

# Head-to-head

Has famous filmmaker Roman Polanski been the victim of an over-enthusiastic state or the subject of proper proceedings under the rule of law? Swiss lawyer **Lucien Valloni** argues in favour of his government's position, while Polish practitioner **Mariusz Paplaczyk** says the Swiss position is confused and the local authorities have gone too far

## Fairness over fame

The arrest of renowned Polish-French film director Roman Polanski in Zurich has created global headlines with many influential voices in both Europe and the US shouting that the Swiss authorities have not behaved correctly under the rule of law.

The extradition treaty between Switzerland and the US is decisive, as is the Swiss Federal Act on International Judicial Assistance in Criminal Matters, which applies to all aspects not exclusively governed by the treaty. Switzerland has also committed itself to respect human rights, which have to be taken into account, and ultimately an extradition cannot be carried out in contradiction of public policy.

On 26 September 2009, Mr Polanski was arrested at Zurich Airport under the terms of a US-initiated Interpol arrest warrant issued in 2005 regarding criminal sexual acts with a minor committed in March 1977. Since arrest he has been kept in detention from which he refuses to accept voluntary extradition. So the Swiss extradition proceedings are taking their usual course and the US authorities have filed a request for extradition within the time limit. In the course of these proceedings, Mr Polanski enjoys all procedural guarantees in accordance with the rule of law.

### Treaty obligations

It has been argued that Switzerland should have warned Mr Polanski before he travelled to the country, so that he would not have been exposed to this position. But that view is not tenable under the rule of law.

If Switzerland had adopted that approach, it would have

acted contrary to the spirit of its international treaty obligations, and in addition, under Swiss criminal law, the individuals involved would have breached their official secrets obligations and committed a crime of favourable treatment. It cannot be accepted that a famous filmmaker has the privilege of receiving a warning when, in practice, the same treatment is not given to everyone.

The fact that Mr Polanski is still under detention awaiting extradition is not unusual when one looks at the consistent jurisprudence of the Swiss federal courts, according to which detention of the accused for the duration of the entire extradition proceedings is the rule, and release on bail is the exception.

In this case, there would seem to be a relatively high risk of flight, as the crime of which Mr Polanski is accused bears a maximum penalty of 50 years' imprisonment in the US. This is no minor offence and the duration of the detention period so far cannot be considered disproportionate. Also, Mr Polanski has already absconded from US criminal proceedings once by leaving for Europe in early 1978.

Moreover, the necessary close relations to Switzerland that would counter the likelihood of flight are missing. Mr Polanski has a Swiss residence, but he is not resident in – nor does he have other close ties to – Switzerland. Initially he did not provide any financial security of the type provided for by law

(cash or bank guarantee), but only offered to pledge a house in security. And he does not appear to be incapable of enduring detention for health reasons.

### Statute of limitations

Looking at the whole picture, Mr Polanski's continued detention does not seem to be contrary to the principle of proportionality.

The big question lies in the length of time between the criminal act (1977), the original US arrest warrant (1978), request for issue of an international search warrant (2005) and arrest (2009). It is not clear why Switzerland made the arrest now – whereas other countries to which Polanski has travelled did nothing – and why the US waited until 2005 before an international arrest warrant was issued.

Nonetheless, the extradition treaty between Switzerland and the US only provides that the statute of limitations must not have expired in the state seeking extradition (the US), and that does not seem to be the case. According to the Swiss Federal Supreme Court, the applicable treaty does not permit reference to the statute of limitations in the state from which extradition is sought (Switzerland). So this does not pose any obstacle to extradition.

As the Swiss people have voted for an unlimited statute of limitations for sexual crimes against children, the lapse of time can hardly be considered contrary to public policy from a Swiss perspective.

The actions of the Swiss authorities are in accordance with the rule of law and Roman Polanski is not the victim of an over-enthusiastic state.

It cannot be accepted that a famous filmmaker has the privilege of receiving a warning when the same treatment is not given to everyone



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## Political posturing

The Roman Polanski case has reverberated around the world, but nowhere more profoundly than in his home country of Poland.

Leading Mr Polanski's defence – following his surprising arrest in Zurich and subsequent extradition proceedings – have been his fellow artists (although there have undeniably also been some voices of support for the actions of the Swiss government). Polish lawyers as well have been actively involved in the debate, but for the most part their comments have been limited to explaining the film director's legal position in US.

However, my particular view is borne out of direct professional experience of the Swiss administration of justice in the context of a Polish citizen's arrest and detention in that country following a US warrant and requisition for extradition. Earlier this year, my client was arrested in Switzerland following an extradition request by the Americans. And indeed, prior to the Polanski case, this was the only time a Polish citizen faced these circumstances.

### Intriguing questions

In common with the Polanski case, my client had travelled freely around many countries of the world when the US issued an international arrest warrant. However, the only European country to execute that warrant was Switzerland.

Whether this is a coincidence or the consequence of close collaboration between the Swiss and US authorities is an intriguing question. Indeed, it is important to note that in the Polanski case, the same legal authority that arrested him had in fact granted him permission

to purchase a property in Switzerland, despite the US at the time having issued an international arrest warrant. It begs the question: can the Swiss legal system be regarded from an international point of view as credible, just and reliable?

It is genuinely difficult for many of us to understand the complicated

Swiss extradition procedures. The problem is that Switzerland – in contrast to many other European countries – operates an administrative, as opposed to court-based, model in dealing with extradition. Such a system clearly dictates that the fate of individuals under the threat of extradition lies in the hands of civil servants. That process is at variance with the approved EU framework decision for the European arrest warrant, which is widely and directly applicable across the union, and under which the political-administrative factor has been deliberately eliminated.

### Court caution

The practice both in Poland and other EU states is that courts are extremely cautious in relation to extradition. They frequently stress that still-existing significant differences between legal systems across Europe potentially form

legitimate reasons to refuse extradition on the basis of European arrest warrants, let alone international warrants out of a fear of breaching principles of justice.

Throughout this high profile case, it has been difficult to resist the impression that the traditional principle of Swiss neutrality has been compromised for the sake of a temporary political expediency that benefits the Swiss government.

Apparently the 'Swiss island' has become a 'Swiss trap'.

It seems to me that the Swiss authorities had a prepared script of proceedings when deciding to arrest Roman Polanski and that any extradition to the US will be tinged with the wider politics of Swiss-US relations. In the instance of my client against whom the arrest warrant was issued by US, our challenge to its validity was only heard after several months and my client being admitted to hospital for ill health.

The prolonged proceedings resulted in my client's reluctant decision that his stay in Switzerland was a waste of time and that he stood a better chance of vindicating himself by agreeing to be extradited to the US and facing a court there rather than relying on Swiss justice.

Arguably, one could come to a similar conclusion in the Roman Polanski case – regrettably that it will not be matter of law, but a long and complicated procedures, that forces the 76-year-old to consent to extradition.

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