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SYMPOSIUM ON INTERPOL AT 100: IMPROVING THE ORGANIZATION'S LEGAL FRAMEWORK

CHALLENGES FOR INTERPOL IN ITS EXTERNAL RELATIONS

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Out of the many fascinating issues concerning the International Criminal Police Organization—INTERPOL (INTERPOL), I would like to concentrate on three main themes and topics. The first one has to do with the status of INTERPOL and the potential impact of a multilateral privileges and immunities treaty on such status. The second concerns the challenges arising from the case of *Waite and Kennedy v. Germany*[1] (*Waite and Kennedy*), and whatever followed in the "shadow of *Waite and Kennedy*,"[2] not only for INTERPOL, but for international organizations more generally. The third theme addresses the responses to *Waite and Kennedy*, and particularly the availability of suitable alternative dispute settlement mechanisms—an issue that is currently discussed in the International Law Commission.[3]

The conclusion of treaties is clearly an element of "*organizationhood*"[4] indicating that non-state entities entering into treaties can be regarded international organizations. The fact that INTERPOL has adhered to the 1986 Vienna Convention[5] can count as an example for multilateral treaty-making of this organization. The various bilateral privileges and immunities agreements concluded by INTERPOL with states where INTERPOL holds conferences, as well as the headquarters agreement with France, also clearly indicate that INTERPOL is considered to be an international organization by its treaty-partners (as Sir Michael Wood observed in this symposium).

Multilateral privileges and immunities treaties, regularly specifying and making more precise the one or two general provisions in the constituent instruments of international organizations, are typically concluded by the member states without participation of the organizations concerned. The paradigmatic example is the

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[1] Waite and Kennedy v. Germany, App. No. 26083/94 (ECtHR Feb. 18, 1999); Beer and Regan v. Germany, App. No. 28934/95 (ECTHR Feb. 18, 1999).

[2] August Reinisch & Ulf A. Weber, *In the Shadow of* Waite and Kennedy*: The Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement*, 1 INT'L ORG. L. REV. 59 (2004).

[3] Report of the International Law Commission on the Work of Its Seventy-Third Session, UN GAOR, 77th Sess., Supp. No. 10, 238, UN Doc. A/77/10 (2022); *see* Int'l Law Comm'n, Third Report on the Settlement of Disputes to Which International Organizations Are Parties, 76th Sess., UN Doc. A/CN.4/782 (2025) (by Special Rapporteur August Reinisch).

[4] JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL ORGANIZATIONS LAW 12, 48, 75–66 (4th ed. 2022); Niels M. Blokker & Ramses A. Wessel, *Revisiting Questions of Organisationhood, Legal Personality and Membership in the OSCE: The Interplay Between Law, Politics and Practice*, *in* THE LEGAL FRAMEWORK OF THE OSCE 135, 150 (Mateja Steinbrück Platise, Carolyn Moser & Anne Peters eds., 2019).

[5] Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 21, 1986, UN Doc. A/CONF.129/15, *reprinted in* 25 ILM 543 (1986) (not yet in force).

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Convention on the Privileges and Immunities of the United Nations,[6] which spells out in detail what is meant by the necessary privileges and immunities to be enjoyed by the UN according to Article 105 of the Charter of the United Nations.[7] Similar multilateral privileges and immunities treaties have been established for the Specialized Agencies,[8] the Council of Europe,[9] the Organization of American States,[10] and other international organizations. The conclusion of such a treaty for INTERPOL would certainly help to overcome the current procedure of having bilateral agreements with states where INTERPOL holds conferences. However, it would not directly imply international status since INTERPOL would not be a contracting party of such a treaty.

Nevertheless, the conclusion of such a multilateral treaty could be another piece in the broader puzzle contributing to recognizing the international status of INTERPOL—on both a formal and a substantive level. As a multilateral treaty entered into by states it would be expected to be registered with the United Nations Treaty Series and could also reanimate the discussion about registering INTERPOL's constituent document. Furthermore, while an international organization is certainly a beneficiary of such multilateral privileges and immunities treaties, some commentators have even considered that they could be regarded as *de facto* treaty parties.[11] Such a treaty would equally enhance the position of INTERPOL, which could certainly claim to enjoy the privileges and immunities of an international organization as a beneficiary under it, if not as *de facto* party to it.

Moving to the second main item, the challenges stemming from the *Waite and Kennedy* case, this is not something that is peculiar to INTERPOL (as Machiko Kanetake observed in this symposium). Rather, most international organizations are facing an increasing tendency of courts in various jurisdictions either not to or not to fully recognize their jurisdictional immunity.[12] In the European context, the 1999 judgment of the European Court of Human Rights in *Waite and Kennedy v. Germany*[13] has certainly significantly contributed to this trend.[14] The case arose from a quasi-employment dispute, involving two individuals, Mr. Waite and Mr. Kennedy, who had been *de facto* working for an international organization, the European Space Agency (ESA), through a hiring agency that was their formal employer. They were claiming that, in fact, they had by then assumed the status of staff members of the international organization. Under German legislation, if one is an employee of company A, but *de facto* works for company B, one may under certain conditions claim the status of being an employee of company B. Claiming on that basis that they had become staff members of ESA they sued the organization before German courts. These courts, however, upheld the international organization's jurisdictional immunity. Subsequently, the claimants petitioned the European Court of Human Rights, claiming that by upholding the jurisdictional immunity of the organization, Germany had violated their right of access to justice under Article 6 of the European Convention on Human Rights (ECHR). The almost Solomonic outcome of the case, endeavoring to find a balanced solution accommodating both immunity and judicial

[6] Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 1 UNTS 15.

[7] UN Charter, Art. 105.

[8] Convention on the Privileges and Immunities of the Specialized Agencies, Nov. 21, 1947, 261 UNTS 33.

[9] General Agreement on Privileges and Immunities of the Council of Europe, Sept. 2, 1949, 250 UNTS 12.

[10] Agreement on Privileges and Immunities of the Organization of American States, May 15, 1949, 1438 UNTS 79.

[11] *See* Christina Binder, *Final Article (Final Sections 31–36 General Convention)*, *in* THE CONVENTIONS ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS AND ITS SPECIALIZED AGENCIES: A COMMENTARY 629, 630 (August Reinisch ed., 2016).

[12] *See, e.g.*, THE PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS IN DOMESTIC COURTS (August Reinisch, ed., 2013); IMMUNITY OF INTERNATIONAL ORGANIZATIONS (Niels Blokker & Nico Schrijver eds., 2015); THE CONVENTIONS ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS AND ITS SPECIALIZED AGENCIES: A COMMENTARY (August Reinisch ed., 2016); EDWARD CHUKWUEMEKE OKEKE, JURISDICTIONAL IMMUNITIES OF STATES AND INTERNATIONAL ORGANIZATIONS (2018).

[13] *Waite and Kennedy v. Germany*, *supra* note 1.

[14] *See* August Reinisch, Waite and Kennedy v. Germany, *Application No. 26083/94; Beer and Regan v. Germany, Application No. 28934/95*, 93 AJIL 933, 933–38 (1999).

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access, was that the Court held that there was indeed a problem insofar as jurisdictional immunity could indeed deny access to justice. However, as long as there was an adequate alternative mechanism of dispute settlement for the type of dispute barred by immunity, it may not necessarily amount to a violation of Article 6 of the ECHR.

In the aftermath of *Waite and Kennedy*, of course, many private individuals tried to bring legal action in domestic courts, not only of this employment type, but also tort actions in various European national courts, trying to invoke *Waite and Kennedy*. However, here the interesting development, in my view, is that those courts have been very reluctant to disregard the immunity of international organizations. Many have adhered to the rationale of *Waite and Kennedy*, but very few have actually found a violation of Article 6 of the ECHR because they were generally willing to recognize an arbitration clause or various other kinds of informal mechanisms as adequate alternative remedies.[15] Some courts, however, have not been so lenient in their approaches.[16] The most famous one is a Belgian case, the so-called *Siedler* case,[17] where the Belgian highest court confirmed the view that the staff dispute settlement procedure available to staff members of the Western European Union was deficient from the point of view of Article 6 of the European Convention because it did not adequately protect the fair trial guarantees inherent in Article 6. More recently in September 2022, the Austrian Constitutional Court rendered a judgment based on a similar line of reasoning.[18] It found with regard to the Organization of the Petroleum Exporting Countries (OPEC) that its staff dispute mechanism was also deficient when measured under the yardstick of Article 6 of the ECHR (which has the rank of constitutional law in Austria) and thus prevails over the jurisdictional immunity to be afforded to the organization in the headquarters agreement (which has the rank of ordinary law). Quite remarkably, the court not only stated that granting immunity to an international organization is unconstitutional in situations where the international organization does not provide for adequate alternative remedies, but also called for repairing this situation which engaged both the organization and the host country.

These are just two examples evidencing the challenges stemming from the *Waite and Kennedy* case. They have to be put in perspective because the vast majority of national courts tend to apply a rather lenient standard when assessing the adequacy of alternative remedies. However, one should not underestimate these challenges nor consider them to be European idiosyncrasies. There is a similar trend especially before Latin American courts not to respect the jurisdictional immunity of international organizations based on a national constitutional right of access to justice.[19] Finally, one should not overlook the fact that in 2024 the UN Human Rights Committee endorsed the *Waite and Kennedy* approach.[20] Thus, it is absolutely correct to say that these are challenges to which organizations have to react and actually are reacting.

[15] *See* HR [Supreme Court of the Netherlands] Apr. 13, 2012, No. 10/04437, ILDC 1760 (Stichting Mothers of Srebrenica et al., v. United Nations) (Neth.); Bundesgericht [BGer] [Federal Supreme Court] July 2, 2004, 130 Entscheidungen des Schweizerischen Bundesgerichts [BGE] I 312, (Switz.). *See also* August Reinisch, *Arbitrating Disputes with International Organisations and Some Access to Justice Issues*, 34 KING'S L.J. 546, 546–61 (2023).

[16] Tribunal de grande instance [TGI] [Ordinary Court of Original Jurisdiction] Paris, Ord. Réf., Oct. 20, 1997, Rev. Arb. 575 (1997) (Fr.); Cour d'appel [CA] [Regional Court of Appeal] Paris, 14e ch. A, June 19, 1998, 24 Y.B. Com. Arb. 295 (1999) (Fr.); Cour de cassation [Cass.] [Supreme Court for Judicial Matters], Ch. Soc., Jan. 25, 2005, No. 04-41012, J. Dr. Int'l 1142 (2005) (Fr.); Cass. [Court of Cassation], 2007, n. 3718, ILDC 827 (It.); Cass. [Court of Cassation], 1999, n. 149, Riv. Dir. Int. Priv. E Proc. 472 (2000) (It.). *See also* August Reinisch, *To What Extent Can and Should National Courts "Fill the Accountability Gap"?*, 10 INT'L ORG. L. REV. 572 (2013).

[17] Cass. [Court of Cassation], Dec. 21, 2009, ILDC 1625 (Belg.).

[18] Verfassungsgerichtshof [VfGH] [Constitutional Court] Sept. 29, 2022, SV 1/2021-23, ILDC 3402 (Austria). *See also* Philipp Janig, X v. OPEC: Judgment No. SV 1/2021 (SV 1/2021-23), ECLI:AT:VFGH:2022:SV1.2021, 118 AJIL 331, 331–37 (2024).

[19] *See* August Reinisch, Third Report, *supra* note 3, para. 153.

[20] M.L.D v. the Philippines, Communication No. 3581/2019, Human Rights Committee, Sept. 18, 2024, CCPR/C/141/D/3581/2019.

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This leads to the third issue, the responses to *Waite and Kennedy* and, in particular, the availability of suitable alternative dispute settlement mechanisms. Before looking at the options explored by many international organizations, it appears useful to remember that the underlying policy issue, the need to provide for a fair settlement of disputes between international organizations and private parties, in particular, was already prominently highlighted in 1954 by the International Court of Justice in its advisory opinion on the Effect of Awards of the UN Administrative Tribunal.[21] The Court opined that the General Assembly had the power to set up a dispute settlement mechanism for the staff members of this organization in the form of an administrative tribunal. In a very important obiter dictum, it added that it would "hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals … that [the United Nations] should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them."[22] This is a very strong policy reason—a policy reason that also underlies *Waite and Kennedy* and similar judgments.

Many international organizations have reacted to this policy demand. In regard to the most frequently arising disputes with private individuals, namely staff disputes, most international organizations have opted for either establishing their own administrative tribunals or accepting the jurisdiction of existing ones.[23] Concerning potential contractual disputes with private parties, arbitration seems to be the method of choice regularly provided for in contracts.[24] Both avenues are also pursued by INTERPOL. More problematic are tort claims against international organizations which cannot be agreed upon contractually in advance. Many international organizations assert that they are willing to settle such claims amicably and may also agree on arbitration.[25] In this regard, INTERPOL's approach is particularly interesting. Its headquarters agreement provides that such disputes "shall be settled in accordance with" Permanent Court of Arbitration (PCA) arbitration.[26] Of course, the problem remains how to distinguish those "tort" actions from "constitutional" types of disputes that are not covered by submission to PCA arbitration.[27]

INTERPOL also provides an interesting additional form of dispute settlement with private parties, the Commission for the Control of INTERPOL's Files.[28] This goes to the core of the organization's functioning:

[21] Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 ICJ Rep. 47 (July 13).

[22] *Id.* at 57.

[23] See the list of organizations recognizing the jurisdiction of the Administrative Tribunal of the International Labour Organization available at: www.ilo.org.

[24] *See* August Reinisch, Third Report, *supra* note 3, paras. 75 et seq.

[25] *See* Starways Ltd. v. United Nations, Award, 44 ILR 23 (1969) (Bachrach, Sole Arb.). *See further* August Reinisch, Third Report, *supra* note 3, paras. 97–100, 202; UN Secretariat, Settlement of Disputes to Which International Organizations Are Parties, Memorandum by the Secretariat, UN Doc. A/CN.4/764 (Jan. 10, 2024).

[26] Agreement Between the Government of the French Republic and the International Criminal Police Organization Concerning the Headquarters of Interpol and Its Privileges and Immunities in French Territory, Art. 24(1), Fr.–Int'l Crim. Police Org., Feb. 14, 1984, 2387 UNTS 255, as amended by Agreement Between the International Criminal Police Organization–Interpol and the Government of the French Republic Regarding Interpol's Headquarters in France, Apr. 24, 2008; Additional Protocol in the Form of an Exchange of Letters Between the Government of the French Republic and the International Criminal Police Organization–INTERPOL on the Interpretation and Application of Article 24 of the Agreement of 14 and 24 April 2008 Regarding INTERPOL's Headquarters in France, Paris, Feb. 9, 2016 & Lyon, Feb. 12, 2016 (promulgated by Decree No. 2016-326 (Fr.), Mar. 17, 2016). *See further* Ge Gao, Hongwei Meng, Zihong Meng & Ziheng Meng (China) v. Interpol, PCA Case No. 2019-19 (Perm. Ct. Arb. 2021).

[27] Interpol Headquarters Agreement, *supra* note 26, Art. 24(3) (referring to "disputes whose origins lie in the application or interpretation of the Organization's Constitution or its appendices").

[28] Statute of the Commission for the Control of INTERPOL's Files, II.E/RCIA/GA/2016.

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processing files and communicating information concerning individual persons. There is a certain resemblance to the development of the ombudsperson system concerning targeted sanctions imposed by the UN Security Council. In both situations, individual rights may be severely affected by the activities of international organizations. Under the UN system, the ombudsperson[29] makes non-binding recommendations to the Security Council for delisting which, through a kind of political commitment, are usually adhered to.[30] Still, the absence of binding adjudication has led to a lengthy debate in the *Kadi* cases before the European Court of Justice,[31] which continues to consider the ombudsperson system deficient from a human rights perspective. Against this background, the establishment of the Commission for the Control of INTERPOL's Files, protecting individual rights by scrutinizing the organization's use of information contained in its files, is remarkable. The crucial and very important innovation was the recognition that what the Commission nowadays decides is legally binding, and that the Commission has been designed in a way that conforms to the requirements of judicial independence and impartiality. Thereby it is likely that the Commission would pass muster against any potential *Waite and Kennedy* challenge concerning an alleged violation of the right of access to court.

This underlines the importance not only of the availability of an alternative dispute settlement method, but also of how such a mechanism is structured. The basic idea of *Waite and Kennedy* and other decisions is that immunity is justified if there are adequate alternative mechanisms. It is hard to assess what exactly "adequate" means, but in principle it is something, according to the Strasbourg court, that would largely correspond to the demands that are imposed on national courts. Thus, international organizations have to look very carefully at how to structure alternative types of dispute settlement.

[29] The Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee was established by SC Res. 1904, para. 20, Dec. 17, 2009.

[30] Devika Hovell, The Power of Process: The Value of Due Process in Security Council Sanctions Decision-Making 23–24, 29, 149–52 (2016)

[31] Case T-315/01, Kadi v. Council & Comm'n, 2005 ECR II-3649; Joined Cases C-402/05 P & C-415/05 P, Kadi & Al Barakaat Int'l Found. v. Council & Comm'n, 2008 ECR I-6351; Case T-85/09, 'Kadi v. Comm'n, ECLI:EU:T:2010:418 (Sept. 30, 2010); Joined Cases C-584/10 P, C-593/10 P & C-595/10 P, Comm'n & Others v. Kadi, ECLI:EU:C:2013:518 (July 18, 2013).

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