



Request concerning [...]
(Ref. CCF/[...])

DECISION OF THE COMMISSION
(101st session, 26 to 29 June 2017)

The Commission for the Control of INTERPOL's Files (the Commission),
Sitting as the Requests Chamber, composed of:

Vitalie PIRLOG, Chairperson
Leandro DESPOUY,
Petr GORODOV,
Sanna PALO,
Isaias TRINDADE,
Members,

Having deliberated in camera during its 101st session, on [...], delivered the following Decision.

I. PROCEDURE

1. On [...], Mr [...] (the Applicant) lodged a complaint addressed to the Commission. Following the submission of all the required documents in accordance with Article 10 of the Operating Rules of the Commission, the request was found admissible, and the Commission informed him on [...].
2. The National Central Bureau of INTERPOL (NCB) of [...] was initially consulted on the arguments set forth in the complaint, in accordance with Article 5(e,4) of the Rules on the Control of Information and Access to INTERPOL's files (RCI).
3. As of [...], the Commission continued the study of the Applicant's request under the Statute of the Commission (CCF Statute) which abrogated and replaced the RCI on that date.
4. In accordance with Article 34(1) of the Statute of the Commission (CCF Statute), the National Central Bureau of INTERPOL (NCB) of [...] was further consulted on the arguments set forth in the complaint.
5. On 10 February 2017, the NCB of [...] confirmed the validity of the proceedings and of the court decision sentencing the Applicant, and provided answers to the questions raised by the Commission.
6. Both the Applicant and the NCB of [...] were informed of the fact that the Commission would study this complaint during its 101st session.
7. During the study of the Applicant's case, the NCBs of [...] and [...], in accordance with Article 34(2) of the CCF Statute, were consulted on arguments set forth in the complaint.

II. FACTS

8. The Applicant is a national of [...]. He is the [...] of the former [...] after the violent riots which took place [...] and overturned the government [...]. The Applicant was the [...].
9. The Applicant is the subject of a red notice issued at the request of the NCB of [...] for [...] on the basis of a court decision of pre-trial detention issued on [...] by [...].
10. The summary of the facts, as recorded in the red notice, is the following: [...]
11. An extract of the red notice is published on INTERPOL's website.
12. On [...], the Applicant was sentenced in absentia to life imprisonment [...].
13. The Applicant established residence in [...].

III. THE APPLICANT'S REQUEST

14. The Applicant requested the deletion of the data concerning him.

15. He contends in essence that:

- a) the case is of a predominantly political character;
- b) the procedural requirements [...] were violated;
- c) the proceedings do not respect the principles of due process and human rights / Article 2 of INTERPOL's Constitution.

IV. APPLICABLE LEGAL FRAMEWORK

16. General provisions:

- Article 2(1) of INTERPOL's Constitution states that the Organisation should "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".
- Article 11(1) of the Rules on the Processing of Data (RPD) provides that "data processing in the INTERPOL Information System should be authorized with due regard for the law applicable to the NCB, national entity or international entity and should respect the basic rights of the persons who are the subject of the cooperation, in accordance with Article 2 of the Organization's Constitution and the Universal Declaration of Human Rights to which the said Article refers".

17. Field of competence of the Commission:

- Article 36 of INTERPOL's Constitution states that the Commission shall ensure that the processing of personal data by the Organization is in compliance with the regulations the Organization establishes in this matter".
Article 3(1)(a) and Article 33(3) of the Statute of the Commission establish that the powers of the Commission are limited to controlling whether the processing of data in INTERPOL's files meets INTERPOL's applicable legal requirements.

18. Non-interference in predominantly political cases:

- Article 3 of INTERPOL's Constitution states that "[i]t is strictly forbidden for the Organization to undertake any intervention or activities of a political (...) character."
- Article 34 of the RPD states the following:
 - 34(2): "(...) prior to any recording of data in a police database, the National Central Bureau, national entity or international entity shall ensure that the data are in compliance with Article 3 of the Organization's Constitution".
 - 34(3): "To determine whether data comply with Article 3 of the Constitution, all relevant elements shall be examined, such as:
 - (a) nature of the offence, namely the charges and underlying facts;
 - (b) status of the persons concerned;
 - (c) identity of the source of the data;
 - (d) the position expressed by another National Central Bureau or another international entity;
 - (e) obligations under international law;
 - (f) implications for the neutrality of the Organization;
 - (g) the general context of the case."
- Resolution ref. AGN/20/RES/11 (1951) requires applying the predominance test (even if in the requesting country the facts amount to an offence against the ordinary law). It states that "(...) no request for information, notice of persons wanted and, above all, no request for provisional arrest for offences of a predominantly political (...) character is ever sent to the International

Bureau or the NCBs, even if - in the requesting country - the facts amount to an offence against the ordinary law.”

- The INTERPOL Repository of practice on Article 3 provides guidance on the application of Article 3 of INTERPOL’s Constitution in a variety of circumstances.
- The resolution ref. AGN/53/RES/7 (1984) forbids to cooperate when acts are committed by politicians in the exercise of their political power, except if common law crimes are committed as a private individual. It also emphasizes that each request requires review on a case by case basis with due consideration of the specific context
- The report endorsed by the resolution ref. AGN/63/RES/9 (1994) clarified the review of cases concerning crimes committed by former politicians.
- INTERPOL Repository of Practice on Article 3 states that “cases involving former politicians wanted by their own countries, the “NCN source may be required to provide evidence, such as personal gain, that the offence comes under ordinary law”.

19. Lawfulness of the proceedings:

- Article 11(1) of the RPD states that “Data processing in the INTERPOL Information System should be authorized with due regard for the law applicable to the National Central Bureau, national entity or international entity and should respect the basic rights of the persons who are the subject of the cooperation, in accordance with Article 2 of the Organization’s Constitution and the Universal Declaration of Human Rights to which the said Article refers.”
- Article 11(3) of the RPD states that “In conformity with Article 5 of the present Rules, prior to any recording of data in a police database, the National Central Bureau (...) shall ensure that (...) it is authorized to record (such) data pursuant to applicable national laws (...).”

20. Compliance with human rights:

- Article 2(1) of INTERPOL’s Constitution states that the Organisation should “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”.
- Article 34(1) of the RPD states that “the National Central Bureau, national entity or international entity shall ensure that the data are in compliance with Article 2 of the Organization’s Constitution”.
- Article 5 of the Universal Declaration of Human Rights (UDHR) states that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. Article 10 of the UDHR states that “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”.

V. FINDINGS

21. In reviewing the issues raised, the Commission based its findings on information provided by the Applicant and the NCBs concerned.
22. The Commission treats the Applicant’s contentions in the order in which they are described in paragraph 15 above.

A. The political character of the case

a) *The Applicant*

23. The Applicant claims that criminal prosecution against him was initiated exclusively due to political motivation from the State authorities, and that he was discriminated based on his political beliefs and due to the fact that he is the [...] of [...]. He adds that he was a high political official [...].

24. To illustrate this persecution, he asserts that [...].

a) The NCB of [...] (NCB source of the data)

25. In its reply, the NCB of [...] explained that the applicant is wanted in relation to a condemnation for serious ordinary crimes [...]. It highlighted that the judgment condemning the Applicant established how he carefully planned [...]. For this purpose, he notably had [...].

b) Findings of the Commission

26. The principle laid down in Article 3 of INTERPOL's Constitution prohibits from engaging in matters of political character, which is reaffirmed in Articles 5 and 34.3 of the RPD.

27. With respect to the assertion that the matter is of a political character, the Organization applies the predominance test, i.e., it evaluates all relevant information and pertinent elements, as provided for by the rules, to determine whether the offense is of a predominantly political character.

28. The rule reflected in RPD Article 34(3) requires analysis of all relevant factors, as to which the following appear to the Commission to be key in the present case:

- the nature of the offense, namely the charges and underlying facts;
- the status of the person concerned;
- the position expressed by another National Central Bureau or another international entity;
- the obligations under international law;
- the implications for the neutrality of the Organization and
- the general context of the case.

29. Here, the offense as described is of a common law character.

- Under Articles 3(1)(a) and 33(3) of the Statute of the Commission, the function of the Commission is to review whether the processing of data in INTERPOL's files meets INTERPOL's applicable legal requirements in accordance with Article 36 of INTERPOL's Constitution. The Commission is not empowered to conduct an investigation, weigh evidence, or make a determination on the merits of a case. That is the function of the competent national authorities.
- However, the publication of a red notice requires the provision of sufficient facts that link the wanted individual to the charges against him, and a clear description of the criminal activities he is accused of. The NCB of [...] and the judgment of condemnation of the Applicant set forth comprehensive elements concerning the effective participation of the Applicant to the criminal activities he was condemned for.

30. The acts the Applicant has been sentenced for were committed during the exercise of his mandate of [...]. However, [...] obviously constituted grave illegal actions facilitated by his abuse of his official powers [...].

31. If the criminal proceedings against the Applicant were not initiated right after the crimes but after the overturn of the government, the general context of the case reveals that [...].

32. In addition, [...]. In view of the above, it cannot be determined solely from the refusal of [...] to extradite the Applicant that there is a political character to the suits. Moreover, no NCB or international organization has taken the position that Article 3 had been violated.

33. Accordingly, even assuming that there may be a political dimension to this case, neither the offense nor the acts he was condemned for appear to undermine the neutrality of the Organization in the context of this case, since the information provided is not sufficient to establish that political elements were predominant over the ordinary criminal law elements of the case.

34. As a result, the Commission finds that the Applicant's claim does not suffice to demonstrate that the processing of the data concerning him is contrary to Article 3 of INTERPOL's Constitution.
35. Nevertheless, the Commission recalled that INTERPOL General Assembly resolution AGN/53/RES/7 of 1984 states that "if certain countries refuse extradition, this is reported to the other NCBs in an addendum to the original notice". The Commission held that this resolution applies to the present case and that country's extradition denials of the Applicant should be reported in INTERPOL's files.

B. Lawfulness of the national proceedings

a) The Applicant

36. The Applicant claims that the national legislation was violated since the investigation and the case were initially conducted in courts and by prosecutor's office of general jurisdiction, whereas [...].

b) The NCB of [...]

37. In its reply, the NCB of [...] explained that while the Applicant was still in office, because he was endowed with unlimited power, the criminal case was originally initiated by the police against a civilian, [...]. After [...] and the overturn of the government, an objective investigation became possible [...], was abolished and the case reopened. According to Article [...] the right to transfer the case to investigators regardless of their department of affiliation. The case was transferred to the [...]. Upon completion of the investigation, [...].

c) Findings of the Commission

38. Under Article 11(1) of the RPD, data processed in the INTERPOL Information System should be authorized with due regard for the national law.
39. The Commission recalls that as a general practice, it does not enter into an inquiry designed to take decisions on application of national procedural law. The Commission does not function in a manner akin to that in which a domestic appellate court re-examines the actions of a domestic court of first instance.
40. In view of the information available to it, the Commission considered that the NCB of [...] provided reasonable elements regarding the lawfulness of the proceedings.
41. Therefore, the Commission finds that it has no reason to refute that the proceedings are potentially valid.

C. Lack of due process

a) The Applicant

42. The Applicant claims that the rights of the defence were not respected since he was not properly notified of the criminal proceedings and of the sentence pronounced against him - he was tried in absentia, and he could not exercise his right to protect himself personally and to use the legal advice of an attorney. The Applicant also asserts that at present, he does not have the possibility to appeal the final and binding resolutions of the national court instances.
43. The Applicant also claims that his presumption of innocence was violated since various senior officials would have accused [...] in the media of being guilty of many crimes, what would undoubtedly have influenced the course of the investigation and the court's decision.
44. The Applicant also questions the independence and impartiality of the [...] judicial system, contending that the courts are fully subjected to the will of the government in place. In proof of this, he refers to a report from [...] considering that since the events in the [...], violations of guarantees of fair trial are of special concern.

b) The NCB of [...]

45. In its reply, the NCB of [...] explained that the Applicant was provided a defence attorney and that the defence attorney was properly notified at all stages of the proceeding since he received copy of the accusation, of the trial and of the verdict, in accordance with the requirements [...]. The NCB added that after [...], the information that the Applicant was wanted in connection with the commission of crimes committed on the territory of the [...] was widely covered in the mass media, including online and foreign ones. The NCB also advised the Commission that the defence attorney was given full possibility to exercise his mandate, in accordance with [...] criminal procedure [...]. The Applicant also has the legal possibility to ask for [...] and the opportunity to choose a lawyer [...].

c) Findings of the Commission

46. Under Article 34(1) of the RPD, data must be processed in INTERPOL's files in compliance with Article 2 of the Organization's Constitution i.e. notably with the spirit of the Universal Declaration of Human Rights.

47. With respect to the allegation that the rights of the defence were not respected, the Commission notes that according to article [...], a case may be tried in the absence of the defendant when the defendant is beyond the boundaries [...] and evades from appearance in court. Considering that the Applicant had left the country, the Commission states that, according to [...], the Applicant was duly notified through his defence attorneys since the later were present at the court hearings of both the order of detention and condemnation decisions. In this later decision, the Applicant is mentioned as "wanted", and in the detention order, the court establishes that he deliberately concealed from the investigating authorities, that it was not possible to establish his whereabouts and that he was thus declared wanted.

48. The Commission recalls that if the situation complained of is attributable to the accused's own conduct, the latter is not in a position to allege a violation of the rights of the defence, and that the NCB has stated the reasons why the notice and trial were carried out in absentia, in accordance with [...], which suffices for purposes of Article 2 analysis, absent a comprehensive and convincing argumentation showing to the contrary. In particular, [...] authorities have stated that the Applicant is entitled to a retrial in his presence should he return to [...] which would effectively address the Applicant's claim, and to be represented by a defence counsel of his choice. The Commission also notes that the Applicant explained that he would not even try to get the judgment reviewed because of him being sure his requests will be left out without execution.

49. With respect to the allegation that the Applicant's presumption of innocence would have been violated, the Commission observes that [...] articles hyperlinked in the Applicant's submissions do not refer to the criminal case concerned by the red notice but to the mention, [...] after the overturn of the Government. Another article is dated [...], i.e. [...] years *after* the condemnation judgment. Besides, the Commission underlines that if the fairness of a trial could be influenced by a [...]press campaign in the case of a trial by [...], national courts composed of professional judges, such as the [...], generally possess appropriate experience and training enabling them to resist any outside influence. Finally, the reference to one single interview, [...] does not establish with enough certainty the existence of a violation of the Applicant's presumption of innocence that could have invalidated the whole proceeding.

50. Regarding the Applicant's claim that the courts in [...] are not independent and impartial, the Commission observes that the Applicant does not substantiate his claim, for instance with the demonstration of a problem regarding the designation of judges, a hierarchical subordination to other officials, a lack of guarantee against external pressure etc. The Commission states that this assertion is only based on a general report, rather than on any specific information regarding this particular prosecution. General criticisms of a country's legal system by outside organizations that do not address the specific situation of an Applicant cannot suffice to establish an Article 2 Violation.

51. As a result, the Commission finds that the Applicant's claim of violation to his right to a fair trial does not meet the required standard to be considered as a breach of Article 2.

D. Remaining contentions

52. The Commission recalled that in studying a request it reviews all of the Applicant's arguments, except when irrelevant.

53. In this case, the Applicant claims that there is no credible evidence of his guilt. In proof of this, he refers a decision [...]. The Applicant asserts that the application of [...] on the ground of lack of evidentiary support.
54. The Commission recalls once more that it is not empowered to weigh evidence. That is the function of the competent national authorities and the condemnation judgment set forth comprehensive elements concerning the effective participation of the Applicant to the criminal activities he was condemned for. Furthermore, the Commission underlines that the Applicant was found not guilty under some charges for lack of evidence of his guilt in committing the crime, which demonstrates that the evidence supporting the charges were not accepted blindly by the court. At last, regarding the decision of the [...] court, the Commission states that it does not concern the same case nor the same defendant.
55. The Applicant also claims that he would be physically in danger if he would return to [...]. In proof of this, he refers to a report from the International Independent Commission considering that since the events in [...], torture and prison abuse were of special concern. He also provides a press article mentioning how a well-known lawyer was recently beaten up in [...].
56. The Commission recalls again that assertions based on general reports by outside organizations cannot suffice to establish an Article 2 violation. Furthermore, the press article referring to a lawyer hardly relates to the present case.
57. Finally, the Applicant claims that the accusations brought against him were not the subject of consideration of the International Criminal Court (ICC) and that his restrictions of movement prevented him to apply to international court instances for protection of his rights.
58. The Commission recalls that the ICC only deals with the crimes of genocide, crimes against humanity, and war crimes and that seeking remedy before a regional court or an international human rights protection mechanism does not require for an applicant to personally defend its case at this international body's headquarters.
59. In light of these findings, these claims and arguments of the Applicant are without merit.

FOR THESE REASONS, THE COMMISSION

1. Decides that the data challenged are compliant with INTERPOL's rules applicable to the processing of personal data, subject to the update of the Applicant's file.
2. Decides that the following information should be added to update the Applicant's file:
 - a) the extradition denial of the Applicant by [...] authorities is reported in INTERPOL's files: *"In application of INTERPOL General Assembly resolution AGN/53/RES/7 (1984), please note that on [...], the General Public Prosecutor's Office of [...] denied the request for extradition [...] as the extradition could be connected with persecution on the basis of political convictions."*
 - b) the following caveat is added in INTERPOL's files: *"This case was studied by the Commission for the Control of INTERPOL's Files in June 2017. The Commission considered that there are political elements surrounding the case, but established that they are not predominant over the common law crime elements of the case."*
