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Secretariat of the Public International Law and Anti-Terrorism Division,
Directorate of Legal Advice and Public International Law, DLAPIL

Fax 33 (0)390215131 - cahdi@coe.int - www.coe.int/cahdi



**REPOSITORY OF PRACTICE:
APPLICATION OF ARTICLE 3 OF INTERPOL'S CONSTITUTION
IN THE CONTEXT OF THE PROCESSING OF INFORMATION
VIA INTERPOL'S CHANNELS**

CONTENTS

SECRETARY GENERAL'S FOREWORD	5
1. INTRODUCTION	6
2. GENERAL BACKGROUND	7
2.1 Historical background.....	7
2.2 The primary objectives of article 3	8
2.3 Guiding principles of article 3 analysis in the context of processing of information ..	8
3. SUBJECT-MATTER ANALYSIS	12
3.1 Offences committed by politicians/former politicians	12
3.2 Offences concerning freedom of expression	14
3.3 Offences concerning freedom of assembly.....	15
3.4 Offences against the security of the state	17
3.5 Offences committed in the context of an unconstitutional seizure of power.....	18
3.6 Membership in a terrorist organization.....	21
3.7 Embargo/sanctions cases.....	22
3.8 Election crimes	23
3.9 Illegal emigration	25
3.10 Military aspects.....	26
3.11 Religious/racial elements.....	30
3.12 Separation of charges.....	33

Appendix Rules applicable to assessing Article 3 cases

SECRETARY GENERAL'S FOREWORD

Neutrality is, and always has been, paramount to INTERPOL. As an international organization with a unique mandate, namely to prevent and fight crime through enhanced international police co-operation, it is of the utmost importance that our activities transcend domestic and international politics.

Our Constitution, Article 3, enshrines this guiding principle of neutrality by explicitly forbidding INTERPOL from engaging in matters of political, military, religious and racial character.

What does this mean on a day-to-day level? Among the various fields of our activities, the application of Article 3 is particularly pertinent to the processing of information via the Organization's channels, especially in the review and issue of INTERPOL Notices, and via messages exchanged directly among our member countries. Given that our activities involve the processing of personal data, it is imperative that we respect the rule of law.

It is clear that the interpretation of Article 3 and its implementation in our daily work has not been without its challenges. Our response in areas such as terrorism and serious international crimes, which by their very essence often include political, military, religious or racial elements, has required the guidance of the Organization's governing bodies. Meanwhile, changes in the nature of transnational crime and developments under international law have necessitated adjustments of policy and legal considerations.

This booklet is the culmination of a study carried out by staff at the General Secretariat on the principles that guide the interpretation and application of Article 3 in the context of the processing of information. It will serve as a reference guide for practitioners, but more than that, it also addresses specific topics and includes real-life examples from INTERPOL's practice.

I would like to thank everyone who contributed their experience and expertise to this valuable publication; I would also encourage any person who has comments or questions concerning this booklet to contact INTERPOL's Office of Legal Affairs. In closing, let me stress that INTERPOL's General Secretariat staff will work to ensure that this booklet remains a living and dynamic document, updated as required to reflect the continuous evolution of our understanding, interpretation and application of Article 3 of INTERPOL's Constitution.



Ronald K. Noble
INTERPOL Secretary General

1. INTRODUCTION

INTERPOL's core functions include secure global police communication services, and operational data services and databases for police. To that end, INTERPOL provides a variety of services that enable the processing of information related to police work around the world.

The regulatory framework governing the processing of information such as notices and diffusions via INTERPOL's channels consists of the following:¹

- (a) INTERPOL's Constitution
- (b) The Rules on the Processing of Information for the Purposes of International Police Co-operation (RPI)
- (c) Implementing Rules for the Rules on the Processing of Information for the Purposes of International Police Co-operation
- (d) INTERPOL's General Assembly Resolutions.

The General Secretariat, serving as an "international centre in the fight against ordinary crime" and as a "technical and information centre" [Article 26(b) and 26(c) of the Constitution], ensures that the processing of information is carried out in accordance with the above regulatory framework.²

When checking whether a particular item of information has been processed in conformity with the rules, the General Secretariat assesses whether all the conditions for the processing of information have been met. Those conditions are laid down in Article 10.1(a) of the RPI.

The first condition of Article 10.1(a) requires that the processing of information through the Organization's channels

"[C]omplies with the Constitution and relevant provisions in the Organization's rules."

This repository of practice concerns the case law INTERPOL has developed in processing information³ in relation to compliance with Article 3 of the Constitution, according to which:

"It is strictly forbidden for the Organization to undertake any intervention or activities of a political, military, religious or racial character."

The repository of practice comprises two parts: Part 1 is a general background concerning the interpretation of Article 3 of the Constitution. Part 2 includes subject-matter analysis on a variety of subjects arising from Article 3 case law. Each analysis provides a background for the particular question, explains the current practice, and includes a number of examples.

¹ Extracts from the relevant rules are enclosed at Appendix I. It should be noted that in addition to the rules mentioned, there exist other INTERPOL rules relating to the processing of information via INTERPOL's channels, such as the Rules Governing Access by an Intergovernmental Organization to the INTERPOL Telecommunications Network and Databases. However, as these rules are generally less relevant for the legal review of the processing of information in a particular case, they will not be addressed here.

² See also Article 4.1(a) of the RPI; Article 2(a) of the Implementing Rules of the RPI.

³ The most common application of Article 3 in INTERPOL's day-to-day practice is in the field of processing of information. It is recalled, however, that Article 3 applies to all INTERPOL functions and activities. Hence, the principles identified in this note also apply, *mutatis mutandis*, to Article 3 analysis concerning activities other than processing of information. For example, those general principles will apply when the Organization examines possible co-operation with another international organization.

2. GENERAL BACKGROUND

2.1 HISTORICAL BACKGROUND⁴

From its early days, the Organization (then known as the International Criminal Police Commission) adopted a position of neutrality and refused to become involved in cases which were political, religious or racial in nature.

In 1948, the phrase "to the strict exclusion of all matters having a political, religious or racial character" was added to the end of Article 1(1) of the Organization's Statutes, which defined the Organization's purposes.

In 1951, INTERPOL's General Assembly adopted Resolution AGN/20/RES/11. The Resolution applied the predominance test under international extradition law by recommending to member countries to see that

"... no request for information, notice of persons wanted and, above all, no request for provisional arrest for offences of a predominantly political, racial or religious 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." [Emphasis added]

The predominance principle was not challenged when the new Constitution, which included Article 3, was adopted in 1956. The main change made was the broadening of the scope of the original provision to include also "military" undertakings or activities.

With the evolution of international law, the practice of INTERPOL has evolved in relation to the application of Article 3. The first significant change was in 1984, when the General Assembly adopted Resolution AGN/53/RES/7, which allowed the Organization to become involved in terrorist cases. The 1984 Resolution recalled the predominance test established by the 1951 Resolution, and emphasized that each request requires a review on a case-by-case basis with due consideration for the specific context. Notwithstanding this general approach, the Resolution set out a number of offences considered by their very nature to be of a political, military, religious or racial character.

Another important principle established by the Resolution concerns refusals of one or more countries to act on a request. The Resolution determined that this does not mean that the request automatically comes under Article 3; rather, it will be reported to other NCBs in an addendum. This principle continues to apply in current practice.

The second significant change was introduced in 1994, when the General Assembly (Resolution AGN/63/RES/9) approved co-operation with the newly established International Criminal Tribunal for the Former Yugoslavia (ICTY), thereby allowing co-operation in cases concerning serious international crimes (genocide, crimes against humanity, and war crimes), which were previously considered to fall under Article 3. The Report, endorsed by that Resolution, further elaborated on the interpretation of Article 3 and clarified certain points such as the review of cases concerning crimes committed by former politicians.

Another General Assembly Resolution pertinent to the interpretation of Article 3 was adopted in 2004. This Resolution endorsed the interim measures taken by the General Secretariat to enable co-operation in relation to the charge of membership of a terrorist organization (Resolution No. AG-2004-RES-18).

In conclusion to this brief historical review, the following points are noteworthy:

⁴ For further information see Document GT-ART3-2004-07.

- (a) INTERPOL, as an independent international organization, has developed its own rules concerning the application of Article 3.⁵
- (b) The Organization has adopted the predominance test in application of Article 3.
- (c) Each case has to be assessed separately, taking into account its particular context. Thus, while the Resolutions concerning the interpretation of Article 3 generally focused on the nature of the offence (e.g. pure political offences such as treason), the requirement of evaluating the overall context of the case introduces other relevant elements to be assessed.
- (d) The general trend of Article 3 interpretation by the General Assembly clearly points to the narrowing of its application in relation to the nature of the offence. This also corresponds to the general evolution under international extradition law.⁶

2.2 THE PRIMARY OBJECTIVES OF ARTICLE 3

The historical background provided above manifests that Article 3 primary objectives may be defined as follows:⁷

- (a) To ensure the independence and neutrality of INTERPOL as an international organization.
- (b) To reflect international extradition law.
- (c) To protect individuals from persecution.

These objectives have been further confirmed by other acts of the Organization and instruments concerning its activities. For example, in Resolution No. AG-2006-RES-04 ("Statement to reaffirm the independence and political neutrality of INTERPOL"), the General Assembly mentioned Article 3 as one of the Constitutional provisions attesting to the Organization's independence and neutrality.

2.3 GUIDING PRINCIPLES OF ARTICLE 3 ANALYSIS IN THE CONTEXT OF PROCESSING OF INFORMATION

A number of scholars have raised doubts about INTERPOL's legal status. However, there should be little doubt today that INTERPOL is an independent international organization and that its Constitution is a product of an agreement establishing an international organization under international law.⁸

Consequently, the interpretation of the Constitution's provisions, including Article 3, should be guided by general interpretation tenets under international law, specifically the principles enshrined by the Vienna Convention on the Law of Treaties. In particular, Article 3 is to be interpreted in the light of the principle that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose".⁹ The discussion below concerning the guiding principles of Article 3 analysis should therefore be understood within this general legal framework.

The predominance test adopted by the 1951 Resolution focused on the nature of the offence committed by the wanted persons.

⁵ See the 1994 Report (AGN-63-RAP-13) adopted by Resolution AGN/63/RES/9.

⁶ *Idem*, which states: "For many years, the general trend of Interpol's practice, as well as of developments in international law, has been to progressively restrict the application of provisions which could ensure that those who commit certain crimes are treated more favourably because of the political context of the act."

⁷ See Document GTI-2008-05 prepared for the Ad Hoc Working Group on the Processing of Information.

⁸ See, *inter alia*, Schermeres and Blokker, who concluded that while formally, INTERPOL is not based on an agreement between states, an agreement of this kind may in fact be deduced from a number of factors such as the designation of INTERPOL by ECOSOC as an intergovernmental organization and INTERPOL's Headquarters Agreement with France - see HG Schermeres and NM Blokker, *International Institutional Law*, 4th Revised edn. (Boston/Leiden, 2003), para. 36.

⁹ See Article 31(1) of the 1969 Convention on the Law of Treaties.

Specifically, the nature of the offence is examined along principles established in inter-State extradition practice such as those concerning the political and military offence exception.¹⁰

The practice of the Organization has been to follow the general distinction between two categories of offences:

- (a) **Pure** offences: Acts criminalized solely due to their political/military/religious/racial nature. These offences do not have any ordinary-law element. They are usually directed against the State and exclusively affect the public interest and cause only public wrong.¹¹
- (b) **Relative** offences: Acts that also contain ordinary-law elements, and therefore also affect private interests and causing, at least in part, a private wrong.¹² Such offences are analysed on the basis of the predominance test.

General Assembly resolutions such as AGN/53/RES/7 (1984) listed a number of examples of pure offences - e.g. treason and espionage - that by their very nature fall within Article 3.

Nonetheless, the Article 3 Working Group, established in 2003, correctly concluded that the list may not be up to date and that it would be impractical to adopt an exhaustive list of pure offences.¹³

Also noteworthy is that the practice of the Organization indicates that the charges as provided in requests for police co-operation may not necessarily reflect the true nature of the offence and could therefore not serve as the sole basis for determining that a given request falls under Article 3.¹⁴

Thus, while the distinction between pure and relative offences still applies, each request that raises a doubt concerning its conformity with Article 3 will require an assessment on a case-by-case basis. Such review should focus, in particular, on the underlying facts supporting the request.

In addition, considering that Article 3 refers to the "character" of the relevant activity, elements other than the nature of the offence ought to be taken into consideration, particularly in light of Resolution AGN/53/RES/7 (1984), which provided that "Each case has to be examined separately, with due consideration for the specific context."

Accordingly, for the purpose of assessing whether an item of information has been processed in conformity with Article 3, the General Assembly adopted an implementing rule¹⁵ which requires that all relevant information be examined, including the following:

- (a) The nature of the offence, namely the charges and the underlying facts
- (b) The status of the persons concerned
- (c) The identity of the source of the information
- (d) The position expressed by a Member or authorized international entities other than the source of the information

¹⁰ A political offence, as understood in inter-State extradition practice, is one which has been criminalized due to its political content or implications. A military offence is one which has been criminalized due to its implications for national security or military matters. According to Article 3 of the UN Model Treaty on Extradition, extradition shall not be granted: "(a) If the offence for which extradition is requested is regarded by the requested State as an offence of a political nature;" and "(c) If the offence for which extradition is requested is an offence under military law, which is not also an offence under ordinary criminal law."

¹¹ See M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (fifth edition), p. 660 - 662.

¹² *Idem*.

¹³ See doc CE-2005-2-DOC-22.

¹⁴ See, in this connection, the 1994 Report adopted by Resolution AGN/63/RES/9, which underscores that "the question of predominance has to be settled by examining the facts, even if, as the 1951 Resolution says, "in the requesting country the facts amount to an offence against the ordinary law."

¹⁵ See Article 40 of the Implementing Rules for the Rules on the Processing of Information for the Purposes of International Police Co-operation, adopted by Resolution No. AG-2008-RES-14.

- (e) The obligations under international law
- (f) The implications on the neutrality of the Organization
- (g) The general context of the case.

The need to evaluate "all relevant information", and the types of information listed in the implementing rule, represent a comprehensive interpretative approach. Moreover, this approach provides for – indeed requires – the examination and consideration of pertinent facts beyond those explicitly supplied in the request for police co-operation, such as information concerning the background for the request or how it relates to other requests. Thus, for example, it might be relevant to assess a red notice request together with similar requests concerning other individuals wanted by the same country, or to consider the fact that those similar requests have been denied in the past.

The examples below show how the criteria set out in the implementing rule may be relevant, taken either in isolation or in combination:

- **Scenario A:** If NCB X seeks the arrest with a view to extradition of person Y on a charge of "treason" and the summary of facts states that the individual gave military secrets to the enemy, the Organization would usually conclude, on the basis of the first element listed (nature of the offence) that Article 3 applies. The rationale for such a determination is that this act is considered to be a pure political crime in extradition practice.
- **Scenario B:** If NCB X seeks the arrest with a view to extradition of person Y on a charge of "undermining State security" and the summary of facts states that the individual has participated in the bombing of a religious site and caused the death of a number of civilians, the Organization would usually conclude, also on the basis of the first element listed (nature of the offence) that Article 3 does not apply in this case. The rationale for such a determination is that the information relates to an offence which is predominantly an ordinary law crime, since the seriousness of the crime and the status of the victims prevail here over the political or religious motivation of the individual (application of the predominance theory introduced in General Assembly Resolution AGN/20/RES/11 (1951) and developed by General Assembly Resolution AGN/53/RES/7 (1984)).
- **Scenario C:** If NCB X seeks the arrest with a view to extradition of person Y on a charge of "murder" and the summary of facts states that the individual is the current president of another country, the Organization would usually conclude, on the basis of other elements identified (status of the person involved and obligations under international law), that Article 3 applies. The rationale for such a determination is that under international law, and as reflected in the Yerodia case before the International Court of Justice, Heads of State benefit from immunity while in office and cannot therefore be prosecuted before national courts of another country during that time.
- **Scenario D:** If an international tribunal such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) requests the publication of a red notice for person Y on a charge of "genocide", the Organization would usually conclude, on the basis of another element (identity of the source of information) that Article 3 does not apply unless there is any specific doubt in relation to a particular item of information. The rationale for such a determination is the independence of the International Tribunal and its status under international law (e.g. in the case of ICTY, the fact that it was established by the United Nations Security Council acting under Chapter VII of the United Nations Charter), which guarantees its political neutrality, combined with the nature of the offence (element 1) as serious international crimes [see General Assembly Report AGN/63/RAP/13 (1994) adopted by Resolution AGN/63/RES/9].
- **Scenario E:** If NCB X seeks the arrest with a view to extradition of person Y, a national of country Z, on a charge of "war crime", and country Z protests against the publication of the

notice, arguing that it is a political case, the Organization may conclude, on the basis of another element (position expressed by a member country other than the source of the information) that Article 3 applies. The rationale for such a determination will depend on the specific arguments raised in the particular case, such as political elements identified by country Z.

- **Scenario F:** If NCB X seeks the arrest with a view to extradition of person Y on a charge of "exporting controlled commodities without a licence" and the summary of facts states that the products illegally exported had both civilian and military applications, particularly in the case of nuclear weapons, the Organization would usually conclude, on the basis of another element (obligations under international law) that Article 3 does not apply. The rationale for such a determination is that the international community, by means of various international instruments, has undertaken to effectively control and combat the illegal transfer of weapons and dual-use goods/technology that pose a particular risk to international security (e.g. United Nations Security Council Resolution S/RES/1540 adopted under Chapter VII of the United Nations Charter, calling upon States to "adopt and enforce appropriate effective laws which prohibit any non-State actor to [*sic*] manufacture, acquire ... nuclear, chemical or biological weapons ...").

Information on such illegal transfers would thus not be considered to be of a predominantly political or military character by virtue of the above obligations under international law.

- **Scenario G:** If NCB X seeks the arrest with a view to extradition of person Y for a terrorist act committed in the country of NCB X by secret agents of country Z, and country Z has recognized its responsibility in the matter and negotiates with country X the consequences of such responsibility under international law, the Organization may conclude, on the basis of another element (implications regarding the neutrality of the Organization) that Article 3 applies. The rationale for such a determination would be similar to the solution adopted in the Rainbow Warrior case, where the Organization ceased to co-operate further once the dispute became a matter for negotiation and settlement by the two States involved under international law, with appropriate compensation for the damage caused to property and for the injuries to persons.
- **Scenario H:** If NCB X seeks the arrest with a view to extradition of a person wanted for murder and the summary of facts states that the individual was the pilot of an aircraft in country Y's air force, which bombed an area occupied by soldiers belonging to country X, resulting in the deaths of soldiers of country X, the Organization would usually conclude, on the basis of another element (general context of the case) that Article 3 applies. The rationale for such a determination is that although the crime (murder) is considered to be an ordinary law crime, the underlying facts and the general context of the armed conflict mean that the case falls within the scope of Article 3.¹⁶

In conclusion, an Article 3 review requires an assessment of a variety of elements based on the facts provided in a given case, taking into consideration the general principles discussed above. The application of those general principles in analysing certain requests for police co-operation, which raise doubts as to their conformity with Article 3 based on similar grounds, is discussed below.

¹⁶ Note: If the act committed is considered a serious international crime or if the attack by country Y was against a United Nations peacekeeping operation, such elements may "tip the balance" towards the non-application of Article 3.

3. SUBJECT-MATTER ANALYSIS

3.1 OFFENCES COMMITTED BY POLITICIANS/FORMER POLITICIANS

The question - May information be processed about politicians/former politicians?

Background

INTERPOL's position concerning the application of Article 3 in cases concerning politicians or former politicians has evolved over the years. Resolution AGN/53/RES/7 (1984) distinguished between offences committed by such individuals in connection with their political activities, on the one hand, and offences committed in their private capacity, on the other. The Resolution concluded that the former case is covered by Article 3. General Assembly Report AGN/63/RAP/13, adopted by Resolution AGN/63/RES/9 (1994), concluded differently: it found that the 1984 Resolution was based on a faulty concept and that "offences committed by politicians must therefore be assessed to determine whether the political or the ordinary criminal law aspect is predominant, in the same way as offences committed by other people."

The latter position has been applied in INTERPOL practice since 1994. Each case is therefore examined on its merits, similar to other cases where political elements exist. However, considering that the involvement of politicians or former politicians may raise questions concerning relations between the Organization's member countries, a distinction should be made between two scenarios:

Scenario A: Politicians/former politicians wanted by their own countries

Scenario B: Politicians/former politicians wanted by other countries

Current Practice

Scenario A - Politicians/former politicians wanted by their own countries

In general, and as indicated, these cases are evaluated in the same way as other cases, namely by applying the predominance doctrine. However, two points may require consideration:

- 1) The individual may enjoy immunity from prosecution in his/her own country (e.g. due to an amnesty law). If such a doubt arises (e.g. on the basis of open-source information), the requesting NCB may be required to clarify the matter.¹⁷
- 2) The individual may have committed the acts in the exercise of his/her political mandate. A failure by politicians to comply with administrative or political procedures would generally not be considered as an ordinary-law crime. Accordingly, the requesting NCB may be required to provide evidence, such as personal gain by the individual, that the offence comes under ordinary law.
- 3) The general context of the case may provide an indication that the request is politically motivated, for example following a coup d'état in the requesting country.

Scenario B - Politicians/former politicians wanted by other countries

This scenario may raise a number of difficulties such as possible application of immunity under international law. In application of the principles enumerated in the ICJ Yerodia case,¹⁸ and based on INTERPOL practice, the following criteria are to be examined: (1) The position of the wanted person. Here, a general distinction is made between Head of State/Government and Minister of Foreign Affairs, on the one hand, and other State officials on the other. In general, only the former enjoy full immunity under international law;¹⁹ (2) Whether the person is currently in office; (3) The

¹⁷ It should be noted that amnesties that purport to apply to war crimes, genocide, crimes against humanity or gross violations of human rights may be considered invalid under international law.

¹⁸ International Court of Justice, Arrest Warrant Case (Congo v. Belgium), 2002.

¹⁹ Note that other forms of immunity may be relevant (e.g. diplomatic immunity of ambassadors).

identity of the source of information, i.e. whether it was an NCB or an international tribunal (in the latter case, the individual may not enjoy immunity under international law);²⁰ (4) Whether the country where the individual served as a politician objects to the processing of information.

Examples

Scenario A - Politicians/former politicians wanted by their own countries

Case 1: Diffusion about an individual who was the wife of the country's former President. She was also the president and founder of a political party. She was wanted for unlawful intervention in the assignment of an apartment that resulted in financial prejudice to the government. It was concluded that this charge was of an ordinary-law nature and that the information could be recorded since, apart from the circumstances of marriage to the former President, there was nothing in the file to suggest that the case was political.

Case 2: A red notice was published at the request of an NCB for the former President of the country on charges of corruption and illicit enrichment. It was concluded that the individual had committed the offence not for political gain but rather to personally enrich himself, hence publication was approved.

Case 3: A red notice was published at the request of an NCB for "embezzlement". In his capacity as former minister of energy, the individual had concluded a contract without the authority to do so. The NCB was therefore requested to provide information showing personal gain or other elements of ordinary-law crimes.

Case 4: A red notice was published for an individual charged with "misappropriation". While serving as president of the country, he had issued an emergency decree in order to award a contract without putting it out to tender. In response to a request by OLA for further information, the NCB indicated that the individual had personally benefitted from the illegal activities as the excess charges in the contract amounted to several million dollars. The red notice was published.

Scenario B - Politicians/former politicians wanted by other countries

Case 1: A red notice was published for an individual, a former President of another country, charged with terrorism, homicide, and kidnapping. Considering that no protest was made by the other country, publication was approved.

Case 2: Diffusions sent by an NCB concerning former high officials of four other governments. The individuals were charged with serious crimes, such as murder of citizens of the country that issued the diffusion. These crimes took place in the context of an operation which was carried out against political dissidents by the regimes of the four countries. It was concluded that there was a priori no legal impediment to the information being recorded. Yet, considering that a number of the wanted persons at the time held positions of Head of State or Minister of Foreign Affairs, the NCBs of the countries concerned were requested to notify the General Secretariat within two weeks as to whether they objected to the information being recorded. Since no objections were raised, the information was recorded in INTERPOL's databases.

²⁰ However note that this may require discussion of the status and rules of the particular international tribunal (e.g. established by the UNSC under Chapter VII of the UN Charter).

3.2 OFFENCES CONCERNING FREEDOM OF EXPRESSION

The question - May information be processed about an individual who is charged with offences concerning freedom of expression?

Background

Offences related to freedom of expression require assessment in light of Article 3 and also in view of the possible application of international human rights standards in the context of Article 2(1) of the Constitution (the “spirit of the Universal Declaration of Human Rights”).²¹

However, the right to freedom of expression is not an absolute right and may be subject to certain necessary restrictions provided for under the law, including those required for the protection of national security, public order, public health, or public morality.²² Accordingly, processing of information will generally be permitted where the forbidden speech amounts to hate speech (e.g. distribution of neo-Nazi propaganda)²³ or incitement to violence.²⁴ It is also noteworthy that the imposition of restrictions on the right to freedom of expression will generally require a close link to be established between the alleged incitement and the risk of ensuing violence.

The conclusion of the assessment may vary depending on the object/target of the “illegal speech” as in the following scenarios:

Scenario A - The “illegal speech/statement” is directed at the State, State officials and/or State institutions.

Scenario B - The “illegal speech/statement” is directed at private individuals or non-political/non-State entities.

Current Practice

Scenario A - The “illegal speech/statement” is directed at the State, State officials and/or State institutions, the general rule is that Article 3 will apply. Resolution AGN/53/RES/7 (1984) states that offences concerning “[the] expression of certain prohibited opinions” and “insulting the authorities” are among those that by their very nature fall within the scope of Article 3.

A decision not to enable the processing of information in such cases may be based also on the fundamental right to freedom of expression, protected under the Universal Declaration of Human Rights (UDHR) and other international human rights instruments, while bearing in mind the possible restrictions on this right as mentioned above.

Scenario B - The “illegal speech/statement” is directed at private individuals or non-political/non-State entities, and where it is apparent that the individual does not have a

²¹ See article 19 of the UDHR and cf article 19(2) of the International Covenant on Civil and Political Rights (ICCPR).

²² See article 19(3) of the ICCPR.

²³ This conforms to international standards against racial discrimination – see Article 4 of the 1965 Convention on the Elimination of Racial Discrimination. In a case brought before the European Court of Human Rights (Lehideux and Isorni v. France, ECHR, Judgement of 23 September 1998), the Court found that negation or revision of clearly established historical facts – such as the Holocaust – is not protected by the right to freedom of expression enshrined by Article 10 of the European Convention on Human Rights. The Court stated that “[T]here is no doubt that...the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded by Article 10.”

²⁴ See, for example, Article 5 of the 2005 Council of Europe Convention on the Prevention of Terrorism, according to which “public provocation to commit a terrorist offence” should be criminalized by Member States. Such “public provocation” is defined as: “The distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.” UN Security Council Resolution 1624 (2005) calls upon States to prohibit and prevent incitement to commit terrorist acts.

political motive in making the speech, the “illegal speech/statement” in question would generally not fall within the scope of Article 3 or be in violation of the UDHR.²⁵

Examples

Illegal speech against a former president of the requesting State (Scenario A)

A diffusion was issued for the offence of "insulting the former President of the State." The information was not registered in INTERPOL's databases since the charge was considered a pure political crime within the meaning of Article 3.

Criminal defamation (Scenario B)

A diffusion issued for an individual for "criminal defamation" against "a mayor of a town." The information was registered since the court decision determined that the statements were not directed against the State or its institutions (a mayor is not considered as a State official). As no other political elements were identified, it was concluded that the case fell outside the scope of Article 3.

3.3 OFFENCES CONCERNING FREEDOM OF ASSEMBLY

The question - May information be processed about an individual who is charged with offences relating to the right of freedom of assembly?

Background

Offences relating to the right of freedom of assembly need to be assessed in the light of Article 3 and also in view of the possible application of international human rights standards in the context of Article 2(1) of the Constitution (the “spirit of the Universal Declaration of Human Rights”). Indeed, in accordance with international human rights law, everyone has the right to take part freely in peaceful assembly.²⁶

However, the right of freedom of assembly is not an absolute right and may be subject to certain necessary restrictions provided for under the law, including those required for the protection of national security, public order, public health or morals and the protection of the rights and freedoms of others.²⁷

Consequently, it cannot be assumed that offences committed in such a context are justified on the basis of a claim to the right to freedom of assembly. It is emphasized that the right protected refers to *peaceful* assembly, and the commission of ordinary-law offences cannot be considered to be “peaceful” in this sense. In addition, an individual’s right to freedom of assembly does not extend to the infringement of the rights of other individuals, as indicated by the possibility to restrict this right for the protection of the rights and freedoms of others. Thus, preventing others from entering an election tent, for example, cannot be seen as a natural and permissible exercise of this right, since it interferes with other individuals’ rights to vote or take part in government.

Current practice

Frequently, offences relating to the freedom of assembly occur in the context of elections or other political unrest.²⁸ The predominance test will have to be applied where there are elements of both

²⁵ A restriction on freedom of expression is sanctioned under international human rights law “for respect of the rights or reputations of others” [Article 19(3) of ICCPR]. Accordingly, criminal defamation does not a priori violate the right to freedom of expression.

²⁶ See Article 20 of the UDHR; Article 21 of the ICCPR; Article 11 of the European Convention on Human Rights (ECHR); and Article 15 of the American Convention on Human Rights (ACHR).

²⁷ Article 21 of the ICCPR; Article 11(2) of the ECHR; Article 15 of the ACHR.

²⁸ In accordance with Articles 18, 19 and 22 of the ICCPR, provision is made for religious and family assemblies, and assemblies of associations. Offences which occur during any such assembly will be assessed in the same way as the more common political assemblies.

a political nature (e.g. where the incident occurs in the context of unrest surrounding an election) and an ordinary-law crime nature (e.g. offence of assaulting a police officer).

Inter-State extradition practice has held that the political offence exception in such situations would only excuse such an ordinary-law crime incident if the alleged offence was committed “in furtherance” of the individual’s political objective, which in turn should be legitimate in nature.²⁹ Moreover, State practice in this regard has consistently held that the political offence exception would only allow justification of an offence in such a context if the methods employed by the individual in furtherance of his political objective were proportionate in nature to the offence committed. For example, the infringement of private rights is only justifiable by reference to a sufficiently important or urgent political objective, as judged through the eyes of a reasonable person in the position of the offender.³⁰

INTERPOL’s current practice is therefore to examine the facts of the particular request for police co-operation to determine the predominant nature of the case, taking into account the above principles and the need to strike a balance between, on the one hand, the rights of the individuals concerned – namely the right of freedom of assembly – and, on the other hand, the right to life and similar rights.

Examples

Case 1 - Diffusions were sent by an NCB. Two individuals in a group, acting “with the aim to impede [the] election campaign”, used obscene words and “struck blows by feet and hands to different parts of body” against activists from a different political faction, and destroyed a tent being used as a polling station. It could not be said that the individuals’ political objectives could not have been achieved in a non-violent fashion. The infliction of personal injury and the destruction of property as ordinary crimes are therefore disproportionate to the individuals’ political aims, and are predominantly of an ordinary-law nature. The information was therefore retained.

Case 2 - A diffusion was sent by an NCB. The individual concerned was in a group of people who injured three journalists with the intention of preventing them from entering a polling station. Attacking journalists can in no way be seen as being “in furtherance” of the individual’s political objective, nor can it be seen as proportionate to the individual’s support of a political party. The acts of hooliganism allegedly committed by the individuals undermined the right of others to participate in free and fair elections. The information was therefore retained.

Case 3 - A diffusion was sent by an NCB, seeking the arrest of two individuals on a charge of “mass disorder.” According to the information provided, the individuals were involved in the organization of violent mass riots which took place as part of a political dispute surrounding national elections. The riots involved homicide, arson, use of firearms against public agents, and other serious violations of public order, resulting in 10 deaths including the deaths of two police officers. The individuals charged were supporters of the political opposition. In addition, the first individual was a Member of the National Assembly at the time. In keeping with INTERPOL’S practice, the organization of mass riots that resulted in violence, casualties and serious damage to property could not be justified by claiming a right to freedom of assembly or expression. The information was therefore retained.

²⁹ In re Castioni [1891] 1 QB 149 (1890).

³⁰ Ktir case 34 ILR 143 (Federal Tribunal 1961, Switzerland).

3.4 OFFENCES AGAINST THE SECURITY OF THE STATE

The question -May information be processed about a person wanted for offences committed against the security of the State?

Background

Offences committed against the internal or external security of the State, such as the offences of treason, sedition, and espionage, have traditionally been viewed as pure political offences under extradition law.³¹ INTERPOL has therefore consistently considered such crimes to fall within the scope of Article 3 of the Constitution.³²

Current practice

As a general rule, and in accordance with INTERPOL's practice, information related to cases of offence against the security of the State may not be processed via the Organization's channels. Nonetheless, analysis on a case-by-case basis is required to ascertain that the facts of the case are purely political in nature.

Indeed, INTERPOL's practice shows that, while in a requesting country an offence may be defined as "espionage" or "act against the security of the State", the facts of the particular case may include aspects of ordinary-law crime – such as violence against persons or property – which may lead to a conclusion that the case is of a predominantly ordinary-law nature within the context of Article 3.

Examples

Pure political offence: treason/espionage/disclosure of government secrets

Case 1: A diffusion issued by an NCB, seeking the arrest of the individual for "treason in a particularly aggravated case". The individual worked in the department of counterespionage and eventually became the head of the group handling the country's intelligence services. He was suspected of disclosing information regarded as State secrets, which should have been kept secret to avoid the risk of causing severe damage "to the external security of the country". It was decided not to register the information in INTERPOL's databases since the crime was considered a pure political offence.

Case 2: A diffusion issued by an NCB, seeking the arrest of a national of another country, for "high treason". By using publicly accessible websites, he "fomented agitation within the country", which included urging his country's government to invade the country. It was concluded that the case was purely political within the meaning of Article 3, considering the nature of the offence, and that the relevant penal provision and facts indicated that the crime was committed against the security of the country and did not involve harm to individuals or property. This conclusion was further supported by the protest submitted by the individual's country of nationality (arguing that the case was political), and by open-source reports, according to which international organizations of a political nature were paying special attention to the case. It was therefore decided not to register the information.

Case 3: A diffusion issued by an NCB, seeking the arrest of an individual for "disclosure of government secrets". As a member of a military unit in the country, he took keys used for encrypting and decrypting messages and tried to sell them for money to foreign entities. It was determined that the case was of a purely political nature within the meaning of Article 3. The fact that the individual requested a monetary reward did not affect the political nature of the case since

³¹ See M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (Fifth edition), p. 660.

³² Resolution AGN/53/RES/7 (1984); Resolution AGN/63/RES/9 (1994).

crimes such as treason and espionage are often conducted for pecuniary gain. Accordingly, the information was not registered.

Case 4: A red notice request sent by an NCB. The individual was alleged to have engaged in espionage. As a former high-ranking official, he disclosed classified information on subjects likely to affect the security and foreign relations of the country. He then fled the country using a false passport provided by an official of another country. It was concluded that the case was of a purely political nature and thus fell within the scope of Article 3. Accordingly, the red notice was not published.

Case 5: A red notice request sent by an NCB. The individual was charged with espionage. According to the facts, the individual - a national of another country - was alleged to have revealed State secrets concerning the requesting country, as well as confidential information about international organizations affiliated with that country. It was concluded that the charge and facts provided were of a purely political nature. The case therefore fell under Article 3 and the red notice was not published.

3.5 OFFENCES COMMITTED IN THE CONTEXT OF AN UNCONSTITUTIONAL SEIZURE OF POWER

The question - May information concerning offences committed in the context of an unconstitutional seizure of power be processed?

Background

The unconstitutional seizure of power is generally not recognized as legitimate in nature, and nor is any de facto government established thereunder. An unconstitutional seizure of power contravenes, *inter alia*, established principles of international human rights. Thus, for example, Article 21(3) of the UDHR states that “[t]he will of the people shall be the basis of the authority of the government; this will shall be expressed in periodic and genuine elections...”³³ An unconstitutional seizure of power may therefore lead to certain measures being taken against the country concerned and against the de facto government that resulted from the seizure, and may also lead to criminal proceedings against the individuals involved in such acts.³⁴

In the context of processing of information through INTERPOL channels, the Organization's involvement in cases related to the unconstitutional seizure of power poses challenges vis-à-vis compliance with Article 3 of the Constitution.³⁵ Firstly, the crimes allegedly committed in such situations necessarily include political (and possibly also military) elements; secondly, the Organization's channels might be inappropriately used to persecute individuals; and thirdly, the processing of information might lead to an undesired involvement of the Organization in the domestic politics of the country concerned or its relationships with other countries.

³³ Most regional and universal human rights instruments contain a similar provision including: ICCPR: Art 25; ECHR: Protocol 1, Art 3.

³⁴ See, for example, Article 25(5) of the African Charter on Democracy, Elections and Governance: “Perpetrators of unconstitutional change of government may also be tried before the competent court of the Union.” Article 23 of that Charter defines an “unconstitutional change of government” as follows:

1. Any putsch or coup d'état against a democratically elected government.
2. Any intervention by mercenaries to replace a democratically elected government.
3. Any replacement of a democratically elected government by armed dissidents or rebels.
4. Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections; or
5. Any amendment or revisions of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.

³⁵ Note that situations of unconstitutional seizure of power present a number of difficulties outside the scope of Article 3, for example which government should be deemed to be the valid government for the purposes of participation in INTERPOL's activities. This note, however, will focus only on the aspects concerning the application of Article 3 to such situations in the context of processing of information.

For the above reasons, INTERPOL's practice has generally been to forbid the use of the Organization's channels for the circulation of requests for police co-operation related to acts committed in the context of an unconstitutional seizure of power. Such cases may include requests against individuals in the following cases:

Scenario A: individuals related to the ousted government, for example members of a government in exile, sought by the *de facto* government following the unconstitutional seizure of power.

Scenario B: individuals involved in a failed attempt to bring about an unconstitutional seizure of power, sought by the government that they attempted to oust for their involvement in the failed attempt

Scenario C: individuals who belonged to the *de facto* government, once the original government has been reinstated

Scenario D: individuals involved in a failed attempt to bring about an unconstitutional seizure of power, where another country seeks to process information concerning their involvement in the failed attempt.

Current practice

In light of the risks involved to the Organization and the difficulties mentioned with regard to Article 3, the above scenarios will generally lead to the same result, namely the application of Article 3. Indeed, requests concerning individuals involved in the above scenarios will frequently be considered to be purely political since they relate to offences against the internal and external security of the State;³⁶ they can be used for the purpose of political persecution of the individuals concerned (e.g. the ousted president of the country); or they otherwise pose a risk of compromising the Organization's political neutrality.

That being said, in accordance with INTERPOL's rules and practice, all requests have to be examined on a case-by-case basis to identify whether elements of ordinary law crime exist and, if so, whether the case has a predominantly ordinary law nature. In particular, when the acts of the individuals caused harm to other individuals or damage to property, the case will need to be considered by applying the predominance test.

Examples

Scenario A:

Case 1 - An NCB sent a diffusion and red notice request for its former President who had been ousted from power in a military coup. The request was sent immediately following the coup and was based on allegations of misuse of authority, usurpation of public functions, offences against the system of government and treason. OLA concluded that: (1) "crimes against the system of government" concerned the constitutional order of the country, were directly related to his position, and affected only the public interest, and were thus official acts of the President; (2) treason is a pure political offence under INTERPOL's rules and international extradition law; and (3) the general context of the case, including the civil unrest in the country as a result of the coup and the inherent political element by virtue of the involvement of the international community (e.g. the UN), could jeopardize INTERPOL's independence and neutrality.

The red notice was not issued and the information was not registered.

Scenario B:

Case 1 - An NCB sent the General Secretariat a request for assistance, requesting information about six individuals who were alleged to have been involved in a plot to commit a coup d'état, as

³⁶ See Resolution AGN/53/RES/7 (1984). See also discussion on offences concerning the security of the State.

well as information concerning the event itself. It was concluded that, as the alleged facts centered on a planned coup d'état and as the individuals in questions were considered by the NCB to be acting in preparation for a coup d'état, it followed that the case was of a clearly political nature. Accordingly, it was concluded that the request fell within Article 3 and the requested assistance was refused.

Case 2 - Red notice requests were received in relation to five individuals for being "involved in destruction toward the security and stability of this State." Open source information revealed that the cases seemed to be related to an attempted coup d'état. Additional similar requests were later made. It was determined that the facts pointed toward an attempted coup d'état without any clear allegations relating to acts directed against the life or freedom of individuals or against property, and that the individuals sought were considered by the NCB to have participated in the preparation of a coup d'état. It was therefore concluded that the alleged offence was of political nature and that as such the request for co-operation was incompatible with Article 3.

Case 3 - An NCB issued diffusions concerning three individuals who were alleged to have committed offences against the constitutional order and the existence of the State in question, by attacking the national Parliament. Based on information obtained from open sources, it was confirmed that the diffusions concerned an attempted coup d'état. It was determined that the alleged facts did not set forth any allegations against the life or freedom of individuals or against property, and instead concerned only an attack against the constitutional order of the State. On this basis it was concluded that the diffusions concerned an attack of a political nature, and that as such the case fell under Article 3.

Case 4 - An NCB issued a diffusion concerning an individual alleged to have concealed information about a conspiracy to commit a coup d'état. The subject was wanted for "involvement in overthrowing the constitutional formation» and was alleged to have committed the offence by knowing about, actively hiding, and failing to inform law enforcement about an overthrow of the constitutional formation. It was concluded that the facts provided by the NCB, and the arrest warrant relating thereto, did not refer to allegations concerning offences against the life or freedom of individuals, or against property, and hence there was no indication that the subject was being accused of an ordinary law crime. The offence was therefore purely political and the diffusion was considered to be in violation of Article 3.

Scenario C:

Case 1 - A diffusion was issued concerning 32 people based on charges of murder and armed rebellion. Some of the subjects of the diffusion were militants, but the list also included the former head of the *de facto* government that seized power following the coup d'état. It was concluded, particularly in light of the fact that those accused included a former head of state, that the case was a priori political and military and as such fell under Article 3.

Case 2 - An NCB issued a diffusion based on allegations which contained both political and non-political elements. The person was wanted for "illegal capture of power by means of armed attack," which appeared to be equivalent to a coup d'état. The statement of facts also indicated that the then Prime Minister of the country was involved in the incident, and that he had "forged statements and statutes," but his involvement was not further clarified. The arrest warrant, however, referred to: "creation of illegal armed formation or groups" and "illegal making, forging, sale, acquisition or use of official documents, stamps, seals, and blanks." It was concluded that, as the NCB did not allege facts that showed an offence against individuals or property, and since the primary allegation was "illegal capture of power by means of armed attack," the case was predominantly political.

Scenario D:

Case 1 - An NCB sent a message to the General Secretariat regarding a person alleged to have taken “an active part in attempted coup d’état,” in another country and enquiring as to “whether he is sought by INTERPOL.” It was concluded that, because the facts focused exclusively on a coup d’état, the request fell squarely under Article 3 as political.

Case 2 - An NCB (A) sent a request to another NCB (B) for mutual legal assistance, with a copy to the General Secretariat. The request concerned a person who had been interrogated in State A in relation to allegations of an attempted coup d’état against the President of State B five years earlier. In analysing the request, it was noted that the judicial authorities in State A, which had jurisdiction as a result of the subject’s nationality, had reviewed the facts and categorized them as ordinary law crimes, basing the arrest on acts related to organized criminal activity under the penal code of State A. Moreover, the elements of the request for assistance in question, namely the nature of the investigation in State B and information about the individual related to State C, supported the inherent criminal intent in the allegations against the subject. Based on these facts, it was concluded that the ordinary law element was predominant and that the use of INTERPOL’s channels for this request for mutual legal assistance did not fall under Article 3 and was therefore permissible.

3.6 MEMBERSHIP IN A TERRORIST ORGANIZATION

The question - May information be processed about a person solely on the basis of the charge of membership in a terrorist organization?

Background

In the past, this crime was considered to fall under Article 3 based on Resolution AGN/53/RES/7 (1984). In the aftermath of the terrorist attacks of 11 September 2001, however, member countries sought to reconsider this approach. Accordingly, in a circular dated 17 March 2003, the Secretary General indicated that a solution had been found within the framework of Article 3 to enable the processing of information in such cases upon the fulfilment of certain elements. In 2004, the Executive Committee approved the change in the application of Resolution AGN/53/RES/7 in that field (Document CE-2004-1-DOC-13), and the new approach enabling co-operation under certain conditions was later endorsed by the General Assembly (Resolution AG-2004-RES-18).

It should be noted that the terms “terrorist” and “terrorism” lack the benefits of an international legal definition and concerns have been raised (by United Nations human rights mechanisms *inter alia*) that they have sometimes been applied improperly to certain acts and organizations, for political purposes. In accordance with international law, reference may therefore be made to the various international counterterrorism conventions on the matter, which, collectively, are considered to go some way to providing a definition of the crime.

Current practice

According to the practice developed and approved by the above 2004 Resolution, the source of information is required to provide evidence to demonstrate:

- (1) **The terrorist nature of the organization:** This element requires the source to indicate the involvement of the said organization in terrorist acts.

Notes:

1. A decision by the General Secretariat that this requirement was met may not be considered as a legal determination of INTERPOL that a given organization is indeed a terrorist organization.

2. In accordance with Document CE-2004-1-DOC-13, no separate proof would be required if the particular group was included in a list issued by a recognized international entity such as the United Nations. Listing by a regional organization such as the European Union may be taken into consideration together with other available information.
3. To determine an organization's "terrorist" nature, an internal practice has been developed, according to which OLA may consult EDPS/SCA/PST when insufficient information has been provided by the source.

(2) The individual's active and meaningful involvement in the said organization: The source is required to provide evidence to demonstrate that the individual's involvement exceeds a mere general support of the political goals of the terrorist organization. Examples of active and meaningful involvement are: recruitment of individuals for the activities of the organization; training in terrorist camps; providing shelter to individuals involved in terrorist activities; and the circulation of materials supporting the terrorist activities of a given organization.

Examples

Active and meaningful link

Red Notices were published where sufficient information was provided to show an individual's active and meaningful link to a recognized terrorist organization. The acts included:

Case 1: Providing accommodation to members of the terrorist organization and planning of meetings.

Case 2: The individual's training courses, his role with the organization, and dates, places, and names of victims of attacks carried out upon the individual's instructions.

Case 3: Distribution of magazines containing specific instructions from the terrorist organization's central committee to members of the organization.

Lack of active and meaningful link

A red Notice was not published as the only facts provided indicated that the individual was wanted for the preparation and distribution of flyers containing the slogan of the terrorist organization. It was determined that this was insufficient to constitute an active and meaningful link between him and the terrorist organization.

3.7 EMBARGO/SANCTIONS CASES

The question: May information be processed when the offence concerns a violation of an embargo law?

Background

An embargo is a prohibition on trade with a specific country in all or certain specific products. For the purposes of analysis of Article 3, a distinction may be made between two types of embargo: (1) "**UN Embargo/sanctions**" – an embargo imposed by a country in implementation of a United Nations Security Council Resolution acting under Chapter VII of the UN Charter; (2) "**Other International/Regional/Unilateral Embargo/sanctions**" – an embargo imposed by a country in implementation of a decision of another international organization (e.g. the EU) or unilaterally by that country.

Current practice

- (1) **UN embargo/sanctions:** A UN embargo represents the stance of the international community vis-à-vis trade with a certain country, and as such a violation will generally not constitute an offence of a political nature covered by Article 3.³⁷ This conclusion also reflects the increased co-operation between INTERPOL and the UN Sanctions Committees.³⁸

Nevertheless, each case should be evaluated independently to ensure that the national implementation of the UNSC Resolution and the particular request comply with INTERPOL's rules.

- (2) **Other embargoes/sanctions:** Unlike UN embargoes, other embargoes may be based on political motives of the prohibiting country. For example, a unilateral embargo may be imposed as a retaliatory measure against the boycotted country.

Each case will have to be examined on its own merits, and will require application of the predominance test in two stages:

Stage 1: Identifying the primary objective of the criminal offence: was it meant to protect the interests of the State as a whole, its political structure or its authorities, as opposed to promoting other public or social interests (e.g. environmental protection) or protecting against private harm? The latter case would generally fall outside Article 3 and stage 2 of the analysis would not need to be applied.

Stage 2: If the primary objective of the criminal offence appears to be of a political nature, the international community's stance on the matter will be analysed to determine whether, despite the ostensibly political nature of the criminal offence, Article 3 does not apply. For example, in the case of weapons and dual-use goods/technology, international documents and State practice clearly show that INTERPOL's member countries have undertaken to effectively control and combat the illegal trade in these products. This obligation reflects the position that illegal trade in these goods is considered to be a serious ordinary-law crime regardless of the existence of political objectives.

Example

Violation of a unilateral embargo

A red notice was published for an individual wanted for conspiring to defraud the government by exporting and attempting to export controlled commodities from the country imposing the embargo to the country that was subject to the embargo without first obtaining the required export licences from the government of the former. It was concluded that, despite the political elements, the case was of a predominantly ordinary-law nature, since the threat posed by the illegal transfer of weapons and dual-use goods/technology has been recognized by the international community, which considers such embargo offences to be ordinary crimes regardless of any underlying political motive.

3.8 ELECTION CRIMES

The question - May information be processed when the crimes committed took place in the context of national or municipal elections?

Background

For the purposes of Article 3 analysis, "**election crimes**" mean crimes conducted with a view to influencing, directly or indirectly, the outcome of national or municipal elections. As such, they frequently include political elements that require an Article 3 review. A distinction may be made

³⁷ Indeed, the Final Report of the Working Group on Article 3 (CE-2005-2-DOC-22), explicitly mentioned acts prohibited by Chapter VII Resolutions as automatically excluded from Article 3.

³⁸ See INTERPOL's GA Resolutions Nos. AG-2005-RES-05, AG-2006-RES-22 and AG-2009-RES-15.

between two categories of election crimes: (1) Election crimes of a "**mixed nature**", namely where an ordinary-law crime was committed in the context of elections; (2) "**Pure election crimes**", namely, where the crime does not contain elements of another typical ordinary-law crime.

Current practice

- (1) Election crimes of "**mixed nature**" are in fact relative offences and the predominance test should be applied accordingly. For example, where a person was involved in murder with the purpose of creating disorder during elections, the predominance test will clearly lead to the case being considered as of a predominantly ordinary-law nature.
- (2) Examination of **pure election crimes** may be more complex. One example is a case where valid election ballots are intentionally destroyed to promote a certain candidate.

Nevertheless, the primary objective behind criminalizing election crimes is to protect individual rights, namely the right to vote and be elected in genuine elections. Hence, an infringement of these rights is to be considered a priori as an ordinary-law crime rather than a crime committed against the State as a whole, its national authorities or its constitutional structure. This premise is also supported by the fact that election crimes have not been listed as pure political offences in the context of extradition law. It is also noteworthy that the importance of genuine elections is explicitly mentioned in the UDHR [Article 21(3)], thus providing grounds, in application of Article 2(1) of the Constitution, for INTERPOL's involvement in such cases.

As a general rule, therefore, the nature of election crimes does not call for the application of Article 3. This conclusion does not, however, exclude the need to review such cases in light of Article 3 and the UDHR, in particular in the following instances: (1) Where INTERPOL's political neutrality may be affected; (2) where the alleged crime was committed as part of a lawful protest against the State with no or relatively little harm to persons or property; and (3) where a doubt exists over possible misuse of INTERPOL's channels for the purpose of persecuting political dissidents or improperly influencing the elections process or the elections outcome.

Examples

Election crimes of a mixed nature

Case 1 - Diffusions were sent out for individuals wanted for committing acts of hooliganism during elections. According to the facts provided, the first individual was with others who injured three journalists with the intention of preventing them entering a polling station. The other two individuals were with others who, acting "with the aim to impede [the] election campaign", used obscene words and struck "blows by feet and hands to different parts of body" against activists from a different political faction, and destroyed an election tent. It was concluded that the information should be maintained since, in the context of the ongoing election proceedings, it could not be said that the individuals' political objectives could not have been achieved in a non-violent fashion. The infliction of personal injury and destruction of property as ordinary crimes are therefore disproportionate to the individuals' political aims. Further, the acts of hooliganism undermine the right of others to participate in free and fair elections.

Case 2 - A diffusion was issued for an individual wanted for "complicity in a Mafia-type criminal organization". According to the summary of facts, the individual, as a "national politician", sought agreements with a Mafia-type organization to control the votes for political elections and for other purposes. It was concluded that the information could be registered in light of the above analysis of election crimes and since the connection between the individual and the Mafia demonstrated the ordinary-law nature of the crime. The fact that the individual was a former politician does not change the conclusion, bearing in mind the 1994 Resolution. [See also Offences committed by former politicians].

Pure election crimes

Case 1 - A red notice was published for an individual wanted for election fraud, extortion and abuse of political position. According to the facts provided, he allegedly directed local officials and their subordinates to vote for a particular presidential candidate on the eve of the presidential election. It was concluded that while the alleged illegal act was motivated by political objectives, it was carried out in his private capacity.

Furthermore, despite its political elements, election fraud is recognized as an ordinary-law crime by the majority of INTERPOL member countries.

Case 2: A red notice was published for an individual wanted, *inter alia*, for preventing his subordinates from voting. It was concluded that the red notice could be published in application of the principles identified in an analysis of election crimes (as described in the "current practice" above).

3.9 ILLEGAL EMIGRATION

The question - May information be processed about a person wanted for illegal emigration (e.g. on charges of "illegally leaving the country")?

Background

For the purposes of Article 3 analysis, the offence of illegal emigration is addressed in one of the following scenarios:

Scenario A: It is the only crime committed by the individual.

Scenario B: It is one of the offences committed separately by the individual.

Scenario C: The offence was committed in connection with other offences.

Current Practice

Scenario A - illegal emigration only

In general, processing of information will not be allowed: Although not mentioned as such in GA Resolutions, the Organization has consistently viewed the offence of illegal emigration as a pure political offence since it does not involve any ordinary-law-crime aspects. According to some accounts, the genesis of Article 3 lies in a case for which INTERPOL's channels were used to pursue individuals on charges of illegal emigration. In application of "the spirit of the Universal Declaration of Human Rights" [Article 2(1) of the Constitution], consideration should also be given to a person's right "to leave any country" [Article 13(2), UDHR]³⁹, bearing in mind that this right is not an absolute one and is subject to certain restrictions.

Scenario B - Illegal emigration separate from other offences

Upon reviewing the facts and concluding that the offence of illegal emigration is not interrelated to other offences, the analysis for Scenario A will apply to that offence, while the other offences will be analysed separately [see analysis of "separation of charges"].

Scenario C - Illegal emigration connected to other offences

If an ordinary-law crime is committed in furtherance of, or in connection with, the offence of illegal emigration, separating the charges will not be feasible. In such cases, the overall predominance of the case has to be evaluated in the same way as relative offences, i.e. by examining factors such as the seriousness of the other crime(s) committed.

³⁹ See also Article 5 of the Protocol against the Smuggling of Migrants by Land, Sea, and Air, Supplementing the United Nations Convention against Organized Crime, according to which migrants shall not become liable to criminal prosecution under the Protocol.

Examples

Scenario B - Illegal emigration separate from other offences

Case 1: Two red notices were requested for the charges of "embezzlement", "illegal enrichment", and "illegal emigration". It was concluded that the last offence was not connected to the first two. Accordingly, it was decided to issue the red notices only in connection with the first two offences, which are ordinary-law offences (i.e. "separation of charges"). An explanation concerning the decision of the General Secretariat was added to each notice in the "additional information" section.

Case 2: A diffusion was issued for "illegally leaving the country". OLA enquired about the existence of any accompanying ordinary-law aspects. The NCB replied that the individual had also been sentenced following a breach of a business agreement. It was concluded that information could not be registered because the alleged ordinary-law crime that accompanied the offence of illegal emigration falls outside Article 2 of the Constitution.

Case 3: A red notice was issued for an individual only for the offences of deception, swindling, fraud and soothsaying as they are considered to be ordinary-law crimes. Information was not published with respect to the offence of illegal emigration as it is considered to be a pure political offence. A caveat was added to the notice indicating the non-registration of the offence of illegal emigration.

Scenario C - Illegal emigration connected to other offences

Case 1: Two red notices were not issued because, firstly, the offence of illegal emigration is a purely political one and the offence of "personating and abetment" was committed in furtherance of, and to facilitate, the commission of the former offence.

Applying the predominance test, OLA concluded that this case was predominately political in character and the offence of "personating and abetment" did not tip the balance in favour of publication as it is not considered a serious crime (i.e. there was no damage to persons or property).

Case 2: A red notice was published for "participation in an illegal organization", "illegal crossing of state borders" and "mercenary activities". It was concluded that the offence of "illegal crossing of state borders" was committed in connection with, and to engage in, terrorist and mercenary activities on behalf of terrorist groups.

Both terrorist and mercenary activities are viewed as serious offences by the international community and it was therefore decided to publish the notice.

3.10 MILITARY ASPECTS

The question - May information be processed in cases with military aspects?

Background

Article 3 of INTERPOL's Constitution forbids the Organization from undertaking any intervention or activities of a military character. Accordingly, for cases with military aspects, an analysis on a case-by-case basis will be required.

The following scenarios may apply:

Scenario A: Purely military offences

Scenario B: Involvement of a military tribunal

Scenario C: Ordinary crimes committed in a military context, or processing of information containing military elements:

Scenario D: Acts committed in an armed conflict

Scenario E: International crimes containing military elements

Current practice

Scenario A -Purely military offences

In application of international extradition law, the Organization has consistently held that processing of information will not be allowed in cases of purely military offences, namely for acts punishable under military law that do not constitute: (1) a crime under ordinary law; or (2) a violation of the laws of war.⁴⁰ Typical examples of such crimes include desertion and draft evasion.

Scenario B - Involvement of a military tribunal

The involvement of a military tribunal does not automatically call for the application of Article 3. It is generally the *nature* and *context* of the offence that determines its military character. In order to determine the implications of the involvement of the military tribunal in a given case, the General Secretariat requests the source of information to indicate the reasons the case was brought before a military judge/court. In cases where the nature or the context of the crime points to the predominance of the ordinary-law nature of the matter, the General Secretariat will publish the notice and register the information in its databases.⁴¹

Scenario C - Ordinary crimes committed in a military context

INTERPOL's practice has been to follow international extradition law, according to which the "military character" exception does not apply where the acts charged constitute a crime under the ordinary laws of the requesting State. Thus, where an ordinary crime has been committed in the military context (for example, a soldier murders a fellow soldier in a peace-time setting), the processing of information will generally be allowed.

An example of information not connected to an ordinary crime, but which nonetheless contains military elements, would be a request to issue a yellow notice for military personnel. Although the person's occupation is not a criterion for the publication of a yellow notice, it is necessary to assess the compliance of such a request with Article 3. Specifically, the following questions require consideration:

1. Was the disappearance of the individual connected with an armed conflict or a military operation?
2. If the individual is found, will his extradition be requested for any political or military crime connected with his military service (e.g. espionage or desertion)?

An affirmative answer to either question will likely violate Article 3.

Scenario D - Acts committed in an armed conflict

In general, information concerning acts committed in an armed conflict, unless related to international crimes (Scenario E below), may not be processed via INTERPOL channels. First, where no indication is provided that the acts were committed in violation of the laws of war, such acts would not necessarily constitute a crime and as such would fall outside the scope of INTERPOL's work (Article 2 of the Constitution). For example, if a soldier of one party to a conflict kills an enemy soldier in battle, in accordance with the laws of war, this is not considered a crime. Alternatively, even if such acts are considered crimes by the requesting country, these crimes would generally be viewed as being committed against the external or internal security of the State and therefore within the scope of Article 3.

⁴⁰ See M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (fifth edition), p. 676.

⁴¹ As with all cases of processing of information, however, publication and registration of information may raise doubts concerning conformity with other rules. For example, rulings by State Security Courts may require assessment of conformity with the "spirit of the Universal Declaration of Human Rights" (Article 2(1), Constitution) and also with extradition principles such as the circumstances in which a person "would not receive the minimum guarantees in criminal proceedings" as set out in the ICCPR (Article 14).

Scenario E - International crimes with military aspects

Report AGN/63/RAP/13, adopted by Resolution AGN/63/RES/9, allowed for co-operation in cases of serious international crimes (genocide, crimes against humanity, and war crimes). The report however calls for application of the predominance test to assess each offence. Moreover, it suggests that the crime of compelling a prisoner of war or a civilian to serve in the forces of a hostile power may be considered an "essentially military offence". This may require an assessment of requests related to international crimes, particularly taking into account the following:

- International crimes did not originate from military law (in comparison to desertion, for example) but rather from international humanitarian law.
- International crimes are considered extraditable offences.⁴²
- The significant development of international criminal law since 1994 (e.g. establishment of more international tribunals), which indicates the seriousness ascribed to such offences by the international community.
- Similarly, the increased involvement of INTERPOL in this field as indicated by General Assembly resolutions and co-operation agreements concluded since 1994.⁴³
- The identity of the source of information:⁴⁴ For example, where the source is an international tribunal established by the UN Security Council acting under Chapter VII of the United Nations Charter (e.g. ICTY, ICTR) or an international tribunal acting on behalf of the international community in a similar manner (e.g. ICC acting upon a referral from the Security Council), it would be difficult to argue that the case is predominantly political or military.
- The position expressed by a member or an authorized international entity other than the source of the information.⁴⁵

Examples

Scenario A - Purely military offence

Case 1: An NCB sent a message requesting additional information about persons who had refused military service, a criminal offence under the national penal code. The General Secretariat replied that the offence of refusing military service falls within the scope of Article 3 due to its political, military and possibly religious character (e.g. cases of conscientious objection), regardless of whether it is considered an offence under national law. Accordingly, the NCB was informed that it could not use INTERPOL's channels in order to obtain information on those individuals.

Case 2: Red notice request sent for an individual, a soldier in the country's armed forces, who was wanted for "absence without leave, theft and unauthorized use of computer". It was concluded that the charge of absence without leave applied to a member of the armed forces is by nature a military offence. The offences of theft and unauthorized use of a computer were considered to be political as their purpose was to steal national security information. It was

⁴² Indeed, as with the approach taken regarding the non-application of the political offence exception to war crimes, the UN Model Treaty on Extradition excludes war crimes from the military offence exception to extradition - see Revised Manual on the Model Treaty on Extradition, para. 49. See also M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (Fifth edition), P. 676.

⁴³ Most notably, Resolution AG-2004-RES-16 (2004) on the Co-operation Agreement with the International Criminal Court clearly states in its preamble that "the crimes which come within the jurisdiction of the International Criminal Court also fall within the aims of the Organization as defined in Articles 2 and 3 of the Constitution." Thus, by adopting this resolution, the GA acknowledged the special status of international crimes and in fact rejected the underlying reasoning of the 1994 report.

⁴⁴ See Article 40 of the Implementing Rules, according to which the identity of the source of information is one of the relevant factors in an Article 3 examination.

⁴⁵ See Article 40 of the Implementing Rules for the RPI. This factor may become particularly relevant in the context of crimes already containing political or military elements (e.g. war crimes), also taking into account the possible geopolitical sensitivity of requests related to armed conflicts.

therefore concluded that all three charges come within the scope of Article 3 and the red notice was therefore not published.

Case 3: Diffusion sent by an NCB for an individual who deserted from the armed forces by forging certain documents. It was concluded that the offence was predominantly military rather than criminal as the ordinary crime of document forgery did not result in any personal injury to third persons or significant pecuniary damage. Therefore the information was not recorded in INTERPOL's databases.

Case 4: Diffusion sent by an NCB. The individual was wanted for the crime of desertion. According to the summary of facts the individual was a police inspector who "untruthfully announced that he was sick and left with his service weapon the territory of the [country] with [the] intent to evade further active service". Although the individual was a police inspector, and hence not a member of the military, the judgment concluded that the individual satisfied "all the elements of [the] crime of desertion" by failing to report to police service, giving untrue information about being sick, and leaving the territory with items given to him for purposes of his service including his weapon and cartridges. According to the court "because [a] police inspector's job assignment ... is necessar[il]y consider[ed] as military service when he failed to duly commence his police service and he left the territory ... this means desertion and he performed this fact with his service weapon that was allocated to him". It was thus concluded that the crime was a pure military offence that fell within the scope of Article 3 and that information may therefore not be registered in INTERPOL's databases.

Scenarios A and B - Pure military offence and involvement of a military tribunal

A diffusion, later replaced by a red notice request, sent by an NCB. The individual was wanted for "robbery with violence, stealing arms, and desertion". The arrest warrant was issued by a court martial. The NCB clarified that the military court was involved because the individual was a cadet at a military institute and had committed the ordinary crime at the military institute. It was concluded that the first two charges came under ordinary law and emanated from a different set of facts from the purely military charge of desertion. The red notice was therefore published on the basis of the charges of "robbery with violence and stealing arms". [See also "separation of charges"]

Scenario C - Ordinary-law crime committed in a military context

Information concerning the killing of a former leader of the military police was sent by an NCB. OLA was of the opinion that while the targeting of military personnel in situations of armed conflict may fall within the scope of Article 3, the situation in question was not recognized by the international community as being one of armed conflict. Further, targeting a member of the armed forces does not in itself prevent a case from being registered in INTERPOL's databases with respect to Article 3, because murder is considered an ordinary crime. The information was therefore registered.

Scenario C - Yellow notice request for disappearance during military service

An NCB requested the issuance of a yellow notice for a soldier in its country's military who had disappeared during his military service. OLA requested the NCB to explain: (1) whether the disappearance was connected with an armed conflict or a military operation, and (2) whether, if found, the individual's extradition would be requested for any political or military crime connected with his military service. The NCB replied that the individual was doing his compulsory military service but that his disappearance had no connection to a military conflict or military operation and that, if found alive, no measures would be taken against him. It was therefore concluded that Article 3 was not violated and the yellow notice was published.

Scenario D - Acts committed in an armed conflict

Case 1: Red notice requests sent by an NCB where the individuals were wanted for aggravated murder. In the context of a situation internationally recognized as an armed conflict, they set an

ambush for members of an opposing army and killed two individuals. No evidence was provided as to the violation of the laws of war or an international crime.

The red notices were therefore not published and the information was not registered.

Case 2: Diffusions were sent by an NCB for individuals wanted for murder, attempted murder, and destruction of other people's property. They participated in an attack by the army on a site occupied by soldiers who were nationals of the country that sent the diffusions, as a result of which many of the soldiers were killed and wounded. It was concluded that Article 3 applied because the diffusions sent related to military clashes between military forces of the country that conducted the attack and the country whose soldiers were the subjects of the attack. The information concerning two individuals who were subject to the diffusions was therefore not registered.

In a third diffusion, it was nonetheless later considered that, since the soldiers attacked were stationed at the site as part of a particular operation following a United Nations Security Council Resolution, the case should not be considered as an armed conflict between two INTERPOL member countries and as such did not fall within the scope of Article 3. The third diffusion was therefore registered.

Case 3: Red notice request sent by an NCB. The individual was wanted for "armed rebellion" and "desecrating a corpse". In the context of a situation internationally recognized as an armed conflict, the individual, who belonged to the Ministry of Interior of one of the countries involved in the armed conflict, was the commander of a paramilitary group that shot a soldier belonging to an opposing military group, and later burned his body. The arrest warrant was issued by a military tribunal. It was concluded that both crimes were committed in the context of an armed conflict and as part of a dispute over the sovereignty over territory. The crimes were not considered serious international crimes. The political and military aspects were therefore predominant and the information was not registered.

Scenario E - International crimes containing military elements

Diffusion sent by an NCB. The individual was wanted for the crime of genocide which was allegedly committed in his capacity as commandant of the military police and with the political motive of exterminating part of the population as a national and ethnic group. Considering the nature of the crime and its gravity, the information was registered in INTERPOL's databases.

3.11 RELIGIOUS/RACIAL ELEMENTS

The question - May information be processed when it contains religious or racial elements?

Background

Article 3 of INTERPOL's Constitution prohibits the Organization from undertaking "any intervention or activities of a religious or racial character". The exclusion of offences of a religious and racial character corresponds to fundamental principles of international human rights, notably the right to freedom of religion⁴⁶ and the prohibition on racial discrimination.⁴⁷ This position also reflects international extradition law.⁴⁸ INTERPOL's General Assembly resolutions have referred to a number of examples of pure religious and racial offences: Practising a prohibited religion,

⁴⁶ Article 18 of the UDHR. See also the 1981 UN Declaration on the Elimination of all forms of Religious Intolerance.

⁴⁷ Article 2 UDHR; the 1965 Convention on the Elimination of Racial Discrimination.

⁴⁸ See UN Model Treaty on Extradition, listing among the mandatory grounds for refusal of extradition, the following: "If the requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinions, sex or status, or that that person's position may be prejudiced for any of those reasons" [Article 3(b) of the Model Treaty]

recruitment or propaganda for particular religions, membership of a racial association,⁴⁹ and belonging to a banned religious group.⁵⁰

The existence of religious and racial elements, however, does not entail the immediate application of Article 3. Indeed, restrictions prescribed by law on the freedom of religion deemed "necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others"⁵¹ do not contravene an individual's right to religion and will not be considered as pure religious offences. Thus, for example, the criminalization of hate speech is not considered as a pure religious/racial offence,⁵² and States are encouraged to criminalize such acts.⁵³

With regard to the term "racial", the 1994 General Assembly Report refers to a distinction between "race" and "ethnic group", pointing to the wording of the 1948 Genocide Convention, which expressly distinguished between ethnic groups and racial groups.

Notwithstanding the above distinction in the Genocide Convention, it appears that, for the purposes of Article 3, a broader interpretation of the term "racial" is desired. To that end, the more comprehensive definition of the term "racial discrimination" in the 1965 Convention on the Elimination of Racial Discrimination appears to be appropriate.⁵⁴ Indeed, this definition includes, *inter alia*, discrimination based on "ethnic or national origin".

In INTERPOL's practice, questions concerning the possible application of Article 3 due to religious and racial elements have arisen in the following scenarios:⁵⁵

Scenario A: Pure religious/racial offences, such as membership of a prohibited religious organization.

Scenario B - Existence of religious/racial elements in the crime committed (e.g. murder with religious motives).

Scenario C - Existence of religious/racial elements in the context of police work (e.g. police operations addressing criminal networks identified on the basis of religious/racial characteristics). Thus, processing of information which amounts to racial profiling, namely singling out a racial group for the purpose of police activities without objective and reasonable justification, is likely to violate both INTERPOL's rules (Articles 2(1) and 3 of the Constitution) and national laws.⁵⁶

Current Practice

Scenario A - Pure religious/racial offences fall within the scope of Article 3; therefore, the processing of information would not be in conformity with our rules.

⁴⁹ 1984 Resolution AGN/53/RES/7.

⁵⁰ 1994 Report adopted by Resolution AGN/63/RES/9.

⁵¹ See Article 1(3) of the 1981 UN Declaration on the Elimination of all forms of Religious Intolerance.

⁵² See also discussion in reference to offences concerning freedom of expression.

⁵³ See e.g. Article 4 of the 1965 Convention on the Elimination of Racial Discrimination.

⁵⁴ According to Article 1(1) of the 1965 Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

⁵⁵ Note that cases may raise questions under both scenarios. For example, a red notice may be requested for a person charged with hate speech (scenario A), and his description may include identifiers (e.g. tattoos) unique to a certain ethnic group.

⁵⁶ See, in this respect, the holding of the European Court of Human Rights, according to which "no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principle of pluralism and respect for different cultures." (ECHR, 13 December 2005, *Timishev v. Russia*, para 58). The use of such grounds as ethnic or national origin may be justified, however, for "very weighty reasons" (ECHR, 16 September 1996, *Gaygusuz v. Austria*, para 42), i.e. the pursuance of a legitimate aim which outweighs the discriminatory character.

Scenario B - Similar to cases where political or military aspects exist, where the facts present both ordinary crime elements and religious or racial elements, INTERPOL will apply the predominance test taking into account factors such as the seriousness of the crime and whether it "constitute[s] a serious threat to personal freedom, life or property".⁵⁷

Scenario C - Personal information revealing racial or ethnic origin is considered "particularly sensitive information."⁵⁸ Such information may be processed via INTERPOL channels only if: (1) it is relevant and of particularly important criminalistic value for achieving the aims of the Organization and the purposes of the processing of information; (2) it is linked to one or more items of information processed by the Organization; and (3) it is described objectively and contains no judgment or discriminatory comments.⁵⁹

Accordingly, cases falling in this category will require analysis to evaluate in particular the necessity and proportionality of processing the particular item of information, as well as conditions put in place to ensure objectivity and non-discriminatory requirements. Consideration should also be given to the terminology used.

Examples

Scenario A - Pure religious offence

A red notice request where the individual was wanted for a number of offences including the "creation, leadership, participation in religious-extremist, separatist, fundamentalist or other forbidden organization." It was concluded that the information submitted did not suffice to qualify the group as a terrorist organization. Rather, the group concerned is a religious organization, and the charge was therefore considered as membership of a prohibited religious organization which, in accordance with INTERPOL General Assembly resolutions, is considered an offence of a religious character by its very nature. Accordingly, the red notice was not published.

Scenario B - Religious/racial elements in the crime committed

Case 1: A diffusion issued by an NCB for an individual for "racism, minimization and approval of the genocide committed during the Second World War". According to the facts provided, the individual had sent documents inciting hatred against Jews and denying the Holocaust. It was concluded that racial hatred was an ordinary crime condemned by various international instruments and the information was registered accordingly.

Case 2: Red notices issued at the request of an NCB. The individuals were charged, *inter alia*, with murder with religious motives. It was concluded that the murder of individuals who merely supported a religious policy was not reasonable, proportionate or "in furtherance" of any legitimate objective. In addition, the murders were aimed at terrorizing supporters of the policy into changing their religious affiliations, which is contrary to Article 18 of the UDHR, according to which everyone has "the right to freedom of thought, conscience and religion...".

Scenario C - Religious/racial elements in the context of police work

Case 1: An NCB sent a research paper with the purpose of "examining the European perspective on gypsy crime", suggesting that a seminar should be held on the subject. It was concluded that such activity may take place, but it was recommended to replace the term "gypsy" with neutral terminology such as "traveller/itinerant people".⁶⁰ It was further noted that, in general, any

⁵⁷ 1984 Resolution AGN/53/RES/7.

⁵⁸ Article 1(d), RPI.

⁵⁹ Article 10.2, RPI.

⁶⁰ Note that in November 2009 the European Commission against Racism and Intolerance (ECRI) brought to the attention of the General Secretariat that 80% of the Roma population in the Council of Europe countries was sedentary. The use of the terms "nomads and travellers" would therefore presuppose that the groups in question had

indication of a racial nature in the context of searches for fugitives (e.g. red notices) is forbidden unless it is meant to facilitate the searches.

Case 2: An NCB wanted to register information in INTERPOL's databases concerning terrorists using terms such as "black Muslim extremism" or "extremists of African origin believing in Islam". It was concluded that both terms were contrary to Article 3 since a category of suspects cannot be identified by the association of a racial characteristic and a religious one.⁶¹ It was therefore suggested that the individuals be identified by their belonging to a given terrorist organization.

Case 3: The information sent by an NCB about arrested members of a terrorist organization linked to MJIM (*Mouvement de la Jeunesse Islamique Marocaine*) was registered in INTERPOL's database. It was concluded that Article 3 did not allow individuals to be classified by political, religious or racial categories; however, there was no legal obstacle to registering the full definition of a terrorist organization regardless of its religious reference.

Case 4: The term "race" is mentioned on the Disaster Victim Identification (DVI) form, which raised the question of its compatibility with Article 3. It was concluded that the term "race" does not violate Article 3 given that the DVI form was adopted by the General Assembly for the purpose of identifying victims after a disaster and facilitating searches for missing persons.

Case 5: An NCB sent a message to INTERPOL asking whether its statistics contained "share of the gypsy community or a number and/or volume of offenders of gypsy origin in committing crime". A reply was sent stating that the term "gypsies" should not be used and it was suggested that a generic term be used which has no ethnic connotation, such as "nomads" or "itinerant people", to avoid any confusion and to assure other NCBs that this information is useful solely for identification purposes or to conduct a crime study.

It was concluded that it would not be possible to request information on such persons simply because of their belonging to a given ethnic group, as this would be in violation of Article 3.

Case 6: An NCB protested against the title of an INTERPOL meeting on illegal drug trafficking related to a particular ethnic group. It was concluded that, by using the term "ethnic", the Organization had in fact processed "particularly sensitive information". However, the latter is of a certain criminalistic value for achieving the legitimate aims of the Organization and the purposes of processing, and the use of such terminology cannot be said to be disproportionate.

It was recommended that the following addendum be included in any documents related to the project: "The use of the expression "ethnic" bears a certain criminalistic value within the meaning of Article 10.2 of the RPI and is in no way meant to reflect any form of prejudice on the ethnic origin of the individuals concerned."

3.12 SEPARATION OF CHARGES

The question - May information be processed where the request for police co-operation is based on separate charges, some of which are ordinary law in nature while others are of a political, military, religious or racial nature?

Background

Notices/diffusions may be sent for persons on the basis of different charges. A distinction may be made between the following scenarios:

a certain lifestyle which was in violation of the ECRI's General Policy Recommendation No. 3 on combating racism and intolerance against Roma/Gypsies.

⁶¹ This position appears to be in accordance with the ECRI's position as brought to the attention of the General Secretariat in November 2009. ECRI stated that in many country reports, they had taken a firm stance against attempts to link ethnicity to certain types of crime, which would amount to stigmatization.

Scenario A: The individual is wanted on at least two charges; at least one of the charges falls under Article 3; the charges emanate from separate sets of facts; separate arrest warrants have been issued for each set of facts.

Scenario B: Similar to Scenario A, but only one arrest warrant has been issued.

Scenario C: The individual is wanted on at least two charges; at least one of the charges falls under Article 3; the charges emanate from one set of facts or are otherwise connected; only one arrest warrant has been issued.

Current Practice

Scenario A: The charges should be treated as if emanating from separate requests. Accordingly, in the case of a notice request, the notice may be published solely on the basis of the arrest warrant(s) issued with reference to the ordinary-law charge(s). If a diffusion contains references to all the charges and information on all the arrest warrants, only the information concerning the ordinary-law charges may be registered, the relevant NCBs (i.e. the source and the recipients of the diffusion) should be informed of the decision, and a caveat be added indicating this decision.

Scenario B: If it is concluded that the charges indeed emanate from different sets of facts, the information may be processed on the basis of the arrest warrant containing both types of charges, with an indication that publication/registration was made only in respect of the ordinary-law charges. In the case of a notice, such information may be added in the "additional information" field. In the case of a diffusion, the relevant NCBs should be informed and a caveat be added to the file.

Scenario C: Considering that the charges emanate from one set of facts or are otherwise connected, the overall predominant nature of the case should be evaluated, bearing in mind that it is the facts – rather than the wording of a particular charge – that should generally determine the nature of the case.

Examples

Scenario A - Separate arrest warrants

A diffusion was issued for an individual for the offences of "insulting a police officer or military servant and insulting the former President of [the country]" and "illegally obtaining weapons". The former charge was clearly considered a political crime within the meaning of Article 3, while the latter was considered to be ordinary law in nature. Separate arrest warrants had been issued for each event. It was concluded that the information could be registered only in respect of the latter charge/event, and a caveat was added, stating that: "Information has not been registered in respect of the offences of insulting a police officer or military servant, and insulting the former President of [the country]". The diffusion was later replaced by a red notice request based on the same arrest warrants. The red notice was published solely on the basis of the arrest warrant which contained the charge of "illegally obtaining weapons".

Scenario B - One arrest warrant only

Case 1: Red notices requested by an NCB for the charges of "embezzlement", "illegal enrichment" and "illegal emigration". It was concluded that the last offence was not connected to the first two and fell under Article 3. Accordingly, it was decided to publish the red notices with reference solely to the first two offences, which are of an ordinary-law nature. An explanation concerning the General Secretariat's decision was added to each notice in the "additional information" section.

Case 2: A diffusion, later replaced by a red notice request, issued by an NCB. The individual was wanted for "robbery with violence, stealing weapons, and desertion". It was concluded that the first two charges were of an ordinary-law nature and emanated from a different set of facts than the pure military charge of desertion. The red notice was therefore published with the charges of "robbery with violence and stealing weapons".

Case 3: A red notice was published for an individual only for the offences of deception, swindle, fraud and soothsaying, as they were considered to be ordinary-law crimes. Information was not registered with respect to the offence of illegal emigration as it was considered to be a pure political offence. A caveat was added to the notice indicating that the offence of illegal emigration had not been registered.

APPENDIX

RULES APPLICABLE TO ASSESSING ARTICLE 3 CASES

Constitution

Article 2

[INTERPOL's] aims are:

(1) To 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';

(2) To establish and develop all institutions likely to contribute effectively to the prevention and suppression of ordinary law crimes.

Article 3

It is strictly forbidden for the Organization to undertake any intervention or activities of a political, military, religious or racial character.

Rules on the Processing of Information (RPI)

Definitions

Article 1

(a) Ordinary-law crimes means crimes as referred to in Article 2 (b) of the Constitution but not those excluded by Article 3 of the said Constitution.

General Conditions for Processing Information

Article 10.1

(a) Processing of information through the Organization's channels may only be carried out if all the following conditions are met:

1. It complies with the Constitution and relevant provisions in the Organization's rules; [...].

Implementing Rules for the RPI

Article 40: Article 3 of INTERPOL's Constitution

(a) To determine whether a specific intervention or activity is of a political, military, religious or racial character, all relevant information shall be examined, including the following:

- (i) the nature of the offence, namely the charges and underlying facts
- (ii) the status of the persons concerned
- (iii) the identity of the source of the information
- (iv) the position expressed by a Member or authorized international entities other than the source of the information
- (v) the obligations under international law

- (vi) the implications on the neutrality of the Organization
 - (vii) the general context of the case.
- (b) National Central Bureaus and authorized international entities shall inform the General Secretariat as soon as possible when there is any doubt about whether the processing of an item of information complies with Article 3 of the Constitution.
- (c) The General Secretariat shall develop a repository of practice on the application of Article 3 of the Constitution, based on directives issued by the General Assembly and pertinent elements of international law, which shall be made available to National Central Bureaus, national authorized institutions and authorized international entities.