Echoes of Kadi: Reforms to Internal Remedies at INTERPOL

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In November 2016, the international police body INTERPOL adopted major reforms to its internal complaints mechanism, the Commission for the Control of INTERPOL's Files (CCF) (see the new Statute of the CCF, entering into force in March 2017 (CCF Statute)). The reforms respond to campaigning by the NGO Fair Trials (see its response), and are welcome news for practitioners. They will also be of particular interest to observers of the case-law concerning international organisations (IOs), UN sanctions and the role of international-level remedies systems as a substitute for judicial review in municipal-level courts. The CCF Statute represents a serious effort to ensure effective access to justice within INTERPOL and, thereby, justify INTERPOL's immunity before national courts. However, as discussed below by reference to one key aspect of the new rules (disclosure of evidence), the success of these reforms depends upon their interpretation and application by the CCF itself.

The back story: IOs and the doctrine of alternative remedies

Since the second world war, sovereign states have transferred numerous tasks to IOs such as the UN and (controversially for some) the EU. By their nature, IOs cannot be governed by the national law of a single country and are granted immunity (typically in their Headquarters Agreements) from the jurisdiction of national courts. The problem arises when the IO acts in such a way as to impact on the fundamental rights of an individual: without a court to turn to, where does he seek a remedy?

The issue first arose before the European Court of Human Rights (ECtHR) in cases relating to other IOs. In *Waite and Kennedy v Germany*, the German employment courts had upheld such an immunity and refused to hear a claim brought by contractors against the European Space Agency (ESA). The contractors argued a breach of their right of access to a court, protected by Article 6 of the European Convention on Human Rights (ECHR). The ECtHR found that the restriction did not impair the essence of the right, in that an appeals board within the ESA offered 'reasonable alternative means to protect effectively their rights' (at 68-69). That is the basic principle: the IO may escape national court jurisdiction, provided it offers an alternative system ensuring access to justice.

The issue shot to prominence when the UN Sanctions Committee (UNSC) began to impose sanctions (asset freezes, travel bans etc.) on individuals, with more drastic individual impact. In its famous judgment *Kadi and Al Barakaat v Commission and Council*, the Court of Justice of the EU (CJEU) held that it was obliged to review the EU law measure implementing a UNSC Resolution imposing sanctions, which in principle enjoyed primacy under the UN Charter. Part of the justification was that the complaints avenue offered by the UN did not offer the 'guarantees of judicial protection': the process was diplomatic, without an independent arbiter; and the

individual did not have access, even in restricted form, to the evidence justifying their inclusion on the sanctions list (at [322-325]). Judges of the Supreme Court of the UK (*Ahmed v HM Treasury*) also noted the deficiencies (see e.g. at [81]).

So began a concerted effort to improve the UN system. Reforms created the 'Ombudsperson' institution, which could receive individual complaints from listed individuals, see some of the evidence (without communicating it to the individual) and recommend an individual's de-listing. Yet the courts have been exacting in their assessment and have so far found the procedure insufficient.

The ECtHR first so held in *Nada v Switzerland* of 2012. The Swiss courts declined to hear Mr Nada's claim against national measures implementing a UN travel ban, confining him to a tiny Italian enclave within Switzerland. The ECtHR found that the Swiss courts' refusal deprived him of a remedy in respect of the Article 8 violation so constituted, adopting the Swiss courts' own acknowledgment that the 'delisting procedure at the [UN] level, even after its improvement (…), could not be regarded as an effective remedy within the meaning of Article 13 [ECHR]' (at [211]). The CJEU followed suit in its '*Kadi II*' judgment (2013), finding that judicial review at EU level was all the more essential as the procedure at the UN level still did not offer 'the guarantees of judicial protection' (at [133]).

The newer case-law is thus more prescriptive, suggesting that municipal (national or regional) judicial review may be asserted if an effective remedy *akin to judicial protection* is not available at the international level. That evolution was logical, given the nature UN sanctions. They have draconian impact and – for precisely that reason – hold an important place in the anti-terrorism response; yet, there are concerns about the provenance of the evidence used to support them (in 2009 a UN Special Rapporteur warned that some may derive from torture); and, as Lord Rodger said in *Ahmed*, there is an "obvious danger" that, in a minority of cases, "States will use listing as a convenient means of crippling political opponents" (at [181]). All of which calls for a genuinely effective system of access to justice to consider individual cases of alleged misuse, inadvertent or deliberate. That is the legal context in which INTERPOL, and its internal complaints panel, the CCF, should be examined.

The case of INTERPOL and the need for remedies

INTERPOL is an international body which operates a system of 'wanted person' notices, or "Red Notices": electronic alerts circulated at the request of one of its 190 member countries' 'National Central Bureaux' (NCB), requesting a person's arrest with a view to extradition. Effectively the alert creates some external effects for domestic arrest warrant. A Red Notice has no binding force, but in practice many countries' police will arrest on this basis alone. The Red Notice thus has considerable impact upon the individual: arrest at international border points and less tangible, but perhaps equally serious, effects such as the inability to travel, the distress of being 'wanted', reputational harm (especially for those whose mugshots feature on INTERPOL's website) and so on.

INTERPOL is required to abide by the 'Spirit of the Universal Declaration of Human Rights' under Article 2 of its Constitution. And clearly, when it facilitates the legitimate apprehension of a fugitive fleeing justice, its interference with any such rights is plainly justified. However, Fair Trials' 2013 report *Strengthening INTERPOL* (which the author wrote) revealed how this system is sadly often used to limit the activities of journalists, activists and the like (in the author's experience, often refugees from Turkey, Russia and Central Asia). Business disputes may also result in Red Notices based on charges which have little to do with ordinary, neutral law enforcement. By assisting in such cases, the report argued, INTERPOL may be taken outside its legitimate mandate and the impact on the individual will amount to an *infringement* of their rights. Which raises the issue of remedies.

Remedies in respect of Red Notices

The individual subject to a Red Notice can tackle some *effects* of the Red Notice when they happen via national courts (e.g. some form of judicial review if they arrested). And, clearly, a remedy may lie against the underlying arrest warrant in the country that issued it. Yet, the ongoing effect of a Red Notice is attributable to INTERPOL, which, though it relies on the information supplied by the NCB, is alone competent for issuing and maintaining Red Notices. In the *Arrest Warrant* case, the International Court of Justice suggested that circulation of an INTERPOL alert alone created legally recognisable (inchoate) effects. In respect of this purely international-level act, a remedy is required.

Yet, INTERPOL enjoys the same immunities from court process as other IOs. It is protected from suit in France, where its seat is, by a Headquarters Agreement. As far as is publicly known, attempts to sue it in the national courts have failed. That document also contains a provision allocating individual disputes to the Permanent Court of Arbitration in The Hague, though the avenue remains essentially untested. For all intents and purposes, the key avenue of redress is the CCF, a panel sitting in Lyon which can hear applications from individuals wanted under Red Notices and whose decisions can lead to their removal, usually the immediate remedy sought. Clearly, by virtue of the principles above, this panel has a dual function: a forum for individuals to seek remedies, but also, in its previous Chairman's candid words, 'a strategic tool to preserve INTERPOL's judicial immunity'.

However, in 2013, the CCF was universally criticised for the *in*effective recourse it offered (see Part III of *Strengthening INTERPOL* for the detail): its proceedings took years; its members had insufficient expertise; its decisions were insufficiently reasoned – literally one-page, cryptic letters with no substantive reasoning at all – and not formally binding on INTERPOL; and, perhaps the worst feature for the practising lawyer, the evidence put forward by countries seeking to justify maintaining their red notices was not disclosed to the individuals challenging them. (For a clear example of the problem at this time, see the case of Petr Silaev in Part III of *Strengthening INTERPOL* (at [222]).)

A host of international bodies such as the Parliamentary Assembly Council of Europe (PACE), OSCE Parliamentary Assembly and the EU became aware of the issue and called upon INTERPOL to improve its game and ensure better access to justice for those affected by abuses (see here). With the judicial trend shown by *Kadi*, *Nada* and similar cases, and the flaws of its own internal remedies system increasingly glaring, INTERPOL's own immunity looked to be on increasingly shaky ground.

So began a number of steps to improve matters. In 2014 INTERPOL appointed an ex ECtHR judge and international organisations law specialist, Prof. Nina Vajic, to Chair of the CCF. In the same year, it announced a Working Group that would study the issue and make reform recommendations. Over 2015, decisions issued by the CCF began to include more detailed explanation of the procedure it had followed and matters it had taken into consideration (though they were still short on the key aspect: how the rules were applied to the facts). An Exchange of Letters of 2016 between INTERPOL and the French government amending the HQA also sought to oust the jurisdiction of the Permanent Court of Arbitration so far as red notice disputes are concerned, effectively isolating the CCF as the one and only remedy. The 2016 reforms strengthening the CCF itself are the intended *pièce de résistance*.

Assessing the 2016 reforms

The Statute adopts a number of the recommendations in *Strengthening INTERPOL*. Among others: a separate Requests Chamber is to be created; time frames will be restricted; the CCF's decisions are to be reasoned and binding; the panel will now all be lawyers with backgrounds in more relevant topics; and there is to be a clearer basis for seeking interim remedies (e.g. suspension of a Red Notice). Each of these would appear, prima facie, to tick boxes identified by the above case-law. But it is helpful to consider one aspect in greater detail, as an example: Article 35 of the CCF Statute, governing the exchange of evidence in CCF proceedings. This is a criterion in in light of the above case-law.

Article 35(1) creates a principle of mutual access to evidence for the applicant and the NCB behind the Red Notice. It is one of INTERPOL's historical features that information sent to INTERPOL belongs to NCB that provided it, and can only be disclosed with its permission. NCBs could thus supply information to the CCF to support their case for maintaining a Red Notice, and yet decline for it to be disclosed. Fair Trials has therefore welcomed the shift in emphasis presented by Article 35(1).

Yet, Article 35(2) reiterates the need for consultation prior to disclosure, so the old approach is not consigned to history (in reality, such a reform might require changes in national laws). Article 35(3) clarifies the basis on which NCBs may object to disclosure, including the (understandable) need to protect the confidentiality of an investigation. The issue is of course what happens when an objection is raised, which is governed by Article 35(4). The provision envisages a balance being struck between the exception invoked and defence rights, e.g. by the disclosure of a summary in lieu of the actual evidence. It also suggests that 'the failure to establish a justification will not lead to disclosure of the evidence [as the CCF has no such power], but may be taken into account by the CCF in deciding on the request'. The final words seem to

suggest that the CCF may be slow to rely on evidence whose withholding an NCB cannot properly justify. But an NCB might argue, *a contrario*, that if it *can* convince the CCF an exception is established, there is no limit upon the reliance the CCF may place on this (undisclosed and unseen) evidence. Article 35(4) offers no clear answer on this point.

It is instructive to compare the approach of Article 35(4) with recent case-law of the CJEU on disclosure of evidence in security-related cases (e.g. *Kadi II* and Case C-300/11 ZZ). The cases hold that, if an authority resisting disclosure of sensitive material cannot put forward a valid justification, then either the authority should consent to its disclosure, or it cannot be relied upon at all by the court (so far, so similar). If, on the other hand, a justification *does* exist, then the balance must be struck: some disclosure should be achieved, e.g. by the use of summaries and the disclosure of the 'essence' of the grounds; and the person's inability to comment on the undisclosed evidence must be factored in when deciding upon its probative value. Article 35(4) is, prima facie, less protective or at least less exhaustive than this, inevitably leaving gaps for the CCF to fill by interpretation and practice.

That is a significant thing: the CCF, until recently a rudimentary data protection panel, assuming a quasi-judicial role and interpreting the rules in light of general principles. To be clear, INTERPOL (including the CCF) is legally autonomous and operates in a *sui generis* context, so the above EU principles have no binding value. But they are one articulation of general 'effective remedy' standards, and a yardstick which a local (e.g. French) court might look to when asked to uphold INTERPOL's immunity. The 2016 speech of the CCF Chair accompanying launch of the CCF Statute, referring to the need for an 'effective remedy', suggests such principles will guide the CCF. But a quasi-judicial body must be assessed by reference to its practice – as reflected in the wording of its decisions. So the savvy observer may welcome the CCF Statute but will want to see what the CCF does with it.

Conclusion

Access to justice is only one part of the puzzle. The underlying problem with INTERPOL abuse lies in the substance of the rules: not least Article 3 of INTERPOL's Constitution (not otherwise discussed here for simplicity), the key 'neutrality' rule whose interpretation is a matter of debate (see Part II of *Strengthening INTERPOL*). A recent – commendable – policy adopted to protect refugees announced in 2015 did not address the issue of what should happen to Red Notices when one or more extradition courts finds the case politically-motivated (i.e. the inclusion of a footnote on the Red Notice or its removal outright). Article 2 itself needs clarifying. These issues were not addressed by the 2016 reforms and need the attention of INTERPOL's Office of Legal Affairs in the first instance.

None the less, INTERPOL should be commended for making a serious effort to improve the CCF so that individuals can better enforce the current rules against INTERPOL. But caution is needed. The example of the disclosure regime in the CCF's new Statute underlines this. It is important that PACE, whose Legal Affairs Committee is currently reviewing INTERPOL's work, does not accept the reforms at face value and

makes its approval conditional upon their effective implementation in practice. Continued work will be needed by Fair Trials and its supporters to monitor this. The CCF, for its part, has every incentive to make a success of the reforms: it will thereby ensure better protection for individual rights, and strengthen INTERPOL's ability to discharge its important law-enforcement function safe in the independence that follows from its judicial immunity. Time and litigation will tell.