

Commission for the Control of INTERPOL's Files
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FAIR TRIALS INTERNATIONAL



Your ref: CCF / 86 / R47.13 / C149.13

By email (ccf@interpol.int) and courier

20 May 2013

Re: SILAEV, Petr (31.01.1985)

1. This is a request under Article 36 of INTERPOL's Constitution (the 'Constitution') for deletion of the information on INTERPOL's Files concerning Mr Petr Silaev. The Commission for the Control of INTERPOL's Files (the 'Commission') is requested to delete the information, and issue a communication to all National Central Bureaus ('NCBs') to confirm that it has been deleted. Please note that this request is without prejudice to the existing request for access made on 30 January 2013 (the 'Access Request'), which Article 9(2) of the Operating Rules of the Commission (the 'Operating Rules') enables the Commission to process independently.

SUMMARY OF ARGUMENTS

2. Mr Silaev is a Russian national and political activist who participated in a demonstration in Moscow on 28 July 2010. During the ensuing police crackdown, he fled Russia and was recognised as a refugee in Finland. He was subsequently arrested in Spain on the basis of a request issued through INTERPOL's channels by Interpol Moscow in April 2011, seeking his arrest to face trial for an offence of 'hooliganism' relating to the demonstration. He was detained for eight days, and spent six months unable to leave Spain before the Russian extradition request was refused on the ground that the criminal proceedings were politically-motivated.
3. The submissions below argue that INTERPOL must delete the information on its files concerning Mr Silaev on two grounds:

(1) the **information is not of specific interest to international cooperation**, because:

- a. the extradition of Mr Silaev, a refugee recognised by the Republic of Finland, **would be incompatible with international law**, since it would be

inconsistent with the 1951 Convention relating to the Status of Refugees and customary international law relating to *non-refoulement*. The information seeking his arrest is therefore not suitable for international police cooperation; and

- b. the allegation against Mr Silaev – that he convened a group of demonstrators, and that unspecified members of that group caused damage to the Khimki City Administration building – **does not allege any criminal action on Mr Silaev’s part**. Criminal law in other countries would not recognise criminal liability in those circumstances. The allegation would therefore fail double criminality requirements in extradition law, making it unsuitable for international police cooperation.

(2) the inclusion of the information concerning Mr Silaev on INTERPOL’s systems is **contrary to Article 3** of the Constitution, for the following reasons:

- a. the allegation against Mr Silaev is **purely political in nature**, or alternatively predominantly political, on the basis that:
 - i. the only conduct clearly attributed to Mr Silaev – that he convened a group of demonstrators for a political purpose – is purely political in nature, and there is no allegation that he is responsible for any of the criminal actions committed by unnamed individuals in the protest;
 - ii. since there is no allegation that Mr Silaev is responsible for any criminal actions of the group, there should be no question of applying the ‘predominance test’; and
 - iii. even if one attributes the actions of other demonstrators to Mr Silaev, given the low level of damage caused to property, and the fact that it was exclusively targeted at government property, the whole allegation is still predominantly political;

- b. even if it were found that the allegation is not political in nature, the Commission should recommend deletion of the information because there are substantial grounds for believing that **the Russian NCB's pursuit of Mr Silaev through INTERPOL's channels is politically-motivated on account of his political opinions**, in line with the general rules of extradition law which Article 3 is intended to reflect. This test is satisfied in this case because:
 - i. the decision of the Finnish Immigration Service, taken with notice of the outstanding allegations, recognising Mr Silaev as a refugee at real risk of persecution on account of his political profile, and the subsequent decision of the *Audiencia Nacional*, Spain, refusing Russia's request for Mr Silaev's extradition on the ground that it was politically motivated, make it unnecessary for the Commission to re-examine the question itself; and
 - ii. should the Commission consider itself required to re-examine the question, there is further evidence showing political motivation, namely (i) the charge of 'hooliganism' and the vagueness of the underlying allegation (ii) the background to the prosecutions relating to the demonstration in which Mr Silaev was involved; and (iii) the general context political abuse of criminal justice in Russia; and
- (3) the Finnish and Spanish decisions, coupled with additional external evidence, leave no room for doubt that the inclusion of information concerning Mr Silaev on INTERPOL's files violates the Constitution. The use of an addendum would be inappropriate in such circumstances and the information should therefore be deleted altogether.

FACTUAL BACKGROUND

General background

4. Mr Silaev, born in January 1985 in Moscow, the son of a professor and scientist, became involved in left-leaning civil activism during his teenage years. He became a member of "Antifa", a loose grouping of young people who sought to denounce and resist the neo-nazi groups which began to emerge in Moscow following the end of the Soviet Union. As the respected Russian non-

governmental organisation “Memorial” confirms, Mr Silaev became a recognised figure, performing with punk bands dealing with social, anti-racist issues, ‘actively participat[ing] in the public life of the Russian Federation as an anti-fascist’ (see Annex 1, p.1). From the latter half of the 2000s, Mr Silaev focused on his university studies and took up work at the Moscow-based publishing house “Ad Marginem” (Annex 1, p.1).

The Khimki movement

5. In 2004, plans were drawn up for the construction of a new super-highway from St Petersburg to Moscow, initially planned to pass through the forest in the Khimki district, in the Moscow suburbs. The requirement for vast deforestation led to considerable resistance from Russian ecological campaigners, who established camps within the forest itself to resist building work. The main resistance movement, led by Ms Evgenia Chirikova, has consistently maintained that the planned route would destroy the Khimki forest ecosystem, and that there were numerous irregularities in the establishment of the plans and the award of contracts to private entities (Annex 2, pp. 3-7).
6. The credibility of these allegations was emphasised in January 2011, when the European Bank of Reconstruction and Development, which had originally intended to provide €1.5bn of funding for the project, abandoned its financing plans for the motorway, citing its insistence on strict conditions. The move was seen as vindication of the ecological campaigners’ claims regarding corruption and irregularities (Annex 2, pp.1-7). As one senior ecological activist noted: ‘a respected organization doesn’t want to be involved in a dubious project’ (Annex 2, pp. 1-2).
7. Within Russia, the harassment of Khimki forest activists is well-documented. For instance, as the enclosed Amnesty International report explains, Mikhail Beketov, editor of the local newspaper Khimkinskaya Pravda, received warnings from local officials after he began exposing corruption, and was subsequently beaten so severely that he eventually had to have a leg and several fingers amputated (see Annex 3, p. 14). He recently died as a result of the consequent health complications (see Annex 4, pp. 1-2). The Committee for the Protection of Journalists has denounced the failure of the Russian authorities to investigate his death adequately (Annex 4, p. 3).
8. As well as prominent individual cases like this, the ecological campaigners within the forest itself also face harassment and beatings by private security guards (Annex 3, p. 14). Evgenya Chirikova’s movement has, on several occasions, denounced the fact that these agents are not

security guards possessing proper security credentials, but rather appear to be informally hired local manpower (Annex 2, pp. 8-9). Memorial's letter confirms the 'repression against defenders of the forest including an attack by football hooligans' (Annex 1, p. 1).

The July 2010 demonstration

9. Following a stay in the construction of the motorway due to a court challenge, construction began in 2010, leading to renewed resistance by the ecologists. Reacting to this, and to the perceived recourse by the Khimki authorities to hired neo-Nazi manpower, the anti-fascist movement came together to support the Khimki forest defenders. A demonstration, in which Mr Silaev was actively involved, took place on 28 July 2010 in Khimki City (the 'July 2010 demonstration').
10. Footage of the demonstration is openly available online (see Annex 5). Mr Silaev can be seen wearing beige shorts and a white short-sleeved shirt with a light grey checked pattern. As well as the photograph on Mr Silaev's passport, a high-resolution picture is provided to assist the Commission in identifying Mr Silaev in the video (references and photograph are provided at Annex 5). The Commission will have no difficulty doing so: unlike many of the demonstrators in the footage, Mr Silaev is unmasked, clearly visible and shouting through a megaphone.
11. As the Commission will note, the demonstration involved a procession of young people along the streets of Khimki, coming to a halt at the City Administration building. Individual demonstrators applied graffiti to the walls which stated '*русский лес*', or 'russian forest', lit flares and chanted slogans. Some individuals can be seen in the footage throwing stones at the windows. Individual demonstrators also appear to use firearms; as the enclosed document from Interpol Moscow itself dated 26 April 2011 confirms (see Annex 6, p. 1), these were so-called 'traumatic guns', essentially 'bi-bi' guns which fire rubber ball bearings and which are readily available within Moscow. Following a brief period outside the City Administration building, the demonstration moved on and the demonstrators boarded a suburban train and dispersed.
12. At no stage in the footage can Mr Silaev be seen causing any criminal damage to the Khimki City Administration building, or being present in the area where this took place. Indeed, he can be clearly seen walking away from the scene in one video (see Annex 5, Clip 1, at 01:40).

Police crackdown

13. On 29 July, Aleksey Gaskarov, a well-known journalist, was invited to an interview with local authorities and subsequently arrested by the Federal Security Service (FSB) anti-extremist unit. On the same day, another representative of the movement, Maxim Solopov, was arrested seconds after giving an interview live on air for the radio station *Svoboda* (as stated in Memorial's letter, see Annex 1, p. 2). More broadly, there followed a widespread, indiscriminate crackdown on known anti-fascist activists in the Moscow region (ibid).
14. The two spokespersons for the anti-fascist Khimki movement having been detained, Mr Silaev, who was known to police as an established anti-fascist activist, anticipated that he would be the next to be arrested. However, at the same time, having the benefit of media and publishing connections and an established media status, he also considered himself obliged to speak on behalf of those detained. Thus on the night of 3 August 2010, by which point he was in hiding within Russia, Mr Silaev gave an anonymous interview to the respected journalist Oleg Kashin, published by the mainstream newspaper *Kommersant* on 4 August 2010 in an article called 'Everyone is entitled to their 15 minutes of power' (a copy is supplied at Annex 7).
15. Shortly after publishing this story, Oleg Kashin was brutally assaulted, causing widespread outrage among the Russian and international press (see Annex 8).

Escape

16. At this point, Mr Silaev began to prepare to escape from Russia as he had been informed by other people who had been arrested that his name had been mentioned in interrogations. He made his way to Minsk, from where he took a commuter train destined for Kaliningrad, but got off at Vilnius, Lithuania, travelled to Kaunas and immediately travelled to Brussels, Belgium, where he claimed asylum.

Asylum granted in Finland

17. As the Commission will know, within the European Union, responsibility for an asylum claim may be transferred from the Member State in which the asylum claim is made to another Member State to which the applicant has a greater connection.¹ Since Mr Silaev was in possession of a

¹ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1).

Finnish visa, having travelled there in the past, Finland was deemed responsible for his asylum application.

18. On 2 March 2012, the Finnish Immigration Service granted Mr Silaev asylum under its legislation implementing the 1951 Convention relating to the Status of Refugees and Directive 2004/83/EC. FTI supplied a copy of this decision, along with a translation, in the Access Request. These are reproduced at Annex 9.
19. The Finnish Immigration Service took account of Mr Silaev's admission that there were allegations outstanding against him and that other participants in the demonstration had been prosecuted (Annex 9, p. 2), considering his evidence credible (Annex 9, p. 5). It also took account of the general context regarding the arrests and physical violence being used against Khimki forest defenders, and law enforcement surrounding demonstrations in Russia (Annex 9, pp. 4-5).
20. Based on these considerations, in addition to finding that Mr Silaev was at risk of harm from non-state actors, the Finnish authorities also found that he was 'a politically profiled activist in such a way that he has reason to fear persecution in his home country by the authorities of his home state' (Annex 9, p. 5 [English translation]).

Arrest and detention in Spain

21. On 21 August 2012, whilst on a trip to Spain, Mr Silaev was arrested by the Spanish authorities in Grenada. Enclosed is a document from the *Juzgado Central de Instrucción No. 2* (Central Investigation Chamber No. 2), ordering Mr Silaev's arrest (Annex 10). The document states that a fax was received by the Interpol NCB (FTI understands this to be the Spanish NCB), and on that basis the arrest was ordered.
22. The basis for Mr Silaev's arrest was: (i) the decision of the Khimki District Court, criminal case no. 91938, issued on 11 August 2010 – though this was not produced in the extradition proceedings; and (ii) a *radiograma* from INTERPOL no. 70486 dated 26 April 2011. This appears to be a reference to the document dated 26 April 2011 (the 'Radiograma'), from Interpol Moscow addressed to 'Interpol Zone 2', which appears to be a diffusion sent via INTERPOL's i-24/7 network (Annex 6).

23. Mr Silaev was taken to Madrid, where his provisional detention was ordered by the *Juzgado Central de Instrucción No. 2*, on the basis that he had no local social and employment ties (Annex 11). From 22 August 2012, he was detained in *Penitenciarío V*, a high-security prison outside Madrid. He remained there for eight days. However, following interventions by the United Nations High Commissioner for Refugees (Spain) and Amnesty International (Spain) (see Annexes 12 and 13), both of which highlighted that Mr Silaev had been recognised as a refugee in Finland, he was released following a decision issued on 30 August 2012. He was, however, required to report on a weekly basis to the local court in Grenada pending the outcome of the proceedings.

Extradition proceedings

24. Further to the arrest, the *Juzgado Central de Instrucción No. 2* initiated extradition proceedings as envisaged by the 1957 Council of Europe Convention on Extradition. The basis of the proceedings was an allegation, set out in the Radiograma, of ‘hooliganism’ (under Article 213(2) of the Russian Criminal Code)² with use of weapon or other objects used as weapon, committed by an organized group. The allegation was described as follows:

‘The subject together with his accomplices collected a group of 150 people under the pretext of support of the defenders of Khimki forest which had to be cut down for the subway to be layed through. The [aforementioned] group came to the building of the town administration and breaking public order began to shoot from traumatic pistols and throw stones and smoke grenades to the windows and the entrance door. The inflicted damage to the building of the town administration amounts to 395 000 rubles.’

25. By verbal note of 19 September 2012, the Russian authorities lodged a formal extradition request. The note comprised, *inter alia*: (a) a request for extradition from the General Prosecutor’s Office of the Russian Federation, complete with assurances that Mr Silaev would not be tried unfairly, would not be subject to inhuman or degrading treatment, and that the extradition request was not politically motivated; (b) an indictment dated 5 August 2010; (c) a ‘search and arrest warrant’, issued by Mr. N.O. Ermilov, head of Office 2 in Department 4, Investigation Unit of the Directorate General for Investigations, part of the Directorate General of the Interior of the Moscow Region, dated 4 August 2010; (d) a similar warrant issued by Mr. A.N. Ochnev, of the Judicial Police of the Directorate for the Interior of Khimki, dated 6 August 2010;

² Available at <http://www.russian-criminal-code.com/PartII/SectionIX/Chapter24.html>

and (e) an extract from the Russian Criminal Code explaining the conduct caught by Article 213(2) (see Annex 14, Extradition Judgment, pp. 2-3).

26. After the *Juzgado Central de Instrucción No 2* submitted the proceedings to the *Audiencia Nacional* (the national court competent to rule on the extradition request) in accordance with standard practice in such cases, the *Ministerio Fiscal* (Spanish state attorney) declined to support the extradition request, on the basis that Mr Silaev was a refugee in Finland. The *Ministerio Fiscal* maintained that position on 27 January 2013 at the extradition hearing (Annex 14, p. 4).

Extradition judgment

27. On 11 February 2013, the *Sección Segunda de la Sala de lo Penal de la Audiencia Nacional* (Second Section of the Criminal Division of the *Audiencia Nacional*) ruled on the extradition request by way of reasoned order. It found the extradition request admissible, though noting from the outset that all the relevant documents emanated from police and prosecutorial authorities, and not judicial authorities.

28. On the merits, the *Audiencia Nacional* found that Spanish criminal law did recognise as criminal certain conduct committed in the context of demonstrations (eg. public disorder and criminal damage, set out in Articles 557-1 and 263 *et seq* of the Spanish Criminal Code), but noted that the papers disclosed no reference to Mr Silaev having any specific role in such criminal actions, as distinct from participation in the demonstration in the context of which those actions were carried out (Annex 14, p.7, top paragraph).

29. It pointed out that the whole extradition process appeared to be police-led, with minimal judicial involvement as, despite there being a reference to an order of the Khimki District court, only the arrest warrants issued by the prosecutors were supplied. It commented that those documents lacked any substantiated assertion that Mr Silaev had participated in unlawful acts exceeding the permissible bounds of exercise of the freedom of expression (Annex 14, p. 7, middle paragraph).

30. The *Audiencia Nacional* also noted that Mr Silaev had been recognised as a refugee in Finland, pointing out that the basis for that decision was the existence of a risk of persecution in relation to the Khimki demonstration (Annex 14, pp. 7-8).

31. The court concluded that 'in the present case, all these circumstances clearly call into doubt the existence of the traditional principles whose observance is obligatory, such as double criminality

and the absence of political motivation of the criminal prosecution or the possible existence of illegitimate reasons for proceeding with the same.’ (Annex 14, p. 8) It based this finding on Article 3 of the European Convention on Extradition,³ which, at subparagraph (2), provides that extradition shall not be granted ‘if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his ... political opinion, or that that person’s position may be prejudiced for any of these reasons’.

32. The *Audiencia Nacional* further considered the application of Article 4 of the Law on Extraditions from Spain,⁴ which requires refusal of extradition where the person has been granted asylum. It pointed out that ‘whether it be Spain or another country within our cultural and legal entourage, in respect of which there can be no doubt as to its motivation, that granted asylum, is irrelevant’. It thus interpreted the legislative provision as covering a grant of asylum by another European state, and found that Mr Silaev was therefore protected from extradition as someone who had been granted asylum (Annex 14, p. 9).

33. On the basis of all of the above, the court refused extradition. Given that the *Ministerio Fiscal* objected to the extradition (Annex 14, p. 4), there is no question of an appeal and this judgment is final.

34. This put an end to six months of distress for Mr Silaev. However, despite the extradition refusal, he remains in a situation of uncertainty because of the existence of the Radiograma, and his ability to travel is compromised.

GROUNDINGS FOR DELETION OF THE INFORMATION

35. Mr Silaev requests deletion of the information concerning him on the basis that: (1) the information is not ‘of specific interest for the purposes of international police cooperation’; and (2) the presence of the information in INTERPOL’s systems is contrary to Article 3 of the Constitution.

(1) Case not ‘of specific interest for the purposes of international police cooperation’

³ European Convention on Extradition, Paris, 13 XII 1957, ETS no. 24, available at:

(<http://conventions.coe.int/Treaty/en/Treaties/Html/024.htm>)

⁴ Ley 4/1985, de 21 Marzo, de extradición pasiva, Boletín Oficial del Estado 26 de Marzo de 1985.

36. It is clear that the Russian NCB, by issuing the Radiograma (and, if it has done so, requesting any red notice) intends to seek the arrest of Mr Silaev, one of the appropriate purposes of international police cooperation as provided in Article 10(2) of INTERPOL's Rules on the Processing of Data ('RPD').⁵
37. However, in order to be processed in INTERPOL's files, the information provided by NCBs must be 'of specific interest for the purposes of international police cooperation', as required by Article 35(1) RPD. The case must, therefore, be one where other countries participating in INTERPOL could assist in the pursuit of the person concerned.
38. Indeed, Article 35(2) specifies that compliance with the condition is assessed by reference to 'the international nature of the data and, in particular, the extent to which the data may be used by National Central Bureaus, national entities or international entities other than the source'.
39. Further clarification is provided by Article 76(1)(b) RPD, which states that a notice may not be published if it 'is not, in the case in point, of specific interest for the purposes of international police cooperation', and that 'this interest is assessed in light of the possibility that the request could be processed by all the Organization's members'. Since diffusions serve the same purpose as red notices (seeking the arrest of a person with a view to extradition), this provision is equally relevant to diffusions.
40. Thus INTERPOL cannot be used to circulate requests with which other countries could not assist. This requirement is not met in the present case, as: **(a)** Mr Silaev is protected under international law; and **(b)** the allegation does not meet basic requirements of extradition law in any event. This reasoning is elaborated upon further below.

a. Mr Silaev is protected under international law

41. The provisions referred to in paragraphs 37 to 39 above provide, in effect, that where the request is for the arrest of a person with a view to extradition, it will not be 'of specific interest for the purposes of international police cooperation' where extradition would be inconsistent with general rules of international law, in particular because the person is protected by the 1951 Convention relating to the Status of Refugees (the '1951 Convention'). Indeed, although INTERPOL itself is not a signatory to the 1951 Convention, INTERPOL's members could not intend

⁵ AG/2011/RES/07.

it to facilitate the arrest of people they have themselves undertaken to protect under international law, particularly given INTERPOL's requirement to observe the right to 'seek and enjoy' asylum from persecution under Article 14 of the Universal Declaration of Human Rights, referred to in Article 2 of the Constitution.

42. Mr Silaev has been recognised as a refugee in Finland, on the basis that he had a well-founded fear of persecution by the state authorities in Russia (see the asylum decision of the Finnish Immigration Service, Annex 9). As the UN High Commissioner for Refugees (Spain) and Barbara Lochbihler MEP reminded the *Audiencia Nacional* during the extradition proceedings (Annexes 12 and 15), the principle of *non-refoulement*, as articulated by the 1951 Convention relating to the Status of Refugees and other treaties and indeed customary international law, prohibits the return, by any means whatsoever, of a person recognised as having a well-founded fear of persecution. Mr Silaev is therefore protected under international law and INTERPOL's channels should not be used to facilitate his arrest.

b. The allegation does not meet basic requirements of extradition law

43. Equally, where the question is the use of INTERPOL's systems to search for the location of a person and to request their arrest with a view to extradition, the information will not be 'of specific interest for the purposes of international police cooperation' if the conduct in question would not constitute an offence in countries other than that of the requesting NCB. Indeed, it is a general requirement of extradition law, worldwide, that the conduct in question must constitute a criminal offence in the requested country. This requirement appears, for example, in Article 2 of the United Nations Model Extradition Treaty (Annex 16).

44. This condition is not satisfied by the allegation as described in the Radiograma. As the decision of the *Audiencia Nacional* makes clear, the allegation lacks any imputation of criminal conduct to Mr Silaev himself.

45. Indeed, the logic of the allegation is flawed: effectively, it is stated that (i) Mr Silaev brought together a group of people; (ii) members of that group caused criminal damage; and (iii) therefore, Mr Silaev is guilty of hooliganism. There is no allegation that Mr Silaev participated in any unlawful activity or had any role in encouraging this.

46. The prosecutors who issued the arrest warrants for Mr Silaev appear to interpret Article 213(2) of the Russian Criminal Code broadly, attributing consequences of the actions of specific demonstrators to Mr Silaev as an alleged organiser of the demonstration. However, given that international human rights principles preclude this broad approach to criminal liability in the context of demonstrations (see paragraphs 60 and 68 below), it is unlikely that criminal law in other countries would recognise Mr Silaev's conduct as criminal in these circumstances. The *Audiencia Nacional* itself noted this in relation to Spanish law (see paragraph 28 above). Similarly, under English law, the offences of criminal damage, riot or violent disorder require direct authorship by the individual, or a specific allegation of aiding and/or abetting the direct author.⁶
47. This means that the allegation made by the Russian NCB should not be deemed to be 'of specific interest for the purposes of international police cooperation', as it would inevitably fail dual criminality tests in extradition agreements, since the criminal laws of other countries participating in INTERPOL would not recognise criminal offences in such an allegation.
48. For all of the above-mentioned reasons, the Commission is asked to conclude that the data circulated by the Russian NCB are not of 'of specific interest for the purposes of international police cooperation'. It does not, therefore, comply with INTERPOL's rules and should be deleted.

(2) Non-compliance of the information with Article 3 of INTERPOL's Constitution

49. Article 3 of INTERPOL's Constitution provides that 'it is strictly prohibited for the Organization to undertake any intervention or activities of a political, military, religious or racial character'. This is to be assessed in light of the factors listed at Article 34(2) RPD (formerly Article 40 of the Implementing Rules for the Rules on the Processing of Information).
50. As set out below, the inclusion of information concerning Mr Silaev in INTERPOL's databases violates Article 3 of the Constitution due to: (a) the political nature of the allegation against Mr Silaev; and (b) the fact that the Russian authorities are politically-motivated in pursuing Mr Silaev on account of his political opinions.

a. Political nature of the allegation

⁶ Criminal Damage Act 1971, s.1; Public Order Act 1986, ss. 1-2.

51. It is explained below that: (i) the only conduct which is directly alleged against Mr Silaev – convening a group of demonstrators – is not criminal and is purely political; (ii) since there is no criminal allegation against Mr Silaev, there should be no question of applying the ‘predominance test’ to weigh up the gravity of the offending committed by other protestors against Mr Silaev’s political objectives in allegedly convening the group; and (iii) even if one attributes the criminal damage committed by other unspecified people to Mr Silaev as the alleged organiser of the demonstration, the allegation remains predominantly political in nature.

i. The allegation against Mr Silaev is purely political

52. The only conduct directly alleged against Mr Silaev in the Radiograma is that he convened a group of people to participate in a demonstration (and, implicitly, that he participated in that demonstration). It is separately stated that the group, as a whole, caused damage to the government building (Annex 6).

53. The Radiograma states that this constitutes an offence of ‘hooliganism with use of weapon or object used as weapon, committed by an organized group’ under Article 213(2) of the Russian Criminal Code. Article 213 provides as follows (see Annex 17):

‘1. Hooliganism, that is, a gross violation of the public order manifested in patent contempt of society and attended:

a) by the use of weapons or articles used as weapons;

b) by reason of political, ideological, racial, national or religious hatred - shall be punishable [...].

2. The same deed committed by a group of persons by previous concert, or by an organised group or connected with resistance to a representative of authority or to any other person who fulfils the duty of protecting the public order or who suppresses violation of public order - shall be punishable [...].’

54. In a Resolution of 15 November 2007, the Plenum of the Supreme Court of the Russian Federation has stated that in order for liability to arise under Article 213(2), ‘a preliminary agreement must be reached not only on making joint hooliganism, but also on the use of weapons or objects used as weapons’ (Annex 27, point 5). It further states that ‘the actions of other participants who did not participate in any preliminary agreement and do not use weapons or objects used as weapons, and have not committed criminal acts ... do not constitute a crime’ (Annex 27, point 5).

55. Despite this clear distinction, the Radiograma fails to make any allegation that Mr Silaev planned to commit offences, as distinct from simply convening a political demonstration. Of course, only the Russian courts are competent to say whether criminal liability arises under Article 213(2) in respect of Mr Silaev's alleged actions. However, it certainly appears that the investigators' allegations under that provision are based on the assumption that, because Mr Silaev took part in the demonstration, he must be severally liable with other participants for offences committed by the group as a whole, despite not specifically alleging any preliminary agreement.
56. The categorisation of the facts under Russian criminal law is, of course, not determinative. Indeed, INTERPOL states that an analysis should be carried out of the specific facts of each case, 'even if – in the requesting country – the facts amount to an offence against the ordinary law'.⁷
57. The allegation in the Radiograma should be categorised as purely political. Indeed, the act of convening a group of people to demonstrate against perceived irregularities and unlawful coercion of an ecological campaign is, by its very nature, a political act, and an exercise of the fundamental right to freedom of expression, assembly and association as protected by Articles 19 and 20 of the Universal Declaration of Human Rights.
58. The fact that the group proceeded to demonstrate in front of a government building, and that some of the people demonstrating committed criminal damage to that building, does not change the nature of Mr Silaev's own alleged conduct. Absent any allegation that Mr Silaev participated, directly or indirectly, in the commission of criminal damage, his alleged conduct should be categorised as purely political and devoid of any criminal character.
59. Article 83(2)(b)(i) RPD requires that, when requesting a red notice, NCBs must provide a '*succinct and clear description of the criminal activities of the wanted person*' (emphasis added). This requirement is all the more important where the charge, such as that set out in the Radiograma, relates to 'public order'. Article 2 of the Constitution requires INTERPOL to respect the spirit of the Universal Declaration of Human Rights, which at Articles 19 and 20 protects the freedom of speech and freedom of assembly and association. This overriding requirement should lead the Commission to insist upon specification of individual wrongdoing, as distinct from the mere exercise of fundamental rights to freedom of expression, assembly and association, in order to avoid INTERPOL's systems being used to seek the arrest of ordinary demonstrators. A broad

⁷ AGN/20/RES/11.

approach such as that taken by the investigators who issued the arrest warrants under Article 213(2) of the Russian criminal code cannot be accepted under INTERPOL's rules.

60. Indeed, the European Court of Human Rights has found that the use of criminal law to penalise mere participation in a demonstration represents a disproportionate interference with the right to freedom of assembly protected by Article 11 of the European Convention on Human Rights 'so long as the person concerned does not himself commit any reprehensible act on such an occasion'.⁸ Similarly, the Organization for Security and Cooperation in Europe, in its *Guidelines on Freedom of Peaceful Assembly* ('the OSCE Guidelines') formulated jointly with the Council of Europe's Venice Commission on Democracy through Law, stated that 'individual participants in any assembly who themselves do not commit any violent act should not be prosecuted, even if others in the assembly become violent or disorderly'.⁹ Likewise, the United Nations Special Rapporteur on Freedom of Expression has stated that '[a]ssembly organizers and peaceful participants should not be held responsible and liable for the violent behaviour of others'.¹⁰

61. In this case, there is no allegation that Mr Silaev committed any criminal action himself. As stated by the *Audiencia Nacional*, 'we are not dealing with a substantiated judicial allegation of the requested person's participation in specific acts exceeding the exercise of constitutionally recognised rights and freedoms' ('*no se trata de una imputación judicial fundada respecto de la participación del reclamado en específicos hechos que excedan del ejercicio de derechos o libertades fundamentales constitucionalmente reconocidos*') (Annex 14, p. 7, middle paragraph). Indeed, as mentioned above, all of the footage shows Mr Silaev leading chants with a megaphone, but at no stage committing any violent action. His conduct, as described in the Radiograma, is thus purely political in nature and the information should therefore be deleted.

ii. No application of the 'predominance test'

⁸ *Ezelin v. France* App. no 11800/85 (Judgment of 26 April 1991), § 53. See also, by analogy, Judgment Kp 1/04 of the Polish Constitutional Tribunal, finding that a statute establishing joint and several civil liability of the assembly organiser and perpetrator for any damage caused during the assembly was contrary to Article 57 of the Constitution of the Republic of Poland, which protects the freedom of assembly.

⁹ Organization for Security and Cooperation in Europe, Office for Democratic Institutions and Human Rights, *Guidelines on Freedom of Peaceful Assembly* (<http://www.osce.org/odihr/73405?download=true>), p. 62.

¹⁰ Statement by Maina Kiai, Special Rapporteur on the rights to freedom of peaceful assembly and of association 20th session of the Human Rights Council, 20 June 2012 (<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12349&LangID=E>).

62. As stated above, the only conduct directly alleged against Mr Silaev is that he convened a group of demonstrators. On the specific facts of this case, irrespective of the content of the Russian Criminal Code, Mr Silaev's alleged actions should not be treated as a crime. There should not, therefore, be any reason to apply the 'predominance test', endorsed by the General Assembly Resolutions of 1951 and 1984¹¹, which serves to determine only whether an *offence* which is not by its very nature political is, because of its motivation and/or context, a 'relative' political offence.

63. Indeed, FTI understands the 'predominance test' applied by INTERPOL to be based on the approach of extradition courts when they consider the application of the 'political offence' exception in international extradition treaties. The authoritative approach is that of the Swiss *Bundesgericht*, summarised as follows in a document produced by the UNHCR Legal Protection Department, *The Interface between Extradition and Asylum* (extracts produced at Annex 18):

'Under this reasoning, for a common crime to be of a 'predominantly political nature', it must have been committed in connection with a struggle for power within a State, a rebellion or a civil war. The offence must have been politically motivated, apt to achieve the political purpose, and there must have been a close, direct and clear link between the act and the aim pursued. A further criterion is that of the proportionality between the purpose of the act and the means employed to achieve it (paragraph 79).'

64. INTERPOL's Repository of Practice¹² (the 'Repository of Practice') on Article 3 follows this approach. For instance, at point 3.3, it cites the example (Case 1) of two individuals who, part of a group, acting 'with the aim of impeding [the] election campaign', used obscene words and 'struck blows by feet and hands to different parts of body' against opposing activists, and destroyed a tent being used as a polling station. It is stated that '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'.

¹¹ Respectively, AGN/20/RES/11 and AGN/53/RES/7.

¹² Repository of Practice: Application of Article 3 of INTERPOL's Constitution in the context of the processing of information via INTERPOL's channels.

65. No such analysis can be made in respect of the allegation in the Radiograma, since this does not allege any specific criminal action on Mr Silaev's part (nor indeed any physical violence against any individuals), and instead purports to hold him responsible for damage to property caused by the group as a whole. Absent a clear link of responsibility for the actions of the group, there is no basis for applying the predominance test.
66. In this regard, it is useful to consider the case-law of the Court of Justice of the European Union, which has considered whether members of a group responsible for criminal actions can be excluded from asylum under Article 1F(b) of the 1951 Convention, a provision which requires broadly the same assessment as the 'political offence' exception in extradition treaties.¹³ It held that in order for a person to come within the scope of that exclusion, 'it must be possible to attribute ... a share of the responsibility for the acts committed by the organisation in question while that person was a member'.¹⁴
67. Here, since the Russian NCB has not made any allegation that Mr Silaev is specifically responsible for any of the criminal actions of the group, there should be no question of applying the 'predominance test'.
68. Nor should the Russian NCB be able to rely on the statement that Mr Silaev allegedly organised the demonstration to establish a link of responsibility, when it has not in fact alleged any specific wrongdoing on his part. As the OSCE Guidelines specify, 'organizers should not be liable for the actions of individual participants or for the actions of non-participants or *agents provocateurs*. Instead, there should be individual liability for any individual who personally commits an offence'. Absent any specific allegation of that kind, there should be no application for the predominance test.

iii. In any event, the allegation is predominantly political

69. Despite not alleging authorship on his part, the prosecutors who issued the arrest warrants against Mr Silaev do, however, hold Mr Silaev responsible for the actions of the group part. FTI also notes that in one of the examples cited in the Repository of Practice on Article 3, INTERPOL has stated that 'the organisation 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

¹³ On the equivalence of the assessment required under Article 1F(b) of the 1951 Convention and the 'political offence' exception, see *T v Secretary of State for the Home Department* [1996] 2 All ER 865.

¹⁴ Joined Cases C-57/09 and C-101/09 *B and D* [2010] ECR I-10979, at 95.

expression' (point 3.3, Case 2; emphasis added). This suggests that INTERPOL may accept that an alleged organiser or member of a group can be treated as responsible for the actions of other participants, even without a direct allegation of responsibility, when considering the predominance test.

70. Even if the actions of the group were attributed to Mr Silaev, on the facts of this case the allegation is predominantly political in nature because of the low degree of harm caused and the close connection of the offending and the political aim.
71. Taken at its highest, the allegation is that Mr Silaev participated in the organisation of the demonstration and that the demonstration resulted in criminal damage being caused to a building. The allegation also specifies that this was allegedly done 'under the pretext of support to the defenders of the Khimki forest which had to be cut down for the subway to be laid through'. It further specifies that '*traumatic* pistols' (emphasis added) were used, and that the total damage done to the building was of 395 000 rubles, that is, around € 9 000.
72. Thus, the whole allegation is connected to a political purpose: denouncing the repression of the Khimki forest defenders. Mr Silaev's actions represented nothing more than the exercise of his freedom of expression, assembly and association in furtherance of that political aim. The criminal actions of other members of the group, even if attributed to Mr Silaev, were also tightly connected to that aim: slogans were drawn on the Khimki City Administration building and such harm as was done was done exclusively to that building. There was no violence directed at, or harm caused to, any individual or private property, and any harm done to the government building was superficial, consisting of only broken windows and graffiti. Only rubber ball, imitation firearms were used, as confirmed by the Radiograma itself, and the use of flares and fume petards cannot be said to have caused great disturbance. The allegation does not compare with violent crime directed against individuals, as in the allegations in Cases 1 and 2 at point 3.3 of the Repository of Practice. This was simply a group of young demonstrators engaged in protest against government.
73. It is to be borne in mind that, in the approach of the Swiss *Bundesgericht* discussed above, 'the political offence exemption does not apply if extradition is requested by a democratic State, where change can be achieved by non-violent means and whose courts possess genuine autonomy *vis-à-vis* the political authority' (Annex 18, paragraph 79). It is noteworthy, in this respect, that Russia is one of the few European countries not to be signatory to the Aarhus

Convention,¹⁵ which enshrines the concept of public participation in official decision-making in environmental matters. Indeed, despite building significant public opposition to the highway construction, the Khimki ecological campaigners have been the target of sustained repression (see Annex 3, pp. 13-14). The July 2010 demonstration was a reaction to this, and was not of a disproportionately violent nature such as to make it predominantly criminal.

iv. Conclusion on the ‘predominance test’

74. The Commission should not consider it appropriate to apply the ‘predominance test’ in this case. Indeed, as pointed out by the *Audiencia Nacional*, the Russian authorities have not alleged that Mr Silaev had any direct role in the commission of criminal acts, and in the absence of a clear allegation of specific offending on the part of Mr Silaev, there can be no question of weighing up its gravity against Mr Silaev’s alleged aims. In the event that the Commission does apply the ‘predominance test’, however, it should conclude that the allegation described in the Radiograma is predominantly political in character.

b. Political motivation

75. Should the Commission find that the allegation against Mr Silaev is predominantly ordinary-law in character, the inclusion of information on INTERPOL’s systems regarding the allegations against Mr Silaev nevertheless violates Article 3 as the offences are being prosecuted for a political purpose. As explained below: (i) such political motivation is established in this case by the prior decisions of the Finnish and Spanish authorities, so that the Commission need not re-examine the case itself; and (ii) should any arguments to the contrary be raised by the Russian NCB, there is further evidence demonstrating political motivation.

76. FTI notes that, in correspondence with us, the Commission has confirmed that it ‘does not make judgments on guilt or innocence’ and that it does not ‘presume to substitute its judgment for that of [national extradition courts]’ (Annex 19, paras. 3, 12); on INTERPOL’s website it likewise states that it does not have the function of ‘giving a view on the validity of an arrest warrant’. Similarly, extradition courts are not competent to review the validity of an arrest warrant. Nevertheless, extradition courts can refuse cooperation where they believe the request has been made in order to pursue the person on account of their political opinions, notwithstanding the

¹⁵ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, 25 June 1998.

validity of the arrest warrant (as the *Audiencia Nacional* did on the basis of Article 3(2) of the European Convention on Extradition).

77. Article 3, which is designed to ‘reflect extradition law’, requires INTERPOL to delete information on the same basis.¹⁶ It follows, therefore, that the Commission should take a view as to political motivation underlying the use of INTERPOL’s systems.

78. The material scope of the Commission’s enquiry under Article 3 is defined by the factors listed in Article 34(3) RPD (eg. the charges and underlying facts, the status of the person, the general context of the case etc). However, public materials do not indicate precisely what evidential threshold applies, that is, at what point the Commission should be satisfied that a case is politically-motivated.

79. The appropriate test is whether there are ‘substantial grounds for believing’ that Mr Silaev is being prosecuted on account of his political opinions.¹⁷ This test is widely used to determine when states must refuse their own cooperation in order to protect individuals from a risk of persecution, without considering the legal validity of any proceedings against them in the requesting country.¹⁸

ii. Political motivation established by prior national decisions

80. There are substantial grounds for believing that the Russian NCB is using INTERPOL’s channels to pursue Mr Silaev on account of his political opinions. There is a wide array of evidence to support this conclusion.

81. However, it is not necessary for the Commission to conduct its own assessment. As indicated by Article 34(3)(d) RPD, the Commission has to take into account ‘the position expressed by another NCB’. It follows that the decisions of other sovereign authorities of the countries concerned

¹⁶ *INTERPOL Repository of Practice: Application of Article 3 of INTERPOL’s Constitution*, p. 6

¹⁷ See Article 3(2) of the 1957 European Convention on Extradition, or Article 3(b) of the United Nations Model Extradition treaty (Annex 14). See also Article 4(4) and (5) of the Inter-American Convention on Extradition.

¹⁸ It would be inappropriate for the Commission to apply a higher standard of proof of a political abuse, in particular the ‘very exacting standard of proof’ applied by the European Court of Human Rights (ECtHR) when deciding whether a Contracting State has prosecuted someone for an improper purpose in breach Article 18 ECHR (see, for instance, *Khodorkovskiy v. Russia* App. No 5829/04 (Judgment of 31 May 2011), paragraph 256). Indeed, the ECtHR is mandated by the Contracting States to determine whether they have abused their own justice system. It is thus competent to ‘give a view on the legal validity of an arrest warrant’ – which INTERPOL cannot do –, which naturally requires a higher standard, since it involves overruling national authorities’ own decisions.

should also be taken into account. Here, the Commission has the benefit of decisions of two national authorities, both of which have reached the view that Mr Silaev is the subject of politically-motivated persecution. One is the decision of the *Audiencia Nacional*, an independent judicial organ of Spain, while the other is a decision of the government of Finland, ranked No 1 in Transparency International's corruption index for 2012. These decisions represent accurate applications of international asylum and extradition law. Indeed both decisions, which were made with the benefit of direct evidence from Mr Silaev, go to unusual lengths carefully to apply the relevant laws.

82. For instance, the Finnish asylum authority, which was advised of the fact that Mr Silaev and others were being prosecuted in relation to the demonstration, clearly considered the exclusion clause under Article 1F(b) of the 1951 Convention, referring to UNHCR guidance and stating its understanding that 'individuals seeking refuge from prosecution or punishment resulting from a[n ordinary-law] law offence are not refugees', whereas 'a refugee is a victim –or potential victim— of injustice, not a fugitive from justice' (Annex 9, p. 4 [English translation]). It thus clearly took the view that Mr Silaev was the subject of persecution for political activity, and not the subject of legitimate prosecution for criminal activity. In this regard, it relied on background information authored by the US State Department in relation to the Khimki demonstrations (extracts reproduced at Annex 20; see pp. 7, 33, 35, 44), various reports of Radio Free Europe, and information from Amnesty International (Annex 9, pp. 4-5). It also underlined that '[Mr Silaev's] account about his participation in the Khimki Forest events can be considered credible'.
83. Likewise, the *Audiencia Nacional's* decision is anchored in a careful assessment of the facts. It notes that the arrest warrants, issued by Msrs Ochnev and Ermilov (members of the Khimki and Moscow investigative authorities) impute criminal wrongdoing to Mr Silaev, an established political figure, without any substantiated basis (Annex 14, p. 7). It notes the grant of asylum to Mr Silaev, pointing out that the very basis for it was the risk of 'illegitimate political persecution' by the Russian authorities against Mr Silaev on account of his role in the Khimki demonstration (*ibid.*). The *Audiencia Nacional* concludes that these circumstances 'plainly call into question' the request's compliance with 'traditional mandatory rules such as ... the absence of political motivation for the criminal prosecution or other improper reasons for carrying out the latter' (Annex 14, p. 8).
84. The *Audiencia Nacional's* decision thus builds on the Finnish asylum decision by finding not only that Mr Silaev is at general risk of persecution because of his political profile, but that the very

arrest warrants seeking his arrest issued by the Khimki prosecution authorities were proof of that motivation. The strength of this conclusion is particularly high given the assurance provided with the extradition request that the latter was not politically-motivated (Annex 14, p. 2, point a): the *Audiencia Nacional's* conclusion openly rejects this assertion by the Russian authorities.

85. In light of these two decisions, the Commission should not re-examine the facts which have already been appraised by these two specialist national authorities. The persecutory nature of the allegation has been clearly established and the Commission should therefore find that Article 3 applies.

iii. Further evidence of political motivation

86. Should the Commission deem it necessary to conduct its own assessment, the following matters, which are organised in accordance with the factors listed in Article 34(3) RPD as relevant for the assessment of the application of Article 3, demonstrate that the prosecution is politically-motivated.

- The nature of the offence (charges and underlying facts)

87. There is international concern at the use of 'broadly defined offences, which confer excessive discretion upon law enforcement officials, or which enable the imposition of excessive and disproportionate sanctions on protesters'.¹⁹ The charge of 'hooliganism' as applied in Mr Silaev's case (according to Article 213(2) of the Russian Criminal Code, 'a gross violation of the public order which expresses patent contempt for society') is a typical example of such an offence, and indeed international concern has been raised, for instance by the European Parliament, at the Russian authorities' use of that offence to repress political dissent – above all in the case of the feminist punk band Pussy Riot (see Annex 21, pp. 3-5). As mentioned above, the Supreme Court of the Russian Federation has drawn a distinction between those who are party to a prior agreement *to commit offences*, who are liable under Article 213(2), and those simply participating in an event, who cannot be so liable (see above paragraph 55a and Annex 27, point 5). One would therefore expect the investigators to specify what led them to believe that Mr Silaev was party to such an agreement, since presence at an event cannot by itself make a person liable under Article 213(2).

¹⁹ *Final Report of the OSCE Civil Society Forum on Freedom of Assembly and Association*, 7 November 2012, Vienna, p. 13 (available at <http://www.osce.org/odihr/98265>).

88. Despite this, the investigators appear to simply rely on bare assertions and generalised statements. As previously stated, the Radiograma alleges no wrongdoing on Mr Silaev's part and merely states that the group as a whole committed offences. There is a further statement in the arrest warrant issued Mr Ermilov, quoted in the *Audiencia Nacional's* decision, that the group, of which Mr Silaev was part, acted 'jointly and in coordinated manner, by prior agreement' in committing offences (see Annex 14, p.6, point A). Mr Silaev firmly denies any such prior agreement, without any evidence of such agreement being provided in the detail of the arrest warrant, the charges appear to be based on conjecture and assumptions (or, as the *Audiencia Nacional* described it, 'nothing more than suspicion' (Annex 14, p. 7, middle paragraph).

89. The vague words thus stand in place of a substantiated allegation, a typical feature of political abuse of criminal law. As noted by the 2009 report *Allegations of politically-motivated abuses of the criminal justice system in Council of Europe member states*, conducted for the Council of Europe Parliamentary Assembly, 'unclear charges, either in terms of legal classification of the crime of which a person is accused or in terms of the acts or other facts which a person has allegedly committed ... are typical indications of motivations on the side of the prosecution that go beyond neutral enforcement of criminal justice' (extracts reproduced at Annex 22, para. 130). The statement was specifically linked to political abuses of criminal justice in Russia.

90. Thus, the information supplied in the Radiograma and other documents is itself evidence of a political abuse of criminal law. This is further substantiated by external factual matters.

- **General context of the case: police and prosecutorial conduct relating to the July 2010 demonstration**

91. The general situation regarding the arrest and prosecution of other anti-fascist activists alleged to have organised or participated in the demonstration provides further, compelling evidence of political motivation.

92. In its letter dated 30 August 2012 to the *Audiencia Nacional*, Amnesty International (Spain) documents the outcome in the cases of two of the three people alleged to be 'accomplices' of Mr Silaev in the Radiograma, Alexey Gaskarov and Maxim Solopov. It states that Gaskarov was acquitted for lack of any evidence even establishing his participation in the events, and Maxim Solopov was convicted of 'hooliganism' (Annex 13, p. 2). It is reported elsewhere that Maxim

Solopov received a suspended sentence of two years (Annex 23, p. 3). In respect of the third alleged accomplice, Denis Solopov, Amnesty state that the evidence against him could be false. It has since been reported that Denis Solopov was granted asylum by the UNHCR in Ukraine, and subsequently by the Netherlands (see Annex 24, p. 4-5).

93. It is significant that one of these prosecutions has failed altogether, and that a respected international organisation should indicate doubts about the evidence in another. The Russian human rights activist, Lyudmila Alexeeva, writing in support of Mr Silaev's asylum application in 2010, explains the underlying reason for this as follows: 'the Russian human rights community has repeatedly expressed the view that Solopov and Gaskarov were arrested only because they are activists and spokespersons for the antifascist movement, without any legal basis' (Annex 25).
94. The chronology confirms this assertion. Gaskarov and Maxim Solopov were arrested on 29 July, immediately after giving radio interviews on the day after the demonstration (Annex 1, p. 2). Mr Silaev was unmasked throughout the demonstration and was thus easily identifiable, yet the arrest warrants against him were issued almost a week later (the second by the same Mr Ermilov on 6 August), only after Mr Silaev gave his anonymous interview to *Kommersant*. This demonstrates the validity of Lyudmila Alexeeva's conclusion that the common denominator of these prosecutions is not the existence of evidence of any wrongdoing, but simply the profile of the individuals as political activists.
95. The evidence shows that the prosecution of the people mentioned in the Radiograma is part of a pattern of widespread arrests of anti-fascists based only on their status as such. In a joint letter to President Medvedev concerning Gaskarov and Maxim Solopov's cases, a coalition of respected civil society organisations condemned the 'unprecedented manhunt for people who actively express anti-fascist views' (Annex 26).
96. In its letter of 14 January 2011, Memorial cites a number of specific examples, such as: (i) on 31 July 2010, over 50 people attending a concert were arrested, two of them being beaten; (ii) on 23 August, 250 people were rounded up at an anti-fascist concert in Kostroma, and interrogated regarding the July 2010 demonstration in Khimki; and (iii) on 26 August, anti-fascist Nikita Chernobaev was arrested and subsequently taken to hospital with a brain injury. Memorial also specifies that many of those arrested were required to give statements regarding Mr Silaev's

involvement in the demonstration (Annex 1, pp. 2-3). These tactics are evidence of politically motivated abuse of criminal law enforcement powers.

- **General context of the case: criminal law enforcement in Russia**

97. Objective reports regarding the current state of criminal law enforcement in Russia show that conditions are conducive to such practices. The aforementioned Council of Europe Parliamentary Assembly notes, in particular, that ‘judges are still subjected to fairly strong pressures compromising their independence ... If criminal procedures must almost always end in conviction, as is still the case in the Russian Federation, the power of prosecutors – who enjoy far less independence from the political authorities – to put people behind bars is in reality almost unchecked’ (Annex 22, para. 135).

98. There are numerous examples of such abuses. In September 2012 the European Parliament issued a resolution alluding to many of these including, *inter alia*: (i) the conviction of activist Taisia Osipova based on ‘dubious and possibly fabricated evidence’; (ii) the investigations concerning the opposition activist Alexei Navalny (now facing what the Financial Times describes as a ‘show trial’²⁰ in Kirov); (iii) the conviction and disproportionate sentencing of the members of the punk group Pussy Riot for ‘hooliganism’; and (iv) the unresolved deaths of high-profile journalists such as Anna Politkovskaya (Annex 21).

99. It is to be noted that the main documents supplied in support of the request lodged by the Russian Federation for the extradition of Mr Silaev from Spain were the arrest warrants issued by Mssrs Ochnev and Ermilov dated 4 and 6 August 2010. The decision of the District Court of Khimki was issued subsequent to these, on 11 August 2010, but was not supplied to the Spanish court, despite being in existence at the time of the extradition hearing. It is clear that the proceedings against Mr Silaev are still predominantly prosecution-led, providing further support for the conclusion that these are not an incidence of neutral law-enforcement, but of political persecution.

²⁰ Financial Times, editorial: ‘Show Trial of a Russian blogger – the West should not ignore the case of Alexei Navalny’ 16 April 2013 (available at <http://www.ft.com/cms/s/0/9507d1e4-a686-11e2-885b-00144feabdc0.html>)

iv. Conclusion on political motivation

100. The Commission should consider itself bound by the prior decisions of the *Audiencia Nacional* and the Finnish Immigration Service, which establish that the proceedings against Mr Silaev are not an incidence of neutral law-enforcement but a politically-motivated abuse of criminal justice. However, should it not, there are clear and substantial grounds for believing that the Russian NCB is using INTERPOL's systems to pursue Mr Silaev on account of his political status.

(3) Insufficiency of an addendum

101. The Commission should not, as a result of this application, adopt the approach of reflecting the asylum and extradition decisions as addenda on the file, but should instead delete the information altogether.

102. The Commission, rightly recognising the importance of the unqualified prohibition laid down by Article 3, has stated that 'it did not wish to use addenda to replace an acknowledgment that information processing did not conform with INTERPOL's rules. It would therefore continue to recommend the destruction of information each time that it considered that maintaining such information in INTERPOL's files might constitute a violation of the applicable rules'.²¹

103. In this case, the existence of the two prior decisions by the *Audiencia Nacional* and the Finnish Immigration Service should raise a presumption that the information should be deleted in accordance with this approach. Indeed, in order to observe the overriding requirement to respect the 'right to seek an enjoy asylum' guaranteed by Article 18 of the Universal Declaration of Human Rights, INTERPOL should take necessary steps to avoid Mr Silaev, a recognised refugee, being repeatedly arrested on the basis of information in INTERPOL's databases, to avoid facilitating the persecution of people the international community has chosen to protect.

104. The Commission has, it is true, elsewhere stated that national decisions recognising political-refugee status or refusing extradition might be reflected as addenda on the INTERPOL file on the basis that while these constitute relevant evidence, they are not sufficient to justify a conclusion that Article 3 applies.²² However, such an approach could only be taken if the Russian authorities

²¹ *Annual Activity Report of the CCF for 2010*, para. 84.

²² *Annual Activity Report of the CCF for 2010*, para. 79; *Annual Activity Report of the CCF for 2009*, para. 45.

could raise any doubt as to the basis for the Spanish and Finnish decisions. Those decisions are, however, irrefutably clear, and their conclusions are supported by external evidence. There should, therefore, be no reason to use an addendum in this case. The information should be deleted altogether.

CONCLUSION

105. For all the reasons set out above, the Commission is asked to recommend the destruction of the information from INTERPOL's systems permanently. It is also asked to issue a communication to all NCBs informing them of this recommendation, and of its basis.

106. Whatever the outcome of its deliberations, the Commission is invited to supply a reasoned decision, explaining, in particular, the manner in which it has interpreted Article 3 of the Constitution (both in terms of the 'political offence' and the political motivation of the prosecution) and the concept of 'specific interest for the purposes international police cooperation', and how it has applied these to the facts of the case.

Fair Trials International

20 May 2013

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