



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

DECISION OF THE COMMISSION
(106th session, 16 - 19 October 2018)

[...], withdrawing based on Article 2.1(d) of the Operating rules of the Commission,

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

[...]
Members,

Having deliberated in camera during its 106th session, on [...], delivered the following Decision.

I. PROCEDURE

1. On [...], Mr [...] (the Applicant) lodged a complaint addressed to the Commission requesting the deletion of the data concerning him registered in INTERPOL's files. Following the submission of all the required documents in accordance with Rule 30 of the Operating Rules of the Commission, the request was found admissible, and the Commission informed the Applicant thereof on 14 June 2017.
2. In accordance with Article 34(1) of the Statute of the Commission (Statute), the National Central Bureau of INTERPOL (NCB) of [...] and INTERPOL General Secretariat (IPSG) were consulted on the arguments set forth in the complaint.
3. The NCB of [...] confirmed the validity of the proceedings and of the arrest warrant, and provided answers to the questions raised by the Commission.
4. 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 106th session.

II. FACTS

5. The Applicant is a national of [...].
6. He is the subject of a diffusion sent by the NCB of [...] for the charge of “[...], on the basis of [...]”.
7. The summary of the facts, as recorded in the Diffusion, is the following: [...].

III. THE APPLICANT'S REQUEST

8. The Applicant requested the deletion of the data concerning him.
9. He contends in essence that:
 - a) the case is of a predominantly political character, and the related data is not compliant with Article 3 of INTERPOL's Constitution;
 - b) the proceedings do not respect the principles of due process and human rights, and the related data is not compliant with Article 2 of INTERPOL's Constitution.

IV. APPLICABLE LEGAL FRAMEWORK

10. 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.

11. Communication of information :

- Article 35(1) of the Statute states that "the information connected with a request shall be accessible to the Applicant and the source of the data, subject to the restrictions, conditions and procedures set out in this article".
- Article 35(3) of the Statute exhaustively lists the grounds on which the communication of information may be restricted at the request of one of the parties, or on the own initiative of the Commission.
- Article 35(4) of the Statute states that restrictions on the communication of information must be properly justified and the party requesting the restriction must indicate whether some information such as summaries may be provided instead. Moreover, if the improper justification of a restriction may not lead to the disclosure of the information by the Commission, it may be taken into account while analysing a request.

12. 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. AG/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.
- [...]

13. 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 (UDHR).”

- 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 9 of the UDHR states that “no one shall be subjected to arbitrary arrest, detention or exile”. 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

14. In reviewing the issues raised, the Commission based its findings on information provided by the Applicant, the NCBs concerned and INTERPOL’s General Secretariat.
15. The Commission decided to assess the Applicant’s contentions in the order in which they are described in paragraph 10 above. In addition, the Commission resolved to analyze first the issue of the restrictions to the communication of information.

A. Communication of information and adversarial nature of proceedings :

a) *The Applicant*

16. The Applicant is aware of the criminal proceedings against him in [...], and knows that information regarding him has been transmitted by the NCB of [...] to INTERPOL, as he was put on the [...] wanted list by a decision of [...]. However, he has not obtained access to the actual information transmitted, and requested access to the data registered in INTERPOL’s files. He did not request any restriction to the communication of information to the other party in the proceedings before the Commission.

b) *The NCB of [...] (NCB source of the data)*

17. The NCB of [...] requested restrictions on the communication of all information connected with the request, *i.e* both the data registered in INTERPOL’s files and the submissions presented before the Commission, on the basis of Article 35(3)b of the Statute and in order to protect the confidentiality of the investigations.
18. The NCB indicated that pursuant to [...], the information of the preliminary investigation are not subject to disclosure and can only be made public with the permission of the investigator in charge of the case, and only to the extent deemed permissible. After consultation with the investigation department competent for the criminal proceedings against the Applicant, it was determined that due to his present absconding and to the ongoing investigations concerning multiple accomplices, disclosure of information would be detrimental to the progress of the case.
19. The NCB explained that when the case was initiated against the Applicant on [...], he was not put in detention as the preventive measure adopted to secure his presence at trial was initially only a written undertaking not to leave the region and to adopt a proper behavior. However from [...], the Applicant made repeated trips outside [...], met with several accomplices, and eventually disappeared. In view of his lack of cooperation with the investigation, he was registered on the

wanted list and the preventive measure was changed to pre-trial detention. In view of this context of obstruction to the investigation, and as the Applicant is already fully informed about the criminal proceedings through his lawyers, the NCB indicated that any additional disclosure of information would not serve the interests of justice.

c) Findings of the Commission

20. The Commission recalled that Article 35(1) of the Statute affirms the principle that “the information connected with a request shall be accessible to the Applicant and the source of the data, subject to the restrictions, conditions and procedures set out in this article”.
21. In this connection, paragraph 3 of the same Article provides that the communication of information may be restricted by the Commission, on its own initiative or at the request of a party to the case, for one or more of the following reasons: “a) to protect public or national security or to prevent crime, b) to protect the confidentiality of an investigation or prosecution, c) to protect the rights and freedoms of the Applicant or third parties, or d) to enable the Commission or the Organization to properly discharge their duties”.
22. Moreover, pursuant to paragraph 4 of the same Article, any restriction on the communication of information must be properly justified and the party requesting the restriction must indicate whether some information such as summaries may be provided instead. In addition, if the improper justification of a restriction may not lead to the disclosure of the information by the Commission, it may be taken into account while assessing and deciding on a request.
23. The Commission reaffirmed that, in analysing the justification of requested restrictions, it tries on the one hand to protect the interests of the parties, while preserving at the same time the essence of an adversarial procedure in order to provide an effective remedy. In doing so, the Commission takes into account, *inter alia*, the general context of the case, the other avenues available to the Applicant to obtain access to the information at the national level, the potential violation of other rules or international obligations, the possible risks for INTERPOL.
24. The Commission held that restrictions under Article 35(3) of the Statute are an exception to the general principle of communication of information, bearing consequences on the rights of the parties, and which must therefore be interpreted strictly. Such restrictions to the communication to the Applicant of information connected with his request must be necessary and proportionate to their stated purpose. Furthermore, the Commission itself must be allowed unlimited access to the information concerned in order to make an effective determination. In addition, in order for a decision not to be based solely or decisively on non-disclosed information, counter-balancing measures must be undertaken to compensate, up to the extent possible, the interferences with the rights of the parties.
25. In the context of the present case, the NCB of [...] has requested a full restriction on the communication of information to the Applicant, covering both the data registered in INTERPOL’s files and the submissions in the present proceedings, on the basis of Article 35(3)(b) of the Statute. The Commission analysed the elements transmitted by the NCB of [...] to justify the restriction sought, and considered that they were elements linked with the context of the case and the potential risks associated with disclosure. Nevertheless, the Commission noted that the Applicant has obtained access to judicial documents at the national level linked with the criminal proceedings in [...] and that he is fully informed about the accusations brought against him. Therefore, the information gathered through his lawyers on the case, at the national level, can constitute a proper counter-balancing measure to the restrictions, as it has allowed the Applicant to formulate specific arguments linked to the facts of the case and to effectively challenge the data concerning him.

B. Political character of the case :

a) The Applicant

26. He claims that the criminal case against him is politically-motivated and therefore that the data related to this case is not compliant with Article 3 of INTERPOL’s Constitution. He argues that he is prosecuted as a retaliation for his close association [...], former adviser [...].

27. He claims that the new [...] initiated a criminal case against [...].
28. He argues that he has been associated in criminal cases in this context, due to his association to [...] but without any evidentiary basis to establish any criminal guilt. [...].
29. [...]
30. However on [...],[...] was pronounced bankrupt by a decision of the Arbitration Court [...]: therefore, the bankruptcy proceedings were terminated, the debts were liquidated, [...].
31. In view of this context, he alleges that the criminal case instituted against him is linked to power conflicts between clans of the political party [...], and is predominantly political.

b) The NCB of [...]

32. In its reply, the NCB of [...] contested any political motivation behind the criminal proceedings concerning the Applicant, and insisted on the very serious nature of the offences concerned, and the important amount of the damages.
33. [...]
34. The NCB concluded that the arguments raised by the Applicant in relation to an alleged political motivation or context were reviewed carefully by judicial bodies every time the Applicant's lawyers challenged investigation measures, and that they were deemed unfounded. The NCB stressed that the Applicant was trying to avoid criminal responsibility by artificially linking his case to a supposed political local conflict, without providing any element to substantiate his claims.

c) Findings of the Commission

35. 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 offense is of a predominantly political character.
36. 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;
 - and the implications for the neutrality of the Organization.
37. In reviewing the applicable criteria under the predominance test, the Commission established first that the offense as described in the red notice and the judicial documents provided [...] is of an ordinary-law law character. The Commission noted that the Applicant is charged with committing fraud with the aggravating factor of [...], which entails a more severe sentence of up to [...] years' imprisonment and heightened fines, further to the serious nature of the offence.
38. The Commission also underlined that the publication of a red notice requires the provision of facts that link the wanted individual to the charges against him, and a clear description of the criminal activities he is accused of. 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 illustrating the Applicant's effective participation in the alleged crime concerned.
39. In the present case, the Commission held that the explanations provided by the investigation authorities and the documents transmitted by the NCB correctly highlight the alleged role played by the Applicant in the conclusion of loan agreements, the transfer of the acquired funds to controlled companies, and the organization of his company's insolvency.

40. The witness interrogation protocols also illustrate [...] deception mechanisms to obtain additional line of credits [...]. The Commission carefully studied the material provided by the NCB from the investigation and found that sufficient elements of possible effective participation have been provided to highlight both the Applicant's alleged criminal behavior and criminal intent.
41. The Commission considered that the Applicant is not himself a politician or former politician. However, [...] the former adviser [...].
42. The general context of the case, although factually disputed, reveals that the Applicant is accused of fraud in his position of [...] based on false information and embezzling the money through criminal schemes to avoid repayment. He claims that he is only charged due to his association with [...], in the context of retaliation prosecutions following a change of governor in the [...], but he has not provided elements to properly substantiate his allegations.
43. Finally, the Commission did not identify any elements in this case which would appear to undermine the neutrality of the Organization. On the balance, even assuming that there may be some political elements in the context of this case, the information provided is not sufficient to establish that these elements were predominant over the ordinary criminal law elements of the case and that the processing of the data concerning the Applicant would be contrary to Article 3 of INTERPOL's Constitution.

C. Lawfulness of the proceedings and compliance with human rights :

a) The Applicant

44. The Applicant claims that the criminal case against him was initiated by investigator [...] solely on the basis of his own report, without any application from [...] to open a criminal investigation, in violation of the criminal procedural law and in contravention to the Applicant's fair trial rights. Finally, he contends that in view of the flaws in the case and of the political motivation behind its initiation, he will not be afforded a fair trial upon return to [...].

b) The NCB of [...]

45. The NCB of [...] indicated that contrary to the Applicant's claims, the investigation department initiated a criminal report and applied for preventive measures on the basis of a complaint received from an authorized representative of the victim company, [...]. The NCB also provided copies of the report from [...] lawyers, as well as the decision on the recognition as a victim in the case.
46. Moreover, the NCB indicated that the Applicant will be able to enjoy all the defence rights enshrined in the [...] Constitution and criminal legislation, and that upon surrender he would continue to have access to the lawyers who have represented him in his absence throughout the investigation phase of the case.

c) Findings of the Commission

47. The Commission recalled that under Articles 3(1)(a) and 33(3) of the Statute of the Commission, its function 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. At the same time, as a general practice, the Commission 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.
48. In the present case, the Commission held that the NCB of [...] has provided reasonable explanations and supporting documents to demonstrate that the criminal case was against the Applicant was initiated at the request of [...] - which suffered important damages linked to the non-reimbursement of the credits - and in accordance with [...].
49. The Commission also recalled that it is not its role to assess a country's law enforcement or judicial system *in abstracto* and that it must make its determinations based on specific information that sheds light on whether or not INTERPOL's legal framework has been complied with in a particular case.

However, in carrying out an Article 2 analysis, the Commission considers all relevant information to determine whether the Applicant has convincingly demonstrated the likelihood that a flagrant denial of due process took place.

50. In the present case, the Applicant has not provided any precise and convincing elements relating to the possible flaws in the procedure followed in the investigation, or to the procedure to be followed prospectively in case of his extradition to [...]. His claim that he may be subjected to an unfair trial appears to be grounded mostly if not solely on the alleged political motivation behind his prosecution, which has been analyzed above under point B.c) and which was found insufficiently substantiated.
51. Therefore the Commission concluded that the information available to it does not demonstrate any flagrant denial of fair trial rights or any other infringement of the Applicant's fundamental rights which may rise to the level of an Article 2 violation.

FOR THESE REASONS, THE COMMISSION

Decides that the data challenged are compliant with INTERPOL's rules applicable to the processing of personal data.
