

## ***MATTER OF W-E-R-B-* AND THE RELIABILITY OF RED NOTICES: HOW TO SUCCESSFULLY ADVOCATE FOR VICTIMS OF PERSECUTION**

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The Board of Immigration Appeals recently published the decision *Matter of W-E-R-B-*,<sup>1</sup> holding that an Interpol Red Notice may constitute reliable evidence that an asylum applicant has committed a serious nonpolitical crime, rendering the applicant ineligible for asylum. In light of the unreliability of many Red Notices, particularly those requested by countries notorious for abusing dissidents abroad, this decision seems to be a dangerous step in the wrong direction. Immigration and Customs Enforcement (ICE) attorneys may also seize upon the decision as authority to make incorrect or misleading arguments about the value and importance of Red Notices in any particular case. However, for the lawyer who understands the limits of Red Notices and Interpol as a whole, the decision leaves plenty of opportunity for successful advocacy on behalf of clients who are the victims of persecutory Red Notices. A closer look at *Matter of W-E-R-B-* reveals a holding that is narrow in scope, limited to a particular factual scenario, and may be easily distinguished in cases where evidence demonstrates that the respondent's persecution includes the publication of an illegitimate Red Notice.

### **I. What Exactly Is a Red Notice, and How Might it Come up in Immigration Proceedings?**

There are many myths surrounding Interpol and its most well-known communication: the Red Notice. Interpol's main function is to manage criminal databases and a network over which different types of communications are transmitted among 194 member countries, including the United States.<sup>2</sup> The organization does not involve itself in investigations or prosecutions. It is merely a conduit for communicating information from member states. A Red Notice is a "request to law enforcement worldwide to locate and provisionally arrest a person pending extradition, surrender, or similar legal

action."<sup>3</sup> Red Notices apply to persons who are wanted either "for prosecution or to serve a sentence," and are published at the request of a member country.<sup>4</sup>

A Red Notice is often described as an "international arrest warrant." This is incorrect, as Interpol itself confirms.<sup>5</sup> Rather, a Red Notice is "simply to inform all member countries that the person is wanted based on an arrest warrant or equivalent judicial decision issued by a country or an international tribunal."<sup>6</sup>

Red Notices must comply with specific conditions, which are set out in Interpol's Rules for the Processing of Data.<sup>7</sup> They must concern serious ordinary-law crimes not related to behavioral or cultural norms, family or private matters, or private disputes that are not serious or are not connected with organized crime, and must meet a penalty threshold.

Importantly, Red Notices also must comply with two broad protections set forth in Articles 2 and 3 of the Interpol Constitution.<sup>8</sup> Article 2 states that the organization aims to promote international police cooperation within the "spirit of the Universal Declaration of Human Rights."<sup>9</sup> And Article 3, sometimes referred to as the neutrality clause, states that it is "strictly forbidden

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<sup>3</sup> See INTERPOL, *Red Notices*, available at <https://www.interpol.int/en/How-we-work/Notices/Red-Notices>.

<sup>4</sup> *Id.*

<sup>5</sup> INTERPOL, *Red Notices*, available at <https://www.interpol.int/INTERPOL-expertise/Notices/Red-Notices>.

<sup>6</sup> *Id.*

<sup>7</sup> Available at <https://www.interpol.int/Who-we-are/Legal-framework/Legal-documents>.

<sup>8</sup> Interpol Constitution, available at <https://www.interpol.int/Who-we-are/Legal-framework/Legal-documents>.

<sup>9</sup> Interpol Const., art. 2, available at <https://www.interpol.int/About-INTERPOL/Legal-materials/The-Constitution> (last visited Jan. 8, 2019).

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<sup>1</sup> 27 I. & N. Dec. 795 (BIA 2020).

<sup>2</sup> See INTERPOL, *What is INTERPOL?*, available at <https://www.interpol.int/en/Who-we-are/What-is-INTERPOL>.

for the Organization [Interpol] to undertake any intervention or activities of a political, military, religious, or racial character.”<sup>10</sup>

In spite of these important safeguards against persecutory requests from member states, Interpol does not properly vet Red Notice requests for compliance with these protections. The onus, after publication, is on the target of the Red Notice, who may already be suffering the significant consequences from its publication, to submit a challenge to the Commission for the Control of Interpol's files.<sup>11</sup>

In short, Red Notices are the result of an *administrative process*, not a judicial procedure. They are not based on any Interpol investigation. They are not arrest warrants. They do not meet the probable cause standard. If they concern an individual accused of a crime, they do not denote any assumption of guilt. They are not based on any evidence other than the unsupported allegation of the national office that made the request. Simply put, they have no independent probative value and can be published even without a valid arrest warrant from the requesting nation.

Unfortunately, Interpol Red Notices are frequently showing up in immigration proceedings where ICE agents, attorneys and immigration judges rely on them, unjustifiably, as conclusive evidence of criminality. U.S. immigration officials also use Red Notices to target and arrest lawful nonimmigrants with the objective of detention and removal. Asylum applicants have been arrested at their asylum interviews, solely on the basis of a Red Notice. Additionally, there are numerous examples of immigration judges denying bond or refusing to set a reasonable bond in cases involving Red Notices. As the number of Red Notices increase,<sup>12</sup> many of them persecutory, immigration officials, including ICE attorneys, seem to be relying on Red Notices to justify detention and deportation.

## II. *Matter of W-E-R-B*

The respondent in *Matter of W-E-R-B* is a citizen of El Salvador who conceded removability and applied for asylum, withholding of removal, and protection under the Convention Against Torture. DHS submitted a Red Notice reflecting that the respondent was the subject of an arrest warrant in El Salvador for “participation in an illicit organization.”<sup>13</sup> The Red Notice states that according to an investigation by the authorities of El Salvador, the respondent is a “*gatillero*” or “hit man” with the MS-13 gang.

Based on the information in the Red Notice, the IJ found the respondent ineligible for asylum and withholding of removal, due to the “serious nonpolitical crime” bar prior to entry into the United States.<sup>14</sup> The respondent appealed the decision arguing, among other things, that “the Red Notice does not have any probative value because such a notice is insufficient to establish probable cause for an arrest in the United States under the Fourth Amendment.”<sup>15</sup> Indeed, the U.S. *Department of Justice Manual* states that, “[i]n the United States, national law prohibits the arrest of the subject of a Red Notice issued by another INTERPOL member country, based upon the notice alone.”<sup>16</sup>

The Board found that there were “serious reasons for believing” that the respondent had committed a serious nonpolitical crime. According to the regulations, once DHS establishes that the “evidence indicates” that a bar to relief applies, then the burden of proof shifts to the respondent to establish by a preponderance of the evidence that the bar does not apply.<sup>17</sup> To trigger this burden shift, the Board underscores that DHS does not need to meet “an onerous standard,” and that it is sufficient to present “**some evidence from which a reasonable factfinder could conclude that one or more grounds for mandatory denial of the**

<sup>10</sup> Interpol Const., art. 3.

<sup>11</sup> Commission for the Control of INTERPOL's Files, available at <https://www.interpol.int/About-INTERPOL/Commission-for-the-Control-of-Files-CCF>.

<sup>12</sup> The number of Red Notices issued each year has increased from 1,418 in 2001 to 13,048 in 2017. According to Amy Mackinnon, “This rise has been largely attributed to the introduction of a new web-based communications system, which has streamlined the process of filing Red Notices.” See Amy Mackinnon, *The Scourge of the Red Notice*, Foreign Policy, available at <https://www.foreignpolicy.com/2018/12/03/the-surge-of-the-red-notice-interpol-uae-russia-china/>.

<sup>13</sup> *Matter of W-E-R-B* at 795-96.

<sup>14</sup> See Immigration and Nationality Act §208(b)(2)(A)(iii) of the Act (asylum); see also INA §241(b)(3)(B)(iii) (withholding of removal); 8 C.F.R. § 1208.16(d)(2) (withholding of removal under the Convention Against Torture).

<sup>15</sup> *Matter of W-E-R-B* at 798.

<sup>16</sup> U.S. Department of Justice, Organization and Functions Manual, Sec. 3, ¶A, available at <https://www.justice.gov/jm/organization-and-functions-manual-3-provisional-arrests-and-international-extradition-requests>.

<sup>17</sup> 8 C.F.R. §1240.8(d) (2019); see also 8 C.F.R. §1208.16(d)(2).

**application may apply.**<sup>18</sup> In this case, the Board affirmed the IJ's finding that submission of the Red Notice was sufficient evidence to shift the burden of proof to the respondent.

In an effort to establish that the serious nonpolitical crime bar did not apply, the respondent provided a letter from an attorney in El Salvador attesting that the charges related to this offense were dismissed. No court documents were submitted.<sup>19</sup> Importantly, the respondent conceded that the offense was nonpolitical. The Board needed only to assess whether the alleged offense was serious. With damning allegations of assault on a police officer and serving as a hitman for MS-13, it's no surprise that the alleged crime was found to be serious.

### III. What Does *W-E-R-B-* Mean for My Client with an Illegitimate Red Notice?

The holding in *Matter of W-E-R-B-* is actually quite limited — “An Interpol Red Notice *may* constitute reliable evidence that *indicates* the serious nonpolitical crime bar for asylum and withholding of removal applies to an alien.”<sup>20</sup> As noted above, the evidentiary standard required of DHS in this analysis regarding asylum and withholding of removal eligibility is extremely low; and the respondent then has the burden, but also the opportunity, to prove the unreliability of the Red Notice. The respondent in *W-E-R-B-* failed to meet this burden through persuasive evidence. Aside from its holding, *Matter of W-E-R-B-* contains some good dicta and bad dicta. Knowing how to contextualize and correct inaccuracies in the bad, while harnessing the good, will empower advocates whose clients are the subject of an illegitimate Red Notice.

#### 1. First, the Bad Dicta.

Aside from the holding, there is *dicta* in *Matter of W-E-R-B-* that betrays an exaggerated, misplaced faith

in the legitimacy of Red Notices. While the Board confirms that a Red Notice is not “a formal international arrest warrant,” it quotes Department of Justice guidance stating that it “is the closest instrument to an international arrest warrant in use today.”<sup>21</sup>

Unfortunately, this indicates that Interpol has somehow elevated the status of the national arrest warrant — if one was even provided in the Red Notice request. That's simply not the case. A Red Notice reflects the criminal allegations and sometimes unproven underlying facts as presented by the requesting member-state, and nothing more. This is a critical fact that attorneys need to explain to IJs.

Further in this vein, the decision indicates that because Interpol prohibits Red Notices regarding predominantly political offenses, then all Red Notices are based on ordinary law crimes.<sup>22</sup> The Board summarizes:

[T]he Immigration Judge found the Red Notice to be reliable for what it purports to be—namely, a request by a member country (here, El Salvador) to provisionally arrest a specifically identified person (here, the respondent) pending extradition based on a **valid** national arrest warrant for a crime that is **not political** in nature. We affirm the Immigration Judge's determination that on this record, the DHS has met its burden to show that the serious nonpolitical crime bar may apply to the respondent.<sup>23</sup>

This summary shows a fundamental misunderstanding of how Interpol functions. Just because a Red Notice is published by Interpol does not mean the underlying arrest warrant is valid, and it certainly does not mean the crime is “not political” in nature. While Interpol's Constitution and Rules on the Processing of Data do contain these requirements, the international trends and statistics show that Interpol

<sup>18</sup> *Matter of W-E-R-B-* at 798 (citing *Matter of M-B-C-*, 27 I. & N, Dec. 31, 36-37 (BIA 2017)).

<sup>19</sup> It is relevant to note that often Interpol databases are in fact outdated and contain information that has otherwise been dismissed or cleared up in national databases. The authors are aware of several cases where an individual was issued a Red Notice due to underlying criminal proceedings that were later dismissed. Even though those proceedings were terminated in favor of the individuals, it can take years for Interpol to update its databases and then disseminate such information to its member states.

<sup>20</sup> *Matter of W-E-R-B-* at 795 (emphasis added).

<sup>21</sup> See U.S. Department of Justice Archives, Criminal Resource Manual, Section 611, Interpol Red Notices, available at <https://www.justice.gov/archives/jm/criminal-resource-manual-611-interpol-red-notices> (last visited on 7 April 2020).

<sup>22</sup> *Matter of W-E-R-B-* at 798 (“The Immigration Judge further noted that a Red Notice may be published only if it fulfills all conditions for processing information, which include the criteria that the offense concerned is a serious ordinary law crime.”).

<sup>23</sup> *Matter of W-E-R-B-* at 799 (emphasis added).

does *not* properly vet Red Notices for compliance with these protective provisions.<sup>24</sup>

As noted previously, after publication, the **onus is on the subject of the Red Notice to demonstrate that it violates Interpol's requirements.** In our experience, many individuals do not even know they are the subject of a Red Notice until they are arrested by ICE and DHS presents a copy of the Red Notice at the bond hearing. They therefore have not yet had an opportunity to challenge the Red Notice.

In light of this inaccurate language, which will no doubt be cited by DHS and IJs to lend authority to the charges and factual allegations in Red Notices, it is critical for immigration attorneys to be familiar with the process for challenging Red Notices, described in Part IV.

## 2. Now, the Good.

Fortunately, the Board includes *dicta* that serves as a guide to distinguishing the *W-E-R-B-* holding, particularly in cases where the Red Notice is illegitimate and persecutory in nature. The Board makes clear that the respondent in *Matter of W-E-R-B-* conceded that their criminal charges were *not political*, and addresses politically motivated Red Notices in a lengthy footnote:

**In a case unlike this, where an alien has put forth evidence of the political nature of his crime to meet his burden, an Immigration Judge should consider evidence in the record that the foreign country issuing the Red Notice abuses them for political reasons.** See *Tatintsyian*, 2020 WL 709663, at \*1 (concluding that a Red Notice from Russia was insufficient to establish “serious reasons for believing” that the serious nonpolitical crime bar applied where an alien presented evidence that the Russian Government abuses Red Notices for political reasons and credible testimony that the Russian

Government had persecuted that respondent); see also *United States v. Mohamud*, 843 F.3d 420, 424 n.5 (9th Cir. 2016) (“Although Interpol will not publish requested Red Notices that violate Interpol’s Constitution, which prohibits the organization from undertaking any activities of a political, military, religious or racial character, **Interpol does not independently vet the governmental request for a Red Notice for its factual and legal justification.**” (citation omitted)).<sup>25</sup>

This is a directive from the Board. Its holding — “Interpol Red Notices *may* constitute reliable evidence that indicates the serious nonpolitical crime bar” — does not apply to politically motivated Red Notices filed by countries abusing Interpol to persecute their nationals abroad. Indeed, this footnote acknowledges that not all Red Notices are equal, specifically citing *Tatintsyian v. Barr*, 799 Fed. Appx. 965 (9th Cir. 2020), involving a persecutory Red Notice from Russia. Just as no one would ever assume that an arrest warrant from the United States has the same legitimacy as one from Russia, the same is true of the Red Notices that are based on such warrants. While it is unfortunate that the most accurate acknowledgement of Red Notice vulnerabilities is placed in a footnote, the message is clear: Some Red Notices are bogus, and it is up to the Respondent to prove it.

Another footnote provides further relief and opportunities for effective advocacy to attorneys challenging the validity of Red Notices. The Board states in footnote 2 that while the Respondent argues that DHS did not submit evidence of a current arrest warrant, the Red Notice indicates that the General Secretariat of Interpol has a copy. The Board then includes a comparative citation to *Tatintsyian v. Barr*, noting the Red Notice in that case indicated that there was no arrest warrant on file, and failed to meet the standard for serious reasons to believe that a serious nonpolitical crime was committed. Attorneys should always check Red Notices to see if an arrest warrant is on file with Interpol, and in general, to point factual or legal inconsistencies to the judge.

## IV. Directly Challenging a Red Notice

The best way to prove a Red Notice is politically motivated, is unreliable, or otherwise violates Interpol’s legal requirements, is to fully explain to the IJ that a

<sup>24</sup> As a result of the increasing numbers of persecutory Red Notices and Interpol’s failure to properly vet requests by member nations, U.S. Congressmembers are taking note of the problem and considering bipartisan legislation to curb Interpol abuse. The bipartisan Commission on Security and Cooperation in Europe, also known as the U.S. Helsinki Commission, introduced the Transnational Repression Accountability and Prevention (TRAP) Act (S.2483) on September 10, 2019, in the Senate and in the House on September 12 (H.R. 4330). If passed, the bill would put in place crucial monitoring mechanisms and safeguards to address Interpol abuse, including enhanced transparency and accountability.

<sup>25</sup> *Matter of W-E-R-B-* at n.5.

Red Notice may be challenged and then to successfully challenge and achieve its deletion. This is done by filing an application with the Commission for the Control of INTERPOL's Files ("CCF" or "the Commission").<sup>26</sup> In 2016, the last year where data is available, the CCF deleted approximately 170 Red Notices. The process is similar to presenting an asylum case, but it is based on international human rights law and arguments based in Interpol's foundational documents.

While recent reforms have improved the CCF's speed of operation, it can take close to a year for the CCF to reach a decision and for the Interpol General Secretariat to implement it. It is therefore advisable to initiate the request process as soon as possible, and to ensure that it includes a request for provisional measures, which can be taken within less than three months. In the asylum or removal process, providing documentary evidence to the IJ or to DHS that the Interpol Red Notice is being challenged as illegitimate may provide critical support to a request for a continuance or requests for other immigration benefits or a bond.

The "Statute of the Commission for the Control of Interpol's Files" is essential background reading, and an application form to begin the process is available on Interpol's public website.<sup>27</sup> The CCF's website is also informative, and includes a selection of decisions to provide insight on how the Commission analyzes requests for deletion and other issues. Nevertheless, the decisions are significantly redacted, and attorneys should strongly consider seeking guidance from, or engaging the services of, a colleague with experience in this specialized area.

Broadly, the process of submitting such a request to the CCF's Requests Chamber has four stages. The applicant – or the applicant's attorney – must submit the application form (or a letter) to the CCF. First, the CCF will acknowledge receipt of the request at the earliest opportunity. Second, within a month of receipt, the CCF will check the admissibility of the request and inform the applicant of its decision. Third, presuming the application is admissible, the CCF will render a decision within nine months unless it determines that exceptional circumstances warrant an extension of that

time limit. Fourth, and finally, the Interpol General Secretariat will implement the CCF's decision within no more than two months.

Because a Red Notice cannot be used as the sole basis for detaining an individual in the United States, (even though ICE's targeted arrests of individuals with Red Notices seems to indicate otherwise), even successfully requesting the deletion of a Red Notice will not on its own automatically result in a changed custody determination. But it could certainly justify a request for a new bond hearing based on changed circumstances. Furthermore, lodging a good faith challenge to the Red Notice is testament to the client and attorney's belief that the charges underlying the Red Notice are wrongful, and that the Red Notice is part of the persecutory scheme against the client. For example, in certain cases, the CCF may issue a letter that states that the individual's information was removed from Interpol databases because the request by the member country was a violation of Article 3 of Interpol's Constitution as it was for a primarily illegitimate reason. In other cases, Interpol will recognize that the person who is the target of the Red Notice has a pending application for asylum that confers a protected status before the organization.

Again, these kinds of letters may constitute valuable evidence in the context of an asylum case, as they show that an international police organization is recognizing the illegitimacy of a request for police cooperation. Paradoxically, therefore, while the publication of a Red Notice is not proof of an individual's guilt, the cancellation of a Red Notice offers considerable proof that the underlying offense was not a crime in ordinary law.

## V. Conclusion

In *Matter of W-E-R-B*, the Board fails to reflect a thorough understanding of how Interpol functions, thereby potentially perpetuating the common misconception that publication of a Red Notice somehow legitimizes the underlying criminal allegations. However, the holding is limited and highly distinguishable: This was an asylum/withholding analysis for a respondent who conceded the charges were nonpolitical, and where the Red Notice referenced an arrest warrant on file with Interpol. Many removal cases with Red Notices will not involve these exact circumstances, and thus it remains the attorney's purview to point out the differences to the IJ and boldly challenge the Red Notice itself.

*All is not lost* for advocates whose clients are the subject of persecutory Red Notices – and *all has not*

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<sup>26</sup> Commission for the Control of INTERPOL's Files, available at <https://www.interpol.int/About-INTERPOL/Commission-for-the-Control-of-Files-CCF>.

<sup>27</sup> Statute for the Control of INTERPOL's Files, available at <https://www.interpol.int/Who-we-are/Legal-framework/Legal-documents>.

*been won* by overzealous DHS attorneys who may erroneously cite this decision as support for the reliability of Red Notices in general.

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