
AILA

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Challenging a Red Notice

What Immigration Attorneys Need to Know About INTERPOL

Ted R. Bromund and Sandra A. Grossman*

Abstract: The central challenge facing immigration attorneys in the context of INTERPOL is to understand and make clear that INTERPOL's publications—including its famous “Red Notice”—are the result of an administrative procedure, not a judicial process. They do not prove guilt and they are not based on evidence. Yet INTERPOL publications are used by authoritarian regimes to persecute dissidents and politically active people abroad, including through the U.S. immigration system. This article will provide immigration attorneys with the background and tools they need to effectively advocate for their clients and successfully challenge Department of Homeland Security assertions about INTERPOL.

Introduction

The International Criminal Police Organization—officially ICPO-INTERPOL, commonly known simply as INTERPOL—plays an important role in international law enforcement, and its publications are often used in U.S. immigration and asylum cases. But neither INTERPOL nor its publications, such as its famous “Red Notice,” are well understood. This can lead attorneys to fail to appropriately challenge Department of Homeland Security (DHS) or immigration judge (IJ) assertions about INTERPOL that are often incorrect. For example, too often IJs uncritically defer to INTERPOL publications in their decisions, resulting in extended detention time or denials of bonds and other requests for immigration benefits, and in general causing serious damage to an individual's U.S. immigration case.

This article will educate attorneys on the meaning of INTERPOL Red Notices and other INTERPOL publications, give background on INTERPOL as an organization, and provide attorneys with the tools and knowledge they need to effectively advocate for their clients when an INTERPOL issue arises. The existence of an INTERPOL issue in any particular case can provide immigration attorneys with an opportunity for advocacy before an IJ, the DHS, and at an international level before the Commission for the Control of INTERPOL's Files (CCF).

What INTERPOL Is and What It Isn't

To understand INTERPOL's various publications, attorneys must first understand INTERPOL itself. Contrary to the image fostered by Hollywood, INTERPOL is not an international law enforcement agency. No one who works for INTERPOL has the power to make an arrest as a result of his or her position in INTERPOL. Rather, INTERPOL is an international organization that has the primary aim of advancing international police cooperation. It is based on the sovereignty of its member nations, and therefore respects the independence of their separate judicial and law enforcement systems. It works by holding databases of nation-provided information, by maintaining a communications system for messages between law enforcement agencies in different nations, and by publishing notices—including its Red Notice.

INTERPOL currently has 194 member nations. (North Korea is one of the few well-known nations that is not a member of INTERPOL.) INTERPOL's supreme body is its one-nation, one-vote general assembly. Below the assembly, INTERPOL has a president, a 12-member executive committee chosen on a geographically representative basis, a secretary-general who has operational control of INTERPOL, and, finally, INTERPOL's staff in its General Secretariat. All INTERPOL member nations are required to establish a National Central Bureau (NCB) to manage all liaison with INTERPOL. In the United States, the NCB is co-managed by DHS and the Department of Justice. Many U.S. state and local law enforcement agencies have "read access" to databases maintained by INTERPOL, but only the U.S. NCB can request a Red Notice or other INTERPOL publication or transmit messages on behalf of the United States.

All INTERPOL activity, including all communications over its network, must respect its Constitution and subsidiary rules adopted by the general assembly, including its Rules on the Processing of Data (RPD).¹ All of INTERPOL's foundational documents and other relevant legal documents can be reviewed on INTERPOL's thorough website at www.interpol.int/About-INTERPOL/Overview.

The purpose of the Constitution and the subsidiary rules is to ensure that INTERPOL is used only against "ordinary-law crime,"² and is not in any way involved in politics, or for purposes of a political, and therefore illegitimate, persecution. In this way, INTERPOL is supposed to be beholden to a general principle also contained in U.S. asylum law, which establishes that while any country has the right to prosecute its own citizens, it must do so for legitimate purposes.

The Constitution's most-cited portions are its Article 2, which requires that international police cooperation be conducted within the "spirit of the Universal Declaration of Human Rights,"³ and, in particular, its Article 3, sometimes referred to as the neutrality clause, which states that it is "strictly forbidden for the Organization [INTERPOL] to undertake any intervention

or activities of a political, military, religious, or racial character.”⁴ INTERPOL cannot stop its sovereign member nations from creating and prosecuting political offenses. All it can and is required to do by its Constitution is ensure that it is used only in connection with genuinely criminal offenses. Unfortunately, as discussed below, INTERPOL’s system of publications and other communications is subject to abuse by member nations.

INTERPOL Publications: Introduction to the Red Notice

The value of INTERPOL rests largely in the structured communications system it provides. This system facilitates three kinds of messages. First, there are simple messages between one or more NCBs. A message is analogous to an everyday email and is only seen by the INTERPOL headquarters in Lyon, France, if the sending nation includes it in the recipient list.

Second, there are “diffusions,” a more structured email that can be sent to one or more NCBs, and can concern a wide variety of subjects, up to and including identifying an individual as a suspect and requesting his or her arrest.⁵ A diffusion is not subject to any prior review by INTERPOL before it is transmitted, but a diffusion is copied automatically to INTERPOL, and can be reviewed by INTERPOL for compliance with its rules after it is received.

Finally, there is INTERPOL’s system of colored notices, including its Red Notice. Any NCB can request the publication of a notice, but all requests are subject to review by INTERPOL for administrative compliance with its rules before publication. By rule, all notices must be published to all INTERPOL member nations.⁶ Yellow Notices (to alert police to a missing person), Blue Notices (to collect additional information about a person in relation to a crime), and Green Notices (to provide warnings about persons who have committed criminal offenses and are likely to repeat those offenses in other countries) are all relatively common, but by far the most-used notice is the Red Notice, of which 13,048 were published in 2017.

The purpose of a Red Notice, according to INTERPOL, is to “seek the location and arrest of wanted persons with a view to extradition or similar lawful action.”⁷ The requesting NCB can choose to make public a redacted version of the Red Notice on the INTERPOL website (www.interpol.int), but by default, Red Notices are published and visible only to law enforcement agencies, such as DHS. This means that often an individual who is the subject of a Red Notice may not be aware of it until he or she is confronted by U.S. law enforcement—for example, when crossing an international border into the United States or when appearing for an interview before U.S. Citizenship and Immigration Services (USCIS), such as for an asylum hearing. Other individuals may become aware of a Red Notice, or at least suspect that one exists, if they have a particularly high-profile case or if their home country publicizes its request for or use of a Red Notice in local media.

A Red Notice is often described as an “international arrest warrant.” This is incorrect. As INTERPOL itself states, a Red Notice “is not an international arrest warrant.”⁸ 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.”⁹ Red Notices must comply with specific conditions, which are set out in RPD Articles 82–87. 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.¹⁰

The requesting NCB must adequately identify the individual sought, must provide judicial data on the facts of the case, the charge, the laws covering the offense, and the maximum penalty possible, and must refer to a valid arrest warrant or comparable judicial decision. While the requesting NCB is asked to provide a copy of the warrant or decision, it is not required to do so. If the NCB meets these requirements, INTERPOL will publish the Red Notice after it completes its review of the request. The conditions relevant to diffusions, or other colored notices, are different, but all communications over the INTERPOL system are equally subject to review for compliance with INTERPOL’s Constitution and its RPD.

How INTERPOL Reviews Red Notice Requests

In conducting its review of Red Notice requests, INTERPOL operates on the belief that, as all of its member states are sovereign, they are all equal, and that therefore all of their requests must be presumed to have equal validity. In other words, while INTERPOL is required by RPD Article 86 to review Red Notices for compliance with Articles 2 and 3 of INTERPOL’s Constitution, INTERPOL begins with the assumption that a request for a Red Notice is compliant. Its review therefore focuses on ensuring that the requested Red Notice meets the administrative conditions set out in the RPD. If INTERPOL becomes aware—either during or after its review—that a request for a Red Notice might be invalid because it violates the requirements of Article 2 and/or Article 3, it will subject that request to additional scrutiny. But this additional scrutiny is not applied to all requests, and even when it is applied, it has considerable and inherent limits. As explained below, this is exactly where an attorney who understands that her asylum client, for example, is the subject of an illegitimate Red Notice can make all the difference.

Precisely because INTERPOL respects the sovereignty of its member nations, it cannot and does not conduct its own on-the-ground investigation of a purported crime. It must rely on information provided by the requesting NCB, by other NCBs that care to contribute to its review, by its appellate body (the CCF), by attorneys acting on behalf of individuals, or on public source

information. When then-INTERPOL President Meng Hongwei of the People's Republic of China was arrested in China in October 2018, INTERPOL's Secretary-General Jürgen Stock of Germany was asked if INTERPOL would investigate Meng's forced resignation. Stock replied that INTERPOL could not do so, as it is "not an investigative body."¹¹ If INTERPOL cannot investigate the circumstances surrounding the disappearance of its own president, it certainly cannot and does not investigate other purported offenses. For individuals who are fleeing persecution, including illegitimate and politically motivated prosecutions in their home countries, it is up to their attorneys to challenge an INTERPOL Red Notice both before an IJ and in INTERPOL itself.

Misuse, Misunderstanding, and Abuse of Red Notices

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 an arrest warrant. 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 NCB that made the request. They have no independent probative value. They can be published without a valid arrest warrant from the requesting nation, and if even if that nation provides an arrest warrant, a Red Notice offers no proof that the arrest warrant is valid, that the purported crime has been committed, or that the crime has not been concocted by the authorities for political purposes.

A Red Notice adds no additional force to an otherwise valid arrest warrant, as it is based on nothing more than the word of the government that procured the arrest warrant in the first place. The only facts a Red Notice proves, are that the requesting nation is a member of INTERPOL, that it has completed the online form requesting the Notice, and that the case did not initially raise political or other improper motives within the internal INTERPOL vetting process. The only fact a diffusion proves is that the transmitting nation is a member of INTERPOL and has successfully sent an email.

The fact that the process for obtaining a Red Notice is straightforward, and the reality that a Red Notice often has substantial direct and indirect effects on the individual named in it has encouraged authoritarian regimes to use Red Notices—and, less frequently, other colored notices or diffusions—to harass dissidents, exiles, or other politically or financially inconvenient opponents abroad. "INTERPOL abuse" occurs when INTERPOL's channels or publications are used by an INTERPOL member nation for political, military, racial, or religious reasons. Governments, international organizations, non-governmental organizations (NGO), and experts have attested to the reality of INTERPOL abuse. Immigration attorneys also witness firsthand the damage that a Red Notice can do to an innocent client who is processing a visa, a

green card, a naturalization case, or an asylum case, among other applications for immigration benefits.

Challenging INTERPOL Red Notices

Attorneys involved in a matter with an INTERPOL dimension should consult reputable sources, such as Fair Trials International,¹² on the wider phenomena of INTERPOL abuse and on the reputation of the nation that requested the publication of the Red Notice (or other INTERPOL notice or diffusion). While every case must be considered on its merits, Red Notices based on charges of financial crime (which, unlike crimes such as murder, leave little physical evidence) or terrorism (which is how some nations describe non-violent political opposition) are worthy of particular attention, and will carry serious adverse immigration consequences. That said, given the lengthy list of crimes contained in the Immigration and Nationality Act (INA), criminal charges of almost any kind may result in the denial of immigration benefits and the issuance of a charging document. As such, in most cases involving INTERPOL, the stakes are particularly high.

In cases with an INTERPOL dimension, attorneys should explain to the IJ that a Red Notice (or other INTERPOL publication) is not an international arrest warrant, is not based on any evidentiary foundation, is not the result of any INTERPOL investigative process, and, as a result, offers no independent or corroborating reason to believe that the individual named in it has committed a crime or that a foreign arrest warrant is supported by credible evidence. Attorneys should also challenge any claim that a Red Notice (or other INTERPOL publication) offers any proof that an individual poses a danger to the community. As a Red Notice is not based on any judicial process, it should not be used as proof of dangerousness.

Unfortunately, past experience shows that DHS itself does not fully comprehend the meaning and limits of a Red Notice. For example, in a recent case involving an individual accused of attempted embezzlement of funds from the Russian Federation, the client filed for asylum in the United States shortly after discovering that he was the subject of a Red Notice. DHS detained the individual at his asylum interview. The results of a request under the Freedom of Information Act (FOIA) filed with Immigration and Customs Enforcement (ICE) later revealed that ICE immediately categorized the individual as a danger to the community and a flight risk. ICE detained him at his affirmative asylum interview, they issued him a Notice to Appear in Removal proceedings, and the IJ denied a reasonable bond. INTERPOL subsequently deleted the Red Notice, but only after the individual and his family had suffered the serious effects of an abusive INTERPOL publication. Attorneys must take great pains to avoid these outcomes by arming themselves with the necessary information to explain to IJs what a Red Notice is and is not.

The fact that ICE has stated that it uses Red Notices to guide its targeting¹³ implies that individuals who are seeking asylum—and who are therefore not U.S. citizens or green card holders—are particularly likely to be selected for arrest, should they be named in a Red Notice. Indeed, if an individual enters the United States on a valid visa that is then cancelled as the result of the publication of a Red Notice, it is possible for the Red Notice to be used by an abusive foreign nation to “manufacture” an immigration violation in the United States—which ICE can then use as the basis for arresting and seeking to deport the individual who is seeking asylum from the abusive nation. This process risks turning ICE, and any IJ who participates in the process, into agents of the abusive nation, a point that attorneys should bring up if it is relevant.

Attorneys should also carefully examine the full, original Red Notice to make sure that it has been correctly translated into English, to ensure that it meets all the conditions and contains all the judicial data required by INTERPOL, and to check if the Notice contains any information or assertions that violate INTERPOL’s rules or indicate bias on the part of the requesting authorities. For example, Red Notices may not be published for certain categories of offenses, such as those that might raise “controversial issues relating to behavioral or cultural norms,” and for those “relating to family/private matters,” among other categories.¹⁴ In theory, INTERPOL is not allowed to publish a Red Notice that does not meet the many conditions established by its Constitution and RPD.

In practice, Red Notices that do not meet these conditions are published nonetheless. In one recent case, a Red Notice from El Salvador specified only that an alleged robbery took place “on the street” in August. This is not sufficient judicial data. By demonstrating that a Red Notice does not meet INTERPOL’s requirements, an attorney can substantially reduce any credibility it may possess in the eyes of an IJ. An attorney should not rely on the public version of a Red Notice, as the full Red Notice—visible only to law enforcement agencies, even if a redacted version has been made public—contains information that is essential to assessing the Notice.

Finally, attorneys should challenge any claim that a Red Notice increases the flight risk posed by an individual. For example, in a recent case involving a citizen of Armenia, the IJ denied a request to lower the bond amount despite the fact that the respondent appeared eligible for permanent residency and asylum, and though he had considerable family ties in the United States. The sole reason for refusing to lower the bond amount was the existence of an INTERPOL Red Notice. But as INTERPOL itself states, a Red Notice is important in part because “[c]riminals and suspects are flagged to border officials, making travel difficult.”¹⁵ As officials routinely consult INTERPOL-maintained databases when controlling a national border, a Red Notice—as it is designed to do—actually decreases flight risk. This point must be made to IJs orally and in filings before the court.

Attorneys should also be aware of, and provide to IJs in filings, the formal U.S. legal position on the value of Red Notices. The U.S. NCB states that:

The United States does not consider a Red Notice alone to be a sufficient basis for the arrest of a subject because it does not meet the requirements for arrest under the 4th Amendment to the Constitution. Instead, the United States treats a foreign-issued Red Notice only as a formalized request by the issuing law enforcement authority to “be on the look-out” for the fugitive in question, and to advise if they are located.¹⁶

The U.S. Department of Justice’s *Justice Manual* states that:

In 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. If the subject for a Red Notice is found within the United States, the Criminal Division will make a determination if a valid extradition treaty exists between the United States and the requesting country for the specified crime or crimes. If the subject can be extradited, and after a diplomatic request for provisional arrest is received from the requesting country, the facts are communicated to the U.S. Attorney’s Office with jurisdiction which will file a complaint and obtain an arrest warrant requesting extradition.¹⁷

In short, the fact that INTERPOL has published a Red Notice on an individual should not mystify anyone, including an IJ, or an attorney, into accepting that the named individual is guilty, or that the named individual is the subject of charges that are supported with evidence that is on its face credible and sufficient. A Red Notice is not by itself a sufficient basis for arresting anyone in the United States, much less detaining or deporting anyone, or denying them asylum.

In defending the interests of their clients, attorneys should be aware of the resources they can draw on to assess the validity of an INTERPOL publication, including a Red Notice. An attorney may find it advisable to retain the services of an expert witness on INTERPOL and the wider phenomenon of INTERPOL abuse, and to consult NGOs with an interest in this problem or colleagues with specialized experience in it. At the INTERPOL level, attorneys should review INTERPOL’s Constitution and its RPD. Next, they should consult its Repository of Practice on Article 3,¹⁸ which provides guidance on the evolution and application in practice of Article 3 in a variety of circumstances.

Attorneys should also be aware of the status of any extradition treaty between the United States and the requesting nation, as the lack of a valid extradition treaty may imply that the Red Notice—which was purportedly sought “with a view to extradition”—is invalid. Similarly, attorneys should consider whether the location of their client was widely known; if so, the Red Notice—which was purportedly sought to “seek the location” of an individual—may be invalid. Finally, they should consult the Annual Reports and “Decision Excerpts” published by the CCF, which set out the CCF’s principles

and precedents. Together, these documents may provide a basis for challenging the use of a Red Notice in U.S. legal proceedings.

Challenging a Red Notice Directly Through the Commission for the Control of INTERPOL's Files

It is also possible to challenge a Red Notice through the CCF. In 2016, the last year for which data is available, the CCF deleted approximately 170 Red Notices. The process is similar to presenting an asylum case, but it is rooted in international human rights law and INTERPOL's foundational documents. While recent reforms have improved the CCF's speed of operation, it will normally 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 begin the 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 the 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 Files¹⁹ is essential background reading, and an application form to begin the process is available on INTERPOL's public website.²⁰ Nevertheless, because the CCF has to date published only 14 decision excerpts, the publicly available case law is limited, and attorneys should strongly consider seeking guidance from, or engaging the services of, a colleague with experience in this specialized area.

In rare cases, it may be advisable to submit a "preventative request"—which seeks to prevent INTERPOL from publishing a Red Notice—to the CCF. But in most cases, attorneys will file a post-publication request. Broadly, the process of submitting such a request through 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. 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 successfully requesting the deletion of a Red Notice will not on its own end any legal proceedings that make use of the Red Notice in the United States. But making a request to the CCF does testify to a belief on the part of a client and attorney that the charges that

led to the Red Notice are political (or racial, religious, or military) in nature, and if the CCF recommends the deletion the Red Notice as the result of a successful application, this is powerful evidence that this belief was correct.

In certain cases, the CCF may issue a letter that states that the individual's information was removed from INTERPOL-maintained databases because the request by the member country was a violation of Article 3 of INTERPOL's Constitution. This kind of letter is extremely valuable evidence in the context of an asylum case. 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 evidence that the purported underlying offense was not a crime in ordinary law.

Conclusion

INTERPOL Red Notices and diffusions are far too often taken as conclusive proof of criminality by the DHS and by IJs. This is due in large part to a lack of understanding of how INTERPOL functions as an organization, as well as a misunderstanding as to the meaning of the organization's various publications. Inclusion in an INTERPOL-maintained database can and does have tremendous negative consequences on an individual's application for U.S. immigration benefits and on his or her life in general. In cases where INTERPOL abuse is perpetrated by authoritarian governments, it is up to immigration attorneys to educate IJs and the DHS to make sure the U.S. government does not become complicit in these tactics.

Notes

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1. INTERPOL's Rules on the Processing of Data (hereinafter RPD), art. 5. The RPD are available on INTERPOL's website at www.interpol.int/en/content/download/5694/file/INTERPOL%20Rules%20on%20the%20Processing%20of%20Data-EN.pdf.

2. *Id.*, art. 1 (“‘Ordinary-law crime’ means any criminal offenses, with the exception of those that fall within the scope of Application of Article 3 of the Constitution and those for which specific rules have been defined by the General Assembly.”).

3. Interpol Const., art. 2, www.interpol.int/en/content/download/590/file/Constitution%20of%20the%20ICPO-INTERPOL-EN.pdf.

4. *Id.*, art. 3.

5. RPD, *supra* note 1, art. 97.

6. RPD, *supra* note 1, art. 79.
7. www.interpol.int/INTERPOL-expertise/Notices.
8. www.interpol.int/INTERPOL-expertise/Notices/Red-Notices.
9. *Id.*
10. RPD, *supra* note 1, art. 83(1)(a)(ii) (noting that if the subject of the Red Notice is sought for prosecution, “the conduct constituting an offense [must be] punishable by a maximum deprivation of liberty of at least two years or a more serious penalty; if the person is sought to serve a sentence, he/she [must be] sentenced to at least six months of imprisonment and/or there is at least six months of the sentence remaining to be served”).
11. *Interpol: Rules Forbid Probe of Ex-President’s Fate in China*, WASH. POST, Nov. 8, 2018, www.washingtonpost.com/classic-apps/interpol-rules-forbid-probe-of-the-fate-of-organizations-ex-president-in-china/2018/11/08/03038276-e39c-11e8-8f5f-a55347f48762_story.html?utm_term=.cada79a487aa.
12. www.fairtrials.org/campaign/interpol.
13. Ted R. Bromund, *ICE Wrongly Continues to Use Interpol Red Notices for Targeting*, FORBES, Dec. 19, 2018, www.forbes.com/sites/tedbromund/2018/12/19/ice-wrongly-continues-to-use-interpol-red-notices-for-targeting/#19a5d3ff175e.
14. RPD, *supra* note 1, art. 83(1)(a)(i).
15. www.interpol.int/INTERPOL-expertise/Notices/Red-Notices.
16. www.justice.gov/interpol-washington/frequently-asked-questions.
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