



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

DECISION OF THE COMMISSION
(104th session, 24 - 27 April 2018)

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

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

Having deliberated in camera during its 104th 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 the applicant thereof 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. On [...], the Commission requested additional information from the Applicant, but it did not receive any answers to its queries.
4. As of [...], the Commission continued the study of the Applicant's request under the Statute of the Commission (Statute) which abrogated and replaced the RCI on that date.
5. In accordance with Article 34(1) of the Statute, the NCB of [...] and INTERPOL General Secretariat (IPSG) were consulted on the arguments set forth in the complaint.
6. The NCB of [...] h confirmed the validity of the proceedings, and provided answers to the questions raised by the Commission.
7. Both the Applicant and the NCB source of the data challenged were informed of the fact that the Commission would study the case during its 104th session.
8. During the study of the Applicant's case, the Commission consulted the NCB of the [...], in accordance with Article 34(2) of the Statute, on arguments set forth in the complaint.

II. FACTS

9. The Applicant is a national of [...]. He is a prominent political leader [...], former Member of Parliament and former Minister.
10. He is the subject of a red notice issued at the request of the NCB of [...] for [...], on the basis of an arrest warrant [...].
11. The summary of the facts, as recorded in the red notice, is the following: [...].
12. An extract of the red notice is published on INTERPOL's website.

13. On [...], the Applicant was arrested in [...] based on the red notice. However, [...] decided to cancel the searches at the national level on [...], and to release the Applicant who has since then left the country.

III. THE APPLICANT'S REQUEST

14. The Applicant requests the deletion of the data concerning him.
15. He contends in essence that:
- a) the proceedings against him in [...] are based on evidence obtained by torture, in contravention to Article 2 of INTERPOL's Constitution;
 - b) the case is of a predominantly political character, in contravention to Article 3 of INTERPOL's Constitution.
 - c) the red notice issued against him restricts his fundamental freedoms and cause reputational damage.

IV. APPLICABLE LEGAL FRAMEWORK

16. 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.
17. Due process and 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 11(1) of the 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”.
 - 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 (...).”
 - 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 states that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. Such provision is mirrored in Article 7 of the International Covenant on Civil and Political Rights, Article 3 of the European Convention on Human Rights, the United Nations Convention against Torture and other international instruments.
 - Article 15 of the UNCAT further states that : “each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”
18. Political character :

- Article 3 of INTERPOL’s Constitution states that it is “strictly forbidden for the Organization to undertake any intervention or activities of a political (...) character.”
- Article 34 of INTERPOL’s Rules on the Processing of Data (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.”
- INTERPOL’s Repository of practice on Article 3 provides guidance on the application of Article 3 of INTERPOL’s Constitution in a variety of circumstances.
- The diffusion addressed by INTERPOL’s General Secretariat to the NCBs on 5 April 2012 states that “for red notice requests and diffusions seeking the arrest of a person, it is important to provide sufficient facts that link the wanted individual to the charges against him/her. Providing such facts is crucial for facilitating international police cooperation”.

V. FINDINGS

19. In reviewing the issues raised, the Commission based its findings on information provided by the Applicant, the NCBs concerned and INTERPOL’s General Secretariat.
20. The Commission decided to treat together the Applicant’s contentions that the evidence adduced against him was obtained through torture, and that the case is of a predominantly political character, as these claims are intrinsically related and linked to common underlying factual arguments.

A. Political character of the case and reliance on evidence obtained through torture :

a) *The Applicant*

21. The Applicant claims that the criminal proceedings against him are politically-motivated, and therefore that the data registered by [...] authorities in INTERPOL’s Information System are not compliant with Article 3 of INTERPOL’s Constitution.
22. He claims that he has been elected as Member of Parliament [...].
23. He explains that on [...] was attacked by armed men who threw grenades at the crowd [...].
24. On [...], a police report based on the confessions of [...], was eventually released accusing [...] his confession had been obtained as a result of torture and was fully untrue. Charges were nevertheless brought against the [...] accused persons on [...].
25. [...]a second confessional statement by [...], from which he again officially retracted on [...] it was obtained under coercion.

26. He argues that according to [...] there is no allegation that he participated to the attack itself, [...]. In addition, he contends that one of these two witnesses [...] had been previously accused of attempting to kill him [...].
27. [...].
28. He therefore invites the Commission to assess the integrity and reliability of these testimonies in the larger context of a seriously discredited and politicized investigation involving the use of torture to secure “evidence”. He has produced numerous reports and official statements by international organizations and non-governmental organizations, demonstrating according to him the lack of independence of the judiciary in [...], the governmental crackdown on [...], and the repression of the media.
29. Given the politicized nature of the allegations and the lack of credible evidence produced at the hands of a non-independent investigation, he fears he will be subjected to an unfair trial overseen by partisan judiciary, and possibly to a death sentence in view of the seriousness of the fabricated charges. [...] to neutralize the political opposition and exclude it from [...] national elections.
30. **[RESTRICTED]**
- b) *The NCB of [...] (NCB source of the data)***
31. In its reply, the NCB of [...] contested the existence of any political motive in the prosecution of the Applicant, and insisted on the serious nature of the ordinary-law offences committed by the Applicant.
32. The NCB indicated that [...] made a confession implicating the Applicant and other defendants, mainly for their participation in a conspiracy meeting, in which [...] attack was discussed. [...].
33. [...]
34. [...] The NCB therefore confirmed that this criminal case was still under trial, due to its complexity and the involvement of several defendants, several of which being still fugitives.
35. Replying to the Commission’s queries, the NCB acknowledged that there will be no legal possibility for the Applicant to cross-examine [...] statements because they are co-accused in the same criminal case. The NCB explained that the long period of time between the issuance of the arrest warrant for the Applicant and the request for a Red Notice was linked to the fact that he absconded from justice. The NCB also indicated that the Applicant’s extradition had not been formally requested yet.
- c) *Findings of the Commission***
36. With respect to the assertion that the matter is of a political character, the Commission applies the predominance test, *i.e.* it evaluates all relevant information and pertinent elements, as provided for by the rules, to determine whether the case is of a predominantly political character. It decided to integrate its assessment of the Applicant’s claims linked to Article 2 of INTERPOL’s Constitution within its predominance test, as they are profoundly connected to the general political context of the investigation.
37. The rule reflected in Article 34(3) of the RPD 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 general context of the case;
 - the implications for the neutrality of the Organization.
38. In reviewing the applicable criteria under the predominance test, the Commission established first that the offenses as described in the red notice [...] and the judicial documents provided by the NCB of [...] are in themselves ordinary-law offences punished under [...] national law, even though they have allegedly been committed in the context of a political meeting.

39. The Commission underlined that the publication of a red notice requires the provision of sufficient facts linking the wanted individual to the charges against him, and a clear description of the criminal activities he is accused of. In the present case, the information provided by the NCB of [...] does not properly highlight the Applicant's personal involvement in the attack itself, nor the role played in preparatory meetings, nor the nature of the instructions or support given to the actual individuals who carried the attack.
40. It appears from the documents transmitted by the NCB that the Applicant's involvement in the general criminal case is dependent upon the judicial confession, [...]. The NCB has not provided appropriate explanations for the sudden connection of the Applicant [...] to this investigation, after almost seven years following completely different leads.
41. The Commission considered that the main noticeable element adduced to link the Applicant to the criminal case, *i.e* the confession [...], has since then been officially recanted [...]. In this document, [...] unequivocally disavowed his prior statements, and meticulously detailed the alleged torture acts he claimed were imposed on him in custody in order to extract accusatory statements from him. [...], arguing again that they had been obtained as a result of ill-treatment.
42. The Commission underlined that the NCB of [...] has not provided any explanations regarding its reliance on such rescinded testimonies by an individual who has repeatedly distanced himself from his past statements, to ground the prosecution of the Applicant. Furthermore, the NCB indicated that upon trial, the Applicant would not be authorized to cross-examine [...].[...]
43. The Commission recalled that it is indeed a norm of international law that statement obtained by torture shall not be invoked as evidence in criminal proceedings. This is provided for instance by Article 15 of the United Nations Convention Against Torture (UNCAT), and firmly established by the jurisprudence of the United Nations Human Rights Committee (UNHRC) or the European Court of Human Rights (ECHR) which for instance underlines that "no legal system based upon the rule of law can countenance the admission of evidence -however reliable- which has been obtained by such a barbaric practice as torture"¹. The ECHR² has specifically found that the use of evidence obtained by torture makes the proceedings automatically unfair as a whole and a flagrant denial of justice. Moreover, under Article 2 of INTERPOL's Constitution and Articles 11(1) and 34(1) of the RPD, the Organisation shall ensure that data processing in INTERPOL's Information System respects the fundamental rights of the data subjects, such as the right no to face a trial tainted by the use of evidence obtained through torture.
44. The Commission recalled that although its function is not to evaluate the reliability or the quality of evidence in a manner that should be undertaken at trial or during extradition hearings, its role is nonetheless to review whether the NCB provided sufficient information linking the wanted individual to the charges against him. In this case, the Commission held that the fact that the prosecution appears to rely mostly - if not only - on a confession which has been recanted due to its alleged extraction under torture, raise strong concerns as to the legality, adequacy and sufficiency of the evidence adduced. Considering this, along with the long and unaccounted delays in the investigation before the inclusion of the Applicant, the Commission concluded that the flaws identified in the case and their impact on the Applicant's fundamental rights raised doubts regarding the compliance of the data with Article 2 of INTERPOL's Constitution. Yet, in order to assess conclusively the overall political predominance of the case, the Commission decided to evaluate the remaining factors deriving from Article 34(3) of the RPD and listed above.
45. The Commission established that the Applicant is a prominent politician, former Minister and Member of the Parliament, from the main opposition party in [...]. However, the criminal acts concerned in this case were not allegedly committed in the exercise of his particular mandate, or in direct connection with his political functions.
46. The general context of the case, although factually disputed, also reveals that the Applicant is wanted in this case along with several political leaders [...]. Open source information indicates that the investigation over the attack, [...].

¹ ECtHR, *Othman (Abu Qatada) v United Kingdom*, App. No 8139/09 (Grand Chamber judgment) of 17 January 2012, para. 264.

² For example, the ECHR Guide on Article 6 of the European Convention on Human Rights, point 138.

47. Over the last [...] years, the investigation has been transferred to [...] successive chief investigating officers, [...], and has known an outstanding number of procedural incidents.. The Commission recalled that [...].
48. On the balance, in view of the strong doubts identified above regarding the compliance with Article 2 of INTERPOL's Constitution, and the strong political elements in the context of this case, the Commission held that that maintaining the data challenged could have adverse implications for the neutrality of the Organization, in that the Organization would be perceived as facilitating politically motivated activities.

B. Remaining contentions

49. The Commission recalled that in studying a request it reviews all of the Applicant's arguments, except when irrelevant.
50. In this case, the Applicant also claimed that the issuance of a red notice against him has deeply restricted his freedom of movement and freedom of assembly as he was unable to travel back to campaign in [...] without being exposed to an arbitrary detention. The Commission recalled that in studying a request it reviews all of the Applicant's arguments, except when irrelevant.
51. In this case, the Applicant also claimed that arrest and an unfair trial, and that the publication of the red notice on INTERPOL's public website has caused him severe reputational damage.
52. The Commission held that since it can conclusively dispose of the case in favour of the Applicant on the basis of his above-studied contentions and provide him with an adequate remedy by deciding the deletion of the data challenged from INTERPOL's files, it will not analyse the Applicant's remaining claims.

FOR THESE REASONS, THE COMMISSION

Decides that the data concerning the Applicant are not compliant with INTERPOL's rules applicable to the processing of personal data, and that they shall be deleted from INTERPOL's files.
