INTERNATIONAL ENFORCEMENT LAW REPORTER

I. INT'L TAX ENFORCEMENT AND MONEY LAUNDERING 91
Swiss Private Bank Rahn+Bodmer Makes DPA for $22M to Settle Tax Crimes 91
Germany, Denmark, and Belgium Bring Criminal Investigations against Foreign Enablers in Cum-Ex Cases. 91
II. MONEY LAUNDERING AND BANK SECRECY 93
OECD Calls for Action to Disrupt, Prevent and Prosecute Criminal Conduct by Professional Enablers 93
Suriname's Corruption and Money Laundering Challenges 95
FinCen Notice Informs Financial Institutions of Money Laundering from Illicit Art and Antiquities Trade 97
FATF Starts New Project to Study and Mitigate the Unintended Consequences from Incorrect Implementation of Standards and Announces More Jurisdictions on its Black and Grey Lists 99
III. INT'L HUMAN RIGHTS ENFORCEMENT 102
58 Countries Sign Declaration Against Arbitrary Detention of Foreign and Dual Nationals 102
IV. INTERNATIONAL CRIMINAL COURT 105
ICC Opens Investigation in the Palestine/Israel Situation 105
V. EXTRADITION 107
Fmr MD of Triton Petroleum Limited Faces Extradition to Kenya for Alleged Conspiracy to Defraud 107
U.S. Extradites Father and Son for Helping Carlos Ghosn Escape from Japan 108
The Czech Government Extradites Two Ukrainian Nationals to the U.S. on Money Laundering Charges 109
VI. TRANSNATIONAL CORRUPTION AND INT'L ASSET FORFEITURE 110
Nigeria's Struggle to Recover Stolen Assets from the U.K. 110
VII. INT'L NARCOTICS CONTROL, TRANSNATIONAL ORGANIZED CRIME, AND SANCTIONS 112
Wife of "El Chapo" Held without Bail in the U.S. on International Drug Charges 112
Daughter of Head of Cartel Jalisco Nueva Generación Pleads Guilty to Violating the Kingpin Act 113
VIII. COUNTERTERRORISM AND INTERNATIONAL HUMAN RIGHTS 115
U.K. Supreme Court Confirms Stripping a Terrorist Suspect of a Citizenship 115
IX. ECONOMIC SANCTIONS AND ECONOMIC INTEGRATION 118
First application of sanctions under the European Union's 'Magnitsky Act' on Russia 118
X. CYBERCRIME 121
U.S. Charges Three N. Korean Military Hackers in Cyberattacks and Financial Crimes Worldwide 121
XI. INTERPOL AND MIGRATION ENFORCEMENT 124
Consideration of INTERPOL Red Notices and Diffusions by U.S. Immigration Courts 124
XII. CRIMES AGAINST HUMANITY 127
Strasbourg Court Rules on the Germany Responsibility for an Air Strike in Afghanistan 127
XIII. FOREIGN ASSISTANCE TO COMBAT CORRUPTION, ORG CRIME, AND ILLICIT MIGRATION 130
US-N. Triangle Enhanced Engagement Act Sets Stage for New US Policy 130

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XI. INTERPOL AND MIGRATION ENFORCEMENT

Consideration of INTERPOL Red Notices and Diffusions by U.S. Immigration Courts Suggests a Uniform Approach

By Yuriy Nemets[1]

The first part of this article was published in the previous issue of the IELR. In the first part, the author discusses the following cases involving INTERPOL Red Notices and diffusions considered by U.S. immigration courts: *Kharis v. Sessions*, *Borbot v. Warden Hudson Cnty. Corr. Facility*, *Soto v. Sessions*, *U.S. v. Mohamud* and *Radiowala v. Attorney Gen. U.S.* In the second part, the author discusses *Hernandez-Lara v. Immigration & Customs Enf't*, *Tatintsyan v. Barr*, *Matter of W-E-R-B*, *Marroquin-Retana v. Att'y Gen. U.S.*, *Malam v. Adducci*, *Oscar C. v. Tsoukaris* and *Barahona v. Wilkinson*.

In *Hernandez-Lara v. Immigration & Customs Enf't*, the petitioner, who applied for asylum and protection under CAT, was subject to a Red Notice issued at the request of El Salvador, her home country, which had accused her of being a gang member.[2] The IJ denied the request for release on bond, reasoning that the petitioner was a "danger based on [the] Red Notice from Interpol, issued by El Salvador, that accused [the petitioner] – incorrectly, according to [her] – of being a gang member."[3] However, as the U.S. District Court for the District of New Hampshire put it in this case, "[E]ven the IJ expressed concern about the Red Notice during the bond hearing:"

> I don't see[, the IJ reasoned,] that there is sufficient evidence explaining why these allegations are being brought against her. She claims that they're street gangs, but it looks like I don't know if that's because this is an inter-rival thing or she was an innocent member or somehow wrongly identified. I just don't have the evidence. What I do have is the Interpol Red Notice. As it is a Respondent's burden of proof to show by clear and convincing evidence she is not a danger, I find, based on this Red Notice, she has failed to meet that burden.[4]

The IJ placed the burden of proof exclusively on the petitioner. The IJ concluded that the petitioner "had not sufficiently refuted the Red Notice and that she was a danger" and despite the concerns regarding the Red Notice, denied her request for bond based on the contents of the Red Notice.[5] The District Court ruled that by placing the burden of proof on the petitioner, the IJ violated her due process rights, which requires that the government bear the burden of justifying detention by clear and convincing evidence.[6] In granting the petition for a new bond hearing, the District Court reasoned that "[t]he record makes clear that this was a close case for the IJ and that, had the government borne the burden of proving danger, the IJ may well have found the evidence deficient."[7]

In *Tatintsyan v. Barr*, the BIA denied relief based "primarily on a red notice issued by Interpol at Russia's request alleging that criminal charges had been filed against [the petitioner]."[8] The U.S. Court of Appeals for the Ninth Circuit vacated the BIA's denial of asylum, withholding of removal and denial of relief under CAT and remanded the petitioner's claims on the merits.[9] The Court of Appeals disagreed with the BIA's reasoning that the Red Notice raised serious questions that the petitioner had committed a serious nonpolitical crime and ruled that the BIA's "determination of 'serious questions' [was] not supported by substantial evidence" – a "finding of 'serious reasons' is tantamount to a finding of probable cause" and "must be affirmed

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[2] *Hernandez-Lara v. Immigration & Customs Enf't*, 2019 DNH 114, 1-2 (D. N.H. 2019).

[3] *Id*. at 4.

[4] *Id*. at 4.

[5] *Id*. at 4.

[6] *Id*. at 6, 10, 19 (citing *Singh v. Holder*, 638 F.3d 1196, 1203-06 (9th Cir. 2011).

[7] *Id*. at 19-20.

[8] *Tatintsyan v. Barr*, No. 18-71056, 2020 WL 709663, at 1-2 (9th Cir. Feb. 12, 2020).

[9] *Id*. at 2.

if it is supported by substantial evidence."[10] INTERPOL did not have a copy of the arrest warrant against the petitioner available, the IJ deemed him credible, and the petitioner presented "evidence that the government had persecuted him before he left Russia and that Russia has abused Interpol's red notice provisions for political reasons."[11] The court reasoned that an "agency's finding of serious reasons" must be based on "specific evidence that supports the reasons for believing an individual has committed a serious nonpolitical crime," and provided several examples: (1) in *Go v. Holder*, the petitioner "explicitly admitted under oath to being involved in a scheme to finance 'drug transactions;'"[12] (2) in *Silva-Pereira v. Lynch*, the foreign indictment "alleged specific facts connecting [the petitioner] to the murder and was supported by an eyewitness whom the Guatemalan courts deemed credible;"[13] and (3) in *Belov v. Holder*, "in addition to [the petitioner] being found not credible, the BIA, in finding 'serious reasons,' also relied on an indictment and an arrest warrant from Russian authorities, the transcript of several witnesses from Russia, and testimony from two former business associates who testified against [the petitioner]."[14] The court found that, in contrast to the three cases mentioned above, *Go*, *Silva-Pereira* and *Belov*, the BIA in *Tatintsyan* relied on the Red Notice alone, which the court refers to as a "single conclusory document, the reliability of which was undermined by both the petitioner's presentation of credible testimony that Russia has political reasons for charging him and evidence indicating that Interpol's red notices arising from Russia are not reliable."[15]

In *Matter of W-E-R-B*, the petitioner applied for asylum, withholding of removal and protection under CAT.[16] The petitioner was subject to a Red Notice issued by El Salvador, his home country, on the charge of "participating in an 'illicit organization' and [being] a 'hit man' for a gang organization."[17] In addition to the Red Notice, DHS produced a Record of Deportable/Inadmissible Alien (Form I-213).[18] The petitioner conceded that his crime was nonpolitical.[19] The BIA concluded that because the petitioner did not produce evidence that the criminal charge was politically motivated, the IJ did not have to consider the issue of whether or not the Red Notice was politically motivated and, therefore, unlawful:

> In a case *unlike* this [(emphasis added)], 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 Tatintsyan*, 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 political, military, religious or racial character, Interpol does not independently vet the governmental request for a Red Notice for its factual and legal justification.")[20]

In *Matter of W-E-R-B*, the BIA also disagreed with the respondent's argument that the Red Notice did not have any probative value.[21] In this regard, the BIA seems to align its reasoning with that of *Kharis*, although it does not cite the latter in its decision. As mentioned above, the court in *Kharis* concluded that, in considering whether a petitioner is a flight risk, "it does not violate due process to give a Red Notice at least some weight . . . [because] it comports with common sense that the existence and seriousness of pending criminal charges appropriately have an impact on the flight risk analysis."[22] The BIA in *Matter of W-E-R-B* agreed that the "Red Notice [is] reliable for what it purports to be – namely, a request by a member country (here, El Salvador) to provisionally arrest a specifically identified person . . . pending extradition based on a valid national arrest warrant for a crime that is not political in nature" and concluded that "DHS has met its burden to show that the serious nonpolitical crime bar may apply to the respondent" and that as a result the "burden shifted to the respondent to prove by a preponderance of the evidence that the serious nonpolitical crime bar does not apply – in other words, to

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[10] *Id*. at 2-3 (citing *Go v. Holder*, 640 F.3d 1047, 1052 (9th Cir. 2011) and *Guan v. Barr*, 925 F.3d 1022, 1032 (9th Cir. 2019)).
[11] *Id*. at 3.
[12] *Id*. (citing *Go*, 640 F.3d at 1053).
[13] *Id*. at 3-4 (citing *Silva-Pereira v. Lynch*, 827 F.3d 1176, 1188-89 (9th Cir. 2016)).
[14] *Id*. at 4 (citing *Belov v. Holder*, 385 F. App'x 624, 625-26 (9th Cir. 2010)).
[15] *Id*.
[16] *Matter of W-E-R-B*, 27 I&N Dec. 795, 796 (BIA 2020).
[17] *Id*. at 797.
[18] *Id*. at 798.
[19] *Id*. at 800.
[20] *Id*. at 800 n.5.
[21] *Id*. at 798.
[22] *Kharis*, No. 18-cv-04800-JST at *14.

show that there are not serious reasons for believing that he committed a serious nonpolitical crime."[23] In support of its reasoning, the BIA cites *Marroquin-Retana v. Att'y Gen. U.S.* in which the Court of Appeals for the Third Circuit concluded that there were "'serious reasons for believing' that the alien had committed a serious nonpolitical crime based on an 'Interpol Notice' *and other evidence*" (emphasis added).[24] Specifically, in *Marroquin-Retana*, the court ruled that the government submitted "substantial evidence that [the petitioner] had committed attempted manslaughter, including the Interpol Notice, a conviction record, the Sentencing Order, and letters from the Commissioner at the Chief of Police Intelligence Center, El Salvador" as well as a ruling by a court of appeals in El Salvador finding the petitioner guilty as charged.[25]

Malam v. Adducci and *Oscar C. v. Tsoukaris*, are also notable because the courts in those cases have weighed on the nature and limited role that INTERPOL alerts play in immigration proceedings. In *Malam v. Adducci*, the District Court for the Eastern District of Michigan reasoned that the Red Notice "diminishes any risk of flight by [the petitioner]" and granted his application for bail.[26] In *Oscar C. v. Tsoukaris*, the petitioner sought immediate release from custody "based on allegedly unconstitutional conditions of confinement" because his health condition placed him at "high risk for severe complications or death from COVID-19."[27][240] The petitioner was subject to a Red Notice issued by Guatemala based on the charge of aggravated rape of a minor, which the petitioner maintained was "probably brought in bad faith by 'corrupt officials' whom he angered."[28] Although the District Court for the District of New Jersey found that despite the pandemic the conditions at the detention facility did not warrant the petitioner's release and did not find the petitioner's rebuttal of the allegations in the Red Notice credible, it reasoned that an INTERPOL Red Notice is "not itself a conviction" nor is it "'an arrest warrant,' but rather, an 'international wanted persons notice.'"[29]

In *Barahona v. Wilkinson*, DHS produced an active Red Notice issued by El Salvador but failed to refute the petitioner's claim that the charge behind the Red Notice had been dismissed.[30] The petitioner conceded that the crime he was accused of was nonpolitical.[31] The IJ denied the petitioner's request for asylum and withholding of removal based on a finding that "serious reasons exist to believe [the petitioner] committed serious nonpolitical crimes outside the United States."[32] The petitioner appealed, arguing that the "Red Notice was insufficient to establish probable cause that he committed a serious nonpolitical crime."[33] The BIA upheld the IJ's decision, reasoning that "[b]ecause DHS presented 'some evidence' to establish that the bar may apply, . . . the burden [to prove eligibility for asylum] shifted back to [the petitioner] to prove otherwise by a preponderance of the evidence."[34] The BIA reasoned that the Red Notice was "sufficient to meet the 'some evidence' standard" required to prove "serious nonpolitical crimes" under 8 U.S.C. § 1158(b)(2)(A)(iii), 8 U.S.C. § 1231(b)(3)(B)(iii), and 8 C.F.R. § 1208.16(d)(2).[35] The Court of Appeals for the Eighth Circuit reversed the BIA decision and remanded for further proceedings reasoning that a Red Notice, "alone, is insufficient to meet [the probable cause] standard in cases involving 'serious reasons for believing' that a serious nonpolitical crime was committed."[36] In this regard, like the BIA in *Matter of W-E-R-B*, the Court of Appeals in *Barahona* cites *Marroquin-Retana* (mentioned above): "In a case involving a Red Notice, the court found probable cause was satisfied after the government submitted 'substantial evidence' that petitioner committed manslaughter, which included the Red Notice, trial records, sentencing order, and letters from the Chief of Police in El Salvador."[37] The Court of Appeals in *Barahona* noted that "[t]he parties [in this case] did not cite, and we could not find, a case in which a court has found a Red Notice, alone, is sufficient to meet this standard."[38] Additionally, the fact that DHS "did not refute and did not ask for additional time to resolve" whether the criminal charge behind the red notice was dismissed also "complicat[ed] the analysis" – "[t]he BIA erred in this case when it failed to make a probable cause finding, particularly in light of the dispute regarding the underlying criminal charges that gave rise to the Red Notice." [39]

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[23] *Matter of W-E-R-B*, 27 I&N Dec. at 799.
[24] *Id*. at 799 n.4.
[25] *Marroquin-Retana v. Att'y Gen. U.S.*, No. 16-2714, at 6-7 (3d Cir. 2017) (per curiam).
[26] *Malam v. Adducci*, No. 20-10829, at 5 (E.D. Mich. Oct. 2, 2020).
[27] *Oscar C. v. Tsoukaris*, Civ. No. 20-5622 (KM), at 4-5 (D. N.J. 2020)
[28] *Id*. at 24.
[29] *Oscar C. v. Tsoukaris*, Civ. No. 20-5622 (KM), at 4, 23-24 (D. N.J. 2020).
[30] *Barahona v. Wilkinson*, No. 20-1546, at 4 (8th Cir. 2021).
[31] *Id*. at 8.
[32] *Id*. at 2, 4.
[33] *Id*. at 4.
[34] *Id*.
[35] *Id*. at 4-6.
[36] *Id*. at 7.
[37] *Id*. (citation omitted).
[38] *Id*.