we shall maintain our theory."¹⁶ Somewhat ironically, the same year an international

16. Heinrich Triepel, *Les rapports entre le droit interne et le droit international*, in 1 RECUEIL DES COURS 79, 82 (1923).

entity, the International Criminal Police Commission (ICPC), was established not as an interstate creation, but rather as a private association under Austrian law. The ICPC resulted from an agreement between police officers of twenty-two states (mostly European, with US involvement).¹⁷ After fifteen years of Austrian domination, both in terms of funding and manpower, the ICPC was taken over by the Nazis in 1938, revived in 1946 by seventeen states under French leadership, and re-established as the International Criminal Police Organization or Interpol in 1956. Its headquarters, originally located in Vienna, were moved to Saint-Cloud (near Paris) in 1946 and then, in 1989, to Lyon.¹⁸

The legal nature of Interpol has been long debated. Its statute is contained in the 1956 Constitution, which was adopted by the Interpol General Assembly and, thus, conceived as an agreement between the heads of national police forces.¹⁹ Despite the lack of a formal treaty basis, Interpol—so the standard account runs—has gradually come “to be recognized as a public international organization” because of “its

17. MATHIEU DEFLEM, *POLICING WORLD SOCIETY* 128 (2002).

18. For information on the European origins of international crime control, specifically Interpol, see PETER ANDREAS & ETHAN NADELMANN, *POLICING THE GLOBE: CRIMINALIZATION AND CRIME CONTROL IN INTERNATIONAL RELATIONS* 87-96 (2006); Mathieu Deflem, “*Wild Beasts Without Nationality: The Uncertain Origins of Interpol, 1989-1910*,” in *HANDBOOK OF TRANSNATIONAL CRIME & JUSTICE* 275-85 (Philip Reichel ed., 2005).

19. However, Interpol’s view is that its Constitution is an agreement in simplified form: the decision to become a party to Interpol stems—in conformity with Articles 4 and 45 of the Constitution—from a decision by the appropriate governmental authorities that, in the light of the 1969 Vienna Convention, commits the state within the international order. This view draws on the decision of the International Court of Justice in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahr.), 1994 I.C.J. 112 (July 1), confirming an extremely flexible and broad interpretation of the notion of international agreement in the Vienna Convention on the Law of Treaties and asserting that the basic criterion for determining the will of the states concerned is to determine their intention. On informal international agreements, see O. Schachter, *The Twilight Existence of Non-Binding International Agreements*, 71 AM. J. INT’L L. 296 (1977); Anthony Aust, *The Theory and Practice of Informal International Instruments*, 35 INT’L & COMP. L.Q. 787 (1986); Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT’L ORG. 495 (1991); see also Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT’L L. 579 (2005) (explaining why some states choose to make their agreements less formal, and thus less costly to violate).

participation in the U.N. and Council of Europe business, its mention in a number of international treaties concerning mutual legal assistance, American recognition of it as an international organization by Presidential Order in 1983 (which granted legal immunities in the U.S.), and other, less important, legal instruments.”²⁰ Accordingly, Interpol enjoys customary recognition in international law as an intergovernmental organization.²¹

In effect, Interpol possesses the typical attributes of an international organization. To begin with, it has a permanent headquarters (since 1984)²² and permanent institutions: the General Assembly, the main decisional body, composed of all the national delegations;²³ the Executive Committee, apex of the executive branch, composed of thirteen delegates that are elected by the General Assembly with due consideration to geographical balance; and the Secretariat General, permanent administrative body implementing the decisions of the General Assembly and the Executive Committee under the responsibility of the Secretary General, whose appointment is proposed by the Executive Committee and approved by the General Assembly. Additionally, Interpol has field offices

20. Anderson, *Interpol and the Developing System of International Police Cooperation*, *supra* note 2, at 91; see also ANDERSON, *POLICING THE WORLD*, *supra* note 2, at 71 (explaining that Interpol is formally or tacitly recognized as an “international inter-governmental organization”); BRESLER, *supra* note 2, at 131 (“...the United Nations according Interpol full legal status as an inter-governmental international organisation”); FOONER, *supra* note 2, at 45 (“Interpol is now a fully accredited international and inter-governmental organization.”).

21. Interpol’s legal personality has been confirmed by the International Labor Organization Administrative Tribunal (ILOAT): “Interpol is an independent international organisation; the parties cite no agreement and do not even mention the existence of any co-ordinating body that would warrant comparison. . . .” Interpol Judgment 1080 ¶ 12 (Jan. 29, 1991). The Organization’s international legal personality is also implicit in its accession in 2000 to the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. *Contra* Sheptycki, *supra* note 2, at 117-23 (labeling the claim that Interpol is an intergovernmental organization erroneous).

22. In 1984, an *ad hoc* Headquarters Agreement granted Interpol legal immunities in France. BRESLER, *supra* note 2, at 171.

23. The General Assembly makes its decisions by a simple majority, except in cases where a two-thirds majority is required. Interpol Constitution art. 14.

operating as peripheral arms in every member party, namely the National Central Bureaus (NCB).²⁴

Secondly, Interpol has a permanent staff²⁵ whose independence is guaranteed by the Constitution.²⁶ As in other international organizations, Interpol officials have the status of international civil servants and enjoy international protection.²⁷

Third, despite the dubious existence of a legal duty, each member country has included in its national budget the financial contribution of the member responsible for representing it within the organization.²⁸ Thereby, Interpol receives regular (though not conspicuous) financial support from the members, with an annual budget of approximately 50 million euros.²⁹

Lastly, formal state membership should also be acknowledged. Despite the ambiguity of article 4 of Interpol's Constitution concerning the accession procedure,³⁰ membership is

24. Additionally, Interpol has established a representative office at the United Nations in New York and at the European Union in Brussels and seven regional offices (four in Africa, two in Central/South America and one in Asia) to support local NCBs, and few specialized units dealing with specific transnational crimes that require additional international coordination, collection of data and tactical and strategic analysis. Interpol, *Interpol: An Overview*, at 1, COM/FS/2010-01/GI-01 (2010), available at <http://www.interpol.int/Public/ICPO/FactSheets/GI01.pdf>; see also Roraima Andriani, *Interpol: The Front Lines of Global Cooperation*, CRIME & JUST. INT'L, May-June 2007, at 4, 8-9.

25. Interpol's Secretariat General has 450 officials (one-third seconded from member states) that carry out all the administrative tasks of the organization.

26. Interpol Constitution art. 30.

27. As defined in the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons art. 1, Dec. 14, 1973, 28 U.S.T. 1975.

28. In Interpol's view, even if one disregards the fact that each government submitted a request for membership and thus expressly consented to be bound by the Constitution, all the contracting parties have, by their acts or behavior subsequent to the adoption of the Constitution, consented to its binding nature as an international legal instrument.

29. In 2010, Interpol's budget was 48.6 million euros. *Interpol: An Overview*, *supra* note 24.

30. Article 4 of Interpol's Constitution states: "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."

attached to state governments, rather than to their police administrative units.³¹

However, if one looks at the concrete operational dimension of Interpol, the metaphor of a network organization seems to capture its essential features much better than the traditional image of an international organization.³² Interpol's decisions, in fact, are taken by national bureaucrats rather than by diplomats or representatives of government. National police delegations gather together in the meetings of Interpol's main body and discuss the most effective ways to develop their action at the international level. Second, National Central Bureaus (NCBs) are regulated by their respective domestic law, but act as domestic extensions of Interpol, not of their government. They implement Interpol's decisions, collect data that feed Interpol databases and engage in a permanent dialogue with their counterparts and with Interpol's

31. Two arguments support this conclusion. First, when Interpol's General Assembly grants formal membership to new countries, its resolutions expressly attach the status of members to their governments. See, e.g., Interpol, *Membership of the Government of Samoa*, AG-2009-RES-01 (2009). Second, member countries are systematically represented at Interpol General Assembly sessions by delegations, which are led by a head of delegation appointed by government authorities, in conformity with the procedure set out in the Rules of Procedure of the General Assembly. Interpol, *Rules of Procedure of the ICPO – INTERPOL General Assembly* art. 7(1) (Dec. 15, 2004) [hereinafter *Rules of Procedure*]. For the view that Interpol is not an intergovernmental organization requiring formal state membership, see Richardot, *supra* note 5, at 80 (observing that some of the most important member states still deny Interpol the character of intergovernmental organization, granting it only the association status of police services); Sheptycki, *supra* note 2, at 119 (arguing that Interpol is properly classified as a nongovernmental organization).

32. Admittedly, the traditional image of an international organization is quite misleading. Most international organizations provide a formal framework for the establishment of transgovernmental bodies, often performing auxiliary tasks, as well for the development of inter-administrative networks. For an early systematic study of this framework, see Paul Reuter, *Les organes subsidiaires des organisations internationales*, in HOMMAGE D'UNE GÉNÉRATION DE JURISTES AU PRÉSIDENT BASDEVANT 415 (1960). For a more recent attempt, see Mario Savino, *The Role of Transnational Committees in the European and Global Orders*, 6 GLOBAL JURIST ADVANCES, no. 3, 2006, art. 5, available at <http://www.bepress.com/gj/advances/vol6/iss3/art5/>. For a more general examination of the actual features of international organizations, see JOSÉ ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 184-268 (2005); José Alvarez, *International Organizations: Then and Now*, 100 AM. J. INT'L L. 324 (2006); INTERNATIONAL ORGANIZATIONS (Jan Klabbers ed., 2005).

Headquarters. In that respect, Interpol does not follow the state-as-a-unit paradigm, but rather the fragmented-state one. Therefore, it functionally resembles more an administration "based on collective action by transnational networks of governmental officials," than an "administration by formal international organizations."³³ Formally, Interpol is an international organization. Substantially, it follows the transgovernmental paradigm.³⁴

B. *Functional Needs in International Police Cooperation: The Imperatives of Consent and Neutrality*

With the end of the Cold War, the immediate threat of a military confrontation between superpowers has been removed. Since then, the distinction between internal and external security has progressively lost significance. State security, at least in Europe and North America, is not threatened anymore by military action. It is threatened, rather, by political violence arising from complex criminal conspiracies—the classic domain of domestic policing. Is it still possible to identify that domain as "internal" security? The negative answer stems from the very simple fact that criminal activities increas-

33. These are two of the five types of global administrative entities elaborated upon in Kingsbury, *supra* note 11, at 20-21.

34. This paradigm was first detected and elaborated by Joseph S. Nye, Jr. & Robert O. Keohane, *Transnational Relations and World Politics: An Introduction*, 25 INT'L ORG. 329 (1971). See also Robert O. Keohane & Joseph S. Nye, Jr., *Transgovernmental Relations and International Organizations*, 27 WORLD POL. 39, 41 (1974); TRANSNATIONAL RELATIONS AND WORLD POLITICS (Robert O. Keohane & Joseph S. Nye, Jr. eds., 1970). Since then, two diverging views have emerged in the debate. Some scholars emphasize the institutional and functional advantages offered by transgovernmental networks. See, e.g., Anne-Marie Slaughter, A NEW WORLD ORDER 171-94 (2004); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 51-70 (2002); Anne-Marie Slaughter & David Zaring, *Networking Goes International: An Update*, 2 ANN. REV. L. & SOC. SCI. 211 (2006); David Zaring, *Transgovernmental Relations*, in ENCYCLOPEDIA OF GLOBALIZATION (Jan-Aart Scholte ed., 2007). Other scholars, by contrast, tend to stress the problems of accountability that "government by transgovernmentalism" raises. See, e.g., Philip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 8 EUR. J. INT'L L. 435 (1997); David Kennedy, *The Politics of the Invisible College: International Governance and the Politics of Expertise*, 5 EUR. HUM. RTS. L. REV. 463 (2001); Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism*, 17 NW. J. INT'L L. & BUS. 1014 (1996).

ingly stretch themselves beyond state borders and acquire a global dimension.³⁵

This blurring between internal and external security has altered the dynamics according to which international police cooperation takes place, in at least two respects.

First, universal police cooperation is not impeded anymore by the pre-existing Western and Eastern blocs divide. Rather, it is generally understood as beneficial and, indeed, necessary to detect the major sources of criminal activities, which have become transnational. As a consequence, international networks of police cooperation have spread, giving substance to the idea that "dark networks" of criminals need to be fought with "bright networks" of policemen.³⁶

However, national police administrations still retain all the most relevant law enforcement powers. States are reluctant to share them, police powers being understood as fundamental attributes of state sovereignty. When such reluctance turns into aversion, bilateral cooperation (instead of multilateral) is the preferred, though insufficient, state response. Therefore, the first imperative is to foster international police

35. On the increasing overlap between internal and external security and its implications, see Peter Andreas & Richard Price, *From War Fighting to Crime Fighting: Transforming the American National Security State*, 3 INT'L STUD. REV. 31 (2001); Didier Bigo, *When Two Become One: Internal and External Securitisations in Europe*, in INTERNATIONAL RELATIONS THEORY AND THE POLITICS OF EUROPEAN INTEGRATION: POWER, SECURITY AND COMMUNITY 171 (Morten Kelstrup & Michael C. Williams eds., 2000); Derek Lutterbeck, *Blurring the Dividing Line: The Convergence of Internal and External Security in Western Europe*, 14 EUR. SECURITY 231 (2005); MARY KALDOR, NEW AND OLD WARS: ORGANIZED VIOLENCE IN A GLOBAL ERA (2d ed. 2006).

36. Nadia Gerspacher & Benoît Dupont, *The Nodal Structure of International Police Cooperation: An Exploration of Transnational Security Networks*, 13 GLOBAL GOVERNANCE 347, 361 (2007). Transnational networks have become a dominant structural feature of police cooperation beyond the state. See Les Johnston, *Transnational Security Governance*, in DEMOCRACY, SOCIETY AND THE GOVERNANCE OF SECURITY 33 (Jennifer Wood & Benoît Dupont eds., 2006); Benoît Dupont, *Security in the Age of Networks*, 14 POLICING & SOC'Y 76, 77 (2004); Neil Walker, *The Pattern of Transnational Policing*, in HANDBOOK OF POLICING 111 (Trevor Newburn ed., 2003); JAMES SHEPTYCKI, IN SEARCH OF TRANSNATIONAL POLICING: TOWARDS A SOCIOLOGY OF GLOBAL POLICING (2002); DIDIER BIGO, POLICES EN RÉSEAUX: L'EXPÉRIENCE EUROPÉENNE (1996); ETHAN A. NADELMANN, COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT (1993).

cooperation without eroding national sovereignty, that is, without threatening domestic police autonomy.³⁷

Secondly, international cooperation is not limited anymore to facilitating "low policing" (prevention of "ordinary crimes"), as was the case in the past.³⁸ After September 11, 2001, most cooperative efforts include "high policing," namely the prevention of terrorism-related crimes, which are, by definition, crimes based on political motivations. Interpol is no exception. Despite its initial commitment not to deal with "political crimes," consecrated in article 3 of the 1956 Constitution, Interpol has gradually broadened the scope of its mandate in order to include terrorism. Its current strict relations with other international bodies—the U.N. Security Council and the OCSE Financial Action Task Force (fighting money-laundering activities related to terrorism), among others—put Interpol at the center of the global network engaged in the fight against international terrorism.³⁹

This broadening in the scope of police cooperation bears relevant implications. Not only does it require the development of intelligence tasks, and thus the gathering at the supra-

37. For a conceptualization of the tension between national and transnational police action, see Ian Loader & Neil Walker, *Locating the Public Interest in Transnational Policing*, in CRAFTING TRANSNATIONAL POLICING: POLICE CAPACITY-BUILDING AND GLOBAL POLICING REFORM 111 (Andrew Goldsmith & James Sheptycki eds., 2007).

38. See Jean-Paul Brodeur, *High Policing and Low Policing: Remarks About the Policing of Political Activities*, 30 SOC. PROBS. 507 (1983).

39. On international cooperation for anti-terrorism purposes, see Ved P. Nanda, *Terrorism, International Law and International Organizations*, in LAW IN THE WAR ON INTERNATIONAL TERRORISM 1 (Ved P. Nanda ed., 2005); Barry A. Feinstein, *Combating Terrorism through International Law*, in FIGHTING TERRORISM IN THE LIBERAL STATE: AN INTEGRATED MODEL OF RESEARCH, INTELLIGENCE AND INTERNATIONAL LAW 48 (Samuel Peleg & Wilhelm Kempf eds., 2006); Nicole Deller, *The Prevention and Prosecution of Terrorist Acts: A Survey of Multilateral Instruments*, in THE IMPERIAL PRESIDENCY AND THE CONSEQUENCES OF 9/11: LAWYERS REACT TO THE GLOBAL WAR ON TERRORISM 414 (James R. Silkenat & Mark R. Shulman eds., vol. 2, 2007); TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY? 787-1194 (Christian Walter et al. eds., 2004); ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM (Andrea Bianchi ed., 2004); GLOBAL ANTI-TERRORISM LAW AND POLICY (Victor V. Ramraj et al. eds., 2005); SEPTEMBER 11, 2001: A TURNING POINT IN INTERNATIONAL AND DOMESTIC LAW 617-824 (Paul Eden & Thérèse O'Donnell eds., 2005); INTERNATIONAL CRIMINAL LAW, VOL. II: MULTILATERAL AND BILATERAL ENFORCEMENT MECHANISMS 695-852 (Mahmoud Cherif Bassiouni ed., 2008).

national level of sensitive data (on political affiliation, religion, race, membership to suspect groups) that call for the protection of individual rights.⁴⁰ It also implies a reconfiguration of international police cooperation as a politically salient activity for dealing with “political crimes.” In a context crossed by deep geopolitical tensions⁴¹ and by divergent understandings of terrorist phenomena,⁴² such a reconfiguration may easily induce state resistance and erode the basis for international cooperation. The second imperative of international police cooperation is, therefore, “de-politicization.”⁴³

Interpol’s ability to enforce this imperative has been the main source of its success. Because of its neutrality, consecrated in the Constitution,⁴⁴ almost all countries of the world—both Western and Eastern, liberal and communist, Islamic and non-Islamic—despite their profound political divisions, are willing to cooperate on police matters on the assumption that Interpol’s ends are not politically biased but (merely) functionally oriented. This assumption is now under

40. For examples of the handling of these issues in the European context, see generally Francesca Bignami, *Privacy and Law Enforcement in the European Union: The Data Retention Directive*, 8 CHI. J. INT’L L. 233 (2007); Rocco Bellanova, *The “Prüm Process”: The Way forward for EU Police Cooperation and Data Exchange*, in SECURITY VERSUS JUSTICE?: POLICE AND JUDICIAL COOPERATION IN THE EUROPEAN UNION 203 (Elspeth Guild & Florian Geyer eds., 2008); Michele Nino, *The Protection of Personal Data in the Fight Against Terrorism: New Perspectives of PNR European Union Instruments in the Light of the Treaty of Lisbon*, 6 UTRECHT L. REV. 62 (2010). For a broader comparative analysis, see generally STEPHAN SOTTIAUX, *TERRORISM AND LIMITATION OF RIGHTS: THE ECHR AND THE US CONSTITUTION* (2008).

41. One does not need to subscribe to the “clash of civilizations” thesis to make such a general statement. The obvious reference is to Samuel P. Huntington, *The Clash of Civilizations*, 6 FOREIGN AFF. 29 (1993).

42. As the lack of an internationally accepted definition of “terrorism” shows. On the issue, see Mahmoud Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT’L L.J. 83, 84-88 (2002); BEN SAUL, *DEFINING TERRORISM IN INTERNATIONAL LAW* (2006).

43. See Mathieu Deflem & Lindsay C. Maybin, *Interpol and the Policing of International Terrorism: Developments and Dynamics Since September 11*, in TERRORISM: RESEARCH, READINGS, & REALITIES 175 (Lynne L. Snowden & Bradley C. Whitsel eds., 2005); Michael Barnett & Liv Coleman, *Designing Police: Interpol and the Study of Change in International Organizations*, 49 INT’L STUD. Q. 593, 598-99 (2005).

44. According to Article 3 of the Interpol Constitution, “[i]t is strictly forbidden for the Organization to undertake any intervention or activities of a political, military, religious or racial character.”

threat because of the inclusion of terrorism-related crimes in Interpol's mandate.

A telling anecdote is in order. After the Israeli offensive launched on the Gaza Strip between December 2008 and January 2009, rumors began to circulate that Iran had requested Interpol to issue a red notice (i.e. an arrest warrant) against fifteen Israeli officials, including outgoing Israeli prime minister Ehud Olmert, defense minister Ehud Barak, and foreign minister Tzipi Livni for crimes committed during Tel Aviv's Operation Cast Lead in Gaza. In early March 2009, Interpol rejected the claim, asserting that Tehran had not sought the issuance of any red notices and that, in any event, "Interpol's Constitution strictly prohibits the Organization from making 'any intervention or activities of a political, military, religious or racial character.'"⁴⁵ Yet, news agencies reported Tehran's chief prosecutor announcing that the Iranian judiciary system had plans to request Interpol red notices for over 100 Israeli officials involved in the war on Gaza. Few days later Interpol admitted that it was reviewing an Iranian request to issue twenty-five red notices against Israeli officials.⁴⁶ Eventually,

45. Press release, Interpol, Interpol issues denial of reported Iranian request seeking arrest of 15 senior Israeli officials (Mar. 2, 2009), *available at* <http://www.interpol.int/Public/News/news2010.asp>.

46. Some embarrassment emerges from a March 10, 2009 Interpol press release:

While Interpol would not ordinarily comment on member country requests for the issue of Red Notices, as Iranian government officials have made their request public and provided information to the media, the General Secretariat has released the following statement: 'The Interpol General Secretariat headquarters in Lyon, France, on Saturday 7 March received a message from Iranian authorities requesting the issue of 25 Red Notices for senior Israeli officials in relation to the Gaza offensive in December and January. In accordance with the Organization's rules and regulations this request is now being studied by Interpol's Office of Legal Affairs in order to determine whether it conforms with the Constitution and specifically Article 3 which strictly prohibits the Organization from making 'any intervention or activities of a political, military, religious or racial character.' Until this thorough review is complete, it would be inappropriate for the General Secretariat to comment further.

Press Release, Interpol, Interpol statement on Iranian request for issue of Red Notices (Mar. 10, 2009), *available at* <http://www.interpol.int/Public/News/news2009.asp>.

none of the red notices requested by Iran were upheld, arguably because the Interpol office of legal affairs deemed the request incompatible with article 3 of Interpol's Constitution, which prohibits the organization from making "any intervention or activities of a political, military, religious or racial character." Interpol was silent on the matter.

As this episode makes clear, in the case of Interpol the imperative of neutrality is both illusory and cogent. It is illusory because terrorism and related crimes are by definition political. Yet, it is more cogent than ever because, amid the "clash of civilizations," neutrality is the only available *passerpartout* for a truly global police cooperation. In short, Interpol cannot be really apolitical, because no institution can be. Interpol can only mask its ideology. And, in the era of the fight against international terrorism, it has to.

C. *Normative Concerns About Interpol's Accountability: Neither "Transmission Belt" Nor "Interest Representation"*

Before analyzing Interpol's administrative powers and legal accountability,⁴⁷ it seems appropriate to put Interpol in context and address the more general question, "to whom is this global administration accountable?" The question can be addressed in many different ways, depending on the conceptual and methodological standpoint one adopts.⁴⁸

In a GAL perspective, both top-down and bottom-up mechanisms of accountability assume relevance. The former are established at the international level, either "inside" the relevant global institution or "outside," by subjecting it to the supervision of other bodies. The latter, by contrast, are institutionalized at the state level, mainly (albeit not exclusively) via

47. See *infra* Parts III, IV.

48. In this part of the paper, I borrow the conceptual framework from Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29 (2005). Accordingly, *accountability* "implies that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met," while the concept of *legitimacy* refers to the set of standards according to which the power-wielder can be judged and subject to sanction. *Id.* at 29-30.

domestic courts.⁴⁹ Here, I start from the simplified assumption that administrative accountability mainly (albeit not exclusively) rests on two basic mechanisms, namely "transmission belt," or control from the political branch of the executive, and "interest representation," or control by those who are regulated.⁵⁰ The roots of these mechanisms can be traced back, respectively, to the "delegation" model of accountability and to the "participation" one.⁵¹

The classic rule, rooted in the dualist state-centric paradigm, is that international organizations have the authority to act in the international arena *if and because* states explicitly confer the required authority on them. This rule is instrumental to accountability: the act of delegation, being formal, presupposes both a decision of the government and parliamentary scrutiny. In turn, domestic governments and parliaments, as "principals," are entitled to enact various forms of political control in order to check the power conferred on the international "agent" and to prevent its abuse.⁵²

In the case of Interpol, this "delegation" model of accountability seems not to be properly in place. Absent an explicit act of delegation (a formal treaty), there is no formal principal. Delegation is, at best, implicit. This situation weakens the typical form of accountability on the international stage: the domestic "transmission belt" is formally disconnected and substantially stretched. Governments may only ex-

49. See Kingsbury et al., *supra* note 11, at 31-35 (distinguishing two basic sources of accountability of global administration, via domestic institutions and via internal mechanisms of control and participation); Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 LAW & CONTEMP. PROBS. 63 (2005) (providing a rich illustration of accountability mechanisms, grouped by "top down" and "bottom up" approaches to global administrative law); Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUR. J. INT'L L. 247, 253-56 (2006) (claiming that national, international and cosmopolitan groups all contribute, as constituencies of global regulatory governance, to make international administrations accountable).

50. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1675, 1723 (1975).

51. See Grant & Keohane, *supra* note 48, at 30-33 (describing these two models of accountability).

52. See generally Kenneth Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONFLICT RESOL. 3, 5 (1998) (discussing the constraints states place on the independence of international organizations).

ert indirect control on the international organization by means of their national delegations. Delegates (should) receive instructions from the capital before participating in the relevant international meeting and afterwards (should) report back to the government.⁵³

The case of Interpol is even more complex. At the domestic level, the usual substitute for (or complement to) the “transmission belt” is the “interest representation” model. It is based on the idea of participation as a suitable accountability mechanism for independent administrations. Accordingly, the performance of the power-wielder is evaluated—absent its “principals”—by those who are affected by its actions. This solution has been consistently experienced in the domestic arenas with regard to independent regulatory agencies, which are typically removed from the direct control of the government.⁵⁴ The same solution may prove to be apt for those international bodies that, like Interpol, operate as autonomous transgovernmental networks. Indeed, the transparency and notice and comment mechanisms have been adopted by many global administrations and these are increasingly advocated as the most appropriate tools to compensate for the lack of political control over international regulatory networks.⁵⁵ Can’t we recommend the same solution for the case of Interpol?

53. The accountability problem posed by transgovernmental bodies was first detected in the 1970s by Karl Kaiser. See, e.g., Karl Kaiser, *Transnational Relations as a Threat to the Democratic Process*, 25 INT’L ORGS. 706 (1971). Since then, scholars have devoted much attention to the issue. In addition to the literature already mentioned *supra* note 34, see Anne-Marie Slaughter, *Agencies on the Loose? Holding Government Networks Accountable*, in TRANSATLANTIC REGULATORY CO-OPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS 521 (George A. Bermann et al. eds., 2000). For a recent critical appraisal, see Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT’L L. 113 (2009).

54. See Stewart, *supra* note 50, at 1671-88 (discussing this lack of direct control over agencies).

55. See Cassese, *supra* note 8, at 775 (observing that “as there are no periodic elections at the global level, procedural accountability plays a dominant role in making global bodies responsible to global society”); see also Richard B. Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 N.Y.U. J. INT’L L. & POL. 695, 717-22 (2005) (discussing application of U.S administrative law to domestic implementation of global regulatory norms); Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1527 (2006) (discussing notice and comment in the

Unfortunately, we cannot. Here lies the specificity of the case. The main obstacle is represented by the kind of functions carried out by Interpol. First, Interpol is responsible for the publication and circulation of different types of notices, concerning arrest warrants of suspected criminals, requests to freeze suspected terrorists' assets, exchanges of police information, warnings about criminal activities and imminent threats to public safety, locations of stolen goods and missing persons, and identifications of dead bodies. The circulation is restricted to the competent national police units, for evident security reasons.⁵⁶ Second, Interpol collects data concerning the names of suspected criminals, fingerprints and DNA profiles, stolen and lost travel documents, and stolen goods (vehicles and works of art). This data is placed in *ad hoc* operational databases, which are accessible only—and again understandably so—to national police forces. Remaining activities (operational support during crisis, training et cetera) are material in character and thus less relevant in this context. It can be added that Interpol is timidly developing some intelligence capacity, so far limited to the analysis of global crime trends and, more specifically, to the use of the internet by terrorists, crimes against children and intellectual property crimes. For practical reasons, all these functions do not leave relevant margins for public participation or disclosure. Most mechanisms of interest representation would be meaningless (notice and comment, for instance, would be misplaced) or even counter-

context of an administrative law procedure advancing supranational good governance).

56. According to the Rules on the Processing of Information for the Purposes of International Police Co-Operation, national and international entities other than the National Central Bureaus may consult or provide information via Interpol's channels only if they are expressly authorized to do so and if the information is essentially for international police co-operation purposes. Interpol, *Rules on the Processing of Information for the Purposes of International Police Co-Operation*, art. 1(f)-(g), AG-2003-RES-04 (entered into force Jan. 1, 2004), available at <http://www.interpol.int/public/icpo/legalmaterials/constitution/info/default.asp> [hereinafter *Processing Rules*]; see also Interpol, *Implementing Rules for the Rules on the Processing of Information for the Purposes of International Police Co-Operation*, ch. 3, AG-2007-RES-09 (entered into force Jan. 1, 2008), available at <http://www.interpol.int/Public/ICPO/LegalMaterials/constitution/rulesRPI/rulesRPI09.pdf> [hereinafter *Implementing Rules*].

productive (transparency would be damaging if understood as public disclosure of sensitive data).⁵⁷

Due to the intrinsic opacity of most security activities, domestic agencies performing similar tasks are, in principle, tightly controlled by the government that, in turn, bears the political responsibility for their action before the parliament. The "transmission belt," therefore, is the prevailing (if not exclusive) model adopted in the field: reliance on "top down" checks is the rule in the domestic setting.⁵⁸ By contrast, as we have seen, international police cooperation enjoys a high level of autonomy and at least partially escapes such checks. Neither top-down nor bottom-up mechanisms of control are in place. From a GAL perspective, this creates a typical accountability gap that needs to be filled.⁵⁹

There is, however, a rationale behind this tendency. Specialists argue that, by building relations with their foreign counterparts, domestic police agencies expand their knowledge of transnational crimes and successfully increase their autonomy from political oversight. Such a partial detachment from their respective governments, in turn, facilitates the "depoliticization" of international police cooperation, thereby expanding its reach. International police cooperation is, thus, crucially dependent on the ability of police agencies to gain a position of relative independence from governments.⁶⁰ And

57. Interpol's General Secretariat has, accordingly, the duty to "grant access to an item of information or to a database solely to those persons whose functions or duties are connected with the purpose for which the said information is processed," to "protect the information it processes from any unauthorized or accidental form of processing such as alteration (modification, deletion or loss) or unauthorized access and use of that information," and to "check and ensure that only those persons authorized to access the information had done so." *Processing Rules*, *supra* note 56, art. 23.

58. For discussions of police accountability, see generally David H. Bayley, *PATTERNS OF POLICING: A COMPARATIVE INTERNATIONAL ANALYSIS* (1990); Barry Loveday, *Government and Accountability of the Police*, in *POLICING ACROSS THE WORLD: ISSUES FOR THE TWENTY-FIRST CENTURY* 132 (Rob I. Mawby ed., 1999); JOHN D. BREWER ET AL., *THE POLICE, PUBLIC ORDER AND THE STATE* (1996); JAMES BECKMAN, *COMPARATIVE LEGAL APPROACHES TO HOMELAND SECURITY AND ANTI-TERRORISM* (2007).

59. See, e.g., Kingsbury et al., *supra* note 11, at 31-35.

60. For this view, see Deflem, *supra* note 18; Mathieu Deflem, *Bureaucratization and Social Control: Historical Foundations of International Police Cooperation*, 34 *LAW AND SOC'Y REV.* 739, 745 (2000).

this reintroduces in the discourse the functional imperatives of consent and neutrality that we have already acknowledged.⁶¹

As a result, a self-sustaining dynamic, based on the cardinal principles of members' consent and political neutrality, buttresses Interpol's action. Consent and neutrality, rather than delegation and participation, are the main sources of Interpol's legitimacy. There is no sign, yet, of accountability, other than that provided by the consent of national administrative sub-units "on the loose."⁶²

III. INTERPOL AND "SOFT" ADMINISTRATIVE POWERS

It is a commonly held view that the legitimacy stemming from state consent reaches its limits when an international (administrative) measure affects individual rights.⁶³ Are those limits reached in the case of Interpol?

Among the few scholars that have dealt with the question, the standard answer is negative. Interpol is not entrusted with any significant investigative or operational powers. Those powers are still located at the national level. Interpol cannot adopt the typical police measures—arrest, for instance—that most directly impinge upon personal freedoms. Its core business is the administration of information. Thanks to its sophisticated communication network (the I 24/7 Communication System), Interpol is able to circulate crime-related information and notices worldwide in real time. Interpol, thus, seems to have "no transnational or international powers with regard to the individual."⁶⁴

In this section, I contend that this conclusion is not accurate. My purpose is to show that the legal issues related to Interpol's administrative powers go beyond the problems of privacy and data protection to which public law disciplines are

61. *Supra* Part II.B.

62. Slaughter, *supra* note 53.

63. E.g. August Reinisch, *Securing the Accountability of International Organizations*, 7 GLOBAL GOVERNANCE 131 (2001); Dan Sarooshi, *INTERNATIONAL ORGANIZATIONS AND THEIR EXERCISE OF SOVEREIGN POWERS* (2005); Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFF. 405 (2006).

64. Schöndorf-Haubold, *supra* note 15, at 1742.

more accustomed.⁶⁵ In particular, I will focus on the problems of legal accountability raised by Interpol red notices.

The issuing of such notices “to seek the location and arrest of a person with a view to his/her extradition”⁶⁶ presupposes the establishment of *ad hoc* databases and, thus, also interferes with the individual right to privacy and informational self-determination.⁶⁷ Not surprisingly, Interpol’s secondary rules on the processing of police information⁶⁸ and on the control of personal data,⁶⁹ discipline the issuing of notifications within the context of data protection. Nonetheless, in this part my claim is (a) that red notices raise problems of legal (and political) accountability that go beyond the privacy issue, and (b) that such problems can be captured *only if* one is willing to abandon a positivist stance and to accept that “soft” international administrative acts enjoy legal significance.

A. *Red Notices: Basic Features*

Red notices, or international wanted persons’ notices, concern persons that are wanted by national jurisdictions or by international organizations, such as international criminal tribunals, with which Interpol has special agreements. In

65. For a thorough analysis, see *id.* at 1736-39, 1745-47; see also Bart De Schutter, *Police Information Exchange and Privacy Protection: A European Perspective*, in STRATEGIES OF THE EU AND THE US IN COMBATING TRANSNATIONAL ORGANIZED CRIME 79 (Brice De Ruyver, Gert Vermeulen & Tom Vander Beken eds., 2002) (comparing Interpol’s rules of data protection to those of Schengen and Europol); STEPHEN KABERA KARANJA, TRANSPARENCY AND PROPORTIONALITY IN THE SCHENGEN INFORMATION SYSTEM AND BORDER CONTROL CO-OPERATION (2008) (examining data protection in the Schengen Information System).

66. *Implementing Rules*, *supra* note 56, art. 37(a)(1)(i).

67. Schönendorf-Haubold, *supra* note 15, at 1741.

68. The rules on the processing of police information—all available at <http://www.interpol.int/Public/icpo/LegalMaterials/constitution/default.asp>—are divided in three subsets: (a) the Processing Rules, *supra* note 56; (b) the Implementing Rules, *supra* note 56; (c) the Rules governing access by an intergovernmental organization to the Interpol telecommunications network and databases, AG-2001-RES-08 (entered into force Sept. 28, 2001).

69. The control of personal data is disciplined by the Rules on the Control of Information and Access to Interpol’s Files, AG-2004-RES-08 (entered into force Jan. 1, 2005) [hereinafter *Control Rules*] and the Rules on International Police Co-operation and on the Internal Control of Interpol’s Archives, AGN/51/RES1 (entered into force Feb. 14, 1982).

2009, the General Secretariat of Interpol issued 5,020 red notices, marking an increase of 61 percent in one year.⁷⁰ These notices are characterized by three main features, concerning (i) the nature, (ii) the conditions and (iii) the effects.

(i) In order to detect the nature of a red notice, it seems appropriate to distinguish the arrest warrant from the notice itself, understood as the communication element of a complex administrative act. The source of the warrant is national: more specifically a domestic judicial authority. The source of the notice is, instead, Interpol: it is up to the Secretariat General, with the assistance of the competent National Central Bureau (functionally dependent on Interpol), to authorize the national request to publish the warrant on Interpol's *ad hoc* database and to circulate it on Interpol's communication system. Therefore, it is true—as other scholars state—that a red notice formally is not an international arrest warrant. Nonetheless, it is an international administrative act: namely, an act of authorization (to publish and circulate a national arrest warrant) issued by Interpol.⁷¹

(ii) Interpol authorizes the publication and circulation of the act if three conditions are met: (a) that the person sought is the subject of criminal proceedings or has been convicted of a crime; (b) that sufficient information is provided to allow for the cooperation requested to be effective; (c) that assurances have been given that extradition will be sought upon arrest of the person, in conformity with national laws and/or the applicable bilateral and multilateral treaties.⁷² In practice, Interpol's Secretariat General deems the first two conditions ful-

70. Interpol, *Annual Report 2009*, at 33 (2010), available at <http://www.interpol.int/Public/ICPO/InterpolAtWork/iaw2009.pdf>; Interpol, *Notices*, at 2, COM/FS/2010-01/GI-02 (2010), available at <http://www.interpol.int/Public/ICPO/FactSheets/GI02.pdf>. In 2008, 3,126 red notices were adopted. *Annual Report 2009*, *supra*, at 33.

71. Article 10 (5) of the Processing Rules, *supra* note 56, makes it clear that the author of all the notices is the General Secretariat: "Notices shall be published by the General Secretariat either at its own initiative or at the request of a National Central Bureau, authorized national institution or authorized international entity."

72. The three conditions are listed in article 37(1)(a)(ii) of Implementing Rules, *supra* note 56. See also *id.* art. 38(b) ("The General Secretariat may only publish a notice once it has verified that the processing required conforms to the rules in force and once the National Central Bureau, authorized national institution or authorized international entity which requested

filled if the national arrest warrant, on one hand, contains sufficient information related to the identity of the suspected criminal (physical description, photograph, fingerprints, occupation, languages spoken, identity document numbers) and if, on the other, it provides references to “an enforceable arrest warrant, court decision or other judicial documents,”⁷³ together with indication of the nature of the charge and the maximum penalty applicable. While the first condition responds to functional needs (identity details are necessary to facilitate local police searches), the second condition pertains to the sphere of legal guarantees: the judicial source of the warrant stands as a presumption that the national request complies with the rule of law and that it is not a discretionary act of the executive.

In the latter respect, the main problem of legal accountability concerns the newly created “Interpol-U.N. Security Special Notice.” This type of notice, introduced in 2005, in response to U.N. Security Council Resolution 1617, specifically concerns individuals and entities that are the targets of U.N. sanctions against Al Qaeda and the Taliban. The aim is to support the implementation of the U.N. 1267 Committee decisions regarding the freezing of assets of suspected terrorists.

The problem this new instrument raises is distinctive. Red notices are based either on an arrest warrant (issued for a person wanted for prosecution) or on a court decision (for a person wanted to serve a sentence): either way the judiciary is involved. By contrast, the issuing of an Interpol-U.N. Security Special Notice does not presuppose any judicial involvement. The legitimacy effect stemming from Interpol’s implicit approval is particularly problematic, insofar as it grants worldwide spread to a very restrictive international administrative decision that has been adopted according to a diplomatic procedure, outside any judicial control and, more generally, outside the reach of the rule of law.⁷⁴ The fact that these mea-

its publication, has communicated to it all the required sets of information.”).

73. *Id.* art. 37(1)(a)(ii).

74. *See* Joined Cases C-402/05 P & C-415/05 P, *Kadi v. Council (Kadi I)*, 2008 E.C.R. I-6351 (concerning EU measures imposed on Yassin Abdullah Kadi, a Saudi Arabian citizen suspected of being associated with Al-Qaeda and the Taliban, including restrictive measures consisting of “freezing” his assets). In the judgment, the ECJ annulled the European regulation on the

asures are relatively rare⁷⁵ does not detract from the relevance of the problem, which accentuates the accountability gap concerning Interpol's notices in general.

(iii) As for the legal effects, if assurance has to be given "that extradition will be sought upon arrest of the person" (see the above-mentioned third condition for the issuance of red notices), it is evident that a red notice does not amount to a request of extradition.⁷⁶ The same provision also makes clear, though, that a relation between the notice and the request of extradition does exist: once encapsulated in a notice, the national arrest warrant explicitly becomes instrumental to extradition. In fact, Interpol internal rules construe a red notice as the final act of a pre-extradition procedure: it corresponds to a request of provisional arrest with a view to extradition, an act that is usually disciplined in bilateral and multilateral treaties on extradition.⁷⁷

ground that it implemented a U.N. decision adopted in violation of the rights of defense and the right to an effective judicial remedy of the concerned person. See also T-85/09, *Kadi v. Comm'n (Kadi II)*, 2010 EUR-Lex LEXIS 825 (Sept. 30, 2010). The topic is also discussed *infra* in Part IV.B.1, in the context of the U.N. decision-making process leading to the adoption of fund-freezing measures against suspected terrorists.

75. Interpol issued 17 Interpol-U.N. notices in 2008 and 26 in 2009, against 3,126 red notices in 2008 and 5,020 in 2009. *Annual Report 2009*, *supra* note 70, at 33.

76. According to the common understanding, "[e]xtradition is the process by which States seek the returns of fugitives, that is the surrender of persons either accused or convicted of crimes, to the States where those crimes were allegedly committed." ARVINDER SAMBEI & JOHN R.W.D. JONES, *EXTRADITION LAW HANDBOOK 1* (2005). On the principle of territorial jurisdiction, upon which the regime of extradition is built, see ANTONIO CASSESE & MIREILLE DELMAS-MARTY, *JURISDICTIONS NATIONALES ET CRIMES INTERNATIONAUX* (2002).

77. Christopher Pyle observes that the "provisional arrest" (i.e. arrest before documents establishing probable cause can be supplied), as enshrined in various international agreements, is a practice that "dates from the age of the sail, when it took weeks or months for slow-moving mails and slow-traveling witnesses to catch up with telegraphed detention requests," and yet "it remains common practice in the age of fax machines and high-speed air travel." CHRISTOPHER H. PYLE, *EXTRADITION, POLITICS, AND HUMAN RIGHTS* 308 (2001). The consequence is that, for instance, in the United States, if the foreign policy interest is deemed to be strong, the Fourth Amendment to the Constitution does not fully apply: the relevant judge, in fact, does not perform the usual scrutiny of allegations and supporting evidence before the person is subject to a planned arrest. *Id.* More accurately,

Moreover, it is true that red notices are not legally binding and that, accordingly, domestic authorities are free not to honor them. For this reason, scholars assert that red notices “cannot be considered as administrative decisions on individual cases with transnational effect in the sense of an international administrative act.”⁷⁸ Yet, it is also true that, as Interpol itself recognizes, “many of Interpol’s member countries, however, consider a Red Notice a valid request for provisional arrest.”⁷⁹ While the non-binding nature of the notice would allow the recipient country to disregard it, the practice—with few exceptions (the U.S. being the most prominent one)⁸⁰—is

Pyle also notes that under 18 U.S.C. § 3184, to get a person arrested in the United States, the foreign country is (only) requested to provide

a sworn complaint declaring that the accused is wanted for an extraditable offense, a statement that an arrest warrant exists, a few facts, a physical description of the accused, and a promise to make a fully documented, formal request later. This is sufficient to put the accused behind bars for between thirty days and three months, depending on the treaty, while the paperwork is being processed. Prehearing incarcerations of seven to eight months are not uncommon.

Id. at 415 n.74.

78. Schöndorf-Haubold, *supra* note 15, at 1740.

79. Press Release, INTERPOL, INTERPOL GENERAL ASSEMBLY UPHOLDS EXECUTIVE COMMITTEE DECISION ON AMIA RED NOTICE DISPUTE (Nov. 7, 2007), available at <http://www.interpol.int/Public/ICPO/PressReleases/PR2007/PR200754.asp>.

80. Even though 18 U.S.C. § 3184 disciplines the conditions for issuing a warrant for the apprehension of fugitives from foreign countries without explicitly mentioning Interpol’s red notices, according to the U.S. Department of Justice:

[N]ational law prohibits the arrest of the subject of a Red Notice issued by another INTERPOL member country, based upon the notice alone. If the subject for a Red Notice is found within the United States, the Criminal Division will make a determination if a valid extradition treaty exists between the United States and the requesting country for the specified crime or crimes. If the subject can be extradited, and after a diplomatic request for provisional arrest is received from the requesting country, the facts are communicated to the U.S. Attorney’s Office with jurisdiction which will file a complaint and obtain an arrest warrant requesting extradition.

U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL tit. 1 § 3 (1997), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title1/doj00003.htm.

the opposite: many member states tend to honor the notice.⁸¹ If they can, they apprehend the fugitives appearing on Interpol's web page and proceed to arrest. When that is the case, the notice itself results in a threat to personal liberty, as the case below shows.

B. *The Kazakh Case (I): The Impact on Personal Freedom*

In early summer 1999, Interpol issued a red notice for the arrest of Mr. Kazhegeldin, by then former prime minister of Kazakhstan and leading opposition figure of the repressive Nazarbayev regime. The request against Mr. Kazhegeldin had been advanced by the Kazakh National Bureau on the basis of allegations of tax evasion, money laundering, abuse of office and illegal ownership of property outside the country (in Belgium). As a consequence, while travelling to Russia for a meeting of the Republican Peoples Party of Kazakhstan, the opposition political party, Mr. Kazhegeldin was arrested by the Russian police and detained on the basis of a red notice issued by Interpol on Kazakh request. Yet, the general prosecutor of Kazakhstan was unable to substantiate the charges. Thus, the Russian general prosecutor ordered the release after concluding that the allegations were unfounded.

Two points need to be noticed: first, the Interpol-sponsored warrant was subject to judicial review in the recipient state; second, this "safety net" scrutiny is important, but not sufficient to insure the integrity of individual rights. Given the *ex post* nature of this safeguard, in fact, Mr. Kazhegeldin "was prevented from meeting with his political supporters and from exercising rights guaranteed to him under the United Nations Universal Declaration on Human Rights."⁸²

81. See Interpol, *Report No. 13 to the General Assembly: Enhancing the International Status of Red Notices*, at 1, AG-2009-RAP-13 (July 29, 2009), available at http://www.coe.int/t/e/legal_affairs/legal_co-operation/transnational_criminal_justice/2_PC-OC/agn78r13.pdf (explaining the asymmetries arising from the uncertain formal status of red notices in the following terms: "the legal value attributed to red notices varies considerably from one State to another, ranging from a simple alert, to an official request to place a suspect in custody, to an official request to make a provisional arrest. It should, however, be noted that only a minority of States have given explicit legal value to red notices in their national laws.").

82. Charles R. Both, *supra* note 2, at 359 (note that Both also gives a detailed description of the case provided by Mr. Kazhegeldin's lawyer). For

However, a few months later in July 2000, while travelling to Rome, Kazhegeldin was arrested and detained by Italian authorities, again on the basis of an Interpol red notice issued at the request of the Kazakh National Bureau. In addition to the previously rejected charges, new allegations of terrorism-related crimes had been advanced against him. Once again, the Kazakh general prosecutor did not provide sufficient evidence, and the Italian authorities released Mr. Kazhegeldin, having found that the charges were groundless.

One may wonder whether the Russian and Italian authorities would have enforced the Kazakh warrant, had it not been encapsulated in a red notice. Absent such a captivating international wrapping, would Mr. Kazhegeldin have enjoyed a double stay in the Russian and Italian jails? Unlikely.

As the Kazhegeldin case shows, Interpol's decision to publish and circulate a national arrest warrant may bear severe consequences for the personal freedom of wanted persons. Interpol's parties tend to honor foreign warrants (that, absent an extradition treaty, they would otherwise disregard) because red notices are widely perceived as internationally sanctioned measures, deserving, as such, deference and prompt implementation.⁸³

For this reason, many countries have declared themselves *a priori* committed to considering red notices as valid warrants, thus granting them a sort of "direct effect" in their land even when the foreign request is not based on a previous agreement. This "direct effect" and the resulting procedural simplification, however, do not imply any "supremacy" granted to

background on the case, see HUMAN RIGHTS WATCH, HUMAN RIGHTS WORLD REPORT 2001, at 471-73 (2001); Ron Stodghill, *Oil, Cash and Corruption*, N.Y. TIMES, Nov. 5, 2006, <http://www.nytimes.com/2006/11/05/business/yourmoney/05giffen.html>.

83. On the existence of an international rule of law, see Matthias Kumm, *International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model*, 44 VA. J. INT'L L. 19 (2003). On the dangers stemming from the assumption that international norms and decisions are always "good" and thus deserve prompt implementation, see Kim L. Scheppele, *The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency*, in THE MIGRATION OF CONSTITUTIONAL IDEAS 373 (Sujit Choudhry ed., 2007) (observing that "it is not just constitutional ideas that migrate, but it may well be anti-constitutional ideas as well").

the foreign warrant over domestic law. Red notices, in fact, are different from European arrest warrants.⁸⁴

The 2002 European arrest warrant framework decision contains a list of thirty-two categories of offences (the most important and troubling being "terrorism") that give rise to surrender "without verification of the double criminality of the act."⁸⁵ Red notices, by contrast, do not trump the principle of double criminality.⁸⁶ Extradition is always subject to the condition that the acts for which the arrest warrant has been issued constitute an offence under the law of the requested state. If that condition is not fulfilled, national authorities are free not to honor an Interpol-sponsored arrest request. Red notices, thus, bear no constraint on national sovereignty. In addition, extradition can be refused on human rights grounds like the political offense exception,⁸⁷ while the European ar-

84. On the birth of the European arrest warrant, see Steve Peers, *Mutual Recognition and Criminal Law in the European Union: Has the Council Got it Wrong?*, 41 COMMON MKT. L. REV. 5 (2004); Susie Alegre & Marisa Leaf, *Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study—The European Arrest Warrant*, 10 EUR. L.J. 200 (2004). On the constitutional implications, see Nico Keijzer, *The European Arrest Warrant Framework Decision between Past and Future*, in CONSTITUTIONAL CHALLENGES TO THE EUROPEAN ARREST WARRANT 13 (Elspeth Guild ed., 2006); Valsamis Mitsilegas, *The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU*, 43 COMMON MKT. L. REV. 1277 (2006). For an illustration of the previous regime, see Mark Mackarel & Susan Nash, *Extradition and the European Union*, 46 INT'L & COMP. L.Q. 948 (1997).

85. For any other criminal offence, the principle of dual criminality continues to apply. Council Framework Decision 2002/584/JHA, of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States art. 2(2), 2(4) 2002 O.J. (L 190) 3 (EC) [hereinafter, "EAW Framework Decision"]; see also Nico Keijzer, *The Double Criminality Requirement*, in HANDBOOK OF THE EUROPEAN ARREST WARRANT 137 (Rob Blekxtoon & Wouter van Ballegooij eds., 2005). For an assessment of how the (partial) abolition of the dual criminality verification works in practice, see Elies van Sliedregt, *The Dual Criminality Requirement*, in THE EUROPEAN ARREST WARRANT IN PRACTICE 51 (Nico Keijzer & Elies van Sliedregt eds., 2009).

86. On this consolidated principle of extradition law, see Christine van den Wyngaert, *Double Criminality as a Requirement to Extradition*, in DOUBLE CRIMINALITY: STUDIES IN INTERNATIONAL CRIMINAL LAW 43 (Nils Jareborg ed., 1989); Michael Plachta, *The Role of Double Criminality in International Cooperation in Penal Matters*, in DOUBLE CRIMINALITY: STUDIES IN INTERNATIONAL CRIMINAL LAW, *supra* at 84.

87. In any event, the exception has a limited reach: it only protects participants in an uprising, see Pyle, *supra* note 77, at 313 (noting that "propo-

rest warrant severely limits the ability to refuse the surrender on human rights grounds⁸⁸ and abolishes the political offence exception.⁸⁹ However, the binding nature of European arrest warrants finds compensation in a detailed set of procedural guarantees⁹⁰ and in the “judicialisation”—i.e. “de-administrativisation”—of the extradition process.⁹¹

nents of political offense exception often overstate its effectiveness in averting foreign injustice”), while in most cases opponents of national regimes are protected by the principle of *non-refoulement*. This principle of refugee law forbids the expulsion of a refugee (*rectius*, of any person) into a country where the person might be subjected to persecution.

88. Article 1(3) of the EAW Framework Decision, *supra* note 85, explicitly acknowledges the obligation to respect fundamental rights and fundamental legal principles as enshrined in article 6 of the Treaty on European Union. However, in their implementing laws, ten member states have retained the power to oppose human rights exceptions: see Annex to the Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Brussels, 11 July 2007, COM (2007) 407 final. On the implementation of the European arrest warrant, see also Massimo Fichera, *The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?*, 15 EUR. L.J. 70, 81 (2009); Sebastian Combeaud, *Implementation of the European Arrest Warrant and the Constitutional Impact in the Member States*, in CONSTITUTIONAL CHALLENGES TO THE EUROPEAN ARREST WARRANT, *supra* note 84, at 187; Mark Mackarel, *The European Arrest Warrant—the Early Years: Implementing and Using the Warrant*, 15 EUR. J. OF CRIME, CRIM. L. & CRIM. JUST. 37 (2007); Mar Jimeno-Bulnes, *The Enforcement of the European Arrest Warrant: A Comparison Between Spain and the UK*, 15 EUR. J. OF CRIME, CRIM. L. & CRIM. JUST. 263 (2007).

89. The 1996 EU Convention on Extradition between Member States already made this ground of exception non-opposable within the realm of terrorism. Council Act of 27 Sept. 1996 on Extradition between Member States 96/C, 1996 O.J. (313/02), available at <http://www.dipublico.com.ar/english/treaties/convention-on-extradition-between-the-member-states-of-the-european-union/>). The EAW Framework Decision goes beyond terrorism, making the abolition absolute. The only *mandatory* grounds for refusal, acknowledged in article 3 of the EAW Framework Decision, *supra* note 85, are amnesty, *ne bis in idem* and the age of the suspect. Article 4 mentions other *optional* grounds for refusal, none of which refers to the political offence exception. *Id.* Yet, in some member states (Italy, Denmark and Portugal), some form of political offence exception has been reintroduced: see Fichera, *supra* note 88, at 88-89.

90. See EAW Framework Decision, *supra* note 85, art. 14, 15, 17, 23.

91. See Michael Plachta, *European Arrest Warrant: Revolution in Extradition?*, 11 EUR. J. OF CRIME, CRIM. L. AND CRIM. JUST. 178, 187 (2003) (“Arguably the most striking feature of the extradition system based on the Framework decision is its removal outside the realm of the executive. The sole responsibility for this procedure has been placed in the hands of the judi-

Despite these relevant differences, the Kazakh case makes clear that a "soft" Interpol red notice may affect personal freedom in a way that is very similar to the impact of a "hard" European arrest warrant,⁹² without being accompanied by a comparable set of guarantees.⁹³ Though formally non-binding, red notices bestow a "superior legitimacy" on foreign arrest warrants that would be otherwise disregarded. As a result, the issuance of a red notice had a crucial impact on the personal liberty of Mr. Kazhegeldin. To his freedom, a red notice was *de facto* equivalent to a binding arrest warrant. This statement needs, now, to be qualified in legal terms, in order to substantiate the claim that a red notice, despite its formal "softness," deserves substantive consideration as an international administrative act.

C. Red Notices as "Soft" International Administrative Acts

One way to drive the point home is to ask why most Interpol members tend to honor red notices *as if* they were binding. One reason is illustrated by the third above-mentioned

ary. . . . Since the procedure for executing the European arrest warrant is primarily judicial, the political phase inherent in the extradition procedure was abolished. Accordingly, the administrative redress phase following the political decision was also abolished.").

92. It is worth noting that, according to the EAW Framework Decision, *supra* note 85, (a) the domestic authority issuing a European arrest warrant may "decide to issue an alert for the requested person in the Schengen Information System (SIS)" (or, "if it is not possible to call on the services of the SIS, the issuing judicial authority may call on Interpol to transmit a European arrest warrant"); (b) "[a]n alert in the Schengen Information System shall be equivalent to a European arrest warrant." Art. 9(2)-(3), 10(3). Two points need to be emphasized. First, the E.U. decision treats SIS and the Interpol global communication network as functionally equivalent, neglecting their different potential. See Ronald K. Noble, Interpol Secretary General, Keynote Speech at the 11th Annual European Police Congress (Jan. 30, 2008) (insisting that "it is crucial to use INTERPOL channels to inform law enforcement worldwide about wanted fugitives. All too often, when a European Arrest Warrant is issued, it is not circulated to non-European countries."). Second, and more important, the E.U. decision explicitly qualifies the arrest warrant and its notice (or alert) as legally "equivalent," thereby preventing the rise of a gap between form and substance. As observed, Interpol regime adopts the opposite solution, because it clearly distinguishes the arrest warrant from the notice and treats the latter as a mere communication element of a complex administrative act. See *supra* Part III.A.

93. On the (low) level of legal protection that accompanies the issuing of red notices, see *infra* Part IV.

condition for the issuing of notices. That condition requires national authorities to draft their arrest warrants “in conformity with national laws and/or *the applicable bilateral and multilateral treaties*” if they want it to be circulated by Interpol. The implication of this conformity requirement deserves particular attention. If Italy receives a red notice encapsulating a warrant from the U.S. and the warrant complies—as it should, according to Interpol’s condition—with the requirements enshrined in a pre-existing Italy-U.S. bilateral treaty,⁹⁴ then it is hardly possible for the Italian authorities to claim that they can *legally* disregard the notice. In short, if a red notice is consistent with (and thus “covered” by) an extradition treaty, it amounts to an act with legal force. This case of “regime complex”⁹⁵—in which informal Interpol rules overlap with formal bilateral or multilateral treaties—determines the “hardening” of a “soft” administrative instrument: red notices circulate globally, borrowing their (legal) teeth from pre-existing treaties.

What, then, if there is no underlying international treaty? Here a second dynamic emerges. Even in the absence of an extradition treaty, domestic law usually provides a basis to extradite fugitives.⁹⁶ As observed, “The requirements for extradition pursuant to a domestic law often mirror the requirements set forth in a bilateral or multilateral treaty and the domestic process under the law to effect the fugitive’s return is practically identical.”⁹⁷ If that is true, a silent process of cross-fertilization and harmonization seems at work in the field of extradi-

94. Extradition Treaty, U.S.-It., art. X, Oct. 13, 1983, 35.2 U.S.T. 3023.

95. See Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT’L ORG. 277, 279 (2004) (“Regime complexes are marked by the existence of several legal agreements that are created and maintained in distinct fora with participation of different sets of actors. The rules in these elemental regimes functionally overlap, yet there is no agreed upon hierarchy for resolving conflict between rules.”).

96. Chapter 209 of the United States Code, for instance, authorizes extradition both on the basis of a treaty with the requesting government and, absent such a treaty, “in the exercise of comity.” 18 U.S.C. § 3181 (2006). The principle of comity is well established in the practice of diplomatic relations on judicial matters in many states. However, some states decide to honor a red notice only after reviewing the identity of the requesting country to ensure an extradition treaty exists between the two countries.

97. David P. Warner, *Challenges to International Law Enforcement Cooperation for the United States in the Middle East and North Africa: Extradition and its Alternatives*, 50 VILL. L. REV. 479, 488 (2005).

tion law: the conditions under which national authorities process the requests of extraditions (and pre-extradition arrest) appear to gradually converge toward a common set of standards,⁹⁸ whose protective capacity tends to weaken in comparison to the domestic law guarantees surrounding personal freedom.⁹⁹

Against this backdrop, if we recall once again the third condition for the issuing of notices—the one that requires the conformity of arrest warrants “*with national laws and/or the applicable bilateral and multilateral treaties*”—we come to realize that national warrants complying with the conditions for issuing a red notice *ipso facto* also satisfy, more often than not, the relevant international or domestic legal requirements.¹⁰⁰

Let us imagine that Italian authorities receive a red notice encapsulating an arrest warrant from a country having signed no treaty on extradition with Italy. And let us assume that, nonetheless, the foreign request is consistent with the relevant

98. Nonetheless Interpol laments that, as far as the cooperation based on red notices is concerned, a relevant problem is represented by “the lack of a universally applicable instrument” in extradition law, which “does not provide an instrument which would be universally applicable by States.” Interpol, *Report No. 13 to the General Assembly*, *supra* note 81, at 2.

99. See PYLE, *supra* note 77, at 301-06 (arguing that various (fallacious) assumptions account for this lower level of protection, namely a) the idea that extradition does not affect “us” but “them” (80-90 percent of the extradition cases concerns aliens, i.e. non-citizens of the extraditing country), b) the assumption that extradition magistrates do not exert a proper “judicial power” in certifying the extradition, and c) somewhere – as in the United States – the idea that extradition is not a criminal proceeding, but rather a civil or an administrative one). For examples of the latter view, see, e.g., *United States v. Galanis*, 429 F. Supp. 1215, 1224 (D. Conn. 1977); *Romeo v. Roche*, 820 F.2d 540, 534-44 (1st Cir. 1987) (both courts refusing to apply criminal law safeguards to extradition proceedings because they are not technically part of a criminal prosecution). This view is also shared in the comment of the Advisory Committee on Rule 1101 of the Federal Rules of Evidence: “Extradition and rendition proceedings are . . . essentially administrative in character.”

100. Some laws and treaties may raise the standard by requiring a *prima facie* case for extradition. This requirement may cause relevant asymmetries, as illustrated by the case of the U.K.-U.S. extradition treaty signed in 2003. Under the new treaty, the allegations of the U.S. government will be enough to secure the extradition of people from the U.K. However, if the U.K. wants to extradite someone from the U.S., evidence to the standard of a “reasonable” demonstration of guilt will still be required. Extradition Treaty, U.S.-U.K., art. 8, ¶ 3(c), Mar. 31, 2003, S. TREATY DOC. NO. 108-23.

Italian law (e.g. the request stands the main grounds of refusal: the “double criminality” test,¹⁰¹ the “political crime” and human rights exception,¹⁰² and so on).¹⁰³ In such a case, shouldn’t the Italian authorities be bound by the Interpol-sponsored warrant exactly in the same way as if it were a formal international arrest warrant? Of course, even in that case, a state could disregard the red notice. Yet, the same holds true with almost any “formal” international measure, binding in theory, much less so in practice.¹⁰⁴ In both cases, in fact, national authorities that do not comply violate either the underlying international treaty or their own domestic law (or even both). Under such conditions, the difference between a binding arrest warrant and a non-binding one vanishes.

Accordingly, an Interpol red notice can be conceptualized as a “parasitic” administrative act: just like parasites feed on other “organisms,” being unable to live on its own, so do red notices, which draw their binding force from other legal texts. However, reliance on other regimes (in our case, international or national extradition regimes) does not imply a lack of autonomous legal salience. It rather highlights the underlying “existential” dynamic, i.e. the legal rationale behind the practice of most of Interpol’s members: they commit themselves to honor red notices because, by experience, they learn

101. Codice penale [C.p.] [Penal Code] art.13(2) (It.).

102. Codice di procedura penale [C.p.p.] [Penal Procedure Code] art. 698 (It.).

103. Moreover, the documentation required by Article 700(2) of the Italian Penal Procedure Code to support a foreign arrest warrant—a statement of the alleged criminal conduct and its circumstances, the kind and amount of the corresponding penalty, identity and factual details in order to facilitate the search and apprehension—largely corresponds to the documentation required for publishing a red notice. See *Implementing Rules*, *supra* note 56, art. 37(1).

104. On the question of why states obey international law, see generally Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT’L L. 705 (1988); Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT’L ORG. 379 (1999). On domestic compliance with international law, see generally Abraham Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT’L ORG. 172 (1993); Harold H. Koh, *Why Do Nations Obey International Law?*, 106 YALE L. J. 2599 (1997); Kal Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, 49 WORLD POL. 482 (2000); Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in HANDBOOK OF INTERNATIONAL RELATIONS 538 (Walter Carlsnaes, Thomas Risse & Beth A. Simmons eds., 2002).

that Interpol-sponsored warrants are consistent with domestic and international law and are, therefore, legally equivalent to proper international arrest warrants. As observed, "regulatory cooperation, both hard and soft, amounts to administration by agreement in a way just as substantial as agreement by treaty. Drawing careful distinctions between hard and soft law makes little sense where nonbinding rules can have such binding effect."¹⁰⁵

It seems, thus, not hazardous to conclude: (a) that red notices are "soft" international administrative acts; (b) that their "softness," consequent to their *formally* non-binding nature, does not prevent them from impinging upon individual freedoms, due to their *substantial* binding nature (widespread recognition); (c) that this substantive "hardening" is the effect of a triangular process of "borrowing regimes," with both international treaties and domestic laws on extradition lending their legal force to Interpol notices; (d) that this mutually reinforcing process is allowed by a process of spontaneous convergence that levels the requirements for extradition in international and domestic law, eventually generating an informal phenomenon of "mutual recognition;" (e) that Interpol "softly" but decisively contributes to such a process of convergence. Thanks to its crucial role as global circulator of national warrants, its internal conditions for the issuing of notices result in the setting of a global standard.

IV. RED NOTICES AND LEGAL ACCOUNTABILITY

Interpol red notices are a manifestation of an administrative power that is both "soft," because it is formally non-binding, and "authoritative," insofar as it has the potential to limit personal liberty.¹⁰⁶ Is there any reason to worry? Do we really

105. David Zaring, *Informal Procedure, Hard and Soft*, in *International Administration*, 5 CHI. J. INT'L L. 547, 595 (2005).

106. The classic notion of the "authoritative" administrative act goes back to Otto Mayer, who famously depicted an administrative measure as an "authoritative pronouncement of the administration which in an individual case determines the rights of the subject." OTTO MAYER, *DEUTSCHES VERWALTUNGSRECHT* 95 (vol. I, 1895). On the German roots of this conceptual framework, later adopted by most legal cultures in continental Europe, see Mahendra P. Singh, *GERMAN ADMINISTRATIVE LAW IN COMMON LAW PERSPECTIVE* 63 (2001); LUCA MANNORI & BERNARDO SORDI, *STORIA DEL DIRITTO AM-*

need the rule of law to be established at the Interpol level to keep in check an administrative power that is merely “soft”?¹⁰⁷

A first attempt to deny such a need can be based on the following warning: not to forget that the main site for the protection of individual rights is still domestic, because national courts provide all the concerned persons with the necessary due process guarantees.¹⁰⁸ “Bottom-up” review of international regulatory power by domestic courts is a crucial accountability tool in a global administrative law perspective: where control from the top is loose, control from the bottom may compensate.¹⁰⁹

This holds true also in the case of red notices. In the country of extradition, the arrested enjoys (at least, in principle) full rights of defense before a court. A red notice may lead to deprivation of personal freedom, but nonetheless does not raise a doubt *vis-à-vis* the person’s innocence, which remains a question for the competent judicial authorities to determine. Isn’t this judicial double-check, typical of extradition procedure, enough?

Before answering, a clarification is in order. The promotion of worldwide police cooperation yields a troublesome externality: Interpol’s door is open to all the countries of the world, including countries where fundamental rights are disregarded or where prosecutors and courts are not independent. Therefore, to declare in advance—as many states do—that Interpol red notices are to be honored is risky: the danger is there that, by granting Interpol red notices automatic enforcement, police forces of a liberal state may unexpectedly become the executive arm of an illiberal government. In the red no-

MINISTRATIVO 369 (2001) (providing an illuminating comparative analysis of the historical evolution of administrative law).

107. For a negative answer, justified in a strictly positivist perspective, see Jean d’Aspremont, *Softness in International Law: A Self-Serving Quest for New Legal Materials*, 9 EUR. J. INT’L L. 1075 (2008). The issue is also extensively discussed in the Conclusion *infra*.

108. This position is common to scholars who deny the autonomous relevance of red notices as (international) administrative acts. See Schöndorf-Haubold, *supra* note 15, at 1942.

109. Stewart, *U.S. Administrative Law*, *supra* note 49, at 76-88.

tice system, a crucial element of extradition procedures is absent, and that is *trust*.¹¹⁰

Trust is the reason *ad hoc* bilateral or multilateral agreements are the privileged source of legal commitments to extradite. By signing treaties, liberal governments select counterparts they can rely upon, (also) having regard to their rule of law "pedigree."¹¹¹ By contrast, Interpol-sponsored cooperation follows a different logic: governments choose to commit themselves to international cooperation and, hence, to trust Interpol rather than the other members. State-by-state commitment, usually enshrined in bilateral treaties, is mediated (and substituted) by acknowledging Interpol as guarantor of fair international cooperation.

Assessed in this perspective, the previous question ("Aren't the typical extradition law guarantees enough?") deserves a negative answer. Interpol red notices are autonomous administrative acts, conceptually distinct from the underlying national arrest warrant: hence, something more than the usual extradition guarantees is required. The relevant question, thus, becomes the following: whether Interpol has put in place the legal infrastructure necessary to act as "reliable guarantor," or, more accurately, whether the processing of red notices has built-in due process guarantees that are sufficient to prevent the international circulation of ill-founded national arrest warrants.¹¹²

110. The issue of trust has been extensively debated in the European Union with regard to the choice between harmonization and mutual recognition. See, e.g., Cardiff European Council, *Presidency Conclusions*, SN 150/1/98 REV 1 (June 15, 1998); Hans Nilsson, *Mutual Trust and Mutual Recognition of Our Differences*, in *LA RECONNAISSANCE MUTUELLE DES DÉCISIONS JUDICIAIRES PÉNALES DANS L'UNION EUROPÉENNE* 155 (G. De Kerchove & A. Weyembergh eds., 2001). For a discussion of these issues after the introduction of the European arrest warrant, see Florian Geyer, *The European Arrest Warrant in Germany*, in *CONSTITUTIONAL CHALLENGES TO THE EUROPEAN ARREST WARRANT*, *supra* note 84, at 115.

111. See, e.g., ISIDORO ZANOTTI, *EXTRADITION IN MULTILATERAL TREATIES AND CONVENTIONS* (2006) (analysing extradition agreements among American countries).

112. It would be ingenuous—one might nonetheless contend—to expect that an international institution, whose aim is to promote police cooperation, should also correct domestic "failures" (e.g., disregard for the rule of law) occurring in non-democratic countries. Reasonable as it may seem, this objection misses the point. The correction invoked here does not pertain to a national measure (arrest warrant). It rather pertains to the legal accounta-

In Part IV, it is submitted that Interpol red notices system allows some room for solutions (so far, only partially introduced) that enhance legal accountability without harming the effectiveness of international cooperation. From a global administrative law perspective, functional and normative needs of international police cooperation can be reconciled, at least to a considerable extent. In Section IV.C, I try to substantiate this claim, after a critical analysis—carried out in Sections IV.A-IV.B—of the guarantees provided for in Interpol's processing of red notices.

A. *The Kazakh Case (II): The Administrative Control*

As the previous discussion of the Kazakh case makes clear,¹¹³ judicial control offered by the countries where the arrest takes place may be effective in preventing extradition, but not an unjust (albeit temporary) detention. Although Russian and Italian magistrates did their job pretty well, in fact, Mr. Kazhegeldin had to suffer a patent violation of his right to personal liberty and spend some days in jail. And not just once, but twice.

However, the Kazakh case did not end with the second detention of Mr. Kazhegeldin in July 2000. One year later, Mr. Kazhegeldin was sentenced "in absentia" by the Supreme Court of Kazakhstan to ten years in prison for crimes involving the use of weapons. At the request of the Kazakhstan National Central Bureau, the Interpol Secretariat General issued a new red notice (the third!) against Mr. Kazhegeldin, on the basis of the Supreme Court ruling. However, the Secretariat General itself subsequently ascertained that (once again) the evidence submitted did not support the charges. Therefore, Interpol decided to revoke the notice on the basis of article 3 of its

bility of an international regime (Interpol) and its administrative acts (red notices). If it is not possible to prevent the issuing of biased arrest warrants at a domestic level, it is still possible, and perhaps necessary, not to grant those warrants any international approval, that is, any substantive extra-territorial force. In any case, multilateral institutions can also contribute to enhancing democracy at a national level in many ways, including through protection of individual rights and improvement of the quality of democracy. See Robert O. Keohane, Stephen Macedo & Andrew Moravcsik, *Democracy-Enhancing Multilateralism*, 63 INT'L ORG. 1 (2009) (arguing that multilateral institutions can enhance democratic processes).

113. See *supra* Part III.B.

Constitution, which prohibits any intervention or activities of a political, military, religious or racial character. The Executive Committee unanimously upheld the decision, but the General Assembly, whose decision is final, eventually overturned it. On the insistence of the Kazakhstan National Central Bureau, the General Assembly re-examined the decision on October 24, 2002 and reinstated the red notice by a 46-38 majority (with 23 abstentions).¹¹⁴

While the initial events of the Kazakh case (discussed in Part III) taught us what happens when Interpol does not carefully check a domestic request of red notice, the subsequent events illustrate the opposite situation, namely what happens (or may happen) when Interpol subjects a national request to a review process. Two aspects deserve a closer analysis: the role of the Secretariat General in reviewing the Kazakh request and the role of the General Assembly in settling the dispute. The former aspect is dealt with in the following pages, whereas the latter is analyzed in the next section (Part IV.B).

1. *Ex Ante Scrutiny*

When a state submits a request to publish a red notice, the General Secretariat takes a (first-instance) decision on the basis of an *ex ante* scrutiny of the request.¹¹⁵ The general aim of this preventive control is to ensure that requests of red notice comply with Interpol's Constitution and its basic rules. This compliance is assessed having regard to three main obligations: to respect "the basic rights of individuals in conformity with . . . the Universal Declaration of Human Rights" (*rule of law requirement*);¹¹⁶ to avoid "any intervention . . . of a political, military, religious or racial character" (*neutrality requirement*);¹¹⁷ to verify that domestic authorities process informa-

114. Press release, Interpol, Interpol re-issue of red notice on former Kazakhstan PM (October 24, 2002).

115. It should be noted that the General Secretariat's control, described here as an *ex ante* mechanism, may well be carried out *ex post*, after the publication of a red notice, when a state so requests or when new relevant facts emerge. When this happens, the same requirements and conditions as in the *ex ante* scrutiny apply. Thus, the General Secretariat, after having reviewed the grounds of the national arrest warrant on which a red notice is based, can cancel it, as happened in the mentioned Kazakh case.

116. Interpol Constitution art. 2.

117. *Id.* art. 3.

tion through the Interpol's channels in conformity with the international conventions to which they are a party, as well as "in the context of the laws existing" in their countries (*legality requirement*).¹¹⁸

In order to ensure respect for these requirements, the General Secretariat is entrusted with three instruments. First, it has no autonomous power of investigation, but it can ask the requesting country to clarify doubts either of formal or of substantive nature.¹¹⁹ Secondly, it can adopt precautionary measures that may indirectly caution the members about the content of a red notice.¹²⁰ An example is the publication of an addendum to a red notice, indicating that the extradition of the fugitive has been denied by another country.¹²¹ Finally, and most importantly, the General Secretariat may reject a request to issue a red notice, when the publication would conflict with the mentioned requirements.¹²²

Having clarified the aims and the tools available to the General Secretariat to carry out an *ex ante* scrutiny of national requests for red notices, we now turn to the crucial question: are the mentioned tools adequate to satisfy the demanding

118. *Processing Rules*, *supra* note 56, art. 10(1)(a)(5).

119. The General Secretariat can consult the requesting national central bureau "if there is any doubt about whether the criteria for processing an item of information are being met." *Id.* art. 10(1)(g).

120. Precautionary measures can be adopted "to prevent any direct or indirect prejudice the information may cause to the member countries, the Organization or its staff, and with due respect for the basic rights of individuals the information concerns." *Id.* art. 10(1)(h).

121. A similar addendum is presumably attached to the red notice still pending on Mr. Kazhegeldin. The addendum cautions members and encourages them to obtain the relevant information from the country that has issued the arrest warrant. This may certainly lead to a decision not to respect the request for cooperation forwarded by the red notice in the particular case, while another country may decide to disregard that information if it considers it to be irrelevant for its purpose (e.g. the extradition was denied by country A based on lack of dual criminality, while this problem will not arise if country C is asked to extradite that individual). I owe this point to Yaron Gottlieb.

122. According to Article 10(5)(b) of the Processing Rules, *supra* note 56, "[b]efore publishing and circulating a notice . . . the General Secretariat shall assess whether it is necessary and advisable to do so, in the light of Articles 2 and 3 of the present Rules." For a discussion of the human rights and discrimination language in Articles 2-3 of the Processing Rules, see *supra* notes 116-17 and accompanying text.

purposes of the control? Is the General Secretariat able to ascertain the compliance of each request of red notice with the three mentioned requirements (rule of law, neutrality and legality)?

This question needs to be put in context. Red notices are processed within the General Secretariat by an *ad hoc* department, whereas the Office of Legal Affairs, a rather small unit carrying out all the legal tasks of the organization, gets involved when legal issues arise (e.g. application of article 3 of the Constitution). One may infer from this that a legal assessment of domestic arrest warrants underlying red notices is merely eventual. Observation of Interpol's practice, in effect, suggests that a full assessment of national requests is not systematically carried out, but is instead supplemented by a rather formal scrutiny.

As for the latter (formal scrutiny), it takes place on a regular basis before the issuance of a notice. The General Secretariat, in fact, "shall ensure that the conditions attached to the given notice are met."¹²³ These conditions are instrumental to the effectiveness of international cooperation: they serve to make a red notice consistent with some basic police cooperation requirements,¹²⁴ whereas they do not touch upon the ground of the warrant.¹²⁵ Does this mean that the mentioned substantive requirements (rule of law, neutrality and legality) are forgotten in Interpol's practice?

This question is not easy to answer for an external observer. However, the evidence available seems to confirm that a substantive scrutiny mainly takes place in two situations: when the requests conflicts with extradition law and when the charge openly or potentially amounts to a political offense.

123. *Implementing Rules*, *supra* note 56, art. 37(b). Interpol authorizes a notice if the national arrest warrant provides sufficient identity information "to allow for the co-operation requested to be effective. The notice must also ensure that "references to an enforceable arrest warrant, court decision or other judicial documents are provided; and provide assurances that "extradition will be sought upon arrest of the person." *Id.* art. 37(a)(1)(ii). These conditions are examined in Part III.A *supra*.

124. *See supra* Part III.C.

125. The assumption is that "the information is considered, a priori, to be accurate and relevant, if it has been provided by a National Central Bureau, an authorized national institution, or authorized international entity." *Processing Rules*, *supra* note 56, art. 10(1)(f).

With regard to the first scenario, if one accepts the qualification of a red notice as a “parasitic” administrative act (borrowing its legal force from the existing national and international norms concerning extradition),¹²⁶ it follows that, when there is a conflict with extradition norms, a red notice has very few chances to be honored. For this pragmatic reason, the General Secretariat, while processing requests of red notices, pays particular attention to consistency with extradition law. If, for instance, the wanted person is a president of another country, the red notice requested is not issued (or, if already published, it is immediately cancelled). Such a red notice, in fact, could hardly be implemented, given the conflict with the international law principle of immunity.¹²⁷

The second hypothesis regards the control based on article 3 of the Interpol Constitution, forbidding “any intervention . . . of a political, military, religious or racial character.” This control is easier to make when the charge is *prima facie* based on a political offence: in this case, Interpol immediately rejects the request.¹²⁸ Other times, the control is more complex.¹²⁹ When the nature of the offence is dubious—as in the case of Mr. Kazhegeldin or when the charge is related to ter-

126. See *supra* Part III.C.

127. This principle has been established in *Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14), concerning an arrest warrant issued in 2000 by Belgium against Mr. Abdulaye Yerodia Ndombasi, by then minister of foreign affairs of Congo. The International Court of Justice held that the adoption and circulation of the Belgian warrant failed to respect diplomatic immunity established by international law. *Id.* Interpol’s practice conforms to this principle. See, e.g., Press Release, Interpol, Interpol statement on Honduras President Manuel Zelaya (July 3, 2009) (stating that “Interpol’s jurisprudence based on international law prevents it from issuing a Red Notice for the arrest of any President, Head of State or Government unless it has been requested to do so by an international tribunal.”).

128. If, for example, a country requests the publication of a red notice based on the charge of treason, the General Secretariat will generally not publish it, as this charge is considered a political offence in international extradition law and, therefore, also within the meaning of article 3 of the Interpol Constitution.

129. According to article 40 of the Implementing Rules, *supra* note 56, all relevant information must be examined in the context of an article 3 analysis, including, for example, the general context. Therefore, in principle, the nature of the offence is only one of the elements that is examined.

rorism¹³⁰—the General Secretariat consults the requesting national central bureau in order to better assess the nature of the offence.¹³¹ The reason of the special care devoted to the neutrality requirement is twofold. On the one hand, extradition law itself provides for the political offence exception: very few countries would extradite a person charged with treason. On the other hand, by checking this requirement, Interpol protects its own political neutrality and, hence, its capacity to foster international police cooperation. This stricter scrutiny is due to the convergence of functional and normative needs.

What, then, about the other two requirements, namely the respect of fundamental rights (rule of law) and of national and international norms that bind the member states (legality requirement)?

As for the latter, the impression is that Interpol jurisprudence tends to pragmatically narrow it, to the extent that only compliance with extradition law norms—as just explained—is carefully assessed.¹³² Also, the rule of law scrutiny appears to be less than systematic. This review would be complex, given the variety of fundamental rights protected by the Universal Declaration of Human Rights. Yet, there is no need to stress its utmost importance. Imagine the case of a fugitive who, if apprehended and extradited in the requesting country, risks facing torture or inhuman treatment. In a similar case, the

130. U.N. Conventions qualify specific terrorist conduct as crimes that no longer enjoy the status of a political offence within the meaning of extradition law. However, when the charge concerns membership in a terrorist organization, the political nature of the offence resurfaces because the meaning of "terrorist organization" in many countries is a salient political issue. Not surprisingly, Interpol refrains from engaging in a legal determination of what constitutes a terrorist organization. Rather, if Interpol receives a red notice request seeking the arrest of a person for the crime of membership in a terrorist organization, the General Secretariat requires the source of information to provide facts attesting to the illegal activities (e.g. bombing) of the particular group and to the meaningful link of the individual to that group, to ensure the request is not used as a form of a political tool.

131. As a matter of practice, in case the red notice request contains both political and ordinary-law elements, Interpol applies the predominance test (which is used in international extradition law) to determine the overall nature of the case.

132. Various reasons account for this choice: not only the over-breadth of the requirement and the natural tendency to focus on legal requirements that provide the act with an *effect utile*, but also the administrative workload and the relevance of time-factor in the circulation of the notice.

extradition would clearly violate the principle of *non-refoulement*.¹³³ Should Interpol accept a national request to issue a red notice in such circumstances? More generally, should Interpol's commitment to the rule of law (including the prohibition against *refoulement*) imply a systematic rejection of all the requests of red notice coming from member states with dubious human rights record?

It would be difficult to argue that Interpol's issuance of such a notice would be consistent with the respect of fundamental rights. Albeit indirectly, the issuance would run counter to the obligation of all states not to return or extradite any person to a country where the life or safety of that person would be seriously endangered.¹³⁴ The same principle also applies when the person to be extradited would be deprived of

133. The principle of *non-refoulement* is codified by article 33(1)(A) of the 1951 United Nations Convention Relating to the Status of Refugees, Jul. 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention], which states that "[n]o Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion." The principle is now recognized as *jus cogens* of international law. All states, therefore, whether or not they are a party to conventions incorporating the prohibition against *refoulement*, are bound by the principle. See KATE JASTRAM & MARILYN ACHIRON, UN HIGH COMM'R REFUGEES & INTER-PARLIAMENTARY UNION, REFUGEE PROTECTION: A GUIDE TO INTERNATIONAL REFUGEE LAW 100 (2001) ("This principle of *non-refoulement* is considered a rule of customary international law."). For an updated overview, see KEES WOUTERS, INT'L LEGAL STANDARDS FOR THE PROTECTION FROM REFOULEMENT (2009).

134. Various international treaties on terrorism and extradition enshrine the principle of *non-refoulement*. The European Convention on Extradition, for instance, prohibits extradition in cases where a state party "has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons." European Convention on Extradition art. 3(2), Dec. 13, 1957, E.T.S. no. 024. An analogous provision can be found in Article 3(b) of the UN Model Treaty on Extradition, G.A. Res. 45/116, U.N. Doc. A/RES/45/116 (Dec. 14, 1990), amended by G.A. Res. 52/88, U.N. Doc. A/Res/52/88 (Dec. 12, 1997). See also INTERNATIONAL HELSINKI FEDERATION FOR HUMAN RIGHTS (IHF), ANTI-TERRORISM MEASURES, SECURITY AND HUMAN RIGHTS – DEVELOPMENTS IN EUROPE, CENTRAL ASIA AND NORTH AMERICA IN THE AFTERMATH OF SEPTEMBER 167-83 (2003).

internationally recognized rights of defense in the requesting state.¹³⁵ No exceptions to the ban of *refoulement* are allowed.¹³⁶

However, an affirmative answer to those questions would put Interpol in a politically uncomfortable situation, due to the tension that may arise with the member whose request is found to violate a basic right. Moreover, such a strict application of the rule of law requirement would ultimately threaten the basis for police cooperation with most African and Asian countries. A possible way out is the existence of a ruling by a regional human rights courts as an "objective" ground to refuse certain requests.¹³⁷ And, yet, this way out is rarely availa-

135. See European Convention on the Suppression of Terrorism, explanatory report, ¶ 50, Jan. 27, 1977, E.T.S. no. 090 (requesting State may refuse extradition on suspicion of political persecution even if the extradited party would be denied rights of defense guaranteed by European Convention on Human Rights); *Human Rights and the Fight against Terrorism: The Council of Europe Guidelines*, at 11, (July 15, 2002), available at <http://www.coe.int/t/dghl/standardsetting/victims/Guidelines%20CM.pdf> ("When the person whose extradition has been requested makes out an arguable case that he/she has suffered or risks suffering a flagrant denial of justice in the requesting State, the requested State must consider the well-foundedness of that argument before deciding whether to grant extradition.").

136. According to article 33(2) of the Refugee Convention, *supra* note 133, the ban does not apply to a refugee "whom there are reasonable grounds for regarding as a danger to the security of the country in which he is or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." However, this provision is only applicable when it is proved that there is a direct link between the presence of a refugee in the territory of a particular country and a national security threat to that country. See HUMAN RIGHTS WATCH, *HUMAN RIGHTS IMPLICATIONS OF EUROPEAN UNION INTERNAL SECURITY PROPOSALS AND MEASURES IN THE AFTERMATH OF THE SEPTEMBER 11 ATTACKS IN THE UNITED STATES* (2001). More importantly, according to the jurisprudence of the UN Human Rights Committee and the European Court of Human Rights (developed under article 7 of the International Covenant on Civil and Political Rights and Article 3 of the European Convention on Human Rights), the ban on *refoulement* is absolute and does not admit derogation. See *Soering v. United Kingdom*, 11 Eur. Ct. H.R. (ser. A) (1989).

137. If a regional court of human rights holds that a national court or criminal procedure violates a human rights convention to which the country is a party (as happens, for instance, with regard to courts and procedures created for the purpose of adjudicating terrorism), Interpol advises the country that no red notice may be published in case the underlying arrest warrant has been issued by that court or according to that procedure; such publication would be in violation of article 2(1) Interpol's Constitution. Additionally, it would run counter to the rule—stemming from article 10 (1)(a)(5) of the Processing Rules, *supra* note 56—that, as an international

ble. In the remaining cases, Interpol does not seem to consistently control this requirement, at least not *ex ante*.¹³⁸

Take the case of Abdul Rasoul Mazraeh, an Iranian citizen and a recognized refugee in Syria. Despite his refugee status (perhaps ignored by the General Secretariat at the time of the Iranian request), Interpol published a red notice against Mr. Mazraeh, thus inadvertently violating the principle of *non-refoulement*. On the basis of that notice, on May 11, 2006 the Syrian government arrested Mr. Mazraeh and on May 15, 2006 extradited him to Iran. Once in Iran, Mr. Mazraeh was detained for two years without being put on trial and was subject to various kinds of torture and violence with permanent physical consequences.¹³⁹

Due to the lack of publicity of review proceedings at Interpol level,¹⁴⁰ it is difficult to assess how often such problems occur.¹⁴¹ This case may well be a particularly unfortunate and

organization, Interpol cannot assist a member country violate its international obligations deriving from human rights conventions.

138. On Interpol's *ex post* scrutiny, see *infra* Part IV.A.2.

139. According to the allegations in the report of the UN Special Rapporteur:

since his arrest he has not had access to a lawyer and has been detained in solitary confinement. Mr. Mazraeh is expected to go on trial in March [2008], however, it remains unclear what charges are put against him. He was physically and mentally ill-treated while in detention. As a result, he carries blood in his urine, his liver and kidneys are not functioning and he lost all of his teeth. Furthermore, he is paralysed because his spine has been damaged.

Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Addendum – Summary of Information, Including Individual Cases, Transmitted to Governments and Replies Received* 124-25, U.N. Doc. A/HRC/7/3/Add.1 (February 19, 2008).

140. The main source of random information, apart from Interpol's press releases, is constituted by NGOs reports and the independent press.

141. For the classic reference on the principle of publicity of judicial review proceedings, see Jeremy Bentham, *Of Publicity and Privacy, as Applied to Judicature in General and to the Collection of Evidence in Particular*, in 6 WORKS OF JEREMY BENTHAM 351 (John Bowring ed., 1843). Even with regard to courts, however, the principle suffers some exceptions. In the United States, for example, appellate courts do not publish all of their judgments; on the issue, see Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004). A different problem—often occurring in terrorism-related trials—concerns the disclosure of intelligence documents to the defense. See, e.g., *Botmeh v. United Kingdom*, App. No. 15187/03, Eur. Ct. H.R. (June 7, 2007).

isolated episode. Nonetheless, it seriously questions the ability of Interpol's General Secretariat to adequately investigate all national requests and, ultimately, to hold its commitment to protect human rights. It, rather, seems that the only systematic check is the formal one, whereas Interpol delves into the substantive ground of a request only when it is necessary to preserve its political neutrality or the effectiveness of a notice.¹⁴² If so, the General Secretariat's *ex ante* scrutiny is driven by functional concerns (as those related to compliance with extradition law and neutrality requirements), rather than by normative concerns (as the ones more directly related to the rule of law and to general legality requirements).

2. *Ex Post Review*

Interpol's basic norms restrict another mechanism of review, additional to the scrutiny over national requests by the General Secretariat. This second control essentially takes place *ex post* and is performed by an independent body: the Commission for the control of data files (CCF).¹⁴³ The CCF is composed of five members, "appointed because of their expertise and in such a way as to allow the Commission to carry out its mission completely independently."¹⁴⁴

142. This would explain why—as Interpol itself frequently reiterates—"the issuance or non-issuance of a red notice for any individual cannot be construed as an indication of the strength or weakness of the case against that individual, which is a matter for the appropriate judicial authorities to decide." Press Release, Interpol, Interpol statement clarifying its role in case involving Iranian minister wanted by Argentina (Sept. 4, 2009).

143. A recent amendment to Interpol's Constitution has introduced an explicit reference to the CCF and its role. The origin of the CCF goes back to the Headquarters Agreement signed by France and Interpol on Nov. 3, 1982. The Agreement, which came into force on February 14, 1984, provided for internal control of Interpol's archives by an independent body, rather than by a national supervisory board, as the French government had initially proposed. Interpol, *Headquarters Agreement between the ICPO-INTERPOL and the Government of the French Republic* art. 8, (Nov. 3, 1982). The procedure of review is now disciplined by the Control Rules, *supra* note 69, and the Operating Rules of the Commission for the Control of Interpol's Files (*entered into force* Oct. 31, 2008) [hereinafter *CCF Operating Rules*]. See MARTHA, *supra* note 2, at 92-104.

144. *Control Rules*, *supra* note 69, art. 2(a). The five members comprise a senior judicial or data protection official as chairperson, two senior data protection experts, a senior electronic data processing expert, and an expert with recognized international experience in police matters. They are ap-

The CCF examines two categories of individual requests, concerning, respectively: (a) one's right to access the information contained in Interpol's databases against her;¹⁴⁵ and (b) the guarantee that the processing of information "conform[s] to all the relevant rules adopted by the Organization" and does "not infringe the basic rights of the people concerned."¹⁴⁶ Both these individual requests are processed through a highly formalized review procedure.

The wanted person may submit a request to challenge the validity of a red notice both on formal grounds (e.g. the underlying arrest warrant has expired in the requesting country) and on substantive ones (e.g. the arrest warrant is an attempt to politically persecute that individual). When the CCF receives a request, it transmits to the General Secretariat a copy of any request calling into question the processing of information, and informs the requesting party of the applicable procedure and deadlines.¹⁴⁷ If the CCF considers the request to be inadmissible, it has to give the reasons.¹⁴⁸

In examining the request, the CCF "may ask the General Secretariat or any other person or entity for further information to be provided within a specified period."¹⁴⁹ In particular, the CCF may invite the General Secretariat to carry out a preliminary study of any requests that call into question the processing of information.¹⁵⁰ However, an oral hearing of the

pointed by the General Assembly from among the candidates put forward by member states and selected by the Executive Committee. *Id.* art. 2(b). In the exercise of their duties, the members of the CCF "shall neither solicit nor accept instructions from any persons or bodies, and shall be bound by professional secrecy." *Id.* art. 5(e)(1).

145. *Id.* art. 9(a). On this internal mechanism of control, more specifically related to the right to informational self-determination and hence less relevant to our discussion, see Schöndorf-Haubold, *supra* note 15, at 1745-47.

146. *Id.* art. 1(a), 4(a).

147. *CCF Operating Rules*, *supra* note 143, art. 6, 7, 12. The decision on the admissibility of the request has to be taken "as soon as possible, generally during the session immediately following receipt of the said request." *Id.* art. 12(1).

148. *Id.* art. 12(4); *see also id.* art. 13(2) ("If the request is rejected in whole or in part, the Commission shall explain its reasons to the requesting party.").

149. *Id.* art. 17(2).

150. *Id.* art. 16(1). The General Secretariat itself may submit a reasoned request to the Commission when it considers that additional details are nec-

requesting party is only exceptionally allowed.¹⁵¹ On the basis of the information collected, the CCF adopts reasoned conclusions and recommendations.¹⁵²

The CCF's *ex post* review would seem, thus, to fill the main gaps of the *ex ante* scrutiny. The conformity with the rule of law and the legality requirements, though not consistently checked before the publishing of a red notice, could still be assessed after issuance at the demand of the fugitive. Put differently, Interpol's legal accountability would rely on a "fire alarm," rather than "police patrol," mechanism.¹⁵³

Nonetheless, the impact of CCF's review on the red notice system should not be overstated. To begin with, whereas the Secretariat General may intervene *ex officio*,¹⁵⁴ the CCF can only intervene *ex parte*, on demand of the concerned person.¹⁵⁵ This implies that the remedy is construed as an *ex post* review: access to the CCF only happens after the wanted person knows about the red notice, that is, once the notice has

essary from the requesting party. *Id.* art. 16(3). If the CCF decides to admit the request, it invites the requesting party to supply the details. *Id.* art. 16(4).

151. *See id.* art. 22 ("The Commission shall not meet requesting parties, or their duly appointed agents or legal representatives, other than in exceptional circumstances if, after examining the case, it considers this necessary.").

152. *Id.* art. 18(1). Within one month, the CCF also notifies the requesting party "that it has carried out the required checks." *Id.* art. 18(4). Re-examination of the request is admitted only under certain conditions. *See id.* art. 19(1) (providing that "[a]n application for re-examination of a request by the Commission may be made by the requesting party only when it is based on the discovery of a fact which would probably have led to a different conclusion if that fact had been known at the time the request was processed.").

153. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

154. An ex-post-facto review may also be conducted by the General Secretariat in light of its ongoing responsibility to ensure compliance with the rules. *Processing Rules*, *supra* note 56, art. 4.1(a) (2). In practice, the General Secretariat can reopen the case upon its own initiative if it becomes aware of new relevant facts after the publication of the red notice. In fact, this was the case in the first round of AMIA described below, in which Interpol cancelled red notices upon learning of irregularities in the investigation of Judge Galeano. *See infra* Part IV.B.

155. The only exception—of limited relevance to our problem—is article 4(d) of the Control Rules, *supra* note 69, allowing that "The Commission may also decide to carry out controls in the context of its spot checks."

been already published.¹⁵⁶ Only from that moment, and until the possible arrest, access to CCF may help to protect the interest of the fugitive not to be apprehended by a foreign police.¹⁵⁷ After the detention, however, the review may still have relevance. If the wanted person is released, the cancellation of the notice contributes to avoiding further arrests while travelling in other states (as happened in the Kazakh case). Therefore, the control of the CCF is an *ex post* remedy that is not foreseen as a relief from detention, but only serves as prevention of further (unjust) arrests.

Within these limits, access to the CCF may eventually provide scrutiny on the compliance of the notice with the rule of law and legality requirements. Yet, that scrutiny is different from a proper judicial review in many respects. Just like the General Secretariat, the CCF can only check the validity of charges and not their accuracy: it cannot take over for the judicial authorities by checking or amending charges, given the necessity to respect national sovereignty. Another important limitation is that the CCF cannot assess the legal situation in a member country with a view to giving an opinion on the validity of an arrest warrant or a legal decision. In addition, the CCF has merely advisory power: when doubts are raised in relation to a red notice, the CCF may only recommend that the General Secretariat apply precautionary measures or cancel a red notice,¹⁵⁸ whereas it is not empowered to process police information itself. Finally, every member state may challenge

156. There is nothing in Interpol rules that prevents an individual from submitting an *ex ante* request to the CCF. The wanted person may issue a “preventive request” that, if a red notice is asked for, it should not be published for the alleged reasons. In such a case, the information provided by the individual could be taken into account upon reviewing the request (if submitted) and may lead to the application of the procedure in article 10.1(c) of the Processing Rules, *supra* note 56: “if there is any doubt about whether the criteria for processing an item of information are being met, the General Secretariat shall consult the source of that information, or the National Central Bureau concerned.” However, in practice, this may only happen when rumours about a prospective red notice spread out.

157. After the arrest, the personal freedom of the concerned person already being compromised, the CCF’s intervention loses (part of) its significance, because a more effective remedy becomes available, namely the validation of the arrest and review of the warrant by a domestic judge.

158. These faculties are exercised by the CCF pursuant to article 5(e)(3)-(4) and article 6(a) of Control Rules, *supra* note 69.

the General Secretariat's decision based on the CCF's advice, subjecting it to a dispute settlement procedure with the Executive Committee and the General Assembly as decision-making bodies.

To sum up, this *ex post* administrative or quasi-judicial review constitutes an important mechanism of individual appeal against a red notice. However, it ensures a low level of protection to personal freedom for three main reasons. First, it comes late, often after a first arrest and detention. Second, it is deferential to national sovereignty to the extent that it cannot question either a domestic appreciation of the charges, or the human rights record of the concerned country. Third, it is contingent upon a diplomatic procedure of appeal where political considerations may easily prevail over legal criteria.

B. *The AMIA Case: The Political Control*

The AMIA case is perhaps the most controversial of all Interpol's jurisprudence. It originates from the 1994 terrorist bombing of the Jewish community centre (the Asociacion Mutual Israelita de Argentina – AMIA) in Buenos Aires, in which 85 people were killed and 300 more injured. In 2003, Judge Galeano, the investigating Argentinian magistrate, accused the government of Iran of directing the bombing. Hence, he issued twelve arrest warrants against Iran's high officials. In November 2003, following a request by Argentina, Interpol published the corresponding red notices.

As in the Kazakh case, the consistency of the allegations was highly dubious and, yet, productive of consequences. One of the warrants signed by Judge Galeano included Hadi Soleimanpour, Iran's ambassador to Argentina at the time of the bombing. On August 21, 2003, Mr. Soleimanpour was arrested in the U.K., put in prison for more than one month and eventually released by the British authorities, because the evidence presented did not support a *prima facie* case for extradition. Nonetheless, Interpol did not cancel the notice.

In September 2004, an Argentinean court found that Judge Galeano had engaged in "substantial violations of the rules of due process" and "irregular and illegal actions." Only at that point, upon the initiative of the General Secretariat, did Interpol suspend all twelve red notices and ask both Iran and Argentina for additional information. The two countries

presented their cases to Interpol's Executive Committee, which unanimously ordered the cancellation of the red notices. The decision was upheld by the General Assembly in September 2005.¹⁵⁹ The "first round" of the dispute was, thus, settled.

The AMIA case resurfaced at the Interpol level one year later. In October 2006, new Argentine prosecutors formally accused the government of Iran of involvement in the 1994 attack, and the Hezbollah militia of carrying it out. One month later, on the request of the Argentinean National Central Bureau, Interpol published nine new red notices in connection with the case. The notices concerned eight Iranian nationals and one Lebanese national, all suspected of involvement in the 1994 strike. The Iranian government criticized both the investigation conducted in Argentina and the decision of Interpol's Executive Committee, dismissed as part of "a Zionist plot."

Once again, the two parties could not resolve the matter bilaterally and a new procedure of dispute resolution began. This time, however, the outcome was different. In March 2007, the Executive Committee endorsed the conclusions of a report prepared by the Office of Legal Affairs of Interpol's General Secretariat and unanimously decided to authorize the issuance of six (out of nine) red notices requested by Buenos Aires.¹⁶⁰ The appeal of Tehran against the decision suspended the publication of the notices until the next meeting of the General Assembly. On Nov. 7, 2007, the General Assembly upheld the decision of the Executive Committee.¹⁶¹ As a result, six red notices started circulating (and are still pending) in connection to the AMIA case. They concern senior

159. On the "first round" of the AMIA case, *see* Press release, Interpol, Argentinean Red Notices for Iranian officials cancelled. Decision upheld by delegates at INTERPOL General Assembly (Sept. 27, 2005); Larry Rother, *Argentines Criticize Investigation of '94 Attack*, N. Y. TIMES, July 19, 2004, A6.

160. Interpol Press Release, *supra* note 79 ("After long and careful deliberation of all the information and arguments presented by both parties, the Executive Committee concluded that the reasons for having the Red Notices cancelled in 2005 were not present in 2007.").

161. On the "second round" of the AMIA case, *see id.* The AMIA case has received extensive media coverage. *See, e.g.*, Hernán Cappiello, *Acusan a Irán por el ataque a la AMIA*, LA NACIÓN (Oct. 26, 2006), available at http://www.lanacion.com.ar/nota.asp?nota_id=852740.

Iranian officials, including the current minister of defense Ahmad Vahidi.¹⁶²

This controversial decision—seen by Iran and other member states as demonstration of the Western influence on Interpol—will hardly be enforced; unless the wanted persons travel abroad, their countries of residence will never extradite or process them for the alleged charges. Yet the decision brought about a worldwide “naming and shaming” effect that further compromised the image of the Iranian leadership.¹⁶³ Conversely, the decision also impaired Interpol impartiality, especially when contrasted with the General Secretariat’s concurrent dismissal of an Iranian request of red notices against Israeli officials.¹⁶⁴ It is thus not surprising that Interpol is still struggling to establish itself as impartial mediator in the AMIA dispute and to achieve a more satisfactory solution for the parties.¹⁶⁵

162. See David Batty & James Sturcke, *Iran appoints bombing suspect as defense minister*, THE GUARDIAN, Sept. 3, 2009, available at <http://www.guardian.co.uk/world/2009/sep/03/ahmad-vahidi-iran-defence-minister>. By contrast, following the advice of the Secretariat General, Interpol’s Executive Committee did not authorize the publication of arrest warrants concerning influential Iranian politicians, such as the former Iranian president Ayatollah Akbar Hashemi Rafsanjani (currently chairman of Iran’s Assembly of Experts), the former Iranian foreign minister Ali Akbar Velayati (now chief foreign policy advisor to Iran’s Supreme Leader Ayatollah Ali Khamenei) and former Ambassador of Iran in Buenos Aires, Hadi Soleimanpour.

163. In September 2009, the Interpol General Secretariat felt the need to publicly reaffirm that the issuance of a red notice “cannot be construed as an indication of the strength or weakness of the case,” while at the same time conceding that “many of Interpol’s member countries consider a Red Notice a valid request for provisional arrest, especially if they are linked to the requesting country via a bilateral extradition treaty.” Interpol Press Release, *supra* note 142.

164. Press release, Interpol, Interpol statement on Iranian request for issue of Red Notices (March 10, 2009); see also *supra* Part II.B.

165. See Press Release, Interpol, Interpol Hosts Argentina-Iran Meeting for Continued Dialogue Over 15-Year-Old AMIA Terrorist Incident (March 12, 2010) (communicating with some discomfort that “during the 10 March 2010 meeting, a practical suggestion was discussed that would designate Interpol as the conduit by which information would be exchanged between both countries. At the conclusion of that meeting, even that suggestion seemed unacceptable. Frequently, countries prefer to use diplomatic channels.”).

1. *Diplomatic Review*

When a dispute arises between member states and it cannot be solved by bilateral consultation, the matter is submitted in the first instance to the Interpol Executive Committee and in the second instance to the General Assembly.¹⁶⁶ This dispute settlement mechanism was the rule applied in the AMIA case: it was the Iranian opposition to the Argentinean request that led to the first decision of the Executive Committee and to the final decision of the General Assembly on appeal by Teheran. Interpol institutions had to step in and review the grounds of the Argentinean arrest warrant because of the opposition by Iran, which ultimately managed to prevent the publication of a notice for three of its citizens. State opposition to the issuing of a red notice, thus, proved to be an effective remedy.

In order to appreciate the importance of this indirect mechanism of review for the protection of a fundamental right, a comparison with a similar global regime can be helpful. Consider the well-known power of the U.N. Security Council to name suspected terrorists in a black list and have their assets seized with the aim of preventing the funding of terrorist activities. The Sanctions Committee, an auxiliary body of the U.N. Security Council composed of representatives of the members of the Security Council, drafts and updates the list of persons and organizations suspected of funding terrorist activities ("global black list"). Once a person is included in the list, all the U.N. members have the duty to freeze the person's assets.¹⁶⁷

The obvious difference between the two international administrative acts pertains to their legal nature: U.N. measures are binding on the member states, whereas Interpol red notices are not. Moreover, domestic courts subject to *ex post* scru-

166. Article 24 of the Processing Rules, *supra* note 56, concerning the settlement of disputes, provides "[d]isputes that arise between National Central Bureaus, authorized national institutions, authorized international entities, or between one of these entities and the General Secretariat in connection with the application of the present Rules and the implementing rules to which they refer, 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 in conformity with the procedure to be established."

167. S.C. Res. 1267, ¶¶ 4, 6, 9-13, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

tiny any Interpol-sanctioned foreign arrest warrant, whereas the courts are reluctant to review the legality of U.N.-sanctioned asset-freezing measures.¹⁶⁸ In the latter (U.N.) case, the legal "black hole" is thus more worrisome.¹⁶⁹

However, some substantive analogies should be noted. First, the Sanctions Committee adopts an "international administrative act" that impinges upon a fundamental freedom of the individual (namely, private property). The formal difference (U.N. decisions are legally binding while Interpol notices are not) is less relevant in practice because both the U.N. decisions and the Interpol notices enjoy—albeit to a different extent—a high degree of compliance.

Second, also in the case of the U.N., the original source of the international decision is national; the listing process, in fact, depends on the initiative of a member state, often based on a judicial decision.¹⁷⁰ Moreover, the relevant state usually has already included the suspect on a "domestic black list" and seeks the U.N. approval in order to extend the reach of its ban worldwide. Here, the similarity of the bottom-up procedure is evident.

The third analogy directly relates to the mechanism of indirect protection. Absent any judicial remedy at the U.N. level,¹⁷¹ if objections are raised against the inclusion of a person in the global black list, it is for the U.N. Security Council to take the final decision. Just like with Interpol dispute settlement, every single state has the power to object, thereby shifting the decision to the main political body.

A fourth analogy concerns private participation. U.N. rules allow the individual to initiate the diplomatic procedure

168. On this issue, see Antonios Tzanakopoulos, *Domestic Court Reactions to UN Security Council Sanctions*, in CHALLENGING ACTS OF INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS, *supra* note 15, at 54.

169. This explains the specificity of the problem raised by the Interpol-U.N. special notices; they are based on U.N. fund-freezing decisions and contribute to their implementation by spreading the notice through Interpol's network. The point is discussed in Part III.A *supra*.

170. Albeit an administrative decision is also deemed sufficient to determine the listing of a suspect terrorist; admittedly, here the U.N. regime grants less protection to civil liberties than Interpol rules, which require a judicial involvement for the issuing of an arrest warrant.

171. The competence of the International Court of Justice does not extend to the decisions of U.N. bodies. See article 36 of the Statute of the International Court of Justice.

of review, in order to obtain delisting, in two ways: indirectly, by petitioning the government of residence or citizenship to request a re-examination of the case, or directly, by submitting a request through a newly established focal point.¹⁷² Yet, the individual enjoys no right to have the decision reviewed: if the petitioned government rejects its citizen's request or if after one month of the direct petition to the U.N. no member state recommends delisting, the procedure comes to an end without reconsideration of that position.¹⁷³

Similarly, Interpol rules allow the individual to initiate the diplomatic review by petitioning a government.¹⁷⁴ In addition, they also provide a full right to have the decision reviewed.¹⁷⁵ However, this higher standard of protection has a limited impact, due to the mere advisory role of the CCF and to a second-order adjudication of the dispute through the diplomatic procedure.¹⁷⁶ In the latter respect, the U.N. and Interpol regimes are similar: the (final) re-examination of the decision is entrusted to a political body.

172. The focal point for delisting was established in 2006 pursuant to U.N. Security Council Resolution 1730, U.N. Doc. S/RES/1730 (Dec. 19, 2006).

173. Guidelines of the Committee for the Conduct of Work, S.C. Comm. established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities, ¶ 8, U.N. Doc. S/2002/1338, Annex III, (July 22, 2010); S.C. Res. 1735, U.N. Doc. S/RES/1735 (Dec. 22, 2006).

174. Article 24 of the Processing Rules, *supra* note 56, refers to "[d]isputes that arise between National Central Bureaus, authorized national institutions, authorized international entities, or between one of these entities and the General Secretariat in connection with the application of the present Rules and the implementing rules to which they refer." In practice, nothing in the wording of this provision precludes a state from raising an objection against a red notice upon request of its named citizen, even though this provision does not explicitly foresee this possibility.

175. As observed *supra* note 152, the concerned person may submit a request of re-examination directly to the CCF, which, in turn, has the duty to process the request, to give reasons in case of rejection and to inform the petitioning person about the initiatives assumed on the basis of her request.

176. In Interpol's regime, the diplomatic procedure overlaps with both the *ex ante* scrutiny by the General Secretariat and the *ex post* review by the CCF: whatever the decision of those administrative bodies, it can be challenged by a member state and overturned by a final political decision. This happens not only when the wanted person is a citizen of the requesting state (Kazakh case), but also when the wanted person is a citizen of another country (AMIA case).

The issue is whether this common mechanism of appeal, being diplomatic in character, is adequate to protect fundamental rights.

Interpol's dispute settlement institutions, the Executive Committee and the General Assembly, decide by majority vote. This facilitates the achievement of a solution in case of firm opposition by a state (or group of states), but also raises the risk of fomenting an opposition between geopolitical blocs. In order to de-politicize the issue, Interpol's political bodies often ask the Secretariat General for technical (legal) advice.¹⁷⁷ However, the final decision is quintessentially political. In the final stage of the Kazakh case, despite the fact that the General Secretariat had revoked the notice, the General Assembly decided otherwise by a thin majority (48 in favour, 38 against, and 23 abstentions), without stating any reason.¹⁷⁸ Secretary-General Ronald K. Noble commented as follows: "Interpol is a democratic organisation, and when our members have expressed their will through the democratic process, the General Secretariat moves promptly—as in this case—to implement the member states' decision."¹⁷⁹

One may wonder how effective is the implementation of a red notice can be in similar cases, given its non-binding nature and the open opposition of a considerable number of member states? More fundamentally: what kind of "democracy" is one in which the will of the majority (of states) is allowed to trump the legal guarantees established to protect a fundamental right?

As these rhetorical questions show,¹⁸⁰ something is missing in terms of legal accountability. At the administrative level, the scrutiny is based on a narrow legality review, selec-

177. As mentioned in Part IV.B *supra*, in the AMIA case the political decision had been prepared by a report on the issue by the Office of Legal Affairs of the Secretariat General. Due to the high political salience of the case, seriously threatening Interpol's political neutrality, it is not surprising that both the Executive Committee (unanimously) and the General Assembly (by majority) followed the legal advice of the General Secretariat.

178. *Supra* Part IV.A.

179. Interpol Press Release, *supra* note 114.

180. Likely answers would be: (a) that the red notice against Mr. Kazhegeldin, formally approved within the General Assembly only by 48 states, will be honored by few among Interpol's 188 members; or (b) that Interpol's "democratic process" will reproduce at the international level a "tyranny of the majority" which is equivalent—when the decision concerns a

tively carried out and mainly focusing on extradition law requirements. At the political (appeal) level, even this thin legal ground is lost: once the issue has entered the dispute settlement engine, a majoritarian logic replaces a proper legal assessment. Ironically enough, this logic also runs counter to Interpol's functional needs: the marginalization of legal arguments makes the political game more open, thereby piercing the veil of Interpol's neutrality.

C. *Any Room for Improvement?*

In the global arena, the protection afforded to individuals against action taken by international institutions is rarely satisfactory. Two main reasons stand out. First, international regulatory regimes are generally established to keep national powers under control. The power-checking purpose of global rules is directed toward national administrations, rather than toward international ones. This is why judicial protection is rarely guaranteed by those regimes. Second, legal accountability gaps are difficult to close: absent a global constitution and an established hierarchy of norms, the fragmented character of the global legal sphere does not favor the emergence of common general principles.¹⁸¹

On the other hand, there are important signs of development. First, it is noticeable that more than 100 extra-national courts operate in the global arena,¹⁸² and many other surrogate mechanisms are available, taking the form of indepen-

basic individual rights—to the majoritarian tyranny encountered by domestic constitutionalism in the last two centuries.

181. See Sabino Cassese, *A Global Due Process of Law?*, N.Y.U. Hauser Colloquium on Globalization & Its Discontents (September 13, 2006), available at <http://www.iilj.org/courses/documents/Cassese.AGlobalDueProcess.pdf>.

182. See Project on International Courts and Tribunals, *The International Judiciary in Context*, http://www.pict-pcti.org/publications/synoptic_chart/synop_c4.pdf (last visited Dec. 20, 2010); see generally YUVAL SHANY, *REGULATING JURISDICTIONAL RELATIONS BETWEEN NATIONAL AND INTERNATIONAL COURTS* (2007) (exploring the issue of jurisdictional overlaps between international courts and tribunals, which threatens the unity of international law); CIVIL SOCIETY, *INTERNATIONAL COURTS AND COMPLIANCE BODIES* (Tullio Treves et al. eds., 2004) (analyzing the role of non-state actors in their relation with international tribunals, courts and compliance mechanisms); CHESTER BROWN, *A COMMON LAW OF INTERNATIONAL ADJUDICATION* (2007) (observing an increasing commonality in the practice of international courts to the application of rules concerning issues of procedure and remedies).

dent or quasi-judicial bodies, inspection panels, and compliance committees.¹⁸³ Still, despite the absence of general legal principles, some "common understandings" are emerging: "the duty to respect human rights and the rule of law; the obligation to inform and to hear interested parties before a decision is taken . . . ; a number of due process obligations; and substantive duties relating to principles of fairness and reasonableness, amongst others."¹⁸⁴

If one observes the system of Interpol red notices in the context of this fast-moving picture, the impression is that some margins for improvement are available. Interpol's combination of rules and procedures of *ex ante* and *ex post* review is not sufficient to close relevant gaps in the protection of individual rights, as the cases discussed above make clear. A final question, thus, remains on the floor: is there any conceivable way to fill those accountability gaps without, at the same time, disrupting the functional pillars—deference to national sovereignty and appearance of political neutrality—on which international police cooperation (and Interpol's success) is built?¹⁸⁵

1. *The Analytical Framework: Red Notices and Global Administrative Procedures*

The red notice procedure can be construed as a mixed or composite one, half international and half national.¹⁸⁶ The

183. It is enough to mention two examples: the Inspection Panel of the World Bank and the Compliance Committee established by the Aarhus Convention. On the former, see Enrique R. Carrasco & Alison K. Guernsey, *The World Bank's Inspection Panel: Promoting True Accountability through Arbitration*, 41 CORNELL INT'L L.J. 577 (2008); Mariarita Circi, *The World Bank Inspection Panel: Is It Really Effective?*, 6 GLOBAL JURIST ADVANCES (2006); Jonathan A. Fox, *The World Bank Inspection Panel: Lessons from the First Five Years*, 6 GLOBAL GOVERNANCE 279 (2000). On the latter, see Marco Macchia, *Legality: The Aarhus Convention and the Compliance Committee*, in GLOBAL ADMINISTRATIVE LAW: CASES, MATERIALS, ISSUES 71 (Sabino Cassese et al. eds., 2008); Svitlana Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 1 (2007).

184. Cassese, *supra* note 8, at 767.

185. On the tension between functional and normative concerns at the Interpol level, see *supra* Part II.B.

186. On mixed administrative procedures at global level, see Cassese, *supra* note 11, at 680-84; Giacinto della Cananea, *Beyond the State: The Europeanization and Globalization of Procedural Administrative Law*, 9 EUR. PUB. L. 69

first phase is bottom-up: it begins with a state request to publish a red notice, proceeds with the examination of the request by Interpol and results in the issuing of a red notice. The second stage of the procedure is top-down: once the notice is published, the relevant national office processes the “soft” international act and decides whether to turn it into a binding (thus “hard”) administrative act. Despite the lack of a comprehensive discipline (the top-down stage is disciplined at the domestic level), this procedure is unitary: it aims to add transnational effects to an arrest warrant that would otherwise only produce effects within the borders of the issuing country.

This modeling exercise highlights the way administrative discretion is allocated along the procedure. *In principle*, Interpol decides as to the *virtual* global reach of a domestic warrant, while national authorities decide as to the *actual* domestic effects of that warrant. *In practice*, if a national central bureau routinely gives automatic recognition to Interpol-sponsored warrants (as it is often the case), then the *virtual* and the *actual* dimensions collapse and conflate: the national recognition becomes a mere formality. As a result, the discretionary power—in *principle* distributed between Interpol and the national central bureau along the virtual/actual divide—in *effect* is shifted to the international level and accumulated in the hands of Interpol. The domestic phase of the procedure amounts to a rubber-stamp exercise of Interpol decisions. As a result, the discretionary power to weigh the global interest to security (pursued by means of police cooperation) against the individual right to personal freedom rests with Interpol. It is true that Interpol’s decisions are subject to scrutiny at the domestic level. Yet, this is not sufficient. As noticed in the Kazakh case, judicial review arrives too late, when the fugitive has already been deprived of personal freedom and spent days or weeks in unpleasant and possibly dangerous prisons.

Other arguments can be added. A citizen may accept being arrested and temporarily detained on the basis of an ill-founded charge if the warrant is issued in conformity with the rules and procedures of *her own* domestic legal order: after all, those rules and procedures have been defined by political rep-

(2005); Manuela Veronelli, *Shared Powers: Global and National Proceedings under the International Patent Cooperation Treaty*, in GLOBAL ADMINISTRATIVE LAW: CASES, MATERIALS, ISSUES, *supra* note 183, at 50.

representatives who she has contributed to electing and who are accountable to her. It is an altogether different issue for that citizen to accept the same restrictions on personal freedom when they are imposed by a warrant of a foreign authority, especially if the issuing state does not respect the basic principles of democracy and rule of law. Would Socrates have submitted to drinking the hemlock, had it been ordered by a non-Athenian jury?

The issue exhibits an institutional side. Can democratic states be content with a global governance system that allows such a practice, and indeed strengthens it, without providing for adequate guarantees? Is it acceptable that an international regime allows domestic authorities to pursue legally questionable practices or, worse, to infringe upon "the most fundamental of all rights recognised in the European Convention and the US Constitution"¹⁸⁷ without establishing specific counter-measures? By accepting this accountability gap in the case of Interpol, liberal democracies would undermine their commitment to the rule of law in the name of effective police cooperation. The governance ethos—"what counts is to apprehend fugitives and if sometimes we arrest and detain them for wrong reasons, *pace!*"—would prevail, and a further silent shift in the balance between security and freedom would occur.¹⁸⁸ But perhaps such a shift is unnecessary.

187. This is how Sottiaux refers to personal liberty. SOTTIAUX, *supra* note 40, at 197; *see also* De Wilde v. Belgium, 12 Eur. Ct. H.R. (ser. A) ¶ 65 (1971) (qualifying freedom from arbitrary arrest as a cornerstone of democratic society).

188. The "security v. liberty" debate has been revived by Western governments in their use of emergency powers in the fight against international terrorism after September 11, 2001. Among the most relevant contributions with a prevalent American focus, see BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING LIBERTIES IN AN AGE OF TERRORISM* (2006); OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* (2006); DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* (2006); ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007); DANIEL MOECKLI, *HUMAN RIGHTS AND NON-DISCRIMINATION IN THE 'WAR ON TERROR'* (2008). For a discussion of the national and regional initiatives on the opposite side of the Atlantic, see Jan Wouters & Frederik Naert, *Of Arrest Warrants, Terrorist Offences and Extradition Deals: An Appraisal of the EU's Main Criminal Law Measures Against Terrorism After '11 September'*, 41 COMMON MKT. L. REV. 909 (2004); Mar Jimeno-Bulnes, *After September 11th:*

2. *In Search of a Balance: Due Process in Context*

A first implication of the above mentioned construction is plain: in order to check the discretionary power enjoyed by Interpol, it is necessary to subject it to the rule of law. Principles of due process, like the right to a hearing, the duty to provide a reasoned decision, the duty to disclose all relevant information and the right to judicial review, should be incorporated. On this point, public law approaches would largely converge. Divergence may concern the appropriate instruments to achieve the result. From a global administrative law perspective, two hypothetical models are available: a “centralized” one, in which all the mentioned safeguards are established at the Interpol level; and a “decentralized” one, in which due process guarantees are, instead, granted at the domestic level.¹⁸⁹

The “centralized” model, if properly established (with the formalization of red notices as international arrest warrants, adequate procedural guarantees and effective judicial review), perhaps would be the optimal solution from a legal standpoint: the discretionary power would be checked at the level where it is exercised, without running into the risk of state failures. This is the “hard” legal path that Interpol is willing to undertake: an international convention on red notices.¹⁹⁰ Yet, this seems to be politically unfeasible, given the high level of distance and distrust among member states on the issue. Is it realistic to imagine a “global arrest warrant” along the lines of the European experiment? The decentralized model, by con-

The Fight Against Terrorism in National and European Law, 10 EUR. L.J. 235 (2004); SECURITY VERSUS JUSTICE?, *supra* note 40.

189. This would be a direct implication of the GAL distinction between “top-down” and “bottom-up” mechanisms of accountability, discussed in Part I.3 *supra*. Alternatively, the Interpol red notice system may be conceptualized as a strategy for a global institution to subject the domestic issuing of an arrest warrant to a loose international control, with the consequence of accruing the “external” democratic accountability of national decisions. This theoretical perspective is developed, in general terms, by Stefano Battini in *The Globalization of Public Law*, 18 EUR. REV. PUB. L. 563 (2006).

190. Interpol Executive Committee recently proposed to “[b]egin a process to draw up an international convention on red notices: For international status to be attributed to red notices, and for States to accept that notices hold them to obligations, it is necessary to proceed through a convention and to have an international legal instrument adopted.” Interpol, *Report No. 13 to the General Assembly*, *supra* note 81, at 3.

trast, represents the *status quo*: a situation that is inadequate from a legal standpoint (as emerged in the discussion of the Kazakh case) and that is becoming untenable also from a functional standpoint (as the mentioned AMIA case illustrates).

Moreover, in some respects, the choice between centralization and decentralization is not available at all. The right to a hearing, for instance, cannot be granted to a suspect before his material apprehension, because the "surprise effect" has to be preserved. Therefore, there is no option but to postpone the hearing of the suspect after the arrest, with all the consequent guarantees stemming from domestic constitutional guarantees and the application of criminal procedures. This is the solution recommended to the E.U. institutions by the European Court of Justice in order to structure a fairer process of implementation of U.N. fund-freezing measures.¹⁹¹ However, in the case of red notices, this innovation would have little effect, as this guarantee is already provided at domestic level.¹⁹²

Nonetheless, some "softer" measures may be considered as a politically feasible and legally adequate way to fill the accountability gaps so far detected.

(a) A first, thin, addition would consist in setting up an Interpol standard to make clear that it is a precise duty of the recipient member state to hold a hearing for the arrestee within a reasonable time limit, in order to decide whether to surrender the arrested person to the requesting state.¹⁹³ This standard would be politically acceptable, being non-binding and consistent with rule of law standards of all liberal democracies.

191. The fact that the European Commission has not yet properly put it in place—as the recent ruling of the European Tribunal of First Instance makes clear, *see supra* note 74—does not seriously question the appropriateness of the solution.

192. I refer to the validation of the arrest and review of the warrant by a domestic judge. *See also supra* Part IV.A.2.

193. For example, under the European arrest warrant regime, "the final decision on the execution of the European arrest warrant should be taken within a period of 60 days after the arrest of the requested person" and that "where in specific cases the European arrest warrant cannot be executed within the time limits . . . the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for the delay. In such case, the time limits may be extended by a further 30 days." EAW Framework Decision, *supra* note 85, art. 17(3)-(4).

(b) As for the requirement of reason-giving, one possibility would be to introduce it directly at the Interpol level—at least when the notice is issued after the settlement of a dispute (as in the AMIA case). This requirement would bring about a legitimacy-enhancing effect: if a notice is based on openly stated and detailed reasons, it would be easier for member states to process the request (simplification effect) and harder for them not to honor the notice (compliance-enhancing effect). However, most, if not all, the reasons stated in the red notice could only be based on reasons provided from national investigating authorities. Therefore, national requests too could or should be subjected to the same duty, by means of an Interpol standard. Treaties on extradition could be used as guidelines. These treaties, in fact, require the requesting party to provide a more or less detailed statement of the offences for which extradition or the provisional arrest is requested.¹⁹⁴ This, in turn, would strengthen the legitimacy of the process and enable peer accountability among members.

(c) Strictly related to the latter point is the duty to disclose relevant information. In the field of police cooperation the troubling nature of such a duty cannot be overstated. Some states restrict information on certain criminal matters (terrorism, for instance), while others are simply unwilling to share most of their information with the rest of the (police) world. Interpol rules already provide the possibility for a member to circulate warrants or other information only to certain other members.¹⁹⁵ However, if members do not share information, not only does Interpol's duty to state reasons lose significance, but also the validation of the arrest in the country where the apprehension happened becomes impossible.¹⁹⁶

194. For an example, see European Convention on Extradition, *supra* note 134, art. 12(2)(b) (imposing on the requesting party the duty to set out "as accurately as possible" the time and place of commission of the offence and its legal descriptions); Inter-American Convention on Extradition art. 11, Feb. 25, 1981, 1752 U.N.T.S. 195 (providing a less demanding requirement as to the content of the documents supporting a request for extradition).

195. *Processing Rules*, *supra* note 56, art. 8(a).

196. Doubtless, these standards would make the procedure to request a red notice much more demanding for member states. Public prosecutors would not be happy to know that they have to specify the reasons for a warrant and even less happy if they have to disclose some evidence. They could rather decide to rely on existing bilateral and multilateral treaties. Yet, in so

Therefore, one possibility is to set a standard requiring the requesting states to share all the information that justifies the warrant not only with the requested party (the state where the apprehension happens), but also with Interpol (as a general rule or at least as an exceptional duty, when disputes between member states arise). In the latter case, the relevant information should be sent *promptly*, so as to allow a speedy validation of the arrest.¹⁹⁷

(d) Finally, another alternative is increased judicial review. As mentioned, it is already available at national level, in the form of validation of the arrest. Nonetheless, the Kazakh case tells us that it comes too late, after the infringement of a fundamental freedom has already happened. Moreover, the

doing, they would lose the advantage of using Interpol's unique communication system, having to contact every state individually, and would also lose the advantage stemming from the *de facto* quasi-universal recognition of Interpol-sponsored notices.

197. Admittedly, it is in the interest of the requesting state to promptly send sufficient evidence for validation, because otherwise the suspect can be freed after the deadline for preventive detention expires. If this happens, though, international police cooperation suffers as well: police and judicial resources of a foreign system would have been wasted and arguably the reciprocal trust between the two jurisdictions involved would be jeopardized. It is, thus, advisable to adopt a rule similar to article 16(4) of the European Convention on Extradition, *supra* note 134, which states: "[p]rovisional arrest may be terminated if, within a period of 18 days after arrest, the requested Party has not received the request for extradition and the documents mentioned in Article 12. It shall not, in any event, exceed 40 days from the date of such arrest." By contrast, sixty days is the span of time allowed by Article 14(3) of the Inter-American Convention on Extradition, *supra* note 194. More generally, article 5(1)(f) of the European Convention on Human Rights states: "No one shall be deprived of his liberty save in the [case of] the lawful arrest or detention of a person . . . against whom action is being taken with a view to deportation or extradition." European Convention on Human Rights art. 5(1)(f), Nov. 4, 1950, 213 U.N.T.S. 222. Despite the fact that this provision does not require the parties to provide a time limit for the detention pending extradition proceedings, the European Court of Human Rights has acknowledged the right to an expedient procedure, *see* *Chahal v. United Kingdom*, 22 Eur. Ct. H.R. ¶ 113 (1996); however, while enforcing the right, the European Court has held that four months does not amount to an excessively long period of custody in view of extradition, when there is no reason to believe that the authorities acted without due diligence, *see* *Bordovskiy v. Russia*, Eur. Ct. H.R. App. No. 49491/99, ¶ 50 (2005). On the rights of the individual during extradition in the European context, see generally COUNCIL OF EUR. PUBL'G, EXTRADITION: EUROPEAN STANDARDS 97-132 (2006).

AMIA case shows that Interpol adjudicates interstate disputes over the issuance of red notices, but that Interpol's institutions are ill-suited to play such an arbitral role. The political salience of those disputes threatens the imperative of political neutrality, especially since terrorism-related crimes have been included in Interpol's field of action. The establishment of an international court (or the extension of the ICJ mandate over such issues), though, would trigger a process of "legalization" that not only conflicts with the governance ethos of the organization, but would also be perceived as an attempt against national sovereignty in police and criminal matters.

A possible compromise would be to strengthen the CCF or to establish a new independent administrative body—a panel of independent legal experts—with consultative powers. The French model of *justice retenue*, applied to the *Conseil d'État* from 1800 to 1872, could be a source of inspiration. By that time, the *Conseil d'État* was not recognized as a judicial body, but rather a consultative body of the government on administrative controversies. Nonetheless, it exercised a judicial function, its advice being always followed by the government.¹⁹⁸

Following this model, the Interpol panel would intervene not only at the request of the wanted person,¹⁹⁹ but also *ex officio* in the dispute settlement stage. At that level, the independent body would not adjudicate disputes, but rather advise Interpol's main bodies once a dispute arose, providing them with opinions based on legal grounds (of course, this would imply the acceptance of the duty of disclosure, as above defined).

A further complementary step would be the creation of a network of national independent units as decentralized arms of the central independent panel. The case of the Europol's Joint Supervisory Body could be taken as a model. It is an independent body that has the task of reviewing "the activities of Europol in order to ensure that the rights of the individual are not violated by the storage, processing and utilization of the

198. See Vincent Wright, *La réorganisation du Conseil d'Etat en 1872*, 25 ETUDES ET DOCUMENTS DU CONSEIL D'ÉTAT 21 (1972); F. BURDEAU, HISTOIRE DU DROIT ADMINISTRATIF (DE LA RÉVOLUTION AU DÉBUT DES ANNÉES 1970) 89 (1995).

199. As is already the case when the CCF is asked to process individual requests according to articles 1(a) and 4(a) of the Control Rules, *supra* note 69; see also *supra* Part IV.A.2.

data held by Europol.”²⁰⁰ This body is the apex of a network of national supervisory bodies; just like the joint supervisory body monitors the activities of the European central offices of Europol, the national supervisory bodies are established to check the activities of Europol’s national units.²⁰¹ Moreover, the joint supervisory body consults and closely cooperates with its national “arms” (the national supervisory bodies) when an individual requests information on whether Europol and its national units have processed her personal data in a lawful and accurate manner.²⁰²

If a similar decentralized network of national supervisory bodies would be established under the coordination of the CCF or any other independent supervisory body, such a network would be able to control the processing of notices and information by Interpol and the national bureaus, to report on violations to the Secretary-General, and to process individual requests concerning data collection, storage, processing, and use by Interpol.²⁰³ A similar arrangement not only would meet the main concerns related to the right of informational self-determination, but would also be beneficial to the reciprocal trust between members.

The mentioned proposals inevitably involve a trade-off. In particular, the imperative of national police autonomy and self-regulation would be eroded by new Interpol standards, albeit to a limited extent. In any case, that loss would be at least partially compensated by some likely potential gains: a more widespread acceptance of red notices by member states, the possible expansion of Interpol’s intelligence capacities, and the development of a common regulatory platform for a more effective coordination with the heavily legalized Europol and Schengen settings would all become more feasible achievements.

200. COUNCIL DECISION ESTABLISHING THE EUROPEAN POLICE OFFICE, art. 3h(1), April 6, 2009 [HEREINAFTER EUROPOL CONVENTION].

201. According to the EUROPOL CONVENTION, each national supervisory body has the task “to monitor independently, in accordance with its respective national law, the permissibility of the input, the retrieval and any communication to Europol of personal data by the Member State concerned and to examine whether this violates the rights of the data subject.” *Id.* art. H33.

202. On the rights of access and claim granted to the individuals whose personal data are at stake, see *id.* arts. H30(7), 33(2), 34(h).

203. *Id.* art. H34.

V. GLOBAL LEGAL STUDIES AND "SOFT" POWERS: THREE CONCLUSIONS

One of the distinguishing features of the global arena is the absence of a clear-cut distinction between legal and non-legal prescription and the blurring between binding (or "hard") and non-binding (or "soft") law. Part II expands on the tension between functional and normative concerns as one possible source of that blurring. In Part III, Interpol red notices are qualified as manifestation of an international administrative power that is basically "soft" (it being non-binding), but that, under certain conditions, becomes "hard" (borrowing its legal force from extradition law). In Part IV, I analyzed the mechanisms of legal accountability established at Interpol level, detect the main gaps and propose how to (partially) fill them. The mentioned proposals are based on a combination of two different techniques: one is the establishment of principles of due process at international level; the other is the setting of global standards that limit national administrative discretion when its exercise determines ultra-national effects.²⁰⁴ The same goal—legal accountability—can be pursued along different and mutually sustaining paths.

There is a distance between such pragmatic proposals and the more traditional alternatives, namely the full legalization of Interpol (to begin with, the adoption of an international convention on red notices) and the mechanical translation to the global level of national consolidated tools of legal accountability (first and foremost, independent judicial review of administrative action). Some public law scholars may consider that distance as a betrayal of the integrity of the rule of law or, at best, as "administrative law light."²⁰⁵ It seems, nonetheless, consistent with (a) the initial commitment to take the "softness" of Interpol powers seriously, (b) the need to accommodate normative legal concerns with the functional imperatives on which international police cooperation is built, and (c) the perception that legal accountability is only one of the many

204. See generally Sabino Cassese, *Global Standards for National Administrative Procedure*, 68 LAW & CONTEMP. PROBS. 109 (2005).

205. Stewart, *U.S. Administrative Law*, *supra* note 49, at 104-06.

mechanisms of accountability that can be applied to global regimes.²⁰⁶

I draw from this case study three general insights. The first one concerns the relevance of "soft" powers for the legal analysis of global governance. As the uncomfortable case of Interpol red notices shows, "soft" powers and "soft" law identify a grey area where the functional goals of global governance and the normative concerns of public law more harshly compete. The scholarly neglect of similar issues is not benign: far from easing the tension between governance and legal perspectives, it exacerbates it and reveals the insufficiency of existing public law paradigms.

Secondly, the existence of "soft" powers entails a basic question: "is a formally binding commitment to obey a rule the only means of producing rule-conforming behavior?"²⁰⁷ This answer cannot be properly given from a mainstream positivist standpoint.²⁰⁸ In that traditional view, if there is no "hard" law that creates a binding public power, then it is impossible to translate normative concerns, if any, into meaningful arguments of legality; here is where legal forms are traditionally perceived as useless. By contrast, an international body that exerts formally binding unilateral powers is the kingdom to put under the law's empire, both to strengthen the legitimacy

206. Grant & Keohane, *supra* note 48, at 35-37 (detecting six mechanisms of accountability other than law, namely hierarchical, supervisory, fiscal, market, peer and public reputational accountability).

207. Cassese, *supra* note 8, at 765.

208. By mainstream positivism I mean voluntaristic or constrained theories of law, which emphasize that law is what law-makers want it to be and, hence, that it implies a connection with sovereignty and command. This Hobbesian or Austinian approach, transposed to the international level (where it is mostly associated with Jellinek and Triepel). Identifies the will of the lawmakers (the states) with "hard" international law, as qualified in article 38 of the International Court of Justice statute, June 26, 1945, 33 U.N.T.S. 993. In this perspective, "soft law" is neglected: either it is dismissed as mere "fait juridique," d'Aspremont, *supra* note 107, at 1080, or, at best, acknowledged as undesirable, see Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 414 (1983); Jan Klabbers, *The Undesirability of Soft Law*, 67 NORDIC J. INT'L L. 381 (1998). For an overview of informal international law, including the motivations for and consequences of its use, see Eyal Benvenisti, 'Coalitions of the Willing' and the Evolution of Informal International Law, in COALITIONS OF THE WILLING: AVANT-GARDE OR THREAT? 1 (Christian Callies, Georg Nolte & Peter-Tobias Stoll eds., 2006).

of the ultra-state public authority and to establish a minimum standard of protection for individuals. For those positivists, to skip the theoretical quicksand of “soft” law is easier, but for global scholars this kind of legal positivism does not hold,²⁰⁹ since it does not serve the purpose of studying heterogeneous global regimes and the development of common principles and rules (soft ones included).²¹⁰

The third issue is *if* and *how* to “legalize” a “soft” power once we acknowledge its legal relevance. What if we face a power that is non-binding, does not fit into any classic category of public law and, yet, ultimately affects individual rights: how do we “legalize” such an atypical manifestation of public authority? How appropriate would it be to put it under the reach of the rule of law? Isn’t this a case where the legal discourse hits its own borders and should defer to competing functional rationales?

In addressing this issue, global administrative law and the competing public international law approach largely converge.²¹¹ Both maintain that public law can play—at least in part and with some adaptations—its traditional dual role of

209. This does not imply an integral rejection of legal positivism by global administrative law. See Kingsbury, *supra* note 8, at 27-31 (proposing a “social fact” conception of law as an extension of Hartian positivism, assumed as compatible with global administrative law, in opposition to traditional (Hobbesian-Austinian) positivism); see also Benedict Kingsbury, *International Law as Inter-Public Law*, in *MORAL UNIVERSALISM AND PLURALISM* 167, 190 (Henry S. Richardson & Melissa S. Williams eds., 2009) (describing how the emerging field of global administrative law is one example of inter-public law in operation). For a discussion of Hart’s concept of law in an international law perspective, see Patrick Capps, *Methodological Positivism in Law and International Law*, in *LAW, MORALITY, AND LEGAL POSITIVISM* 9 (Kenneth E. Himma ed., 2004).

210. See Casese, *supra* note 8, at 762 (observing, with regard to global (administrative) law studies, that “a scholarly endeavor of this sort has not been undertaken since the 17th century. Indeed, ever since the attack from legal positivism led to the collapse of natural law approaches to the discipline, law has been conceived of as exclusively the product of nation-states, with international law conceptualized mainly on the basis of ‘contractual’ relations among them.”).

211. On public international law and global governance, see generally Bogdandy et al., *supra* note 8; Eberhard Schmidt-Assman, *The Internationalization of Administrative Relations as a Challenge for Administrative Law Scholarship*, 9 GER. L.J. 2061 (2008); *THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS*, *supra* note 8 (collecting essays and case-studies conducted within this theoretical framework).

enabling and limiting public power also when it is "soft" and international. Both claim, in fact, that a relative concept of normativity is necessary to overcome the stark dichotomy of binding/non-binding and to fully appreciate the legal salience of "soft" instruments of law.²¹² Moreover, both reject the positivist *caveat* not to promote "legal spillovers," that is, not to conflate legal and non-legal discourses. Here is where positivism still poses a major challenge to global studies. Yet, global scholars contend that this concern is misplaced, especially (but not exclusively) when it is advanced in the global arena.²¹³ The main effort should be, rather, devoted to elaborating strategies of "legalization" or "gap-filling" that are consistent with the specific legal salience of the public power at stake.²¹⁴

In conclusion—and here is the third insight I draw from this case study—the answer to the previous question ("how to treat soft powers") depends on the kind of legal lenses employed. Those who shape their quest for public law at the international level in a positivist fashion risk either overlooking relevant "soft" powers (because they lack a legal basis), or, by contrast, armoring them into an ill-suited legal cage (commanded by the imperative to re-establish accountability to states). By contrast, global administrative law seems well-equipped both to capture the various degrees of "softness" pertaining to global powers, and to sew legal clothes that more appropriately fit informal global institutions and powers (by

212. Goldmann, *supra* note 12; see also Kingsbury, *supra* note 8, at 27 ("Whereas positivist thought within a unified legal system has focused on the binary validity/invalidity, or binding/non-binding, the absence of a very organized hierarchy of norms and institutions in global governance, and the dearth of institutions with authority and power to determine such questions in most cases, means the actual issues in global administrative law often go to the weight to be given to a norm or decision.").

213. Objections may be condensed in two questions: (a) does the legal discourse have fixed or clearly defined boundaries, so that no interplay with competing wisdoms is allowed and indeed beneficial? (b) is it really necessary (and meaningful) to prevent "legal spillovers" in a global arena where political dynamics systematically interferes with legal ones and where, as a result, the two spheres largely overlap?

214. See Stewart, *U.S. Administrative Law*, *supra* note 49, at 76-88 (distinguishing between top-down and bottom-up mechanisms of legal accountability); Goldmann, *supra* note 12, at 1879-1905 (advancing a classification of "standard instruments of international public authority" and detecting some common elements of their legal regimes).

squaring functional needs with the protection of individual rights). In so doing, global administrative law, compared to more ambitious approaches,²¹⁵ seems to perform a modest, while potentially not less effective, role in promoting the rule of law beyond the state.

215. Bogdandy et al., *supra* note 8, at 1390-95, describe their methodology as a combination of three approaches: constitutional law, administrative law and institutional international law. In my view, the main divergence between this approach and global administrative law concerns the different emphasis put on the role of states. Global administrative law scholars openly reject the “state-as-a-unit” paradigm and tend to conceive the global context as an arena where states compete with other private and public actors. See Kingsbury et al., *supra* note 11; Cassese, *supra* note 8; Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT’L L. 1, 10 (2006) (all authors stressing the tension between global administrative law and the classical models of consent-based inter-state international law). By contrast, proponents of public international law defend a state-centered approach both at the terminological and conceptual levels. As for terminology, the traditional word “international” is preferred to the word “global,” which is intended to highlight the vanishing of a sharp separation between the domestic and international legal orders. See Cassese, *supra* note 11, at 684. At the conceptual level, a state-centric vision surfaces where global governance is conceived “as peaceful cooperation between polities, be they states or regional federal units, a cooperation which is mediated by global institutions. . . . These are propelled by national governments . . . [and] would in turn be conscious of their largely state-mediated (and thus limited) resources of democratic legitimacy and respectful of the diversity of their constituent polities.” Bogdandy et al., *supra* note 8, at 1400; see also Schmidt-Assman, *supra* note 211, at 2066-69.