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Article 3 of Interpol's Constitution: Balancing International Police Cooperation with the Prohibition on Engaging in Political, Military, Religious, or Racial Activities

Yaron Gottlieb

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ARTICLE 3 OF INTERPOL’S CONSTITUTION:
BALANCING INTERNATIONAL POLICE COOPERATION
WITH THE PROHIBITION ON ENGAGING IN POLITICAL,
MILITARY, RELIGIOUS, OR RACIAL ACTIVITIES

Yaron Gottlieb*

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I. INTRODUCTION

In 1976, a dispute erupted between two INTERPOL member countries regarding the interpretation of Article 3 of INTERPOL’s Constitution, which states that “[i]t is strictly forbidden for the Organization to undertake any intervention or activities of a political, military, religious or racial character.” In a passionate speech before INTERPOL’s General Assembly, the Organization’s supreme organ, the representative of one of the disputing countries stated:

Can we treat Article 3 as lovers treat a daisy, claiming that in some cases we apply it and in some we do not? The word s-t-r-i-c-t-1-y in Article 3 does not allow us to strip off all the petals—or all the garments from our beautiful and beloved Organization.

* The author works as a Senior Counsel at INTERPOL’s Office of Legal Affairs. I would like to thank my colleagues at the Office of Legal Affairs—in particular Mr. Olivier Foures and Ms. Lina Monten—for their valuable comments. All errors remain the author’s own.


2. See id. art. 6 (“[t]he General Assembly shall be the body of supreme authority in the Organization. It is composed of delegates appointed by the Members of the Organization”).
Forgive me for saying so, but Article 3 is a sort of chastity belt.3

The rhetorical question posed by the distinguished delegate and his somewhat provocative statement was clearly intended to highlight the significance of Article 3 of INTERPOL’s Constitution to the Organization’s activities. Indeed, since the Organization’s earlier days, Article 3 has been among the most prominent constitutional provisions, a cornerstone governing INTERPOL’s undertakings.

This Article aims to analyze the developments concerning the application of Article 3, and the various considerations pertinent to its interpretation. While Article 3 applies to all INTERPOL activities, in practice it has been particularly relevant to INTERPOL’s activities in two domains: first, in the field of processing of information related to police work via INTERPOL’s channels; and secondly, in the context of cooperation with other international entities. This Article will therefore focus on the application of Article 3 and the different tests applied in these two domains.

Part II of this Article provides an introduction to Article 3 in the context of INTERPOL work. Part III examines a number of general observations regarding the interpretation of Article 3, and Part IV presents an overview of the relevant Resolutions of INTERPOL’s General Assembly. Part V discusses the four elements enumerated in Article 3, namely the political, military, religious, and racial elements. Parts VI and VII then analyze the interpretation and implementation of Article 3 in INTERPOL’s practice: first, in the sphere of processing of information; and secondly, in the context of cooperation with other international entities.

II. Article 3 in Context

INTERPOL was created in 1923 as the International Criminal Police Commission (ICPC), with its headquarters in Vienna, Austria.4 When its current Constitution was adopted in 1956, the Organization’s name was changed to “The International Criminal Police Organization—INTERPOL,” and its seat was established in France.5 The Organization has 188 member countries,6 and hence enjoys almost universal membership. As the world’s largest international police organization,

5. INTERPOL Constitution, supra note 1, art. 1.
INTERPOL aims to facilitate cross-border police cooperation and support, and to assist all organizations, authorities, and services whose mission is to prevent or combat international crime. To ensure cooperation, each member country designates a national body, called the National Central Bureau (NCB), which ensures a liaison with the various departments in the country, NCBS in other countries, and the Organization’s General Secretariat.

The creation of the Organization as an international commission established by representatives of national law enforcement agencies has raised doubts concerning the legal status of the Organization under international law. Indeed, it has been argued in the past that INTERPOL is a private organization of police officers, or a non-governmental organization. Nonetheless, there should be little doubt today that INTERPOL enjoys the status of an independent international organization.

7. For further information about INTERPOL’s vision and mission, see INTERPOL, Overview, available at http://www.interpol.int/About-INTERPOL/Overview.
8. INTERPOL Constitution, supra note 1, art. 32.
INTERPOL’s aims are defined in Article 2 of INTERPOL’s Constitution as follows:

(1) To ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the laws existing in the different countries and in the spirit of the “Universal Declaration of Human Rights”;

(2) To establish and develop all institutions likely to contribute effectively to the prevention and suppression of ordinary law crimes.\(^1\)

Thus, in accordance with Article 2, it is within the fields of international criminal law and international criminal justice that INTERPOL carries out its activities. The terminology used in Article 2 enables broad interpretations, and thus the possibility to confront new challenges without the need to resort to amendments of the Organization’s legal framework. Based on the general guidance provided for in Article 2, INTERPOL has defined its strategic priorities as follows: first, creating a secure global communication network (called I-24/7), which enables the processing of police information and requests for police cooperation among INTERPOL’s NCBs and with the General Secretariat; secondly, providing 24/7 support to policing and law enforcement; thirdly, capacity building; and fourthly, assisting member countries in the identification of crimes and criminals.\(^2\)

Among the tools and services that INTERPOL provides are operation data services and databases for police such as fingerprints and DNA databases.\(^3\) INTERPOL also publishes notifications known as INTERPOL Notices. These are international alerts allowing police in member countries to share critical crime-related information. They are published and circulated by INTERPOL’s General Secretariat upon the request of an NCB or an international entity (e.g., an international tribunal) with which the Organization has concluded a cooperation

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\(^1\) INTERPOL Constitution, supra note 1, art. 2.


agreement. 14 The most well known of INTERPOL’s notifications is the red notice, which is a request to provisionally arrest a wanted person pending extradition. 15 INTERPOL also publishes alerts of imminent threats (the orange notice), requests to assist in the location of a missing person (the yellow notice) and more. 16

From its earliest days on, INTERPOL has maintained a position of neutrality. As stated by INTERPOL’s President in 1946, by adhering to this principle, the Organization “had succeeded in gaining the respect of administrative and judicial authorities in all member countries.” 17 In 1948, the phrase “to the strict exclusion of all matters having a political, religious or racial character” was added to the end of Article 1(1) of the Organization’s Statute, which defined the Organization’s purposes. 18

Despite the fact that the drafters of the 1956 Constitution chose to divide the former Article 1(1) into two separate provisions, namely Article 2 and Article 3, it appears that conceptually and structurally the two provisions should be read together, as their combination forms INTERPOL’s scope of activities, namely its rule of speciality. 19 This


17. See opening speech made by INTERPOL’s President Mr. Louwage at the Brussels Conference in 1946 (on file with author). This Conference led to the rebuilding of the Organization following World War II.


19. See id. International organizations must conduct their activities within the mandate defined by their creators. As explained by the International Court of Justice (ICJ):

[International organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the “principle of specialty,” that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.

Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1996 I.C.J. 226, ¶ 25,
position is supported also by certain INTERPOL General Assembly resolutions, such as the resolution approving cooperation with the International Criminal Court. The preamble of the resolution states that the crimes under the jurisdiction of the International Criminal Court “fall within the aims of the Organization as defined in Articles 2 and 3 of the Constitution.”

Thus, INTERPOL’s activities should be understood to encompass any undertaking that can promote international police cooperation, so long as such an undertaking conforms with three restrictions: firstly, it is performed within the limits of the pertinent national laws; secondly, it is conducted “in the spirit of the Universal Declaration of Human Rights;” and finally, it is not of a political, military, religious or racial character within the meaning of Article 3 of the Constitution.

III. THE INTERPRETATION OF ARTICLE 3: GENERAL OBSERVATIONS

Prior to delving into a discussion concerning the interpretation of Article 3 in light of INTERPOL’s rules and practice, three general questions merit consideration: first, the applicable principles of interpretation under international law which guides the interpretation of Article 3; secondly, differences between the versions of Article 3 in the three official languages of INTERPOL’s Constitution; and thirdly, the interrelation between Article 3 and the concept of “ordinary law crime.”

A. The Applicable Principles of Interpretation

The general principles of treaty interpretation are laid out in Articles

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20. See ICC Corporate Agreement.
21. INTERPOL Constitution, supra note 1, art 2(1).
22. Id. See Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948), available at http://www.un.org/events/humanrights/udhr60/hrphotos/declaration%20_eng.pdf (Unlike the other two restrictions regarding INTERPOL’s scope of activities (namely the limitation of national laws and Article 3), this requirement can also be construed as embodying a positive instruction, namely that INTERPOL should be encouraged to engage in activities which can promote the “spirit of the Universal Declaration of Human Rights”).
23. See INTERPOL Constitution, supra note 1, art. 3.
24. See id. art. 2.
31-33 of the 1969 Vienna Convention on the Law of Treaties, which has been recognized as reflecting customary international law. The Vienna Convention defines a “treaty” for its purpose as an “international agreement concluded between States.” The Convention applies also to a treaty which “is the constituent instrument of an international organization,” and defines an “international organization” as an “intergovernmental organization.” Considering that the legal character of INTERPOL’s Constitution has often been questioned, a doubt may arise as to whether the principles of interpretation enshrined in the Vienna Convention apply with regard to INTERPOL’s Constitution.

Nonetheless, as noted earlier, INTERPOL should be considered as an independent international organization, and this author concurs with the view according to which “INTERPOL’s Constitution is a product of an agreement establishing an international organi[z]ation under international law.” In addition, INTERPOL has accessed to the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which applies interpretive principles identical to the 1969 Vienna Convention. Consequently, it is safe to assert that the interpretation of INTERPOL’s Constitution, including of Article 3 of the Constitution, is guided by the interpretation tenets embodied in the Vienna Convention, notably the principle according to which “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms


27. Vienna Convention, supra note 25, art. 2.
28. Id. art. 5.
29. Id. art. 2.
30. See MARTHA, supra note 10, at 1-2.
31. See id. at 4. See also BLOKKER & SCHERMERES, supra note 10, at 29, who concluded that while “[f]ormally, Interpol is not based on an agreement between states[,] . . . such an agreement may be in fact deduced from a number of factors[, such as,] in 1975 it was designated as an intergovernmental organization to participate in the work of ECOSOC on a continuing basis . . . .”
32. INTERPOL’s accession to the 1986 Vienna Convention was approved by INTERPOL’s General Assembly. See INTERPOL Accession to the Vienna Convention, supra note 10. According to the Resolution’s preamble, INTERPOL’s member countries consider the Organization as an “intergovernmental organization” in the meaning of that Convention: “[b]earing in mind that the ICPO—Interpol has the capacity to conclude treaties and that it is recognized as an intergovernmental organization as specified in Article 2(1)(i) of the 1986 Vienna Convention and under the rules of international law . . . .” Id.
33. Vienna Convention, supra note 25, arts. 31-33.
of the treaty in their context and in light of its objects and purpose."

B. The Difference Between the English, French and Spanish

Versions of Article 3

Another general question pertains to the differences in the versions of Article 3 in its three authoritative languages—French, English, and Spanish. The English version prescribes that "[i]t is strictly forbidden for the Organization to undertake any intervention or activities of a political, military, religious or racial character;" while the French version states that "[t]oute activité ou intervention dans des questions ou affaires présentant un caractère politique, militaire, religieux ou racial est rigouresusement interdite à l'Organisation." Thus, the English version appears to relate to the activities of the Organization itself, while the French version concerns matters which the Organization might be asked to engage in. The Spanish version, which reads "[e]stá rigurosamente prohibida a la Organización toda actividad o intervención en cuestiones o asuntos de carácter político, militar, religioso o racial," appears to be closer to the French version.

The application of general interpretative principles regarding treaties authenticated in more than one language leads to the conclusion that the French version should govern with regard to this question of interpretation. INTERPOL was established for the purposes of providing services to police authorities around the world, thus it is the matters in which it is asked to support national authorities which should not be of a political, military, religious or racial character. Resolutions adopted by INTERPOL's General Assembly further support this position: those resolutions refer to the prohibition set forth by Article 3 with regard to requests for cooperation sent by INTERPOL's member countries via INTERPOL's channels, and require the General

34. Id. art. 31(1).
35. INTERPOL Constitution, supra note 1, art. 43. The French version was the original language when the Constitution was adopted. In addition to the three authoritative languages (French, English, and Spanish), Arabic is the fourth working language of INTERPOL. See General Regulations art. 54(1).
36. Id. art. 3.
37. INTERPOL, O.I.P.C.—INTERPOL Statut et Règlement, June 13, 1956, art. 3, available at http://www.interpol.int/fr/A-propos-d’INTERPOL/Documents-juridiques/Documental-texts (A literal translation of the French version of Article 3 will read as follows: "Any activity or involvement by the Organization in questions or matters of a political, military, religious or racial nature is strictly forbidden.").
39. See Vienna Convention, supra note 25, art. 33.
Secretariat, as the primary organ responsible for the daily operation of the Organization, to assess each request based on the particular facts provided on a case-by-case basis. The resolutions therefore concern the possible application of Article 3 with regard to requests for cooperation, which encompasses the matters in which the Organization may become involved.

Moreover, a different interpretation, namely that Article 3 applies with regard to the activities of the Organization itself, that is, taking a literal interpretation of the English version, might theoretically imply that other entities would not be bound by the restrictions imposed by Article 3 when using the Organization’s tools and services. Consider, for example, a situation where a member country sends directly to another member country via INTERPOL’s channels a message of pure religious character, or a situation where during an INTERPOL conference a delegate representing one of INTERPOL’s member countries carries out a political speech. In both cases, it is not the Organization’s organs which directly undertook an activity in violation of Article 3, yet it would seem inconceivable to argue that the activities described above fall outside the scope of that provision. Conversely, the approach embodied in the French version, according to which it is the subject matter that determines whether the particular activity or undertaking that the Organization is requested to support is sanctioned by Article 3, will lead to the more reasonable interpretation applying Article 3 in the above examples.

Finally, in the domain of collaboration with other international entities, a prerequisite for any use of INTERPOL’s services and tools by these international entities, for instance for the purposes of having access to INTERPOL’s information network and databases, is that this use is in conformity with Article 3. The question of whether cooperation is allowed in light of Article 3 is also determined by examining the subject matter of the proposed cooperation.

In conclusion, it appears that the French version of Article 3 should apply. Thus, whether a particular activity falls within the scope of Article 3 is determined by the subject-matter of this activity, and all entities—whether the Organization’s organs, its member countries, or other international or national entities—are bound by Article 3 upon using INTERPOL’s tools and services, and when participating in the

40. INTERPOL Constitution, supra note 1, art. 26.
41. See Part IV, discussion.
42. See Part VII.
43. In that reference, see also James Sheptycki, stating that “in practice it is the French version which seems to be operative.” James Sheptycki, The Accountability of Transnational Policing Institutions: The Strange Case of Interpol, 19 CAN. J.L. & SOC’Y 107, 128 (2004).
Organization's activities.\textsuperscript{44}

\textit{C. The Interrelation Between Article 3 and the Concept of "Ordinary Law Crime"}

The term "ordinary law crime" is explicitly mentioned in INTERPOL’s Constitution, notably in the aforementioned Article 2(2), as well as in Article 26(b), which defines one of the functions of the General Secretariat as being "[t]o serve as an international centre in the fight against ordinary crime."\textsuperscript{45} Nonetheless, it has been correctly indicated that "the concept of 'ordinary law crime' is important[,] but its meaning is by no means clear-cut."\textsuperscript{46}

In INTERPOL’s practice, Article 3 serves to define the scope of this concept: thus, "ordinary law crime" means crimes that do not fall within the scope of Article 3.\textsuperscript{47} This interrelation between the concept of "ordinary law crime" and Article 3 supports the argument presented above regarding Articles 2 and 3 of the Constitution being read together for the purpose of defining INTERPOL’s rule of specialty. Moreover, this link has enabled the shaping of the scope of INTERPOL’s activities not by interpreting Article 2 of the Constitution, but rather through the evolution in the interpretation of Article 3. For example, in 1994 when INTERPOL’s General Assembly considered the question whether the Organization should get involved in the field of fighting serious international crimes (genocide, crimes against humanity, and war crimes), the debate focused less on the meaning of the term "ordinary

\textsuperscript{44} MARTHA, supra note 10, at 43 (indicating that the restriction laid down by Article 3 "apply both to the General Secretariat and to INTERPOL members").

\textsuperscript{45} INTERPOL Constitution, supra note 1, art. 26(b).

\textsuperscript{46} Sheptycki, supra note 43. The terms "ordinary law crime" and "common crimes" are frequently used interchangeably. One scholar describes "common crimes" as follows:

Throughout the history of mankind, organized societies have characterized certain forms of behavior as offensive to their common morality. These forms of behavior have invariably included that which harmfully affects a commonly shared interest, perceived by almost every member of society, irrespective of ideology. Among these have been certain acts affecting the life and physical integrity of individuals, which, by virtue of their consistent recognition in the legal controls of almost all social systems, are referred to as "common crimes.

M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 656 (5th ed. 2007).

\textsuperscript{47} Compare this with the context of the processing of police information via INTERPOL’s channels, where Article 3 is of particular importance, "ordinary law crimes" are defined as "crimes as referred to in Article 2(b) of the Constitution but not those excluded by Article 3 of the said Constitution." See RPI, supra note 14, art. 1(a).
law crime” in Article 2 of the Constitution, and more on the application of Article 3 in that context.48 By concluding that, a priori, Article 3 does not prevent the Organization from collaboration in this field, INTERPOL’s General Assembly in fact enabled the broadening of INTERPOL’s activities in the promotion of international police cooperation in the meaning of Article 2 of the Constitution.49

IV. INTERPOL’S GENERAL ASSEMBLY RESOLUTIONS CONCERNING ARTICLE 3

INTERPOL’s General Assembly has addressed the question of the interpretation of Article 3 in a number of its resolutions. General Assembly resolutions are the decisions of INTERPOL’s supreme organ adopted in its plenary session,50 namely by a vote of the delegates of member countries.51 The resolutions are therefore particularly relevant for the interpretation of Article 3 in view of the interpretive principles set forth by the Vienna Convention, as they reflect “subsequent agreement[s] between the parties regarding the interpretation of the treaty or the application of its provisions.”52

The General Assembly adopted the first pertinent resolution in 1951.53 The impetus for the resolution was a dispute that arose over the publication of red notices upon the request of Czechoslovakia against Czechoslovakian nationals charged with hijacking a plane in March 1950 and forcing it to land in an American airbase in West Germany. The individuals were granted political asylum in the United States, which argued that INTERPOL should not have issued the notices in light of the prohibition against engaging in political matters. INTERPOL’s General Secretariat did not concur with the position of the United States, and allowed the publication of the notices. Consequently, the U.S. Federal Bureau of Investigation (FBI), which was the police body that represented the United States in INTERPOL, withdrew from the activities of the Organization.54

The 1951 Resolution recommended to member countries to see that:

[N]o request for information, Notice of persons wanted and,

48. See INTERPOL General Assembly Resolution AGN/63/RES/9 (on file with author).
49. See infra, section IV for a further discussion on the 1994 INTERPOL General Assembly resolution.
50. INTERPOL Constitution, supra note 1, art. 17.
51. Id. arts. 6, 13.
52. See Vienna Convention, supra note 25, art. 31(3)(a).
53. See INTERPOL, Background to Article 3, supra note 17.
54. See Fooner, supra note 9, at 24, 41; see also Sheptycki, supra note 43, at 128-29; MARTHA, supra note 10, at 62.
above all, no request for provisional arrest for offen[s]es of a *predominantly* political, racial or religious character, is ever sent to the International Bureau or the [NCB]s, even if—in the requesting country—the facts amount to an offen[s]e against the ordinary law[].

The Resolution therefore applied the predominance test used in international extradition law, according to which extradition may be granted if the act for which extradition is requested constitutes primarily a common crime, even though the individual alleges a political motive or end. The test is based on the distinction between "pure offenses" and "relative offenses." The former are considered non-extraditable offenses, as they refer to acts criminalized solely due to their political or military nature, and they contain no ordinary law element. They are usually directed against the sovereign, and exclusively affect the public interest and cause only public wrong. Typical examples of such offenses are treason, espionage, and desertion. Relative offenses, on the other hand, are acts that also include ordinary law elements, therefore also affecting private interests and causing, at least in part, a private wrong.

Most importantly, the 1951 Resolution provided that the Organization will not be bound by the categorization of an offence in the requesting country as an ordinary law crime; rather, as deriving from the Resolution, the Organization conducts its own examination on a case-by-case basis and in application of the predominance principle to assess the nature of the case.

As international law evolved, so did the practice of INTERPOL in reference to the interpretation and application of Article 3. The first significant change made via the adoption of General Assembly resolutions addressed cases of terrorism. Traditionally, requests for

56. See GEOFF GILBERT, RESPONDING TO INTERNATIONAL CRIME 218-19 (2006).
58. See id.
59. Id.
61. See BASSIOUNI, supra note 46, at 660-62.
62. See MARTHA, supra note 10, at 43.
police cooperation related to terrorism were viewed as falling under Article 3 due to the political motivations of the perpetrators and the difficulty of drawing a clear and universally acceptable distinction between “terrorists” and “freedom fighters.”

During the 1970s, in light of the increase in terrorist acts such as hostage taking and the international conventions adopted to combat such acts, INTERPOL’s General Assembly adopted a number of resolutions addressing those crimes. The resolutions, while mindful of Article 3 of the Constitution, considered certain acts of violence as a danger to public safety, and therefore recommended international cooperation within the framework provided by INTERPOL. The resolutions stopped short, however, of categorizing such acts of violence as terrorist acts and analyzing them in light of Article 3 of the Constitution.

In 1983, INTERPOL’s General Assembly requested the Executive Committee to examine the possibility of drawing up guidelines on how Article 3 should be interpreted in connection with international terrorism. A year later, based on the preparatory work done by the delegates to an international symposium dedicated to this question, the General Assembly adopted two resolutions directly concerning terrorism and the interpretation of Article 3. The first noted that in many countries there are organized groups engaging in violent criminal activities designed, by spreading terror or fear, to enable them to attain allegedly political objectives; and that such activities, typically including acts such as kidnapping and hostage taking, are commonly covered by the term “terrorism.” The General Assembly referred to international conventions covering such matters, mentioning that those conventions do not admit exceptions for political reasons in extradition cases where certain serious crimes have been committed in the context


66. See 1979 Organized Groups Resolution, supra note 65.


68. 1984 Terrorism Resolution, supra note 67.

69. Id. The Resolution explicitly referred to the European Convention on the Suppression of Terrorism; the Organization of American States’ Convention to prevent and punish acts of terrorism, and the League of Arab States’ Extradition Convention.
of terrorism. The General Assembly further acknowledged that "by virtue of the principle of national sovereignty, the political character of any offen[s]e can only be determined by national legislation," but that "it is nonetheless essential to combat this type of crime which causes considerable damage in [INTERPOL] Member States[.""]70 The General Assembly therefore requested that "[t]he NCBs, while respecting the provisions of Article 3 of the Organization’s Constitution, to co-operate [sic] as fully as possible to combat terrorism as far as their national laws permits."71

The second 1984 resolution did not make an explicit reference to the term terrorism, yet by defining the general principles for the interpretation of Article 3 paved the way—together with the first Resolution—for the Organization’s active participation in the counter-terrorism field.72 The resolution specified that "[w]hen offenses are committed with definite political motives[,]" but nonetheless have "no direct connection with the political life of the offenders’ country or the cause for which they are fighting, the crime may no longer be deemed to come within the scope of Article 3."73 "This is particularly true when offen[s]es are committed in countries which are not directly involved (i.e., outside the “conflict area”)[,] and when the offen[s]es constitute a serious threat to personal freedom, life[, or property."74

The resolution clarified that "[o]ffenses [such as aircraft hijacking] committed outside the conflict area . . . in order to draw attention to a particular cause, do not come within the scope of Article 3."75 It further indicated that in general, "a valid criterion is whether there is anything to connect the victims directly or indirectly with the aims or objectives pursued by the offenders, and with the countries in the conflict area or with the relevant political situation."76

Thus, while some of the qualifying criteria defined by the resolution—notably the general criterion concerning links (or their lack thereof) to the “conflict area” and between the offenders’ aims and their victims—might be considered somewhat obsolete today, the resolution nonetheless enabled INTERPOL’s involvement in combating terrorism. Pursuant to that development, and in response to a number of terrorist attacks that took place in the 1990s, the fight against international terrorism became one of INTERPOL’s primary aims,77 a position the

70. Id.
71. Id.
72. See 1984 Application of Article 3 Resolution, supra note 67.
73. Id. at II.3.
74. Id.
75. Id. at II.4.
76. Id. at II.5.
77. See INTERPOL, Cairo Declaration Against Terrorism, AGN/67/Res/12 (Oct. 22-27,
organization confirmed following 9/11. With reference to the principles governing the interpretation of Article 3, the 1984 Application of Article 3 resolution recalled the predominance test established by the 1951 Resolution, and emphasized that each request requires review on a case-by-case basis with due consideration for the specific context. Notwithstanding this general approach, the resolution enumerated a number of offenses considered by their very nature to be of political, military, religious or racial in character.

Another important principle established by the resolution concerns refusals of one or more countries to act on a request. The resolution determined that this "does not mean that the request itself is invalid and that it automatically falls under Article 3 . . . " However, if certain countries refuse extradition, this is reported to all other member countries for information and consideration. This approach represents a fundamental tenet governing international police cooperation, namely the principle of national sovereignty. Thus, so long as the request does not violate INTERPOL’s rules (e.g., a request to arrest a person for allegedly committing a pure political crime), it may be processed via the Organization’s channels and the decision whether to cooperate remains within the discretion of each member country in accordance with its national laws and international obligations. The role of INTERPOL’s

1998) (on file with author); INTERPOL, The Financing of Terrorism, AGN/68/Res/2 (Nov. 8-12, 1999) (on file with author), where the General Assembly stated that it “AGREES that the fight against international terrorism is one of the main aims of INTERPOL’s action in carrying out its general activities of police co-operation[.]”

80. According to the 1984 Application of Article 3 Resolution,

Some of the acts included as offences in various national penal codes are by their very nature political, military, religious or racial (e.g. membership of a prohibited organization, the expression of certain prohibited opinions, offences involving the press, insulting the authorities, offences against the internal or external security of the State, desertion from the armed forces, treason, espionage, practising a prohibited religion, recruitment or propaganda for particular religions, membership of a racial association). Such acts come within the scope of Article 3.

Id. at II.1.
81. Id. at I.9.
82. Id.
83. Id.
84. INTERPOL’s rules make specific references to the obligation of member countries to act in accordance with their national laws and international obligations. See INTERPOL Constitution, supra note 1, arts. 2(1), 9, & 31; see also RPI, supra note 14, art. 10.1a.5.
General Secretariat following the examination of each request and the approval of its processing is to provide member countries with all available and pertinent information, which will enable them to decide whether and to what extent they wish to cooperate.85

The last notable resolution concerning the application of Article 3 in the counter-terrorism field was adopted by INTERPOL’s General Assembly in 2004.86 The resolution endorsed the interim measures taken by the General Secretariat to enable cooperation in reference to the crime of membership in a terrorist organization.87 As indicated in the resolution, until November 2003 the General Secretariat declined the publication of red notices if they were based solely on this crime.88 This policy derived from the application of the 1984 Resolution, which considered “membership of a prohibited organization” as political by its very nature.89 In the aftermath of 9/11 and the ensuing terrorist attacks in Spain and the United Kingdom, INTERPOL’s General Assembly sought to broaden the scope of INTERPOL’s involvement in combating terrorism by allowing cooperation, under certain conditions, with requests concerning this crime.

Another significant change with regard to the evolution of Article 3’s interpretive framework was introduced in 1994 when an INTERPOL General Assembly resolution (1994 Resolution) adopted the contents of an INTERPOL report, which recommended that collaboration with the International Criminal Tribunal for the Former Yugoslavia (ICTY) should be allowed.90 The 1994 Resolution therefore enabled cooperation in cases concerning serious international crimes (genocide, crimes against humanity, and war crimes), which were previously considered to fall under Article 3 in light of the intrinsic political (and sometimes

85. This role of the General Secretariat is based on its function as “an international centre in the fight against ordinary crime” and as a “technical and information centre.” See INTERPOL Constitution, supra note 1, arts. 26(b), 26(c).
87. Id.
88. Id.
89. INTERPOL, 1984 Application of Article 3 Resolution, supra note 67, at II.1.
military) elements they contain. The report analyzed the various elements of Article 3 and reiterated the principle that each request for cooperation has to be evaluated individually by examining the facts. It further elaborated on the interpretation of Article 3 by clarifying certain points such as the review of cases concerning crimes committed by politicians.

In addition to the three important resolutions addressing directly the interpretation of Article 3, namely the 1951, the 1984, and the 1994 Resolutions, a number of other resolutions referring to Article 3 are worth noting. These include a resolution adopted in 2006, which mentioned Article 3 among the Constitutional provisions attesting to the Organization’s independence and neutrality, thereby underscoring one of the important objectives of Article 3; and resolutions approving cooperation agreements with other international entities such as with the International Criminal Court, which made important references to Article 3.

This overview of INTERPOL’s General Assembly resolutions manifests that the primary objectives of Article 3 may be defined as follows: firstly, to ensure the independence and neutrality of INTERPOL as an international police organization; secondly, to reflect established principles of international extradition law; and thirdly, to protect individuals from persecution.

In addition, the following points are noteworthy: INTERPOL, as an independent international organization, has developed its own guidelines concerning the interpretation of Article 3. Secondly, the Organization has adopted the predominance test for the purpose of evaluating requests for police cooperation in light of Article 3. Thirdly, each case has to be assessed separately, taking into account all relevant elements. Finally, the general direction has clearly been towards the

91. See 1994 Resolution, supra note 90.
92. See 1994 Report, supra note 90.
93. See infra Part VI.
95. See Cooperation Agreement with the ICC, supra note 90. See also infra Parts VI & VII.
96. It was correctly indicated that “de-politicization” is among the important imperatives ensuring international police cooperation, and INTERPOL’s ability to enforce this imperative has been the main source of its success. See Mario Savino, Global Administrative Law Meets “Soft” Powers: The uncomfortable Case of INTERPOL Red Notices 43 N.Y.U. J. INT’L L. & POL. (2010). The author argued, however, that “the assumption that INTERPOL’s ends are not politically biased but (merely) functionally oriented . . . is now under threat because of the inclusion of terrorism-related crimes in INTERPOL mandate,” and that INTERPOL cannot be really apolitical because no institution can be. Id. at 18-19.
narrowing of the application of Article 3 with regard to the nature of the offense, notably through the exclusion of the crime of terrorism and serious international crimes from the ambit of Article 3. This shift in INTERPOL’s practice reflects the evolution under international extradition law with regard to the concept of the political offense exception.97

V. THE POLITICAL, MILITARY, RELIGIOUS, AND RACIAL ELEMENTS OF ARTICLE 3

A. The Political Element

The decision to place the political element first among the four elements of Article 3 was unlikely to have been a random one. Indeed, this aspect has been the most prominent one in INTERPOL’s practice, notably as it is the primary element aimed at guaranteeing INTERPOL’s neutrality.98

The application of the political element to address the other main objectives of Article 3 is also frequent. First, for reflecting principles of international extradition law, this element introduced the political offense exception into INTERPOL’s practice. Thus, INTERPOL has consistently refused to facilitate cooperation where a request was based on pure political charges (e.g., treason) or offenses limiting free political speech.99

Another example of the application of the political element is found

97. See Vienna Convention, supra note 25, art. 31(3), according to which for the purpose of interpretation of a treaty, “[t]here shall be taken into account, together with the context: . . . (c) any relevant rules of international law applicable in the relations between the parties.” The 1994 Report stated that “for many years, the general trend of Interpol’s practice, as well as of developments in international law, has been to progressively restrict the application of provisions which could ensure that those who commit certain crimes are treated more favorably because of the political context of the act.” 1994 Report, supra note 90. The narrowing of the political offense exception has been manifested in a number of international instruments—particularly in the field of counter-terrorism. Cf. International Convention for the Suppression of the Financing of Terrorism, A/Res/54/109 (Dec. 09, 1999), art. 14, available at http://treaties.un.org/doc/db/Terrorism/english-18-11.pdf; European Convention on the Suppression of Terrorism (Strasbourg, 27, 1977) art. 1. See also Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters, published by the U.N. Office on Drugs and Crime [hereinafter Revised Manuals], ¶ 42, available at http://www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf: “[t]he history of the political offense[s] exception is an interesting study in the progression of efforts to accommodate legitimate political change, while increasingly denying sanctuary to perpetrators of violence.”

98. See Statement to Reaffirm Independence & Political Neutrality, supra note 94.

in cases related to an unconstitutional change of government. INTERPOL’s assistance may be requested in the following scenarios: 1) Requests against individuals related to the ousted government, for example members of a government in exile, sought by the de facto government following a coup d’etat; 2) requests against individuals sought for their involvement in a failed coup; 3) requests against individuals who belonged to the de facto government, once the original government has been reinstated; and 4) requests sent by one country against individuals involved in a coup d’etat in another country.

The involvement of INTERPOL in such cases may pose challenges regarding compliance with Article 3, since crimes allegedly committed in such situations frequently include political elements. Facilitating cooperation might also lead to an undesired involvement of INTERPOL in the domestic politics of the country concerned, or in the country’s international relationship with other countries. Accordingly, INTERPOL has generally refrained from any involvement in cases related to an unconstitutional seizure of power, unless there are indications of violent acts or other elements that may tip the balance in favor of the case having a predominantly ordinary law character.

An example of a case that fell under the first scenario described above and where INTERPOL refused cooperation was a request sent by the Honduran NCB in July 2009 to publish a red notice against Manuel Zelaya, the ousted President of the country. The request was sent to INTERPOL’s General Secretariat only a few days following the coup d’etat in the country, and sought the arrest of Zelaya based on charges of misuse of authority; usurpation of public functions; offenses against the system of government; and treason. These charges were assessed by the Office of Legal Affairs of the General Secretariat as being of a political nature with no ordinary law crime element. In addition, the fact that Honduran authorities turned away a plane carrying the ousted President, which had intended to land in Tegucigalpa, the Honduran capital, pointed to the existence of motives other than the promotion of international police cooperation. The red notice request was therefore

100. See Bettina Schöndorf-Haubold, *The Administration of Information in International Administrative Law—The Example of Interpol*, 9 German L. Rev. 1719, 1720 (2008). The author mentioned Article 3 as one of INTERPOL’s functional limitations and noted that “the non-interference with national political matters is an important premise for the willingness of member states to cooperate on a broad transnational level.”


102. See id.

103. Id.

104. See id.
denied by INTERPOL. 105

With regard to the protection of individuals' rights, the political element may be particularly relevant when evaluating individuals' claims that information processed via INTERPOL's channels is aimed at persecuting them due to their political activities or opinions. Such claims are examined by the Commission for the Control of INTERPOL's Files [CCF], an independent body whose role is to ensure that the processing of personal information by INTERPOL is in compliance with the Organization's rules, including with Article 3. 106

B. The Military Element

This element was not included in the original restriction on INTERPOL's involvement in certain matters, as introduced in the Organization's Statute in 1948, 107 and was added only upon the adoption of the 1956 Constitution. Incorporating this element in Article 3 enabled the Organization to reflect the international law principle that excludes extradition for acts punishable only under military law. 108

In application of this principle, INTERPOL has consistently refrained from facilitating cooperation in cases of pure military offenses, such as desertion. 109 At the same time, INTERPOL's involvement is not excluded a priori where an ordinary law crime was committed in a military context. For example, in a case where a soldier murdered his colleague in a peace-time setting, the application of the predominance test will probably lead to the conclusion that the case falls outside the scope of Article 3. Based on the same reasoning, cooperation is not hindered by the mere fact that the arrest warrant

105. Id.

106. See INTERPOL Constitution, supra note 1, art. 36. If the CCF finds that the information provided by an individual indeed points to violation of Article 3, it will forward to INTERPOL's General Secretariat this finding and its recommendations with regard to the necessary actions to be taken to amend the situation. See INTERPOL General Secretariat, Rules on the Control of Information and Access to Interpol's Files art. 6, available at http://www.interpol.int/About-INTERPOL/Legal-materials/Data-protection. For further information on the CCF, see http://www.interpol.int/About-INTERPOL/Structure-and-governance/Commission-for-the-Control-of-INTERPOL's-Files; see also MARTHA, supra note 10, at 92-104; Cheah Wui Ling, Policing Interpol: The Commission for the Control of Interpol's Files and the Right to a Remedy, 7 INT'L ORG. L. REV. 375 (2010); Savino, supra note 96, at 58.

107. See supra note 18.

108. See Model Treaty on Extradition, A/Res/45/116, art. 3(c) (Dec. 14, 1990) (according to which extradition shall not be granted "[i]f the offen[se] for which extradition is requested is an offen[se] under military law, which is not also an offen[se] under ordinary criminal law") [hereinafter Model Treaty on Extradition]. The exclusion of military offences from extradition has been recognized under customary international law. See BASSOUNI, supra note 46, at 733.

supporting a request to arrest a fugitive was issued by a military tribunal. In such a case, if the assessment of the particular request points to the matter being of a predominantly ordinary law nature, cooperation should generally be permitted.110

A specific category of requests that may require consideration concerns acts committed in an armed conflict or a military operation. Such acts are likely to fall within the scope of Article 3 due to the predominance of both the political and military elements. Nonetheless, where the acts amount to serious international crimes, the application of the 1994 Report and the Resolutions that followed will generally lead to the conclusion that Article 3 would not prevent INTERPOL’s involvement.

The 1994 Report, however, presented a challenge with regard to the interpretation of Article 3 upon assessing requests for cooperation concerning serious international crimes: while permitting INTERPOL’s cooperation with the International Criminal Tribunal for the former Yugoslavia [ICTY], and therefore enabling INTERPOL’s involvement in this field, the Report nevertheless required the application of the predominance test to assess each offense.711 Moreover, upon analyzing the various offenses enumerated by the ICTY Statute, the Report concluded that the crime of compelling a prisoner of war or a civilian to serve in the forces of a hostile power (Article 2(e) of the ICTY Statute) may be considered as an “essentially military offen[s]e” that falls under Article 3.112

The position presented by the 1994 Report and its underlying rationale raise difficulties not only concerning this particular crime, but also when evaluating other serious war crimes that are ostensibly of “military” nature, such as illegal conscription of child soldiers or unlawful use of certain weapons. The Report’s position derives from the traditional principles of an Article 3 analysis, namely the focus on an examination of the elements of a crime. This approach, however, requires reconsideration: as explained, Article 3 is aimed at, inter alia, reflecting principles of international law. Accordingly, the assessment of a particular offense in the context of Article 3 should consider the background for criminalizing the act, as well as the stance of the international community with regard to that offense.

Unlike pure military offences such as desertion, which are derived

110. The involvement of military tribunals in the criminal proceedings in the requesting country may nonetheless require consideration in light of other INTERPOL’s rules. For example, decisions of military tribunals or “Security Courts” may require assessment of conformity with the “spirit of the Universal Declaration of Human Rights.” INTERPOL Constitution, supra note 1, art. 2(1).
111. 1994 Report, supra note 90.
112. Id.
solely from military law and are therefore considered as non-extraditable offences, the criminalization under national law of serious international crimes reflects international conventions such as the 1948 Genocide Convention and is frequently incorporated in the domestic ordinary laws or similar penal legislation. Furthermore, serious international crimes are considered extraditable offenses in light of their heinous nature. One cannot ignore the developments in international law with regard to these offenses and the clear recognition by the international community of the importance of bringing to justice perpetrators of these crimes.

INTERPOL's practice in the years that followed the 1994 Report manifests that the Organization endorsed the view that the entire category of serious international crimes falls outside Article 3. Indeed, INTERPOL has significantly increased its involvement in the field without distinguishing between the various crimes.

Notably, INTERPOL's General Assembly resolution approving the cooperation agreement with the ICC clearly stated that the crimes that come within the jurisdiction of the ICC fall outside Article 3. By adopting this resolution, the General Assembly acknowledged the special status of serious international crimes, and in fact rejected, although without discussion or explanation, the underlying reasoning of the 1994 Report and its conclusion with regard to the crime of compelling a prisoner of war or a civilian to serve in the forces of a hostile power, and possibly similar "military" crimes. The 2004 Resolution should be considered as a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of

113. See Bassiouini, supra note 46, at 732-34.
116. Indeed, the U.N. Model Treaty on Extradition excludes serious international crimes from both the political offence and the military offence exceptions to extradition. See Revised Manuals, supra note 97, Part I, ¶¶ 45, 49. Considering that one of the aims of Article 3 is to reflect principles of international extradition law, for the purpose of interpretation of Article 3, the principle that views serious international crimes as extraditable offences is among "the relevant rules of international law applicable in the relations between the parties" in the meaning of Article 31(3)(c) of the 1969 Vienna Convention. Vienna Convention, supra note 25, art. 31(3)(c). Bassiouini, supra note 46.
117. To learn about some of INTERPOL's activities in the field, see INTERPOL, Genocide, War Crimes, and Crimes Against Humanity, http://www.interpol.int/Crime-areas/Fugitive-investigations/War-crimes (last visited Apr. 16, 2011).
118. Cooperation Agreement with the ICC, supra note 90.
its provisions” within the meaning of the Vienna Convention.\textsuperscript{120} INTERPOL’s cooperation with the ICC further supports the position that, in practice, the approach of the 1994 Report was abandoned: INTERPOL has published a number of red notices upon the request of the ICC against individuals sought for crimes such as enlisting and conscripting of children under the age of fifteen, a crime whose elements could have been considered to be of “military” nature if the rationale of the 1994 Report had been applied.\textsuperscript{121} The publication of those red notices reflects a “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” under the terms of the Vienna Convention.\textsuperscript{122}

Hence, in application of general principles of interpretation of a treaty, it can be claimed that the interpretative paradigm of the 1994 Report regarding the assessment of the nature of serious international crimes is no longer applicable, and does not pose a \textit{prima facie} obstacle for cooperation with requests concerning those crimes.

On a separate note, one should recall that Article 3 might apply beyond the narrow ambit of the nature of the offense. In that reference, requests concerning serious international crimes may be particularly sensitive and may have political and other implications for the relationship among INTERPOL member countries. Thus, for example, countries may attempt to use INTERPOL’s channels for political ends under the disguise of prosecution of serious international crimes. Requests of such nature will require a broader examination under

\textsuperscript{120} Vienna Convention, \textit{supra} note 25, art. 31(3)(a).

\textsuperscript{121} For example, the red notices issued by INTERPOL in 2006 against the leaders of the Lord Resistance Army [LRA] sought by the ICC for, \textit{inter alia}, the crime of forced enlisting of children. \textit{See Press Release, International Criminal Court, Interpol Issues First ICC Red Notices (Jan. 6, 2006), available at http://www.icc-cpi.int/Menus/Go?id=9fe2c45a-91b3-414c-891c-1590c16296bb&lan=en-GB.}

\textsuperscript{122} Vienna Convention, \textit{supra} note 25, art. 31(3)(b). Subsequent practice is considered as “a most important element in the interpretation of any treaty.” \textit{See ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 194 (2000). On the importance of practice for the purpose of interpreting the rules governing the operation of an international organizations, see Vienna Convention on the Law of Treaties Between States & International Organizations or Between International Organizations, art. 2(j), March 21, 1986, A/CONF.129/15, which states that “rules of the organization” means, in particular, the constituent instruments, decisions, and resolutions adopted in accordance with them, and established practice of the organization”; International Law Commission, \textit{Report of the International Law Commission, delivered to the General Assembly}, art. 2, ¶ 16, U.N. Doc. A/64/10 (May to Aug., 2009), which is an explanatory note according to which “one important feature of the definition of ‘rules of organization’ in subparagraph (b) is that it gives considerable weight to practice”; and Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 180 (Apr. 11, 1949), wherein the International Court of Justice indicated that “the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.”
Article 3 based on the other elements provided in INTERPOL’s rules.123

C. The Religious and Racial Elements

The prohibition against any intervention in cases of religious or racial character corresponds to fundamental principles of international human rights, notably the right to freedom of religion124 and the prohibition of racial discrimination.125 This position also reflects international extradition law, which bars extradition where the requested State has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of, inter alia, that person’s race or religion.126 INTERPOL’s General Assembly resolutions discuss a number of examples of pure religious and racial offenses: practicing a prohibited religion, recruitment or propaganda for particular religions, membership in a racial association, and belonging to a banned religious group.127

Similar to the political and military elements, the existence of religious and racial factors does not entail the immediate application of Article 3. Indeed, restrictions prescribed by law on the freedom of religion deemed “necessary to protect public safety, order, health or morals of the fundamental rights and freedoms of others”128 do not contravene an individual’s freedom of religion and will not be considered as pure religious offenses. Thus, for example, the criminalization of hate speech is not considered as a pure religious or racial offense, and States are encouraged to criminalize such acts.129

With regard to the term “racial,” the 1994 Report refers to a distinction between “race” and “ethnic group,” pointing to the wording of the 1948 Genocide Convention, which expressly distinguished between ethnic and racial groups.130 Notwithstanding this distinction in the Genocide Convention, it seems that for the purpose of protecting

123. See infra Part VI.
126. See Model Treaty on Extradition, supra note 108, art. 3(b).
128. See Declaration on Religious Tolerance, supra note 124, art. 1(3).
129. See, e.g., 1965 Convention on Racial Discrimination, supra note 125, art. 4.
130. Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Dec. 9, 1948, 78 U.N.T.S. 277 (defining genocide as certain acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such).
individual rights a broader interpretation of the term “racial” is desired. To that end, the more comprehensive definition of the term “racial discrimination” in the 1965 Convention on Racial Discrimination appears to be appropriate. This definition includes, *inter alia*, discrimination based on “ethnic origin.”

In the context of INTERPOL’s work, questions concerning the possible application of Article 3 due to religious and racial elements are likely to arise in the following scenarios: first, with regard to pure religious/racial offenses, such as membership in a forbidden religious organization. Such cases undoubtedly fall within the scope of Article 3.

In the second possible scenario, religious/racial elements might exist in the context of the crime committed. One example is the case of a murder derived from religious motives. Similar to cases with political or military elements, when the facts present both ordinary crime elements and religious or racial elements, INTERPOL will apply the predominance test, taking into account factors such as the seriousness of the crime and whether it “constitute[s] a serious threat to personal freedom, life[,] or property.”

A third scenario is where religious or racial elements exist in the context of police operations. Thus, for example, operations based on racial profiling, namely singling out a racial group for the purpose of police activities without objective and reasonable justification, is likely to violate both INTERPOL’s rules (Articles 2(1) and 3 of the Constitution), and possibly also national laws. At the same time, reference to a person’s race in a police form used for the identification of victims after a natural disaster (such as a tsunami) does not, by itself, contravene Article 3, as it is aimed at facilitating searches for missing persons rather than stigmatizing individuals based on their race.

Finally, INTERPOL’s rules dictate that personal information revealing racial or ethnic origin is considered “particularly sensitive information,” and the processing of such information is therefore permitted only following the fulfillment of certain conditions.

133. *See*, in that respect, the holding of the European Court of Human Rights [ECHR], according to which “no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principle of pluralism and respect for different cultures.” Timishev v. Russia, ¶ 58, Nos. 55762/00 & 55974/00, 2005 ECHR--XII (Dec. 13, 2005). The use of such grounds as ethnic or national origin may be justified, however, for “very weighty reasons.” Gaygusuz v. Austria, ¶ 42, No. 17371/90 (May 23, 1996), available at http://www.unhcr.org/refworld/country,ECHR,TUR,,3ae66f12c,0.html (i.e., the pursuance of a legitimate aim, which outweighs the discriminatory character).
134. RPI, *supra* note 14, art. 1(d).
135. *Id.* art. 10.2; Implementing Rules, *supra* note 15, art. 10.
Accordingly, cases falling under this category will require an analysis that evaluates in particular the necessity and proportionality in processing an item of information, as well as conditions put in place to ensure the objectivity and non-discriminatory requirements, and the terminology used.

VI. THE INTERPRETATION AND IMPLEMENTATION OF ARTICLE 3 IN THE SPHERE OF PROCESSING OF INFORMATION VIA INTERPOL’S CHANNELS

A. The Legal Framework

Traditionally, INTERPOL’s primary roles have included facilitating the sharing of information regarding police matters among its member countries.136 INTERPOL’s Constitution therefore provides that the General Secretariat shall, inter alia, serve “as an international centre in the fight against ordinary crime” and as “a technical and information centre.”137 To that end, INTERPOL has established communication systems and created operational data services and databases.138 These services include the publication of international notices upon the request of member countries and international tribunals, and the registration of “diffusions,” namely messages exchanged among member countries, in INTERPOL’s criminal databases.139

INTERPOL has put in place an elaborate legal framework140 aimed at ensuring that the processing of information via the Organization’s channels comply with international standards, such as data protection principles. The most pertinent rules for the purpose of Article 3 interpretation are the RPI and its Implementing Rules.

The RPI was meant to set out the conditions and basic procedures according to which information may be processed by the Organization or through its channels.141 It explicitly mentions Article 3 in its preamble,142 and, as mentioned above, in its definition of “ordinary law crime.” Most importantly, Article 3 is invoked—albeit implicitly—in the process of examining the conditions governing the processing of

136. See INTERPOL, Overview, supra note 7.
137. INTERPOL Constitution, supra note 1, arts. 26(b), 26(c).
138. See INTERPOL, Priorities, supra note 12.
139. See Notices, supra note 14.
141. Rules on the Processing of Information, supra note 14, art. 2(a).
142. “Considering Article 3 of the Organization’s Constitution, which forbids it to undertake any intervention or activities of a political, military, religious or racial character.” Id.
information. Article 10.1 of the RPI prescribes that:

(a) Processing of information through the Organization’s channels may only be carried out if all the following conditions are met:

(1) It complies with the Constitution and relevant provisions in the Organization’s rules; . . .

(5) It is carried out by its source in the context of the laws existing in its country, in conformity with the international conventions to which it is a party, and with the Organization’s Constitution.\(^{143}\)

Thus, compliance with Article 3 is a condition for the Processing, via INTERPOL’s channels of a request for police cooperation, such as a request to arrest an individual based on a national arrest warrant.

The Implementing Rules of the RPI, adopted for the purpose of implementing the general principles set out in the RPI, include a specific rule concerning Article 3. Article 40 of the Implementing Rules reads:

(a) To determine whether a specific intervention or activity is of a political, military, religious or racial character, all relevant information shall be examined, including the following:

(i) the nature of the offen[s]e, namely the charges and the underlying facts[;]
(ii) the status of the persons concerned[;]
(iii) the identity of the source of the information[;]
(iv) the position expressed by a Member or international authorized entities other than the source of the information[;]
(v) the obligations under international law[;]
(vi) the implications on the neutrality of the Organization[; and]
(vii) the general context of the case.

(b) National Central Bureaus and international authorized entities shall inform the General Secretariat as soon as possible when there is any doubt about whether the processing of an item of information complies with Article 3 of the Constitution.

(c) The General Secretariat shall develop a repository of practice

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143. It appears that this repetition of the requirement that the processing of information must comply with the Constitution is redundant.
on the application of Article 3 of the Constitution, based on
 directives issued by the General Assembly and pertinent elements
 of international law, which shall be made available to National
 Central Bureaus, national authorized institutions[,] and
 authorized international entities.\footnote{144}

This implementing rule refers to substantive as well as institutional
 aspects of the interpretation of Article 3. The former are addressed in
 Article 40(a), which enumerates—in a non-exhaustive list\footnote{145}—the
 relevant types of information that require examination in the context of
 an Article 3 analysis of a particular case. The latter are mentioned in
 Article 40(b) and Article 40(c).\footnote{146}

Article 40 therefore serves as a “subsequent agreement between the
 parties regarding the interpretation of the treaty or the application of its
 provisions” under the terms of the Vienna Convention.\footnote{147} It is the only
 provision in INTERPOL’s legal framework that specifically addresses
 the interpretation of Article 3, and its elements therefore merit
 discussion.

B. Article 40(a)—Examination of All Relevant Information of a
 Particular Case

By referring to an examination of a “specific intervention or
 activity,” Article 40(a) corresponds to the directive embodied in
 INTERPOL’s General Assembly Resolutions, according to which each
 request for cooperation requires a case-by-case analysis.\footnote{148}

The drafters of this implementing rule chose not to define the four
 elements of Article 3, namely the political, military, religious, and racial
 elements; rather, the rule focuses on the types of information that
 require consideration in the context of an Article 3 analysis.\footnote{149} This
 approach may have derived from the difficulty of formulating a
 comprehensive definition of terms such as “political character.” The
 interpretation of those elements would thus continue to be based on the
 jurisprudence developed by the Organization and its updates in the
 context of the repository of practice foreseen in Article 40(c).\footnote{150}

The various factors listed in Article 40(a) can be divided into two

\footnote{144} Implementing Rules, supra note 15, art. 40.
\footnote{145} Id. at 40(a). The non-exhaustive nature of the list provided in Article 40(a) is evident
 considering the phrasing of that Article: “all relevant information shall be examined, including
 the following: . . .” Id. (emphasis added).
\footnote{146} Id. art. 40(b)-(c).
\footnote{147} Vienna Conventions, supra note 24, art. 31(3)(a).
\footnote{148} Implementing Rules, supra note 14, art. 40(a).
\footnote{149} See id.
\footnote{150} See id. art. 40(c).
general categories: the first concerns information emanating directly from the specific request for police cooperation, such as the nature of the offense. The second category, which includes factors such as the general context of the case, invokes the examination of pertinent facts beyond those explicitly provided in the particular request. Yet, both categories and the factors they contain are of equal importance: no hierarchical structure exists among the different factors, and each of them, by itself or in combination with others, can define the outcome of an Article 3 analysis.

The need to evaluate “all relevant information” and the factors enumerated in Article 40(a) represent a holistic interpretative paradigm, which departs from the narrower test focusing solely on the examination of the “nature of the offen[s]e,” a test which dominated the interpretation of Article 3 in the past. In doing so, Article 40(a) not only epitomizes a modern and comprehensive approach, but also addresses the various objectives of the prohibition embodied in Article 3. Most importantly, it enables the prevention of situations where processing of requests ostensibly based on “ordinary law” crimes might compromise the Organization’s independence and neutrality, or serve for purposes of political and other forms of persecution.

C. The Nature of the Offense

The nature of the offense remains an important criterion for an Article 3 analysis. Hence, in accordance with INTERPOL’s General Assembly resolutions and long-standing practice, the Organization will deny requests for police cooperation (e.g., requests to publish notices) which concern offenses of pure political, military, religious or racial nature, and will continue to evaluate offenses of mixed nature using the predominance test.

As indicated in Article 40(a)(i), the nature of the offense is determined by both the charges and the underlying facts. Assessing the facts is imperative considering that the charges may be articulated differently by different States, and may not necessarily reflect the true nature of the offense. Thus, the charges cannot serve as the sole basis

151. This narrower approach can be found in the wording of General Assembly Resolutions and Reports. The 1951 Resolution, for instance, refers to requests for provisional arrest for offenses of a predominantly political nature. See 1951 Resolution, supra note 55. The 1984 Application of Article 3 Resolution listed examples of offenses that, by their very nature, fall under Article 3. See 1984 Application of Article 3 Resolution, supra note 67. The 1994 Report analyzed the compliance of the various offenses listed in the ICTY Statute with Article 3. See 1994 Report, supra note 90.

152. See INTERPOL, INTERPOL Will Not Issue Red Notice for Arrest of President Manuel Zelaya, supra note 101.

for concluding that a given request falls under Article 3. For example, a fugitive may be sought for allegedly committing the crime of “undermining State security,” which a priori appears to be a political crime. The underlying facts, however, may provide that the fugitive has actively participated in a terrorist bombing that caused the death of civilians. In such a case, it is likely that Article 3 would not prevent police cooperation, the rationale being that the offense committed is of predominantly ordinary law nature, due to the seriousness of the crime and its consequences.

D. The Status of the Person Concerned and the Identity of the Source of the Information

The element concerning the status of the person concerned calls for the examination of pertinent facts related to the individual who is the subject of the information processed. The term “status” appears to refer principally to the person’s profession or role within certain groups or associations. Thus, for example, the fact that a person against whom a red notice has been requested is a politician, a military officer, or a leader of a religious group may require consideration in the context of an Article 3 analysis.

Concerns emanating from the person’s “status” should be examined in light of the facts of the case and the general context of the case. For example, the mere fact that a person was the former president of the requesting country should not automatically preclude the use of INTERPOL’s channels for the purpose of seeking her arrest. Indeed, if Article 3 inevitably prevents INTERPOL’s involvement in such a case, this would provide for impunity of high officials whose “status” would protect them, thereby frustrating INTERPOL’s aim to promote international police cooperation.

INTERPOL’s General Assembly addressed the dilemma concerning the person’s status in two of its Resolutions on Article 3. The 1984 Application of Article 3 Resolution provided that:

Article 3 also covers any acts committed by politicians in connection with their political activities, even if those concerned are prosecuted after their fall from power and, in some cases, after they have fled abroad. The situation is different in the case of an offender committed by a politician acting as a private individual.

For the purpose of Article 3, the resolution therefore invoked the

154. See id. art. 40(a)(ii)-(iii).
distinction between acts committed in “official capacity” and those committed in “private capacity.” This position posed a challenge ten years later when the General Assembly was requested to approve cooperation with the ICTY. As indicated in the 1994 Report, the individual criminal responsibility imposed by the ICTY Statute refers to crimes that are likely to be committed by politicians, and the test prescribed by the 1984 Application of Article 3 Resolution could have therefore entailed that Article 3 should apply and prevent cooperation with the Tribunal.  

Such a conclusion was clearly inconceivable in light of the object and purpose of Article 3, and considering the international stance toward ending impunity for perpetrators of serious international crimes, as manifested by the creation of the ICTY. Hence, the 1994 Report found that the part of the 1984 Resolution referring to acts committed by politicians seemed to have been based on a faulty concept. It concluded that the offenses referred to in the Tribunal’s Statute cannot have been committed in the exercise of political power; rather, they can only have been committed outside of such power, and the offender bears personal responsibility for them as the Statute states. 

The 1994 Report held that offenses committed by politicians must therefore be assessed to determine whether the political or the ordinary criminal law aspect is predominant, in the same way as offenses committed by other people. Similarly, with regard to military personnel, the Report found that the fact that a person who committed a crime is a member of the armed forces does not automatically make the offense a military one, any more than an offense committed by a

156. See 1994 Report, supra note 90.
157. Id.
158. A similar conclusion—although based on different reasoning—was presented in the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal of the ICJ, in the case concerning the Arrest Warrant of Apr. 11, 2000 (Democratic Republic of the Congo v. Belgium), Judgment of Feb. 14, 2002 [Arrest Warrant Case], where the ICJ examined the nature and the scope of immunity accorded to Heads of States and Ministers of Foreign Affairs. The three judges mentioned that

It is now increasingly claimed in the literature . . . that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform . . . This view is underscored by the increasing realization that State-related motives are not the proper test for determining what constitutes public state acts.

159. 1994 Report, supra note 90.
politician automatically becomes a political offense.\textsuperscript{160}

In practice, one can draw a general distinction between three types of requests for police cooperation: first, with regard to individuals wanted by their own countries; secondly, with regard to individuals wanted by other countries; and thirdly, with regard to individuals sought by international tribunals. These scenarios therefore invoke not only an examination of the status of the person concerned, but frequently that of the identity of the source of information as well.

In the first scenario, and in application of the rationale of the 1994 Report, the status of the person may require evaluation in a manner similar to other requests, while taking into account the possible difficulties arising in the particular case. For example, requests against former politicians sought by their countries may raise concerns of possible political persecution, which will be assessed in view of the predominance test.

In the second scenario, the complexities raised in the context of an Article 3 analysis might be of a different nature, particularly where processing the request relates to an act of state or has implications for inter-state relationships, and therefore possibly to INTERPOL’s neutrality. One example was the request sent by the Ecuadorian NCB in July 2009, seeking the publication of a blue notice\textsuperscript{161} for the purpose of locating Colombia’s former Minister of Defense Juan Manuel Santos Calderon. After examining the facts provided and the basis for the blue notice request, the Office of Legal Affairs of the General Secretariat found the case to be of predominantly military and political nature.\textsuperscript{162} In particular, Ecuador’s request concerned acts allegedly committed in Santos’ official capacity as Colombia’s Minister of Defense.\textsuperscript{163} It was determined that “the alleged orders were given by him to a military force carrying out a military operation in the territory of another country, hence manifesting both the political and military aspects of the case.”\textsuperscript{164}

Another pertinent example in the context of the second scenario is where the individual enjoys immunity under international law, as, for example, the Head of State or the Minister of Foreign Affairs. Based on

\begin{itemize}
  \item \textsuperscript{160} Id.
  \item \textsuperscript{162} Id.
  \item \textsuperscript{163} Id.
  \item \textsuperscript{164} Id.
\end{itemize}
the well-recognized principle of immunity, information may not be processed via INTERPOL’s channels in such a case.\footnote{See Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 88, ¶ 84 (Feb. 14, 2002) (holding that the mere issuance of the arrest warrant by Belgium authorities violated the immunity accorded to the Congo’s incumbent Minister for Foreign Affairs). The ICJ mentioned that Belgium also requested the publication of a Red Notice in this case, but the Notice was not issued. \textit{Id.} at 11, ¶ 20.} Thus, for example, following the 2005 election of Yulia Timoshenko as the Prime Minister of Ukraine, who was wanted at the time by Russia and against whom a red notice was published upon the request of NCB Moscow, INTERPOL suspended the red notice and all information contained in its databases concerning her, due the immunity she enjoyed under international law.\footnote{See National Radio Company of Ukraine, \textit{All Data, Concerning Yulia Tymoshenko’s Search, Withdrawn from Interpol System} (Apr. 13, 2005), available at http://www.nrcu.gov.ua/index.php?id=148&listid=12985.}

The cases described above in the second scenario may pose a difficulty with regard to the application of the official/private capacity test: as indicated, this test, introduced by the 1984 Application of Article 3 Resolution, was later rejected by the 1994 Report. In the Santos Calderon case, however, the conclusion reached by the Office of Legal Affairs was based, \textit{inter alia}, on the fact that the acts attributed to him were conducted in his official capacity.\footnote{INTERPOL, \textit{INTERPOL Rules Prohibit Publication of Blue Notice for Former Columbian Minister of Defen[s]e}, supra note 161.} Similarly, where immunity of state officials is concerned, an application of the official/private test may be required to determine whether immunity applies in the particular case.\footnote{The ICJ held that a former Head of State or a former Minister of Foreign Affairs will not enjoy immunity with regard to acts committed while in office in their private capacity. \textit{Arrest Warrant Case}, 2002 I.C.J. at 25, ¶ 61.} The challenge is therefore how to reconcile the position of the 1994 Report with those cases where the “official capacity test” is invoked.

It appears that the stance of the 1994 Report was narrowly tailored to ensure that requests from the ICTY against high level officials are not blocked pursuant to the 1984 Application of Article 3 Resolution, as this would have prevented cooperation in cases that involve prosecuting perpetrators of serious international crimes. To that end, the Report created a legal theory according to which serious international crimes cannot be considered as acts committed in an official capacity. The 1994 Report did not, however, intend to reject altogether the “official capacity test,” which, in the context of an Article 3 analysis, may still impact the outcome of the case: if the illegal conducts are allegedly carried out in the official capacity of the individual concerned, they may be perceived as acts of state and lead to an inter-state dispute or
otherwise yield international ramifications.\textsuperscript{169} Hence, upon assessing compliance with Article 3, the official/private capacity test may be invoked where the request concerns individuals of another country whose alleged crimes were committed while in office and in their official capacity.\textsuperscript{170}

With regard to the third scenario, namely requests originating from international tribunals, the position of the person concerned will generally have lesser weight in assessing the request. This derives from the unique status of those tribunals established by the United Nations Security Council (UNSC) via a Resolution adopted under Chapter VII of the U.N. Charter,\textsuperscript{171} or tribunals acting in a particular case upon the referral of the UNSC\textsuperscript{172}: a request sent by those tribunals represents the stance of the international community and hence circulating it via INTERPOL’s channels through, for example, the publication of a notice, is less likely to compromise INTERPOL’s political neutrality or raise other doubts with regard to the application of Article 3. In addition, the principle of immunity under international law will not be applied with regard to such requests.\textsuperscript{173}

In conclusion, the element concerning “the status of the person concerned” remains important for the purposes of an Article 3 analysis.

\textsuperscript{169} The conduct of an organ of a state, if attributed to the state, might also entail responsibility of the state under international law. See Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, 2001 2 Y.B. INT’L L. COMM’N 31, at 40, art. 4 [hereinafter Draft Articles].

\textsuperscript{170} This explains the reference made in the Article 3 analysis of the Santos Calderon case to the fact that Ecuador’s request concerned acts allegedly committed in his official capacity as Colombia’s Minister of Defense.


\textsuperscript{172} In accordance with Article 13(b) of the Rome Statute of the International Criminal Court, the Court may exercise its jurisdiction upon the referral of the UNSC. See Rome Statute, supra note 119, art. 13(b).

\textsuperscript{173} See Arrest Warrant Case, 2002 I.C.J. at 25, ¶ 61 (the Court mentioning that one of the exceptions for the principle of immunity is cases where the individual is subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. The Court mentioned the ICTY, ICTR, and ICC as examples. The statutes of those international tribunals explicitly exclude a defense based on the individual’s immunity or official position). Cf., Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (July 2009), art. 7(2), available at http://www.icty.org/x/file/Legal%20Library/Statute/sept09_en. pdf: (“[t]he official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment”).
as it may both trigger the analysis and determine its outcome. The scenarios described above indicate that often the assessment of this element will be conducted in conjunction with the element involving the "the identity of the source of information." 174

E. The PositionExpressed by a Member or International Authorized Entities Other Than the Source of the Information

Information provided by entities other than the requesting country may shed new light on a case from operational, legal, and even policy perspectives. 175 By referring to "the position expressed" and by limiting the type of entities that express the position to "a Member or international authorized entities," 176 this element of Article 40(a) appears to focus on situations where the additional input is provided in the context of disputes over the processing of information.

INTERPOL’s rules provide for a procedure for the settlement of disputes over the processing of information. 177 This procedure is not aimed at settling intergovernmental disputes, as this would be beyond INTERPOL’s mandate. In addition, the scope of the dispute is confined to the question of conformity of the processing of a particular item of information with INTERPOL’s rules. Nonetheless, disputes that erupt between NCBs over the processing of information—the publication of red notices, for example—may be de facto disputes between the respective countries and governments. 178 Such disputes will likely possess political and policy elements that require consideration within


175. Hence the obligation requiring the users of INTERPOL’s network to inform the General Secretariat of any doubt about whether the processing of an item of information complies with Article 3. See Implementing Rules, supra note 15, art. 40(b).

176. The Rules for Processing Information defines an international authorized entity as "any entity, as referred to in Article 41 of the Constitution, which has concluded an agreement with the Organization authorizing it to process information directly through the Organization’s channels." Rules on the Processing of Information, supra note 14, art. 1(g).

177. Id. art. 24, which reads:

Disputes 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.

Id.

178. See MARTHA, supra note 10, at 63 (stating that "[t]he careful drafting of Article 24 notwithstanding, it cannot mask the fact that disputes between NCBs are, ultimately, disputes between governments").
the context of Article 3. Accordingly, INTERPOL’s organs will need to evaluate the substantive allegations raised by the protesting country to decide whether they justify the application of Article 3 in the particular case.

One example for the application of Article 40(a)(iv) is a case where the processing of information involves a former Head of State of another country who is wanted for acts allegedly committed while in office. If no protest is made by that other country, the processing of information may a priori take place. It can be assumed that the individual’s country either waived the individual’s immunity, or does not consider that the acts were committed in an official capacity where immunity would persist. 179 If, however, a protest is submitted, this would manifest that the case has evolved into a political interstate dispute between two members, and the continuous processing of information will likely be considered as violating Article 3, and possibly the principle of immunity.

F. Obligations Under International Law

The requirement that processing of information via INTERPOL’s channels be conducted in accordance with obligations under international law is evident. Moreover, it is explicitly referred to in the RPI, which prescribes that the processing of an item of information must be carried out by the source “in conformity with the international conventions to which it is a party.” 180

Nonetheless, the inclusion of this element in Article 40 is not redundant. Consider the following example: an INTERPOL member country requests the publication of a red notice against a person wanted for “exporting commodities without a licence.” The criminalization of such an act may be for the purpose of implementing an embargo imposed by the requesting country vis-à-vis another country for political reasons. Such a request may therefore raise concerns with regard to Article 3.

The charge mentioned above, however, may have a different background and goals: for example, it may aim to implement sanctions imposed on a particular State by the UNSC acting under Chapter VII of the U.N. Charter. 181 Alternatively, its objective may be to apply a general prohibition imposed by the UNSC on the trade of certain commodities, for instance with regard to products that may be used by non-State actors to manufacture nuclear, chemical, or biological

180. Rules on the Processing of Information, supra note 14, art. 10.1(a)(5).
weapons. In both cases, the prohibition imposed by the UNSC on exporting commodities—either to a particular State or to non-State actors—represents the stance of the international community, and all States have an obligation under international law to implement it.

Consequently, upon examining the facts of the red notice request and the background for criminalizing the particular act, the outcome of the Article 3 analysis may differ in the scenarios described above: in the first scenario (implementation of a bilateral embargo), the predominant political nature of the case will likely lead to a conclusion that the case falls under Article 3. In the latter scenario (implementation of sanctions or prohibitions imposed by the UNSC), the probable conclusion would be that Article 3 does not hinder the publication of the red notice. The difference between the outcome in the two scenarios is the result of consideration of the element listed in Article 40(a)(v), namely the “obligations under international law.”

G. The Implications on the Neutrality of the Organization

To ensure the independence and neutrality of the Organization, INTERPOL must refrain from engaging in activities that might compromise its unique position as an international organization focusing on enhancing international police cooperation.

The risk for the politicization of INTERPOL may sometimes be addressed through other elements enumerated in Article 40(a). The explicit reference to the implications for the neutrality of the Organization is nonetheless imperative for ensuring that INTERPOL takes into account policy considerations relevant to the specific case, as well as in the broader context of the Organization’s work. Indeed, weighing in policy considerations such as possible implications to INTERPOL’s image and interests is mandated by the rules governing the processing of information via INTERPOL’s channels, and is

182. Cf. S.C. Res. 1540, ¶ 2, U.N. Doc. S/RES/1540 (Apr. 28, 2004) (concerning non-proliferation of weapons of mass destruction, where the UNSC decided that “all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery . . .”).

183. See U.N. Charter art. 25, and, specifically with regard to sanctions, see U.N. Charter art. 41.


185. One of the general conditions for processing an item of information is that the processing “is not such that it might prejudice the Organization’s aims, image or interests.” Rules on the Processing of Information, supra note 14, art. 10.1(a)(4). Reference to the Organization’s image or interests and to other policy considerations such as with regard to “prejudicing international police cooperation” is made in other provisions of the RPI. Cf. Id. at arts. 10.3(b) & 15.2(b). Assessing policy considerations is also an integral part of the process of
clearly of particular importance where the Organization’s political neutrality may be at stake.

In addition, Article 40(a)(vi) guarantees that INTERPOL’s neutrality is considered where other factors mentioned in Article 40(a) are less applicable.\(^{186}\) An example of such a scenario is where INTERPOL’s involvement is requested in a case that has become the subject of an international dispute between States, and political and legal negotiations between the countries concerned are taking place outside of INTERPOL’s channels.\(^{187}\) An intervention by INTERPOL—for example, via the publication of notices—may derail the negotiations process or negatively affect their outcome, and may also sway INTERPOL from police work into political debates on the international level.

The “Rainbow Warrior” case presents a good example of the implementation of policy considerations and the application of Article 3: in 1985, an undercover operation conducted by the French security service in New Zealand led to the sinking of the Greenpeace ship Rainbow Warrior and the death of one person.\(^{188}\) Two French agents were captured, tried, and sentenced in New Zealand.\(^{189}\) The NCB of New Zealand sought INTERPOL’s assistance in circulating requests against a number of other French individuals accused of crimes, such as murder and arson.\(^{190}\)

Strictly speaking, the acts perpetrated by the accused individuals were criminal acts, and the fact that they were committed with political ends would not have precluded them from being considered “ordinary law” crimes. Accordingly, INTERPOL’s General Secretariat disseminated the requests of New Zealand to the relevant member countries during the initial stages of the investigation.\(^{191}\)

When the political and military aspects of the whole operation became clear, however, INTERPOL reconsidered its continued involvement in the case, and decided that Article 3 barred further

\(^{186}\) Implementing Rules, supra note 15, art. 40(a)(vi).

\(^{187}\) If the dispute is brought before INTERPOL’s organs, it is likely that Article 40(a)(iv) will be applicable.


\(^{189}\) Id.

\(^{190}\) The description of the Rainbow Warrior case is based on an internal legal memorandum (on file with author).

\(^{191}\) Id.
intervention.\textsuperscript{192} It was concluded that Article 3 cannot be applied to any factual situation from a strictly legal perspective alone; rather, extra-legal considerations may be relevant, and, moreover, may transform the character of the case from an essentially criminal matter to a predominantly political one.\textsuperscript{193}

To reach this conclusion, INTERPOL’s General Secretariat took into account the express recognition by the French authorities of their involvement in this case; the publicity given to the case in the international press and media; the political consequences involving probable Ministerial responsibility; the negotiations that took place between France and New Zealand; and the arbitration chaired by the Secretary General of the United Nations at the time.\textsuperscript{194} Thus, despite the existence of clear common law aspects in this case, the risk to the neutrality of the Organization, as well as facts attesting to the general political context of the case,\textsuperscript{195} were decisive in the assessment of the case and in the conclusion that it fell under Article 3.\textsuperscript{196}

**H. The General Context of the Case**

The last element enumerated in Article 40(a) ensures that no relevant factors will be overlooked upon conducting an Article 3 analysis.\textsuperscript{197} This element enables a final two-tier evaluation: first, of facts related to the specific case, which were not necessarily addressed via other elements under Article 40(a); and secondly, of facts originating outside the narrow realm of the particular request, which may nonetheless shed important light on the background of the case and its overall context.

An example for the application of this element is where a red notice request appears to comply with all the conditions mandated by INTERPOL’s rules. Nonetheless, comparing the particular request with other requests may yield a different conclusion: it may be the case that similar requests from the same country have been denied, since they were considered as attempts to persecute political opposition leaders under a disguise of “ordinary law crimes,” such as corruption or fraud. The new request examined by INTERPOL may therefore be part of a pattern of an attempted abuse of INTERPOL’s channels. In this scenario, it is only the final level of assessment, namely the consideration of the general context and relevant information beyond the facts of the particular request, which may tilt the balance towards

\begin{itemize}
  \item \textsuperscript{192} Id.
  \item \textsuperscript{193} Id.
  \item \textsuperscript{194} Id.
  \item \textsuperscript{195} See discussion below concerning the element of the general context of the case.
  \item \textsuperscript{196} supra note 195.
  \item \textsuperscript{197} Implementing Rules, supra note 15, art. 40(a)(vii).
\end{itemize}
the denial of publication in application of Article 3.

I. Articles 40(b) and 40(c)—The Role of Users and the General Secretariat

Review of information processed via INTERPOL’s channels in application of Article 3 is incumbent upon INTERPOL’s General Secretariat, as the body in charge of ensuring compliance with INTERPOL’s rules on the processing of information.198 The General Secretariat therefore conducts such review—for example of red notice requests prior to their publication—on a regular basis.

The review might be triggered, however, by the users of INTERPOL’s network. Article 40(b) prescribes that the NCBs and the international authorized entities (such as international tribunals) have the duty to inform the General Secretariat where a doubt arises regarding the compliance of a particular item of information with Article 3.199 This provision aims at ensuring the active participation of the network’s users in guaranteeing the observance of the restrictions imposed by Article 3. This is particularly important where information is processed directly between users (e.g., between two NCBs) without the involvement of the General Secretariat: by raising a doubt regarding compliance with Article 3, the user, which received the questionable request for police cooperation, enables the General Secretariat to monitor the processing of information and intervene where necessary. From this user’s perspective, informing on the possible doubt also reduces the risk that it will be held responsible for collaborating with a request that does not comply with INTERPOL’s rules and international principles.200

Article 40(c) further requires the General Secretariat to develop a repository of practice concerning the interpretation of Article 3.201 The repository should be based on two sources: first, the “directives issued by the General Assembly,” namely the relevant Resolutions; and

198. Rules on the Processing of Information, supra note 14, art. 4.1.
199. See Implementing Rules, supra note 15, art. 40(b).
200. See, in that respect, Draft Articles on State Responsibility, supra note 169, art. 16. This states that:

A state which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.

id.

201. Implementing Rules, supra note 15, art. 40(c).
secondly, "pertinent elements of international law." The explicit reference to these two sources manifests the operation of INTERPOL as a classical international organization, whose activities are governed by both the instructions adopted by its supreme organ and those derived from international law. Moreover, it enables a continued dynamic interpretation of Article 3 in accordance with developments within the Organization and under international law.

J. Conclusion: Article 3 in the Context of Processing of Information

Article 3 remains of paramount importance in the field of processing of information. Indeed, the relevant General Assembly resolutions described in this Article, while not explicitly limiting their scope to processing of information, in fact focus on the interpretation and implementation of Article 3 in that area.

The interpretation of Article 3 in this field has seen significant changes throughout the years. In particular, the following two developments are noteworthy: first, and on the one hand, the narrowing of the scope of Article 3 with reference to the test concerning the nature of the crime. Thus, for example, Article 3 no longer prevents the processing of information related to crimes such as terrorism. This development reflects the international community’s stance towards the perpetrators of such crimes, as indicated through limiting the application of the political offense exception in extradition law. Secondly, and on the other hand, the broadening of the examination of a particular case in light of Article 3 to include other elements and address other concerns, notably the need to ensure INTERPOL’s independence and neutrality.

In conclusion, and considering the principles and the developments discussed, it appears that in the domain of processing of information Article 3 should be construed as if it read as follows: “It is strictly forbidden to use INTERPOL’s channels for the purpose of processing information of predominantly political, military, religious, or racial character.”

202. Id.
VII. The Interpretation and Implementation of Article 3 in the Context of Cooperation with Other International Entities

A. The Applicable Test: The Purpose and Nature of the Potential Cooperation

Successful international police cooperation undoubtedly requires collaboration among international and regional organizations. This has been recognized by the drafters of INTERPOL's Constitution, who sought to enable such cooperation by providing that "[w]henever it deems fit, having regard to the aims and objects provided in the Constitution, the Organization shall establish relations and collaborate with other intergovernmental or non-governmental international organizations."\(^{204}\)

Article 3, however, may pose an obstacle for the establishment of working relations with certain organizations, whose mandates and functions include the promotion of political, military, religious, or racial objectives. A strict and literal reading of Article 3 may lead to a conclusion that INTERPOL is necessarily forbidden to cooperate with such organizations.

Nonetheless, such a stringent interpretation of Article 3 does not represent "the ordinary meaning to be given to the terms of [INTERPOL's Constitution] in their context and in the light of its object and purpose."\(^{205}\) Indeed, it has been accepted that the natural and ordinary meaning must be given to words in the context in which they occur and not in the abstract, and that the text should not be interpreted in a narrow and quasi-literal manner.\(^{206}\)

Accordingly, the reference to the words "political or military character" in INTERPOL's Constitution does not entail that any cooperation with another international body, whose decisions are guided by political realities or may address military activities, is forbidden. If such an interpretation applied, INTERPOL would have been prevented from cooperating with a significant number of international organizations, and, moreover, would not have been allowed to undertake any activity connected to international instruments adopted under the auspices of those organizations. Clearly, this was not the intention of the drafters of INTERPOL's Constitution, and it does not represent the modern international order that is based, \textit{inter alia}, on an increasing number of entities operating in the international sphere.

\(^{204}\) INTERPOL Constitution, \textit{supra} note 1, at. art. 41.
\(^{205}\) Vienna Convention, \textit{supra} note 25, art. 31(1).
The approach that has therefore guided INTERPOL in this area is to evaluate potential interactions with other entities based on the purpose and nature of the cooperation foreseen. Thus, if it is assessed that the purpose of the anticipated joint activities with a particular organization is to enhance international police cooperation, and that those activities, by their very nature would not negatively affect INTERPOL’s independence and neutrality, and would not promote—directly or indirectly—objectives of political, military, religious, or racial character, then a priori there is no hindrance to such collaboration.

This functional interpretation has guided the Organization since the introduction of Article 41 in the 1956 Constitution, and enabled it to broaden its realm of activities and significantly increase its operations on the international level through collaboration with other international organizations. The following three examples manifest the application of the “purpose and nature of cooperation” test in INTERPOL’s practice.

B. Cooperation with the U.N. Security Council Sanctions Committees

The UNSC is one of the principal organs of the United Nations, and it was conferred with the primary responsibility for the maintenance of international peace and security in accordance with the specific powers it was granted by the U.N. Charter.

The key function of the UNSC has been to ensure the absence of the use of force between States. Nonetheless, the UNSC’s role was gradually developed to address other challenges. It has been correctly stated that “[t]hreats to international peace and security now come as much from a breakdown of law and order within states as from military aggression by one state against another.”

UNSC’s practice indeed shows that “threat to the peace” is a constantly evolving concept, which has been considerably broadened

207. As indicated by the drafters of the 1956 Constitution in their comment to draft Article 41 of the Constitution,

This article is included so that the Organization may accept tasks such as those entrusted to it by the United Nations in the field of illicit drug trafficking . . . it matters little what body entrusts the tasks, so long as it is not contrary to the purpose and is within the competence of the Organization.

General Assembly of 1956 (on file with author).

208. U.N. Charter art. 7(1).

209. Id. at arts. 24(1), 24(2).


since the beginning of the 1990s. Specifically, the UNSC has addressed criminal activities such as terrorism and serious international crimes in a significant number of its resolutions. The UNSC’s involvement in these areas has included acts directly falling within the realm of international criminal law and justice, such as requiring specific states to cooperate with criminal investigations and criminal legal proceedings, establishing international criminal tribunals such as the ICTY and ICTR, and listing individuals on terrorist watch lists that subject those individuals to sanctions.

Thus, UNSC’s involvement in the fight against various criminal activities is expanding, and this body explicitly recognized the existence of links between international security and international crimes including terrorism, money-laundering, and trafficking in illicit drugs and illegal arms. A typical recent example of the UNSC’s intensive involvement in combating international crime is found in its resolutions regarding maritime piracy off the Coast of Somalia, a criminal activity that has evolved into a major threat to international peace and security.

The mandates of UNSC and INTERPOL therefore entail that cooperation between both organizations in the field of international criminal law is possible—indeed essential. Yet, such cooperation requires consideration of Article 3, since UNSC’s decisions are influenced by political realities, and may also include “military characteristics,” such as the ordering of military operations.

218. See Peter Rackow & Ignaz Stegmiller, Court of First Instance: EC Regulations: "Targeted Sanctions," 71 J. CRIM. L., 25, 27 (2007) ("[d]ecisions of the Security Council under Chapter VII UN Charter are essentially of a political nature"). Similarly, Talmon, supra note 212, at 180, stated that “[t]he determination of a threat to the peace thus requires more than mere
If Article 3 were to block cooperation between the organizations, this would lead to unreasonable results because it prevents INTERPOL from effectively carrying out its functions in promoting international police cooperation in fields such as counter-terrorism. Similarly, while INTERPOL may certainly not participate in military activities carried out by one or more of its member countries, INTERPOL is not prevented from providing assistance to the international body in charge of preventing armed conflicts and representing the stance of the international community, so long as such collaboration is related to police work. It is therefore the purpose and nature of the potential areas of cooperation that determine the outcome of an Article 3 examination with regard to possible cooperation with the UNSC.

In application of this principle, INTERPOL and the UNSC have increased their cooperation since the conclusion of a formal cooperation agreement between the United Nations and INTERPOL in 1997.219 Specifically, in Resolution 1617 of July 2005, the UNSC, for the first time, made an explicit reference to collaboration with INTERPOL in the fight against Al-Qaida and the Taliban.220 Following that resolution, INTERPOL’s General Assembly adopted in September 2005 its own resolution concerning the request of the UNSC that INTERPOL assist in the U.N. fight against terrorism.221 These two resolutions paved the way for collaboration between INTERPOL and the UNSC sanctions committee, established pursuant to UNSC Resolution 1267, and led to the creation of a new type of notice, namely the INTERPOL—U.N. Security Council Special Notice.222

normative considerations; it also necessitates an analysis of political realities.”


220. In this resolution, adopted under Chapter VII of the U.N. Charter, the Security Council encouraged “Member States to work in the framework of Interpol, in particular through the use of the Interpol database of stolen and lost travel documents, to reinforce the implementation of the measures against Al-Qaida, Usama bin Laden, and the Taliban, and their associates.” It further requested the Secretary-General of the United Nations to take the necessary steps to increase cooperation between the United Nations and Interpol in order to provide the Committee with better tools to fulfill its mandate more effectively and to give Member States better tools to implement the measures referred to in the Resolution. It also urged all Member States, in their implementation of those measures, to ensure that stolen and lost passports and other travel documents are invalidated as soon as possible and share information on those documents with other Member States through the Interpol database. S.C. Res. 1617, U.N. Doc. S/RES/1617 (2005) (July 29, 2005).


222. An INTERPOL—U.N. Security Council Special Notice is issued for individuals and entities associated with Al-Qaida and the Taliban as listed by the 1267 Committee on the Consolidated List, and therefore subject to sanctions (freezing of assets, travel ban and arms
The purpose and nature of this cooperation between INTERPOL and the UNSC, namely a joint undertaking aimed at combating terrorism, is clearly permitted under Article 41 of INTERPOL’s Constitution and INTERPOL’s General Assembly resolutions regarding the interpretation of Article 3. Thus, rather than preventing INTERPOL from operating in this important field of criminality by applying a strict literal interpretation test to Article 3, the functional “purpose and nature of cooperation” test enables INTERPOL to assist the UNSC and INTERPOL member countries in accordance with the Organization’s mandate.

The successful cooperation with the UNSC Resolution 1267 Committee led to the expansion of collaboration between the two organizations. In 2006, the UNSC adopted a specific resolution concerning cooperation with INTERPOL, following which INTERPOL’s General Assembly adopted its own resolution concerning the UNSC’s request to increase cooperation between the United Nations and INTERPOL in order to provide the UNSC’s sanctions committees with better tools to fulfill their mandates more effectively. In 2009 INTERPOL’s General Assembly approved an arrangement on cooperation between INTERPOL and the United Nations in relation to the UNSC sanctions committees.

C. Cooperation Agreement with the Regional Security System

The Regional Security System (RSS) is a regional intergovernmental organization that consists of seven Caribbean States. The backdrop
for the creation of the RSS was the need identified by its Member States for a collective response to security threats, which were impacting the stability of the region in the late 1970s and 1980s. The purposes and functions of the RSS include promoting cooperation among its Member States in the prevention and interdiction of traffic in illegal narcotic drugs and the prevention of smuggling, on the one hand, and combating threats to national security, on the other hand.

The RSS was therefore created to address threats of a criminal nature, as well as those that possess political and military characteristics. Indeed, as indicated by the RSS itself, the Organization "is a 'hybrid' Organization in that its security forces comprise both Military and Police personnel who remain under the command of their respective forces."

In 2006, negotiations were launched between INTERPOL and the RSS with a view to concluding a cooperation agreement between the two organizations that would, inter alia, provide RSS with access to INTERPOL's communication network and databases.

The "hybrid" functions of the RSS and specifically its role in addressing threats of political and military character raised a doubt as to whether such an agreement would be compatible with Article 3. Nonetheless, considering that RSS is involved in fighting ordinary law crime, and that cooperation may therefore enhance international police cooperation, the outcome of the assessment of compliance with Article 3, conducted by INTERPOL as part of the negotiations between the organizations, was that the purpose and nature of the foreseen cooperation allow for the conclusion of a formal agreement between the organizations.

To ensure that the foreseen cooperation strictly remains in the field of international police cooperation and adheres to Article 3, the drafters of the Agreement sought to introduce specific references to that Article. Thus, the preamble of the Agreement recognizes that INTERPOL "is strictly forbidden to undertake any intervention or activities of a political, military, religious or racial character." Article 1 of the Agreement, defining its purpose, further stated that "[t]he Parties acknowledge that the present Co-operation Agreement shall not provide a framework for any intervention or activities of a political, military,

227. Id.
228. Id.
229. Id.
230. This information is based on the author's personal involvement in the negotiations.
231. Id.
religious or racial character.”233 Finally, for the purpose of granting RSS with access to INTERPOL’s network and databases, the appendix to the Agreement stipulated the conditions for such access, which includes the requirement that the RSS use INTERPOL’s system and the information obtained from it “[s]olely for the purposes of crime prevention and law enforcement with regard to international ordinary law crime, as covered by Article 2 of Interpol’s Constitution;” and “[w]ithin the limits of Article 3 of Interpol’s Constitution, namely that no use of Interpol’s telecommunications system and the information obtained from it will be made for any intervention or activities of a political, military, religious or racial character.”234

Thus, by applying the “purpose and nature of the cooperation” test, and by including in the text of the Agreement legal safeguards explicitly referring to Article 3, INTERPOL and RSS were able to conclude the formal Agreement, which paved the way for conducting successful joint activities,235 while ensuring that those activities will not violate Article 3.

D. Cooperation in the Context of Combating Maritime Piracy Off the Coast of Somalia

Maritime piracy is an old form of criminality, which has reemerged in recent years with particularly serious consequences to commercial shipping in the area off the coast of Somalia. Combating piracy has posed numerous challenges to the international community in the prevention phase, as well as in the stages of arrest and prosecution of the suspected pirates. These challenges derive, inter alia, from the need to engage entities whose primary functions are not of a typical law enforcement nature. Specifically, naval forces, which carry out the bulk of counter-piracy activities, are trained and equipped for military activities rather than police ones. Inter-disciplinary cooperation, namely cooperation between entities whose expertise generally lies in different disciplines, is therefore a key for any successful operation against maritime piracy.

With regard to INTERPOL’s activities, a question arises whether cooperation with naval forces—either directly with naval vessels or via organizations that operate in the region, such as NATO—is permitted in light of Article 3. Similar to the previous two examples, the application

233. Id. art. 1.
234. Id. app. 2.2.1-2.2.2.
235. For example, the Co-operation Agreement and in particular the access granted to INTERPOL’s communication system and databases enabled RSS in securing the 2007 Cricket World Cup that took place in the RSS region.
of the test focusing on the “purpose and nature of the foreseen cooperation” is useful.

Maritime piracy is an ordinary law crime, albeit with certain unique characteristics, as it is committed by civilians for private ends, namely for the purpose of seeking personal financial gain. Thus, and taking also into consideration the international aspects of this crime, INTERPOL’s involvement for the purpose of prevention and suppression of that phenomenon is clearly desirable.

To that end, collaboration with other entities, such as naval forces operating in the field, will be required. So long as the purpose and nature of such collaboration is strictly confined to promoting international police cooperation, Article 3 does not prevent it. A distinction should be drawn between collaboration of military characteristics or for possible military ends, on the one hand, and activities confined to combating maritime piracy and bringing the perpetrators to justice, on the other hand. Thus, for example, Article 3 prevents the exchange of information via INTERPOL’s channels regarding a naval military maneuver. Yet it does not prevent the sharing among INTERPOL’s member countries and checking against INTERPOL’s databases of information such as fingerprints of suspected pirates, collected by the naval vessel that arrested them. A different conclusion with regard to the application of Article 3 will render INTERPOL’s tools irrelevant, and will therefore hinder the prospects of successful prevention of piracy and prosecution of suspected pirates.

Indeed, the importance of sharing with INTERPOL information collected by navies operating off the Coast of Somalia has been explicitly mentioned in the legal instrument governing Operation Atalanta, which is the European Union operation off the Coast of Somalia. Operation Atalanta has been instructed to collect data including characteristics likely to assist in identification of suspects such as fingerprints, and to circulate via INTERPOL’s channels and check against INTERPOL’s databases the data collected.236 The role of INTERPOL in exchanging and preserving evidence related to suspects of maritime piracy was also highlighted in the most recent U.N. Security Council Resolutions on the situation in Somalia.237

The purpose and nature of cooperation in this field, namely the exchange of information relevant for police work, therefore governs the interpretation of Article 3 and enables INTERPOL to assist the international endeavors in combating maritime piracy.


237. See UNSC Resolutions 1950 and 1976, supra note 217.
E. Conclusion: Article 3 in the Context of Cooperation with Other International Entities

Within the realm of international cooperation, INTERPOL has developed a functional test by which a foreseen joint undertaking is examined in light of its purpose and nature to ensure compliance with Article 3. Similar to the field of processing of information, INTERPOL’s independence and neutrality remain paramount factors.

In this domain, Article 3 should therefore be construed as if it read as follows: “it is strictly forbidden for the Organization to cooperate with another international entity, if the nature and purpose of such cooperation are of a political, military, religious or racial character.”

The decision to apply this test, rather than the predominance test that governs the interpretation of Article 3 in the field of processing of information, derives from the different nature of the activities conducted in each domain. Moreover, if the foreseen cooperation also includes political, military, religious or racial purposes—even if those purposes are not predominant in the foreseen joint activities—INTERPOL might be acting outside its mandate and risk jeopardizing its neutrality. Thus, for example, if INTERPOL concludes a cooperation agreement with a regional military alliance according to which the information provided will be used to fight crime, but possibly also for military purposes, such cooperation will not be in conformity with Articles 2 and 3 of INTERPOL’s Constitution.

Similar to the assessment of requests for police cooperation processed via the Organization’s channels, the examination of a project of international cooperation is conducted on a case-by-case basis, and, where relevant, includes legal and other mechanisms that guarantee compatibility with Article 3 in the context of the specific cooperation.

VII. CONCLUSION

Since its introduction into INTERPOL’s constituent instrument, Article 3 has assumed a prominent place in INTERPOL’s legal scheme and practice, both in defining the scope and nature of INTERPOL’s activities and in shaping the very character of the Organization. Moreover, Article 3 serves as a fascinating example of a norm developed through the practice of an international organization, based on the interrelation between the Organization’s internal legal regime and principles of international law.

The distinguished delegate who argued before the 1976 General Assembly of INTERPOL on the application of Article 3 was successful in persuading his counterparts from other INTERPOL member
countries that Article 3 forbids the Organization from intervening in the particular case. Considering that the dispute centered around a terrorism case, it is likely that had it been brought before INTERPOL’s General Assembly a decade later—let alone today—the outcome of the dispute would have been different. As this Article showed, the understanding of what constitutes a violation of Article 3 has changed in the past few decades.

Nonetheless, the message conveyed by the delegate’s speech remains as pertinent as it was at that time: Article 3 is, after all, a sort of a “chastity belt,” aimed primarily at ensuring the Organization’s independence and neutrality and protecting it from being improperly used for political ends.

Furthermore, while the prohibition embodied in Article 3 appears to limit INTERPOL’s potential scope of activities, it in fact supports the very purpose of the Organization. Indeed, only by avoiding engagement in certain matters, notably those of political character; by maintaining a position of neutrality; and by focusing on combating ordinary law crime, can INTERPOL promote international police cooperation among countries that have very different political structures, legal regimes, and cultures.

However, identifying the appropriate balance between enhancing police cooperation and the prohibition of Article 3 is not without difficulties. The interpretation of Article 3 and, moreover, the implementation of this provision in specific cases, will continue to pose challenges for the Organization’s organs. It is therefore likely that the principles governing the application of Article 3 will continue to be examined, reconsidered, and developed in years to come. Article 3 will thus remain a dynamic and living provision in INTERPOL’s practice.