
CRIMINAL LAW & PROCEDURE

INTERPOL'S TRANSNATIONAL POLICING BY "RED NOTICE" AND "DIFFUSIONS": PROCEDURAL STANDARDS, SYSTEMIC ABUSES, AND REFORMS NECESSARY TO ASSURE FAIRNESS AND INTEGRITY

By Peter M. Thomson*

Note from the Editor:

This article is about Interpol's use of Red Notices and Diffusions; it describes problems with the system and urges reforms. As always, the Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. Generally, the Federalist Society refrains from publishing pieces that advocate for or against particular policies. When we do so, as here, we will offer links to other perspectives on the issue, including ones in opposition to the arguments put forth in the article. We also invite responses from our readers. To join the debate, please e-mail us at info@fedsoc.org.

- *Notices*, INTERPOL, <http://www.interpol.int/INTERPOL-expertise/Notices>.
- *Interpol and the Case for Reform: Who Has Said What?*, FAIR TRIALS INTERNATIONAL, (August 20, 2015), <http://www.fairtrials.org/press/interpol-and-the-case-for-reform-who-has-said-what/>.
- Shreya Dasgupta, *Interpol Rejects Malaysia's Request to Place Journalist on Red Notice List*, MONGABAY, (August 31, 2015), <http://news.mongabay.com/2015/08/interpol-rejects-malaysias-request-to-place-journalist-on-red-notice-list/>.
- Jago Russell, *Letter to Prof. Dr. Jurgen Stock, Secretary-General of Interpol, Regarding Journalist Clare Rewcastle Brown*, FAIR TRIALS INTERNATIONAL, (August 25, 2015), <http://www.fairtrials.org/wp-content/uploads/25082015-Rewcastle-Brown-Letter.pdf>.

Rasoul Mazrae, a citizen of Iran, was an outspoken critic of his government. Although his political speech would have been protected in the United States as a constitutional right, in Iran his conduct was considered a crime against the state. Fleeing his persecutors, Mazrae was taken into custody in Syria based on a wanted alert published by the International Criminal Police Organization—Interpol. He was extradited to Iran, jailed, tortured, and then sentenced to death. The wanted alert disseminated by Interpol for Mazrae's capture was a Red Notice, which under Interpol's constitution should not have been issued because Mazrae's crime was of a "political character." His case is just one example of numerous instances where Interpol's Red Notice system has been exploited by its members to locate, detain, and extradite persons for political, racial, or religious reasons. In these and even legitimate cases warranting Interpol's engagement, Red Notices come with considerable human impact. Those targeted often suffer serious financial, personal and professional harm; ultimately, they face arrest, detention, and extradition.

In many countries, Red Notices have the weight of an international arrest warrant, but they lack sufficient procedural safeguards to prevent regimes from using them to oppress, harass, and silence political and economic opponents. Even more troubling is the rise in the number of Interpol-sponsored Diffusions, which are informal electronic wanted alerts that

countries are using to bypass the Red Notice system in order to achieve essentially the same goals. In fact, Diffusions are outpacing Red Notices at a rate of approximately two to one.

This article provides an overview of the procedures governing the publication of Red Notices, the legal strategies that can be employed to prevent and challenge them, the inherent flaws and systemic abuses in the Red Notice system, and possible reforms that could be implemented to improve Interpol's wanted notice system. This article also briefs the growing threat to human rights posed by Interpol's Diffusion alert and the reforms necessary to assure that fundamental due process rights of those targeted are not violated.

I. INTERPOL'S RED NOTICE: PROCEDURES AND REQUIREMENTS FOR PUBLICATION

An Interpol Red Notice seeks the provisional arrest (i.e., temporary detention) of a wanted person with a view towards extradition based on an arrest warrant or court decision issued by the requesting country.¹ Red Notices are processed through each Interpol member country's National Central Bureau (NCB)² and have the effect of an international wanted notice.³ Red Notices typically contain two principal groups of information: (1) identity particulars (physical description, fingerprints, etc.) and (2) relevant judicial information (offense charged, maximum penalty, etc.).⁴ Red Notices are routinely used to track and detain wanted persons whose whereabouts are unknown, particularly individuals who travel frequently through conventional means (i.e., commercial aircraft, cruise ships, trains, etc.) and who pass through official ports of entry staffed by customs or immigration personnel.⁵

The U.S. NCB within the U.S. Department of Justice provides the following guidance concerning Red Notices:

*Peter M. Thomson is Special Counsel with Stone Pigman Walther Wittmann L.L.C. in New Orleans, Louisiana. From 1988 to 2011, he served as an Assistant United States Attorney and in 2010 worked on special detail at the National Security Agency. From 1988 to 2008, Mr. Thomson also was an Associate Professor of Trial Advocacy at Tulane University Law School.

Red Notices are issued in order to seek the location and arrest of fugitives for the purpose of extradition. A Red Notice serves as an international wanted notice and provides information on the identification of fugitives charged with, or convicted of serious crimes. The country initiating the notice commits to seeking the provisional arrest and extradition of the fugitive in question should he or she be located.⁶ A request for a Red Notice must concern a person who is the subject of an arrest warrant and is wanted for prosecution or to serve a sentence. *Approximately one-third of Interpol member countries consider a Red Notice to be a valid request for provisional arrest and will detain the subject of a Red Notice.*⁷

Most Interpol member countries commit themselves to honoring Red Notices because, generally, they are believed to be issued in compliance with both domestic and international law.⁸ The ultimate goal of a Red Notice is to secure the wanted individual's extradition back to the requesting country. The most common method of extradition is by treaty between two countries.⁹ However, absent proof that the foreign offense also constitutes a violation under the laws of the country in which the fugitive is located, there is no obligation to honor an Interpol Red Notice. Extradition treaties usually set forth a list of qualifying offenses. Many require "dual criminality," which means the extraditable offense's underlying conduct must also constitute a criminal offense in the country being asked to extradite.

A. A Red Notice Can Trigger a Fugitive's Provisional Arrest Pending Extradition

Once a fugitive is located pursuant to a Red Notice, the pursuing jurisdiction may follow up with a formal request that the subject be arrested and held on a provisional basis, until an extradition application can be filed through formal channels. Typically, however, a provisional arrest is requested in urgent situations where authorities believe the wanted person will flee the country before formal extradition documents can be filed and perfected. A judge or magistrate in the recipient country usually can authorize a provisional arrest only if the request legally comports with the respective extradition treaty and international law.

However, about one-third of Interpol's member countries consider a Red Notice *itself* to be the equivalent of a formal request for a "provisional arrest." Many countries, therefore, treat a Red Notice as an *actual* arrest warrant even though it is an administrative vehicle intended merely to provide "notice" that an arrest warrant has been issued by another member country.¹⁰ The fact that some countries grant such legal status to a Red Notice guarantees that a fugitive in any of those countries will be placed immediately under provisional arrest once he has been located, and that the prosecuting jurisdiction will be informed of that fact so that the extradition process can begin.¹¹ This practice, of course, results in Red Notices having more of a "direct effect" in the recipient jurisdictions even when the request is not based on a previous agreement or treaty. It is important to stress that a Red Notice, although afforded such a status by some countries, is *not* the same as a request for extradition, which only takes place once a fugitive

has been located and taken into provisional custody.

By contrast, federal law in the United States prohibits the arrest of an individual solely on the basis of a Red Notice. If a wanted subject is determined to be within the United States, the Criminal Division of the U.S. Department of Justice will determine whether a valid extradition treaty exists between the U.S. and the requesting country for the specified crime or crimes. If the subject is extraditable, and after a diplomatic request for a provisional arrest is received from the requesting country, the facts are communicated to the U.S. Attorney's Office in the district where the person is located. The U.S. Attorney's Office will then file a Criminal Complaint and obtain an arrest warrant requesting extradition.¹² Approximately two-thirds of Interpol member nations follow the U.S. model and only seek a person's provisional arrest after a formal request is received pursuant to an applicable treaty.

B. The General Procedural Requirements for Issuance of Red Notices

Interpol relies on its member countries to request Red Notices in compliance with Interpol's Constitution and international law. According to Interpol's stated legal basis, a Red Notice will be issued only where it fulfills "all conditions for processing the information."¹³ For example, Interpol states that "a Notice will not be published if it violates Article 3 of its constitution, which forbids the organization from undertaking any intervention or activities of a political, military, religious or racial character. Notices are processed pursuant to Interpol's Rules on the Processing of Data, which ensure the legality and quality of information, and the protection of personal data."¹⁴ Notwithstanding that Red Notices are presumed to be validly issued, on occasion they are based on inaccurate information, or even on factual and/or legal pretenses that do not meet Interpol's legal criteria. They might also be based on a criminal offense that was fabricated or mischaracterized by officials in the requesting state. Therefore, in an effort to prevent such abuses, Interpol requires that all NCB-processed applications satisfy the following criteria:

1. The penalty for the underlying offense must be at least imprisonment for one year;
2. The charging document has not been sealed; and
3. The responsible prosecutor (located in the originating country) has committed to extradite; has completed and signed a conformation of agreement to extradite; and has forwarded the agreement to the respective Interpol office with the application for Red Notice.¹⁵

Once the originating NCB assures the foregoing requirements have been met by the official applicant and approves the Red Notice, it forwards the application and supporting documents to Interpol's General Secretariat in Lyon, France. It is the General Secretariat's responsibility to ensure that all Red Notices meet international legal requirements prior to disbursement to member nations. Publication of a Red Notice may take several months to complete. Once approved, it is circulated worldwide to law enforcement agencies and border checkpoint locations.

C. The Role of Interpol's General Secretariat

Red Notices are processed by an ad hoc unit within the Of-

office of the General Secretariat.¹⁶ Occasionally, when legal issues involving Article 3 of Interpol's Constitution are implicated, Interpol's Office of Legal Affairs can also become involved in the review process. In its gatekeeping role, the General Secretariat has the responsibility of ensuring not only that Red Notices meet international legal requirements, but that they comply with Interpol's Constitution and its fundamental rules. In ensuring compliance, the General Secretariat may request that the prosecuting country address any concerns it may have of either a procedural or substantive nature and may reject the application where its publication would conflict with Interpol's rules or Constitutional principles.¹⁷ As a threshold matter, there are three fundamental legal precepts that cannot be violated:

1. Rule of Law: A Red Notice must respect "the basic rights of individuals in conformity with . . . the Universal Declaration of Human Rights."
2. Neutrality: There can be no intervention of a "political, military, religious or racial character."
3. Legality: The General Secretariat must verify that domestic authorities process information through Interpol's communication channels in compliance with the international conventions to which they are a party, as well as "in the context of the laws existing" in their countries.¹⁸

In ensuring "that the conditions attached to [the given Red Notice] are met,"¹⁹ the General Secretariat has the authority to scrutinize an application even more closely if it finds an apparent conflict with extradition law or if the charged offense appears to be of a "political" character. If the General Secretariat finds a conflict with accepted extradition law and/or international norms, or if it concludes the underlying offense is political in nature, it should decline the Red Notice application.²⁰ The General Secretariat also has the authority to refuse a Red Notice if it considers its publication to be "unadvisable."²¹

In the event that a Red Notice has been published without being timely challenged by an aggrieved party, however, the General Secretariat still has the authority *ex officio* to intervene if there is reason to believe that a violation of its constitution or governing rules has occurred. Moreover, Interpol's Executive Committee and the General Assembly also have the authority to review Red Notices following direct challenge of the issuing NCB. These two bodies serve as Interpol's dispute settlement institutions, and their decisions are reached by majority vote.²²

II. PREVENTING AND CHALLENGING RED NOTICES

Preventing or defeating *ex post* the issuance of a Red Notice based on a legitimate or arguably legitimate criminal offense is an exceedingly difficult and complex process in most cases. Nevertheless, there are a number of legal and procedural options available through which one might successfully defeat a Red Notice.

First, the initial application can be challenged directly through the originating NCB in an attempt to prevent it from forwarding the Notice to Interpol's General Secretariat in Lyon, France, as long as Interpol has not yet reviewed or acted upon the Red Notice application. In such a case, the aggrieved party may file a "preemptory objection" with the NCB. Second, through local counsel, a court challenge in the originating

jurisdiction can be mounted on procedural and/or substantive grounds against the application. Third, a Red Notice can be contested directly with the General Secretariat. Objections can be based on a number of procedural and substantive grounds, including violations of Interpol's constitution. Fourth, relief can be sought from Interpol's Office of Legal Affairs, also located at Interpol headquarters in France. Fifth, a "preventive request" can be filed with the Commission for the Control of Interpol's Files (CCF), Interpol's "watchdog" arm, based on violations of Interpol's constitution, rules, and/or the general law of extradition. Sixth, in the event that any or all of the above strategies fail to prevent publication of the Red Notice, an *ex post* challenge can be made pursuant to a formalized procedure available for its removal. This review procedure includes the filing of a complaint with Interpol's Office of Legal Counsel and the CCF, which can intercede post-publication as well on a peremptory basis.

A. Legal Arguments in Support of Red Notice Challenges

More particularly, to successfully defeat a Red Notice, evidence must be provided indicating that the request is in violation of Interpol's constitution, legal rules, and/or the general law of extradition. The following legal arguments present the strongest likelihood of success when challenging a Red Notice application:

1. The Prosecution is of a "Political Character"

Under Article 3, Interpol is strictly forbidden from intervening in matters of a "political character." The term "political character," however, is not defined by Interpol's Constitution. Where an individual is not charged with a "political" crime *per se* (for example, treason or sedition), a valid argument can nevertheless be presented that the prosecution *itself* is politically motivated.

2. The Criminal Charges Are Misrepresented

Misrepresentation or mischaracterization of a criminal charge against a defendant violates Interpol's rules. Accordingly, although the General Secretariat and its legal office cannot intervene to verify the guilt or innocence of a defendant, a challenge can nevertheless be made arguing that the charges have been concocted based on political and other reasons. Further, regardless of whether a mischaracterization argument can stand substantively on its own, it should be considered as an argument in support of a political challenge under Article 3.

3. A Violation of Due Process has Occurred

A challenge to a Red Notice may also be made by a claim of a due process violation. This kind of claim can also be supported with the evidence used to challenge the Red Notices based on the mischaracterization argument referenced above.

B. The CCF

The CCF, as an independent monitoring body within Interpol, is empowered to scrutinize Red Notices for compliance with the rule of law, including Interpol's specific legal requirements. If a Red Notice has not yet been filed, its intended target can file a "preventive request" so that, in the event a Red Notice is sought, "it should not be published for the alleged reasons. In

such a case, the information provided by the individual [target] could be taken into account upon reviewing the request (if submitted) and may lead to the application of the procedure in article 10.1(c) of the Processing Rules.”²³

In the event a Red Notice has actually been published and circulated worldwide, a formalized review procedure can still be initiated by the CCF. One of the CCF’s primary functions is to ensure that the processing of information “conforms to all the relevant rules adopted by the Organization” and does “not infringe the basic rights of the people concerned.”²⁴ Accordingly, the subject of an issued Red Notice may challenge its validity with the CCF, either on procedural or substantive grounds. If the CCF calls into question the processing of the Red Notice, it forwards its concerns to the General Secretariat, and the CCF may invite the General Secretariat to conduct a preliminary inquiry into the request.²⁵ The CCF then adopts conclusions and makes recommendations. An oral hearing into the matter with the requesting party is allowed only in exceptional cases. Otherwise, the aggrieved person is not entitled to a hearing.

As with a General Secretariat review, the CCF can only verify the validity of charges, not their accuracy.²⁶ The CCF cannot check or amend charges which could intrude into national sovereignty. Hence, the CCF has its limitations; it cannot assess the legal situation in a member country with a view to giving an opinion on the validity of an arrest warrant or legal decision. The CCF’s power is advisory, so when doubts are raised with respect to a Red Notice, the CCF may only *recommend* that the General Secretariat proceed with caution or cancel the Notice. Further, a member state may challenge the General Secretariat’s decision based on the CCF’s advice, subjecting it to the dispute settlement procedure with the Executive Committee and General Assembly.

III. INTERPOL’S “DIFFUSION” ALERTS: INFORMAL ALTERNATIVES TO RED NOTICES LACKING FUNDAMENTAL PROCEDURAL SAFEGUARDS

Although similar, even arguably equivalent to a Red Notice, a “Diffusion” is a less formal alternative that may be used to obtain international cooperation in locating, arresting and detaining a wanted subject. While Diffusions are not as widely known by the general public, they result in more arrests and detentions than Red Notices, without the latter’s procedural safeguards (as imperfect as they might be).

Diffusions, like Red Notices, are originated by a member’s NCB at the request of local authorities. Although Diffusions may be circulated worldwide over Interpol’s “I-Link” network and recorded in Interpol’s primary database, the requesting NCB has the same discretion as with Red Notices to limit Diffusions to select countries or police organizations of its choice.²⁷ This option has advantages because it permits an NCB to request foreign assistance in apprehending a wanted person without risking disclosure of its existence to a complicit member nation that might be providing aid and support to the same person. As with Red Notices, Diffusions must comply with Articles 2 and 3 of Interpol’s constitution and are subject to CCF review. However, that is where the similarities end.

Whereas a Red Notice is published through Interpol’s General Secretariat at the request of a member nation or an

international organization, a Diffusion is published (i.e., disseminated) by a member country’s NCB or by an international organization, not technically by Interpol.²⁸ Second, unlike with a Red Notice, there is no formal application and review process for a Diffusion seeking someone’s arrest and detention. Any member NCB can issue and transmit a Diffusion within a matter of minutes, if not seconds, and once issued, a Diffusion alert remains active for at least five years. Third, a Diffusion can be disseminated to foreign police agencies of the originating NCB’s choosing and, unlike a Red Notice, is not published by default to all Interpol member nations.²⁹ Fourth, a Red Notice application must state that a valid arrest warrant or court order exists and that the applicant country will seek extradition of the fugitive; a Diffusion, on the other hand, requires compliance only with Interpol’s Rules for Processing Data. Fifth, unlike a Red Notice, a Diffusion is not automatically reviewed by the legal office of the General Secretariat prior to publication.³⁰ It simply is recorded in Interpol’s database and distributed via its I-Link network³¹ by the originating NCB. Sixth, although both Red Notices and Diffusions are required to comply with Article 3, a Diffusion can be issued without any legal review whatsoever by the General Secretariat. Finally, whereas a summary version of a Red Notice generally can be viewed by the public on the Interpol website, only authorized law enforcement personnel may view a Diffusion that seeks a person’s arrest.

Although Interpol maintains that it is not technically responsible for Diffusions, the organization nevertheless plays an important role in their distribution to member nations. Notwithstanding the fact that Diffusions lack many of the procedural safeguards afforded by Red Notices, Interpol actually *encourages* its member police organizations to transmit Diffusions simultaneously with their Red Notice requests, including where the publication of a Red Notice might not be appropriate or factually justified.³² Interpol also reviews Diffusions and takes credit for the arrests that result.³³ Therefore, although Diffusions are issued independently by member state NCBs, there is little doubt that Diffusions carry Interpol’s stamp of approval and that Interpol shares responsibility for their dissemination.

IV. THE INHERENT FLAWS AND SYSTEMIC ABUSES IN INTERPOL’S WANTED NOTICE SYSTEM

The immediate and collateral consequences of being targeted by one of the thousands of Red Notices or less regulated Diffusions filed each year can be devastating to an individual, personally and professionally. The effects can be far-reaching and linger for substantial periods of time. Often the individual has not been charged with a crime that would, from a reasonable man’s perspective, justify being tracked down, arrested, and jailed in a foreign country. Regrettably, once a Red Notice has issued, the target has little to no recourse against his accuser and, once detained, is subject to being extradited to the pursuing nation through a lengthy process.

Very often, the target of a Red Notice simply has no idea of the substantial risk he is taking by merely traveling between two countries. In such instances, the first notice he might receive is being swept out of a customs line and tossed into a local prison. In other instances, the target may have been apprised of his “wanted” status and fully understand the risks

he faces while traveling. For those individuals whose livelihoods require travel, an Interpol alert can result in disruption of their client base and substantial financial losses, both to the individual and his employer. Even if business travel is not required, the curtailed freedom of movement and the looming threat of arrest can be exceedingly disruptive and distressing. The person's reputation and credit rating undoubtedly will be harmed. He might become separated from his family for weeks, if not months. Further, he might find that he is unemployable, his bank accounts inaccessible, and his financial assets frozen.

Of course, there are circumstances that would justify arresting and detaining someone in a foreign country who has been legitimately charged with a serious criminal offense. Those who commit violent crimes and acts of terrorism, for example, should be subject to foreign arrest, detention, and extradition. Interpol's wanted notice system can be used legitimately to further such appropriate law enforcement goals. But far too often Red Notices are exploited for the purpose of locating and arresting someone based on weak evidence or for committing an offense for which foreign detention arguably or admittedly is inappropriate or unjustified. Under such circumstances, much of the damage is irreversible at the moment the Red Notice issues, because the process of removing a published Red Notice is difficult, complex, and time consuming.

In some cases, Interpol has taken years to retract an improperly issued Red Notice. The organization appears to lack the necessary resources, capacity, and expertise to address objections raised by targeted individuals, and there is no truly independent administrative, judicial, or parliamentary oversight. The only body claiming "independence" from Interpol and having an oversight role is the CCF, but the CCF is funded by Interpol and is part and parcel of the organization's internal legal structure. Further, in typical bureaucratic fashion, the CCF has a reputation of being slow to resolve complaints, and its investigative and decision-making process lacks transparency. Moreover, an aggrieved party has no right to a hearing, and the CCF typically does not provide detailed explanations for its decisions, from which there is no right to appeal.

Some have suggested that Interpol's fundamental problem is that it operates on a theory of sovereign equality with regard to its nearly 200 member nations.³⁴ Stated differently, Interpol's notice system presumes a global standard of integrity. But this assumption is not only wrong, it is patently dangerous. Red Notices do not have to be founded on "probable cause," as recognized under American law. In fact, they can issue regardless of the requesting jurisdiction's level of institutional corruption or its record with regard to human rights. As reported by Fair Trials International (FTI), a number of countries, including Russia, Sri Lanka, Turkey, Belarus, Indonesia, Iran, and Venezuela, have exploited Interpol's system to pursue political dissidents, refugees and journalists.³⁵ In those cases, Interpol's entire international community was used to further the corrupt regime's goals. Reliable procedural safeguards should exist to prevent the Red Notice system from being exploited to oppress and silence, or to arrest and extradite someone for less than a serious crime or for conduct that is arguably not even criminal at all. But Interpol's system of checks and balances has not

sufficiently prevented these and other kinds of abuses. Red Notices certainly have been directed against political opponents, political dissidents, economic targets, human rights activists, refugees, and even journalists.³⁶ Of the offending regimes, half are "corrupt" as defined by Transparency International, and the abuses appear to be increasing.³⁷ Nevertheless, Interpol seems to be making some progress toward reforming the system.³⁸ In its recently updated 2012 Rules on the Processing of Data, Interpol tightened and improved its procedures for publishing and recalling Red Notices.³⁹ As a result, and though more reforms still are needed, some regimes apparently have started to resort to Diffusions to further their tactics of silence, oppression, and persecution.⁴⁰ Some circumstantial evidence suggests that this might be occurring: the most controversial cases over the past few years have involved jailings and deportations based on Diffusions.

V. DIFFUSIONS – A GROWING THREAT TO FUNDAMENTAL DUE PROCESS RIGHTS

Diffusions present even more of a threat to human and due process rights than the flawed Red Notice system. For example, in 2012, a Diffusion was disseminated by Egypt for the arrest of 15 Non-Governmental Organization (NGO) democracy workers even though Interpol had refused to publish Red Notices. Because Interpol policy permits a Diffusion to be requested simultaneously with a Red Notice, Egypt effectively bypassed Interpol's review process by the General Secretariat – a process that subsequently rejected the same Red Notice requests because the charges against the NGO workers were politically motivated. From this example, it is easy to see how Interpol's current system basically invites member nations—expecting denial of their Red Notice applications—to file Diffusions simultaneously as a strategy to guarantee that their targets are arrested and detained pending extradition.⁴¹ Unfortunately, and on average, twice as many Diffusions as Red Notices are issued on an annual basis through the Interpol system. This is a troubling statistic because Diffusions carry the weight of a Red Notice and Interpol's endorsement without equivalent procedural protections. For these reasons, Diffusions raise even more serious and pressing concerns. Diffusions are entered into the Interpol system without any formal or informal vetting process or institutional review. Interpol is autonomous, and it has not imposed adequate, much less robust, checks and balances on Diffusions.⁴² Because there is no vetting of Diffusions, and because they are so easily obtained, the process naturally invites exploitation and corruption. Although Diffusions are in theory required to respect Article 3 of the Interpol constitution and other applicable rules, the fact that they are not reviewed by the General Secretariat, as Red Notices are, renders this requirement a mere recommendation in practice. Hence, there is nothing to prevent regimes from transmitting Diffusions for the purpose of harassing or silencing political opponents, racial or religious minorities, dissidents, activists, or anyone else for whom a valid arrest warrant has not been issued. The 2012 Egyptian Diffusion requesting arrests of the NGO workers is a prime example: Egypt achieved its political ends even though Interpol had refused to publish even one Red Notice on the same individuals.⁴³ After Diffusions have been kept active for five years, Interpol

requests updated information from the issuing NCB to support the Diffusion's continued publication. Even absent such information, the NCB independently can keep the Diffusion active indefinitely.⁴⁴ Although the same five-year procedure also applies to Red Notices, they are subject to the more rigorous review process within the office of the General Secretariat. As one scholar concluded, Diffusions "are not in conformity with basic requirements for criminal or administrative procedures affecting individual rights."⁴⁵

Of course, Interpol argues that it does not endorse Diffusions, but simply allows member NCBs to use its system to disseminate them. Interpol has analogized itself to a news publisher, but the comparison is inaccurate if not disingenuous.⁴ First, Interpol itself takes credit for arrests made as a result of Diffusions.⁴⁷ Second, by allowing its communications system to be used to transmit Diffusions, Interpol knowingly assists NCBs with requested arrests. Furthermore, it does so without confirming the NCB's factual representations or reviewing the Diffusions for compliance with Interpol's constitutional rules. Therefore, there is no question that Diffusions carry Interpol's endorsement and that the organization considers them to be a complementary addition to the Red Notice system.

VI. NECESSARY REFORMS TO ASSURE FAIRNESS AND INTEGRITY IN INTERPOL'S INTERNATIONAL WANTED NOTICE PROCESS

Although Interpol has recently made strides in improving its procedures for the issuance and retraction of Red Notices, the reforms have not gone far enough to prevent abuse and assure that due process is applied on an equal and consistent basis. As Interpol's processing platform has made it easier for NCBs to transmit Diffusions, publish provisional Red Notices, and access Interpol-held data directly, the number of troubling cases has increased. Absent further reforms, the increase likely will continue.⁴⁸ Therefore, more must be done to curtail the abuse and correct the systemic flaws in the application and review process, particularly with regard to those individuals who are unfairly targeted for corrupt or political reasons.

A. Due Process

Because due process is not administered equally by Interpol's sovereign members in the filing of Red Notice applications, a leveling of the playing field is needed to require that all nations and NCBs operate pursuant to the same procedural and substantive standards. Interpol should adopt more comprehensive procedural and enforcement mechanisms to better guarantee that a targeted person is afforded due process by both the requesting and arresting member nations. Reforms in procedural and substantive due process, comprehensively applied, will help reduce instances where the arresting jurisdiction, knowingly or unknowingly, aids and abets an originating jurisdiction in a *persecution*, rather than in a legitimate *prosecution* warranting Interpol's intervention.

Interpol should scrupulously abide by its own constitution, which requires that Red Notices respect the basic rights of individuals and that no intervention occur in matters of political, military, religious, or racial character. Questions have been raised regarding Interpol's intention to uphold its own constitutional mandates in view of several controversial

cases in which the organization has become involved over the last few years.⁴⁹ In fact, in a recent report, FTI concluded that, because Interpol's procedural safeguards have proved ineffective, the organization should absolutely refuse or delete Red Notices where there are "substantial grounds to believe the person is being prosecuted for political reasons."⁵⁰ Likewise, Interpol should modify its current policy requiring that Red Notice applications merely certify the existence of a properly issued arrest warrant. Instead, Interpol should require that the requesting jurisdiction provide an actual certified copy of the arrest warrant as an attachment to its application. Interpol's practice of issuing provisional Red Notices is problematic as well. Even under circumstances where they are visible only to other law enforcement agencies, the practice allows applicant nations to circumvent (as with Diffusions) a wanted person's due process rights. A Red Notice, whether provisional or permanent, should only issue after its application and supporting documents are reviewed fully by Interpol and found to be in compliance with its constitutional principles and international due process standards. Provisional Red Notices, by definition, are not guaranteed by Interpol to be compliant with any standard. Accordingly, Interpol should not permit provisional Red Notices except in urgent cases involving life and death. In the American criminal justice system, the due process rights of a person facing serious criminal charges and imprisonment are no better exemplified than in that person's right to challenge his accusers in a public hearing administered by an independent judicial officer. Under Interpol's current rules, the person targeted for arrest through a Red Notice or Diffusion does not have to be notified of his wanted status, is not entitled to an Interpol hearing, and does not have access to an independent court to challenge the Red Notice or Diffusion. Therefore, with the possible exception for crimes of violence and terrorist acts, Interpol's rules should be amended to require notification of every person targeted by a Red Notice or Diffusion. Wanted persons should be notified the moment that an NCB has submitted an application for a Red Notice or entered a Diffusion into Interpol's system.

Interpol should also allow an aggrieved person the right to an evidentiary hearing, the right to call and cross-examine witnesses, and the right to review and introduce evidence. As an added benefit, such a process would inject a needed dose of transparency into the process, while enhancing public confidence in Interpol. The CCF would be the likely candidate to serve in the capacity of an independent tribunal. On the other hand, an independent court of review—or possibly independent regional courts—could be created by international convention for the same purpose. Judges could be drawn from the ranks of the least corrupt nations as identified, for example, by Transparency International. Regardless of whether the CCF or a court is delegated this function, it must have authority to act independently of Interpol, and the complaining party must have the right to appeal an adverse decision.

B. Transparency

With an eye toward comprehensive reform, additional measures are also needed to increase transparency in the process of issuing Red Notices and Diffusions. One author has suggested that Interpol completely end the practice of removing controver-

sial Red Notices from public view.⁵¹ One of Interpol's practices, when faced with a controversial Red Notice, particularly ones questioned on Article 3 grounds, is to remove the summarized contents of the Red Notice from the Internet and therefore from public scrutiny.⁵² In those cases, the Notices still remain active and visible to law enforcement agencies worldwide. However, if Interpol receives information post-publication that establishes grounds to believe that the Notice should not have been published, Interpol must be obligated to retract it completely, not merely from public view. Red Notices also should be subject to systematic review. For example, some Red Notices have remained published despite extradition decisions recognizing the political nature of the cases. Interpol, therefore, should routinely follow up with nations that have reported arrests based on Red Notices and inquire into the outcome of the post-arrest proceedings.

C. Interpol's CCF

The CCF itself has come under scrutiny as well. FTI has argued that the CCF's expertise is centered on data processing and that it therefore institutionally lacks the competence and requisite procedural safeguards to review challenges to either Red Notices or Diffusions.⁵³ FTI's recent report further suggests that Interpol explore the idea of creating a separate organization or chamber within the CCF that is dedicated to handling such complaints and challenges. This would allow the CCF, in its present form, to advise on data protection issues as intended. This idea is worthy of Interpol's consideration, particularly until an independent court of review can be established.

D. Diffusions

In contrast to Red Notices, Diffusions routinely are reviewed only after they have been internationally disseminated. By endorsing this policy, Interpol effectively is aiding member nations in circumventing the Notice system and its procedural safeguards. Together with provisional Red Notices, Interpol should end this practice. Except for urgent cases, there is no reason Diffusions should not be reviewed by Interpol's General Secretariat prior to transmission, particularly given their practical equivalence to Red Notices. Interpol's failure to subject Diffusions to the same review process as Red Notices makes a mockery out of Interpol's constitution and the entire Red Notice system. Absent pre-dissemination review by Interpol, the availability of a Diffusion seeking an arrest should be limited to the most serious criminal offenses. Alternatively, Diffusions should be limited to emergency situations not afforded the weight of an arrest warrant by member nations. In any case, a person aggrieved by a Diffusion should have the right to challenge it in the same manner provided for challenging a Red Notice.

Endnotes

1 See Int'l Criminal Police Org. [Interpol], *Interpol's Rules on the Processing of Data*, art. 82, at 33, Interpol Doc. III/IRPD/GA/2011 (2014) [hereinafter *INTERPOL's Rules on the Processing of Data*]. An arrest warrant (enforceable within the issuing country's jurisdictional bounds) is distinguishable from a Red Notice, which is essentially an administrative vehicle used to publish the warrant through an international communication and database system. See *id.* art. 87, at 35. Hence, a Red Notice is an autonomous administrative act conceptually distinct from the underlying warrant.

2 *Id.* art. 82, at 33. Each Interpol member country maintains an NCB, essentially an Interpol field office, staffed by law enforcement officers. See Int'l Criminal Police Org. [Interpol], *Constitution of the ICPO-Interpol*, arts. 31-32, at 6, Interpol Doc. I/CONS/GA/1956 (2008) [hereinafter *Interpol's constitution*]. "The NCB is the designated contact point for the General Secretariat, regional offices, and other member countries requiring assistance with overseas investigations and the location and apprehension of fugitives." CLIFF ROBERTSON & DILIP K. DAS, AN INTRODUCTION TO COMPARATIVE LEGAL MODELS OF CRIMINAL JUSTICE 254 (2008). The NCBs "are regulated by their respective domestic law, but act as domestic extensions of Interpol, not their government." Mario Savino, *Global Administrative Law Meets "Soft" Powers: The Uncomfortable Case of Interpol Red Notices*, 43 N.Y.U. J. INT'L L. & POL. 263, 274 (2011).

3 The prosecuting country is the source of the wanted notice. *Interpol's Rules on the Processing of Data*, *supra* note 1, art. 82, at 33. Interpol by itself has no authority to require a member country's NCB to take any specific action. See *id.* art. 87(c), at 35.

4 Interpol has the authority to refuse to issue a Red Notice when it is not satisfied that the notice contains all the information needed to formulate a valid request for a provisional arrest. *Id.* art. 81(3)(c), at 33; see also *id.* art. 83, at 33 (listing the criteria for the publication of a Red Notice).

5 Police can also bypass (to a limited extent) the formal Red Notice system altogether by typing an informal notice of arrest in an e-mail and posting it on Interpol's internal communications system. See *id.* arts. 97-98, at 38. These e-mail notices, referred to as "Diffusions" by Interpol, go out instantly with no automatic Interpol review. *Id.* art. 98, at 38. A Diffusion therefore is an electronic dissemination of wanted person information to agencies in a particular country or area who then immediately broadcast the wanted person information to their officers. The Diffusion acts in the same manner as an "all points bulletin" or "APB," and precedes the official Red Notice. The principal difference between a Diffusion and a Red Notice is that the General Secretariat does not review a Diffusion prior to its dissemination. Compare *id.* art. 98(1), at 38, with *id.* art. 88, at 35. It may contain information similar to a Red Notice and is frequently disseminated while the issuing member country awaits an approval for a Red Notice. If a Diffusion is issued based on an improperly issued warrant, Interpol likely will refuse to issue the Red Notice. Diffusions, like Red Notices, can be challenged and are, therefore, subject to scrutiny by Interpol offices located in Lyon, France.

6 Hence a Red Notice is not, by itself, a request for extradition. The initiating country must file a formal extradition request after the person is located and detained. See *id.* art 97(1), at 38.

7 Timothy A. Williams, *Interpol Washington Recognizes the Importance of International Police Cooperation and Information Sharing*, Presentation at Foro de Líderes de Seguridad Nacional (Nov. 18, 2010) (emphasis added).

8 Savino, *supra* note 2, at 298.

9 A second, although less common, manner in which extradition can be granted is through diplomatic relations.

10 "Wanted by Interpol" goes live on the Internet, INTERPOL (Feb. 25, 2000), <http://www.interpol.int/News-and-media/News/2000/PR001>.

11 *Id.* ("If a red notice is considered to be a valid request for provisional arrest, the appropriate judicial authority in a country receiving the notice can decide, on the basis of the information it contains, and in accordance with the national laws, that the wanted person should be provisionally arrested as soon as he has been located by the police. In that case, the requesting country will be informed that the wanted person has been provisionally arrested and that the extradition process must be initiated. The requesting country will be assured that the person concerned will be detained in accordance with the applicable laws of the arresting country.")

12 If the United States is the requesting country, the Red Notice is generated by the U.S. NCB in coordination with the Criminal Division of the U.S. Department of Justice. See *Provisional Arrests and International Extradition Requests—Red, Blue, Or Green Notices*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/usam/organization-and-functions-manual-3-provisional-arrests-and-international-extradition-requests> (last visited July 29, 2015). The Notice will request that the subject be provisionally arrested. *Id.* The Notice is sent to all 188 Interpol member countries, and is posted at all U.S. border ports of entry. *Id.* The data is also entered into the National Crime Information Center (NCIC). *Id.*

13 See Notices, INTERPOL, <http://www.interpol.int/INTERPOL-expertise/Notices> (last visited July 29, 2015).

14 *Id.*

15 *Interpol Red Notice*, in INTERNAL REVENUE SERVICE, INTERNAL REVENUE MANUAL § 9.4.12.18.1 (2008), available at http://www.irs.gov/irm/part9/irm_09-004-012.html#d0e937.

16 Savino, *supra* note 2, at 305.

17 See *Interpol's Rules on the Processing of Data*, *supra* note 1, arts. 85-86, at 34-35.

18 Savino, *supra* note 2, at 304.

19 *Interpol's Rules on the Processing of Data*, *supra* note 1, art. 76(b), at 32.

20 Savino, *supra* note 2, at 305.

21 See *Interpol, Notices*, at 2, Interpol Doc. COM/FS/2010-01/GI-02 (2010), available at <http://www.interpol.int/Public/ICPO/FactSheets/GI02.pdf>.

22 Savino, *supra* note 2, 320-21.

23 *Id.* at 314 n.156.

24 *Id.* at 312.

25 *Id.*

26 *Id.*

27 See FAIR TRIALS INTERNATIONAL, STRENGTHENING RESPECT FOR HUMAN RIGHTS, STRENGTHENING INTERPOL 15-16 (2013), available at <http://www.fairtrials.org/wp-content/uploads/Strengthening-respect-for-human-rights-strengthening-INTERPOL4.pdf>.

28 *Id.* at 15-16.

29 *Interpol's Rules on the Processing of Data*, *supra* note 1, art. 99, at 38.

30 Interpol, Annual Report 2011, at 34 (2011); see also Theodore R. Bromund & David B. Kopel, *Necessary Reforms Can Keep Interpol Working in the U.S. Interest*, HERITAGE FOUNDATION BACKGROUNDER, No. 2891, Dec. 11, 2013, at 12, 36 n.119, available at http://thf_media.s3.amazonaws.com/2013/pdf/BG2861.pdf.

31 Law enforcement officers worldwide routinely exchange thousands of messages using the I-Link system. Officers located in NCBs and other authorized users are able to access I-link through the I-24/7 network.

32 *Interpol's Rules on the Processing of Data*, *supra* note 1, art. 99(3)(c); *Data Exchange*, INTERPOL, <http://www.interpol.int/INTERPOL-expertise/Data-exchange/I-link> (last visited July 29, 2015).

33 Bromund & Kopel, *supra* note 30, at 15.

34 *Id.* at 11.

35 See generally FAIR TRIALS INTERNATIONAL, *supra* note 27.

36 See Bromund & Kopel, *supra* note 30, at 8-11.

37 Libby Lewis, *Interpol's Red Notices Used by Some to Pursue Political Dissenters, Opponents*, THE CUTTING EDGE, July 25, 2011, <http://www.thecuttingedge-news.com/index.php?article=52447>.

38 See generally Bromund & Kopel, *supra* note 30.

39 See *Interpol's Rules on the Processing of Data*, *supra* note 1.

40 See Bromund & Kopel, *supra* note 30, at 12-16.

41 *Id.*

42 James Sheptycki, *The Accountability of Transnational Policing Institutions: The Strange Case of Interpol*, 19 CANADIAN J. OF L. & SOC'Y, 107, 124 (2004).

43 Sara Sorcher, *Interpol Denies Egypt's Request for Arrest of NGO Workers*, NATIONAL JOURNAL, May 29, 2013, <http://www.nationaljournal.com/nationalsecurity/interpol-denies-egypt-srequest-for-arrest-of-ngo-workers-201220423>.

44 See *Interpol's Rules on the Processing of Data*, *supra* note 1, art. 100, at 38-39.

45 Bettina Schöndorf-Haubold, *The Administration of Information in International Administrative Law—the Example of Interpol*, 9 GERMAN L.J. 1719, 1742 (2008), available at https://www.germanlawjournal.com/pdfs/Vol09No11/PDF_Vol_09_No_11_1719-1752_Articles_Haubold.pdf.

46 Bromund & Kopel, *supra* note 30, at 15 (citing Michael Olmsted, briefing, Interpol, January 12, 2010).

47 See, e.g., INTERPOL, Annual Report 2011, *supra* note 30, at 33.

48 See Bromund & Kopel, *supra* note 30, at 8-11.

49 FAIR TRIALS INTERNATIONAL, *supra* note 27, at 4.

50 Bromund & Kopel, *supra* note 30, at 27.

51 *Id.*

52 FAIR TRIALS INTERNATIONAL, *supra* note 27, at 52-65.

