

# **PUBLIC INTERNATIONAL LAW**

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# INTERNATIONAL LAW

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## The nature and development of international law

In the long march of mankind from the cave to the computer a central role has always been played by the idea of law – the idea that order is necessary and chaos inimical to a just and stable existence. Every society, whether it be large or small, powerful or weak, has created for itself a framework of principles within which to develop. What can be done, what cannot be done, permissible acts, forbidden acts, have all been spelt out within the consciousness of that community. Progress, with its inexplicable leaps and bounds, has always been based upon the group as men and women combine to pursue commonly accepted goals, whether these be hunting animals, growing food or simply making money.

Law is that element which binds the members of the community together in their adherence to recognised values and standards. It is both permissive in allowing individuals to establish their own legal relations with rights and duties, as in the creation of contracts, and coercive, as it punishes those who infringe its regulations. Law consists of a series of rules regulating behaviour, and reflecting, to some extent, the ideas and preoccupations of the society within which it functions.

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And so it is with what is termed international law, with the important difference that the principal subjects of international law are nation-states, not individual citizens. There are many contrasts between the law within a country (municipal law) and the law that operates outside and between states, international organisations and, in certain cases, individuals.

International law itself is divided into conflict of laws (or private international law as it is sometimes called) and public international law (usually just termed international law).<sup>1</sup> The former deals with those cases, *within* particular legal systems, in which foreign elements obtrude, raising questions as to the application of foreign law or the role of foreign courts.<sup>2</sup>

<sup>1</sup> This term was first used by J. Bentham: see *Introduction to the Principles of Morals and Legislation*, London, 1780.

<sup>2</sup> See e.g. C. Cheshire and P. North, *Private International Law*, 13th edn, London, 1999.

For example, if two Englishmen make a contract in France to sell goods situated in Paris, an English court would apply French law as regards the validity of that contract. By contrast, public international law is not simply an adjunct of a legal order, but a separate system altogether,<sup>3</sup> and it is this field that will be considered in this book.

Public international law covers relations between states in all their myriad forms, from war to satellites, and regulates the operations of the many international institutions. It may be universal or general, in which case the stipulated rules bind all the states (or practically all depending upon the nature of the rule), or regional, whereby a group of states linked geographically or ideologically may recognise special rules applying only to them, for example, the practice of diplomatic asylum that has developed to its greatest extent in Latin America.<sup>4</sup> The rules of international law must be distinguished from what is called international comity, or practices such as saluting the flags of foreign warships at sea, which are implemented solely through courtesy and are not regarded as legally binding.<sup>5</sup> Similarly, the mistake of confusing international law with international morality must be avoided. While they may meet at certain points, the former discipline is a legal one both as regards its content and its form, while the concept of international morality is a branch of ethics. This does not mean, however, that international law can be divorced from its values.

In this chapter and the next, the characteristics of the international legal system and the historical and theoretical background necessary to a proper appreciation of the part to be played by the law in international law will be examined.

### Law and politics in the world community

It is the legal quality of international law that is the first question to be posed. Each side to an international dispute will doubtless claim legal justification for its actions and within the international system there is no independent institution able to determine the issue and give a final decision.

Virtually everybody who starts reading about international law does so having learned or absorbed something about the principal characteristics of ordinary or domestic law. Such identifying marks would include the

<sup>3</sup> See the *Serbian Loans* case, PCIJ, Series A, No. 14, pp. 41–2.

<sup>4</sup> See further below, p. 92.

<sup>5</sup> *North Sea Continental Shelf* cases, ICJ Reports, 1969, p. 44; 41 ILR, p. 29. See also M. Akehurst, 'Custom as a Source of International Law', 47 BYIL, 1974–5, p. 1.

existence of a recognised body to legislate or create laws, a hierarchy of courts with compulsory jurisdiction to settle disputes over such laws and an accepted system of enforcing those laws. Without a legislature, judiciary and executive, it would seem that one cannot talk about a legal order.<sup>6</sup> And international law does not fit this model. International law has no legislature. The General Assembly of the United Nations comprising delegates from all the member states exists, but its resolutions are not legally binding save for certain of the organs of the United Nations for certain purposes.<sup>7</sup> There is no system of courts. The International Court of Justice does exist at The Hague but it can only decide cases when both sides agree<sup>8</sup> and it cannot ensure that its decisions are complied with. Above all there is no executive or governing entity. The Security Council of the United Nations, which was intended to have such a role in a sense, has at times been effectively constrained by the veto power of the five permanent members (USA; USSR, now the Russian Federation; China; France; and the United Kingdom).<sup>9</sup> Thus, if there is no identifiable institution either to establish rules, or to clarify them or see that those who break them are punished, how can what is called international law be law?

It will, of course, be realised that the basis for this line of argument is the comparison of domestic law with international law, and the assumption of an analogy between the national system and the international order. And this is at the heart of all discussions about the nature of international law.

At the turn of the nineteenth century, the English philosopher John Austin elaborated a theory of law based upon the notion of a sovereign issuing a command backed by a sanction or punishment. Since international law did not fit within that definition it was relegated to the category of 'positive morality'.<sup>10</sup> This concept has been criticised for oversimplifying and even confusing the true nature of law within a society and for overemphasising the role of the sanction within the system by linking it to every rule.<sup>11</sup> This is not the place for a comprehensive summary of Austin's

<sup>6</sup> See generally, R. Dias, *Jurisprudence*, 5th edn, London, 1985, and H. L. A. Hart, *The Concept of Law*, Oxford, 1961.

<sup>7</sup> See article 17(1) of the United Nations Charter. See also D. Johnson, 'The Effect of Resolutions of the General Assembly of the United Nations', 32 BYIL, 1955–6, p. 97 and below, chapter 22.

<sup>8</sup> See article 36 of the Statute of the International Court of Justice and below, chapter 19.

<sup>9</sup> See e.g. Bowett's *Law of International Institutions* (eds. P. Sands and P. Klein), 5th edn, London, 2001, and below, chapter 23.

<sup>10</sup> See J. Austin, *The Province of Jurisprudence Determined* (ed. H. L. A. Hart), London, 1954, pp. 134–42.

<sup>11</sup> See e.g. Hart, *Concept of Law*, chapter 10.

theory but the idea of coercion as an integral part of any legal order is a vital one that needs looking at in the context of international law.

### The role of force

There is no unified system of sanctions<sup>12</sup> in international law in the sense that there is in municipal law, but there are circumstances in which the use of force is regarded as justified and legal. Within the United Nations system, sanctions may be imposed by the Security Council upon the determination of a threat to the peace, breach of the peace or act of aggression.<sup>13</sup> Such sanctions may be economic, for example those proclaimed in 1966 against Rhodesia,<sup>14</sup> or military as in the Korean war in 1950,<sup>15</sup> or indeed both, as in 1990 against Iraq.<sup>16</sup>

Coercive action within the framework of the UN is rare because it requires co-ordination amongst the five permanent members of the Security Council and this obviously needs an issue not regarded by any of the great powers as a threat to their vital interests.

Korea was an exception and joint action could only be undertaken because of the fortuitous absence of the USSR from the Council as a protest at the seating of the Nationalist Chinese representatives.<sup>17</sup>

Apart from such institutional sanctions, one may note the bundle of rights to take violent action known as self-help.<sup>18</sup> This procedure to resort to force to defend certain rights is characteristic of primitive systems of law with blood-feuds, but in the domestic legal order such procedures and

<sup>12</sup> See e.g. W. M. Reisman, 'Sanctions and Enforcement' in *The Future of the International Legal Order* (eds. C. Black and R. A. Falk), New York, 1971, p. 273; J. Brierly, 'Sanctions', 17 *Transactions of the Grotius Society*, 1932, p. 68; Hart, *Concept of Law*, pp. 211–21; A. D'Amato, 'The Neo-Positivist Concept of International Law', 59 *AJIL*, 1965, p. 321; G. Fitzmaurice, 'The Foundations of the Authority of International Law and the Problem of Enforcement', 19 *MLR*, 1956, p. 1, and *The Effectiveness of International Decisions* (ed. S. Schwebel), Leiden, 1971.

<sup>13</sup> Chapter VII of the United Nations Charter. See below, chapter 22.

<sup>14</sup> Security Council resolution 221 (1966). Note also Security Council resolution 418 (1977) imposing a mandatory arms embargo on South Africa.

<sup>15</sup> Security Council resolutions of 25 June, 27 June and 7 July 1950. See D. W. Bowett, *United Nations Forces*, London, 1964.

<sup>16</sup> Security Council resolutions 661 and 678 (1990). See *The Kuwait Crisis: Basic Documents* (eds. E. Lauterpacht, C. Greenwood, M. Weller and D. Bethlehem), Cambridge, 1991, pp. 88 and 98. See also below, chapter 22.

<sup>17</sup> See E. Luard, *A History of the United Nations*, vol. I, *The Years of Western Domination 1945–55*, London, 1982, pp. 229–74, and below, chapter 22.

<sup>18</sup> See D. W. Bowett, *Self-Defence in International Law*, Manchester, 1958, and I. Brownlie, *International Law and the Use of Force by States*, Oxford, 1963.

methods are now within the exclusive control of the established authority. States may use force in self-defence, if the object of aggression, and may take action in response to the illegal acts of other states. In such cases the states themselves decide whether to take action and, if so, the extent of their measures, and there is no supreme body to rule on their legality or otherwise, in the absence of an examination by the International Court of Justice, acceptable to both parties, although international law does lay down relevant rules.<sup>19</sup>

Accordingly those writers who put the element of force to the forefront of their theories face many difficulties in describing the nature, or rather the legal nature of international law, with its lack of a coherent, recognised and comprehensive framework of sanctions. To see the sanctions of international law in the states' rights of self-defence and reprisals<sup>20</sup> is to misunderstand the role of sanctions within a system because they are at the disposal of the states, not the system itself. Neither must it be forgotten that the current trend in international law is to restrict the use of force as far as possible, thus leading to the absurd result that the more force is controlled in international society, the less legal international law becomes.

Since one cannot discover the nature of international law by reference to a definition of law predicated upon sanctions, the character of the international legal order has to be examined in order to seek to discover whether in fact states feel obliged to obey the rules of international law and, if so, why. If, indeed, the answer to the first question is negative, that states do not feel the necessity to act in accordance with such rules, then there does not exist any system of international law worthy of the name.

### The international system<sup>21</sup>

The key to the search lies within the unique attributes of the international system in the sense of the network of relationships existing primarily, if not exclusively, between states recognising certain common principles

<sup>19</sup> See below, chapter 19. See also M. Barkin, *Law Without Sanctions*, New Haven, 1967.

<sup>20</sup> See e.g. H. Kelsen, *General Theory of Law and State*, London, 1946, pp. 328 ff.

<sup>21</sup> See L. Henkin, *How Nations Behave*, 2nd edn, New York, 1979, and Henkin, *International Law: Politics and Values*, Dordrecht, 1995; M. A. Kaplan and N. Katzenbach, *The Political Foundations of International Law*, New York, 1961; C. W. Jenks, *The Common Law of Mankind*, London, 1958; W. Friedmann, *The Changing Structure of International Law*, New York, 1964; A. Sheikh, *International Law and National Behaviour*, New York, 1974; O. Schachter, *International Law in Theory and Practice*, Dordrecht, 1991; T. M. Franck, *The Power of Legitimacy Among Nations*, Oxford, 1990; R. Higgins, *Problems and Process*, Oxford, 1994, and Oppenheim's *International Law* (eds. R. Y. Jennings and A. D. Watts), 9th edn, London, 1992, vol. I, chapter 1.

and ways of doing things.<sup>22</sup> While the legal structure within all but the most primitive societies is hierarchical and authority is vertical, the international system is horizontal, consisting of over 190 independent states, all equal in legal theory (in that they all possess the characteristics of sovereignty) and recognising no one in authority over them. The law is above individuals in domestic systems, but international law only exists as between the states. Individuals only have the choice as to whether to obey the law or not. They do not create the law. That is done by specific institutions. In international law, on the other hand, it is the states themselves that create the law and obey or disobey it.<sup>23</sup> This, of course, has profound repercussions as regards the sources of law as well as the means for enforcing accepted legal rules.

International law, as will be shown in succeeding chapters, is primarily formulated by international agreements, which create rules binding upon the signatories, and customary rules, which are basically state practices recognised by the community at large as laying down patterns of conduct that have to be complied with.

However, it may be argued that since states themselves sign treaties and engage in action that they may or may not regard as legally obligatory, international law would appear to consist of a series of rules from which states may pick and choose. Contrary to popular belief, states do observe international law, and violations are comparatively rare. However, such violations (like armed attacks and racial oppression) are well publicised and strike at the heart of the system, the creation and preservation of international peace and justice. But just as incidents of murder, robbery and rape do occur within national legal orders without destroying the system as such, so analogously assaults upon international legal rules point up the weaknesses of the system without denigrating their validity or their necessity. Thus, despite the occasional gross violation, the vast majority of the provisions of international law are followed.<sup>24</sup>

<sup>22</sup> As to the concept of 'international community', see e.g. G. Abi-Saab, 'Whither the International Community?', 9 EJIL, 1998, p. 248, and B. Simma and A. L. Paulus, 'The "International Community": Facing the Challenge of Globalisation', 9 EJIL, 1998, p. 266. See also P. Weil, 'Le Droit International en Quête de son Identité', 237 HR, 1992 VI, p. 25.

<sup>23</sup> This leads Rosenne to refer to international law as a law of co-ordination, rather than, as in internal law, a law of subordination, *Practice and Methods of International Law*, Dordrecht, 1984, p. 2.

<sup>24</sup> See H. Morgenthau, *Politics Among Nations*, 5th edn, New York, 1973, pp. 290–1; Henkin, *How Nations Behave*, pp. 46–9; J. Brierly, *The Outlook for International Law*, Oxford, 1944, p. 5, and P. Jessup, *A Modern Law of Nations*, New York, 1948, pp. 6–8.

In the daily routine of international life, large numbers of agreements and customs are complied with. However, the need is felt in the hectic interplay of world affairs for some kind of regulatory framework or rules network within which the game can be played, and international law fulfils that requirement. States feel this necessity because it imports an element of stability and predictability into the situation.

Where countries are involved in a disagreement or a dispute, it is handy to have recourse to the rules of international law even if there are conflicting interpretations since at least there is a common frame of reference and one state will be aware of how the other state will develop its argument. They will both be talking a common language and this factor of communication is vital since misunderstandings occur so easily and often with tragic consequences. Where the antagonists dispute the understanding of a particular rule and adopt opposing stands as regards its implementation, they are at least on the same wavelength and communicate by means of the same phrases. That is something. It is not everything, for it is a mistake as well as inaccurate to claim for international law more than it can possibly deliver. It can constitute a mutually understandable vocabulary book and suggest possible solutions which follow from a study of its principles. What it cannot do is solve every problem no matter how dangerous or complex merely by being there. International law has not yet been developed, if it ever will, to that particular stage and one should not exaggerate its capabilities while pointing to its positive features.

But what is to stop a state from simply ignoring international law when proceeding upon its chosen policy? Can a legal rule against aggression, for example, of itself prevail over political temptations? There is no international police force to prevent such an action, but there are a series of other considerations closely bound up with the character of international law which might well cause a potential aggressor to forbear.

There is the element of reciprocity at work and a powerful weapon it can be. States quite often do not pursue one particular course of action which might bring them short-term gains, because it could disrupt the mesh of reciprocal tolerance which could very well bring long-term disadvantages. For example, states everywhere protect the immunity of foreign diplomats for not to do so would place their own officials abroad at risk.<sup>25</sup> This constitutes an inducement to states to act reasonably and moderate

<sup>25</sup> See *Case Concerning United States Diplomatic and Consular Staff in Tehran*, ICJ Reports, 1980, p. 3; 61 ILR, p. 502. See also the US Supreme Court decision in *Boos v. Barry* 99 L. Ed. 2d 333, 345–6 (1988); 121 ILR, p. 499.

demands in the expectation that this will similarly encourage other states to act reasonably and so avoid confrontations. Because the rules can ultimately be changed by states altering their patterns of behaviour and causing one custom to supersede another, or by mutual agreement, a certain definite reference to political life is retained. But the point must be made that a state, after weighing up all possible alternatives, might very well feel that the only method to protect its vital interests would involve a violation of international law and that responsibility would just have to be taken. Where survival is involved international law may take second place.

Another significant factor is the advantages, or 'rewards', that may occur in certain situations from an observance of international law. It may encourage friendly or neutral states to side with one country involved in a conflict rather than its opponent, and even take a more active role than might otherwise have been the case. In many ways, it is an appeal to public opinion for support and all states employ this tactic.

In many ways, it reflects the esteem in which law is held. The Soviet Union made considerable use of legal arguments in its effort to establish its non-liability to contribute towards the peacekeeping operations of the United Nations,<sup>26</sup> and the Americans too, justified their activities with regard to Cuba<sup>27</sup> and Vietnam<sup>28</sup> by reference to international law. In some cases it may work and bring considerable support in its wake, in many cases it will not, but in any event the very fact that all states do it is a constructive sign.

A further element worth mentioning in this context is the constant formulation of international business in characteristically legal terms. Points of view and disputes, in particular, are framed legally with references to precedent, international agreements and even the opinions of juristic authors. Claims are pursued with regard to the rules of international law and not in terms of, for example, morality or ethics.<sup>29</sup> This has brought into being a class of officials throughout governmental departments, in

<sup>26</sup> See *Certain Expenses of the United Nations*, ICJ Reports, 1962, p. 151; 34 ILR, p. 281, and R. Higgins, *United Nations Peace-Keeping; Documents and Commentary*, Oxford, 4 vols., 1969-81.

<sup>27</sup> See e.g. A. Chayes, *The Cuban Missile Crisis*, Oxford, 1974, and Henkin, *How Nations Behave*, pp. 279-302.

<sup>28</sup> See e.g. *The Vietnam War and International Law* (ed. R. A. Falk), Princeton, 4 vols., 1968-76; J. N. Moore, *Law and the Indo-China War*, Charlottesville, 1972, and Henkin, *How Nations Behave*, pp. 303-12.

<sup>29</sup> See Hart, *Concept of Law*, p. 223.

addition to those working in international institutions, versed in international law and carrying on the everyday functions of government in a law-oriented way. Many writers have, in fact, emphasised the role of officials in the actual functioning of law and the influence they have upon the legal process.<sup>30</sup>

Having come to the conclusion that states do observe international law and will usually only violate it on an issue regarded as vital to their interests, the question arises as to the basis of this sense of obligation.<sup>31</sup> The nineteenth century, with its business-oriented philosophy, stressed the importance of the contract, as the legal basis of an agreement freely entered into by both (or all) sides, and this influenced the theory of consent in international law.<sup>32</sup> States were independent, and free agents, and accordingly they could only be bound with their own consent. There was no authority in existence able theoretically or practically to impose rules upon the various nation-states. This approach found its extreme expression in the theory of auto-limitation, or self-limitation, which declared that states could only be obliged to comply with international legal rules if they had first agreed to be so obliged.<sup>33</sup>

Nevertheless, this theory is most unsatisfactory as an account of why international law is regarded as binding or even as an explanation of the international legal system.<sup>34</sup> To give one example, there are about 100 states that have come into existence since the end of the Second World War and by no stretch of the imagination can it be said that such states have consented to all the rules of international law formed prior to their establishment. It could be argued that by 'accepting independence', states consent to all existing rules, but to take this view relegates consent to the role of a mere fiction.<sup>35</sup>

<sup>30</sup> See e.g. M. S. McDougal, H. Lasswell and W. M. Reisman, 'The World Constitutive Process of Authoritative Decision' in *International Law Essays* (eds. M. S. McDougal and W. M. Reisman), New York, 1981, p. 191.

<sup>31</sup> See e.g. J. Brierly, *The Basis of Obligation in International Law*, Oxford, 1958.

<sup>32</sup> See W. Friedmann, *Legal Theory*, 5th edn, London, 1967, pp. 573–6. See also the *Lotus* case, PCIJ, Series A, No. 10, p. 18.

<sup>33</sup> E.g. G. Jellinek, *Allgemeine Rechtslehre*, Berlin, 1905.

<sup>34</sup> See also Hart, *Concept of Law*, pp. 219–20. But see P. Weil, 'Towards Relative Normativity in International Law?', 77 AJIL, 1983, p. 413 and responses thereto, e.g. R. A. Falk, 'To What Extent are International Law and International Lawyers Ideologically Neutral?' in *Change and Stability in International Law-Making* (eds. A. Cassese and J. Weiler), 1989, p. 137, and A. Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making', 12 Australian YIL, 1992, p. 22.

<sup>35</sup> See further below, p. 88.

This theory also fails as an adequate explanation of the international legal system, because it does not take into account the tremendous growth in international institutions and the network of rules and regulations that have emerged from them within the last generation.

To accept consent as the basis for obligation in international law<sup>36</sup> begs the question as to what happens when consent is withdrawn. The state's reversal of its agreement to a rule does not render that rule optional or remove from it its aura of legality. It merely places that state in breach of its obligations under international law if that state proceeds to act upon its decision. Indeed, the principle that agreements are binding (*pacta sunt servanda*) upon which all treaty law must be based cannot itself be based upon consent.<sup>37</sup>

One current approach to this problem is to refer to the doctrine of consensus.<sup>38</sup> This reflects the influence of the majority in creating new norms of international law and the acceptance by other states of such new rules. It attempts to put into focus the change of emphasis that is beginning to take place from exclusive concentration upon the nation-state to a consideration of the developing forms of international co-operation where such concepts as consent and sanction are inadequate to explain what is happening.

Of course, one cannot ignore the role of consent in international law. To recognise its limitations is not to neglect its significance. Much of international law is constituted by states expressly agreeing to specific normative standards, most obviously by entering into treaties. This cannot be minimised. Nevertheless, it is preferable to consider consent as important not only with regard to specific rules specifically accepted (which is not the sum total of international law, of course) but in the light of the approach of states generally to the totality of rules, understandings, patterns of behaviour and structures underpinning and constituting the international system.<sup>39</sup> In a broad sense, states accept or consent to the general system of international law, for in reality without that no such system could possibly operate. It is this approach which may be characterised as consensus

<sup>36</sup> See e.g. J. S. Watson, 'State Consent and the Sources of International Obligation', PASIL, 1992, p. 108.

<sup>37</sup> See below, chapter 3.

<sup>38</sup> See e.g. A. D'Amato, 'On Consensus', 8 Canadian YIL, 1970, p. 104. Note also the 'gentleman's agreement on consensus' in the Third UN Conference on the Law of the Sea: see L. Sohn, 'Voting Procedures in United Nations Conference for the Codification of International Law', 69 AJIL, 1975, p. 318, and UN Doc. A/Conf.62/WP.2.

<sup>39</sup> See e.g. J. Charney, 'Universal International Law', 87 AJIL, 1993, p. 529.

or the essential framework within which the demand for individual state consent is transmuted into community acceptance.

It is important to note that while states from time to time object to particular rules of international law and seek to change them, no state has sought to maintain that it is free to object to the system as a whole. Each individual state, of course, has the right to seek to influence by word or deed the development of specific rules of international law, but the creation of new customary rules is not dependent upon the express consent of each particular state.

### The function of politics

It is clear that there can never be a complete separation between law and policy. No matter what theory of law or political philosophy is professed, the inextricable bonds linking law and politics must be recognised.

Within developed societies a distinction is made between the formulation of policy and the method of its enforcement. In the United Kingdom, Parliament legislates while the courts adjudicate and a similar division is maintained in the United States between the Congress and the courts system. The purpose of such divisions, of course, is to prevent a concentration of too much power within one branch of government. Nevertheless, it is the political branch which makes laws and in the first place creates the legal system. Even within the hierarchy of courts, the judges have leeway in interpreting the law and in the last resort make decisions from amongst a number of alternatives.<sup>40</sup> This position, however, should not be exaggerated because a number of factors operate to conceal and lessen the impact of politics upon the legal process. Foremost amongst these is the psychological element of tradition and the development of the so-called 'law-habit'.<sup>41</sup> A particular legal atmosphere has been created, which is buttressed by the political system and recognises the independent existence of law institutions and methods of operation characterised as 'just' or 'legal'. In most countries overt interference with the juridical process would be regarded as an attack upon basic principles and hotly contested. The use of legal language and accepted procedures together with the pride of the legal profession reinforce the system and emphasise the degree

<sup>40</sup> See e.g. R. Dworkin, *Taking Rights Seriously*, London, 1977.

<sup>41</sup> See e.g. K. Llewellyn, *The Common Law Tradition*, Boston, 1960, and generally D. Lloyd, *Introduction to Jurisprudence*, 4th edn, London, 1979.

of distance maintained between the legislative–executive organs and the judicial structure.<sup>42</sup>

However, when one looks at the international legal scene the situation changes. The arbiters of the world order are, in the last resort, the states and they both make the rules (ignoring for the moment the secondary, if growing, field of international organisations) and interpret and enforce them.

While it is possible to discern an ‘international legal habit’ amongst governmental and international officials, the machinery necessary to enshrine this does not exist.

Politics is much closer to the heart of the system than is perceived within national legal orders, and power much more in evidence.<sup>43</sup> The interplay of law and politics in world affairs is much more complex and difficult to unravel, and signals a return to the earlier discussion as to why states comply with international rules. Power politics stresses competition, conflict and supremacy and adopts as its core the struggle for survival and influence.<sup>44</sup> International law aims for harmony and the regulation of disputes. It attempts to create a framework, no matter how rudimentary, which can act as a kind of shock-absorber clarifying and moderating claims and endeavouring to balance interests. In addition, it sets out a series of principles declaring how states should behave. Just as any domestic community must have a background of ideas and hopes to aim at, even if few can be or are ever attained, so the international community, too, must bear in mind its ultimate values.

However, these ultimate values are in a formal sense kept at arm’s length from the legal process. As the International Court noted in the *South-West Africa* case,<sup>45</sup> ‘It is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered.<sup>46</sup>

International law cannot be a source of instant solutions to problems of conflict and confrontation because of its own inherent weaknesses

<sup>42</sup> See P. Stein and J. Shand, *Legal Values in Western Society*, Edinburgh, 1974.

<sup>43</sup> See generally Henkin, *How Nations Behave*, and Schachter, *International Law*, pp. 5–9.

<sup>44</sup> See G. Schwarzenberger, *Power Politics*, 3rd edn, London, 1964, and Schwarzenberger, *International Law*, 3rd edn, London, 1957, vol. I, and Morgenthau, *Politics Among Nations*.

<sup>45</sup> ICJ Reports, 1966, pp. 6, 34.

<sup>46</sup> But see Higgins’ criticism that such a formulation may be question-begging with regard to the identity of such ‘limits of its own discipline’, *Problems*, p. 5.

in structure and content. To fail to recognise this encourages a utopian approach which, when faced with reality, will fail.<sup>47</sup> On the other hand, the cynical attitude with its obsession with brute power is equally inaccurate, if more depressing.

It is the medium road, recognising the strength and weakness of international law and pointing out what it can achieve and what it cannot, which offers the best hope. Man seeks order, welfare and justice not only within the state in which he lives, but also within the international system in which he lives.

#### Historical development<sup>48</sup>

The foundations of international law (or the law of nations) as it is understood today lie firmly in the development of Western culture and political organisation

The growth of European nations of sovereignty and the independent nation-state required an acceptable method whereby inter-state relations could be conducted in accordance with commonly accepted standards of

<sup>47</sup> Note, of course, the important distinction between the existence of an obligation under international law and the question of the enforcement of that obligation. Problems with regard to enforcing a duty cannot affect the legal validity of that duty: see e.g. Judge Weeramantry's Separate Opinion in the Order of 13 September 1993, in the *Bosnia* case, ICJ Reports, 1993, pp. 325, 374; 95 ILR, pp. 43, 92.

<sup>48</sup> See in particular A. Nussbaum, *A Concise History of the Law of Nations*, rev. edn., New York, 1954; *Encyclopedia of Public International Law* (ed. R. Bernhardt), Amsterdam, 1984, vol. VII, pp. 127–273; J. W. Verzijl, *International Law in Historical Perspective*, Leiden, 10 vols., 1968–79, and M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960*, Cambridge, 2001. See also W. Grewe, *The Epochs of International Law* (trans. and rev. M. Byers), New York, 2000; A. Cassese, *International Law in a Divided World*, Oxford, 1986, and Cassese, *International Law*, 2nd edn, Oxford, 2005, chapter 2; Nguyen Quoc Dinh, P. Daillier and A. Pelet, *Droit International Public*, 7th edn, Paris, 2002, p. 41; H. Thierry, 'L'Evolution du Droit International', 222 HR, 1990 III, p. 9; P. Guggenheim, 'Contribution à l'Histoire des Sources du Droit des Gens', 94 HR, 1958 II, p. 5; A. Truyol y Serra, *Histoire de Droit International Public*, Paris, 1995; D. Gaurier, *Histoire du Droit International Public*, Rennes, 2005; D. Korff, 'Introduction à l'Histoire de Droit International Public', 1 HR, 1923 I, p. 1; P. Le Fur, 'Le Développement Historique de Droit International', 41 HR, 1932 III, p. 501; O. Yasuaki, 'When was the Law of International Society Born? An Inquiry of the History of International Law from an Intercivilisational Perspective', 2 *Journal of the History of International Law*, 2000, p. 1, and A. Kemmerer, 'The Turning Aside: On International Law and its History' in *Progress in International Organisation* (eds. R. A. Miller and R. Bratspies), Leiden, 2008, p. 71. For a general bibliography, see P. Macalister-Smith and J. Schwietzke, 'Literature and Documentary Sources relating to the History of International Law', 1 *Journal of the History of International Law*, 1999, p. 126.

EXTRADITION TREATY  
BETWEEN  
THE GOVERNMENT OF THE UNITED STATES OF AMERICA  
AND  
THE GOVERNMENT OF THE SWISS CONFEDERATION

The Government of the United States of America and the  
Government of the Swiss Confederation, desiring to provide for  
more effective cooperation between the two States in the  
repression of crime and to facilitate the relations between the  
two States in the area of extradition,  
Have agreed as follows:

(1)

**Article 1**

**Obligation to Extradite**

1. The Contracting Parties agree to extradite to each other, subject to the provisions of this Treaty, persons whom the competent authorities of the Requesting State have charged with or found guilty of an extraditable offense or persons who are wanted for the carrying out of a detention order.
  
2. ~~With respect to an offense committed outside the territory of the Requesting State, the Requested State shall grant extradition if:~~  
  
(a) ~~its law would provide for the punishment of such an offense in similar circumstances; or~~  
  
(b) ~~the person sought is a national of the Requesting State or is wanted for an offense against a national of the Requesting State?~~

**Article 2**

**Extraditable Offenses**

1. An offense shall be an extraditable offense only if it is punishable under the laws of both Contracting Parties by

deprivation of liberty for a period exceeding one year. When the request for extradition relates to a person who has been convicted, extradition shall be granted only if the duration of the penalty or detention order, or their aggregate, still to be served amounts to at least six months.

- (a) whether the laws of the Contracting Parties define the criminal act as the same offense; or
- (b) whether the offense is one for which United States federal law requires proof of interstate transportation, or use of the mails or of other facilities affecting interstate or foreign commerce, such matters being merely for the purpose of establishing jurisdiction in a United States federal court.
3. Subject to the conditions set out in paragraphs 1 and 2, extradition shall also be granted for attempting or participating in the commission of an offense and for conspiring to commit an offense when the underlying criminal act is also a violation of Swiss federal law.

~~Requesting state gives such assurances as the Requested State  
considers sufficient to safeguard the rights of defense of the  
person sought.~~

~~Article 8~~

~~Extradition of Nationals~~

- ~~1. The Requested State shall not decline to extradite because the person sought is a national of the Requested State unless it has jurisdiction to prosecute that person for the acts for which extradition is sought.~~
- ~~2. If extradition is not granted pursuant to paragraph 1, the Requested State shall, at the request of the Requesting State, submit the case to its competent authorities for the purpose of prosecution. For this purpose, documents and evidence relating to the offense shall be submitted without charge to the Requested State. The Requesting State shall be informed of the result of its request.~~

~~Article 9~~

~~Request for Extradition~~

- ~~1. Requests for extradition shall be made through the diplomatic channel. They shall be accompanied by the translation required by Article 11.~~

2. All requests for extradition shall contain:

- (a) information concerning the identity, nationality and probable location of the person to whom the documents required pursuant to either paragraphs 3 or 4 refer, with, if available, a physical description, photographs and fingerprints;
- (b) a brief statement of the facts of the case, including the time and location of the offense; and
- (c) the texts of the laws describing the essential elements and the designation of the offense for which extradition is requested, the punishment for the offense, and the time limit on the prosecution or the execution of the punishment for the offense.

~~3. Requests for extradition which relate to persons~~

~~who has not yet been tried shall be accompanied by~~

- (a) a certified copy of the arrest warrant or any order having similar effect; and
- (b) a summary of the facts of the case, of the relevant evidence, and of the conclusions reached, providing a reasonable basis to believe that the person sought

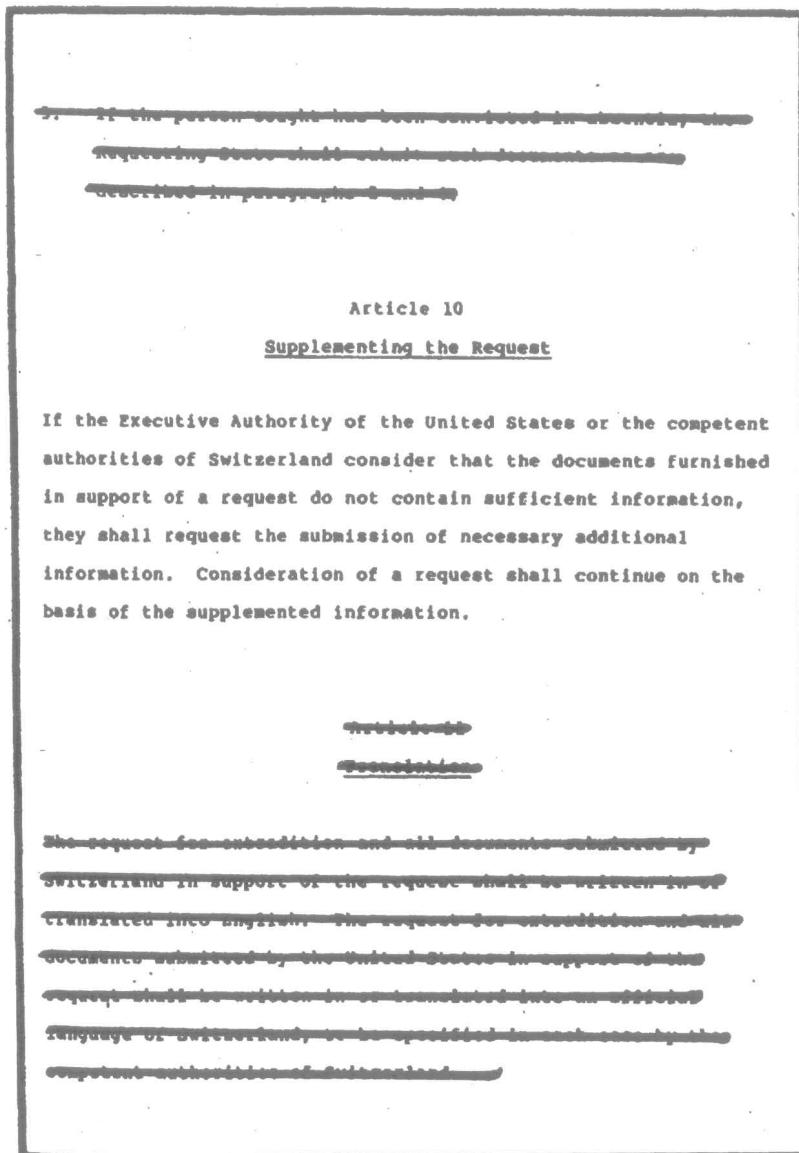
4. A request for extradition which relates to a person sought who has been found guilty or convicted shall be accompanied by:

(a) a certified copy of the judgment of conviction or, if the person sought has been found guilty but not yet sentenced, a statement by a judicial authority to that effect;

(b) a copy of the charge upon which the person sought has been found guilty;

(c) a certified copy of the arrest warrant or a statement that the person sought is subject to detention on the basis of the judgment of conviction; and

(d) if the sentence has been pronounced, a certified copy of it and a statement as to the remainder to be served.



<p><u>Article 12</u></p> <p><u>Admissibility of Documents</u></p> <p>The documents which accompany an extradition request are admissible into evidence when:</p> <p>(a) in the case of a request from the United States, they are certified by a judge, magistrate or other United States official and are sealed by the Secretary of State;</p> <p>(b) in the case of a request from Switzerland, they are signed by a judicial authority or other competent Swiss authority and are certified by the principal diplomatic or consul officer of the United States in Switzerland; or</p> <p>(c) they are certified or authenticated in any other manner accepted by the law of the requested State.</p>
<p>Article 13</p> <p><u>Provisional Arrest</u></p> <p>1. In case of urgency, a Contracting Party may apply for provisional arrest of the person sought. An application for provisional arrest or an extension thereof shall be made</p>

either through the diplomatic channel or directly between the United States Department of Justice and the Federal Department of Justice and Police.

2. The application shall state:
  - (a) that a request for extradition will follow;
  - (b) that an arrest warrant, an order having similar effect, or a judgment of conviction exists, with the date and issuing authority;
  - (c) the offense and the maximum penalty upon conviction, and, if appropriate, the sentence still to be served;
  - (d) briefly, the facts of the case, including the time and location of the offense; and
  - (e) information concerning the identity, nationality and probable location of the person sought.
3. On receipt of such an application, the Requested State shall take the appropriate steps to secure the arrest of the person sought. The Requesting State shall be promptly notified of the result of its application.
4. Provisional arrest shall be terminated if, within a period of 40 days after the apprehension of the person sought, the Executive Authority of the United States or the competent authorities of Switzerland have not received the formal request for extradition and the supporting documents.

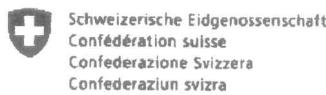
Upon application, this period may be extended as an exception for a maximum of 20 days.

5. The termination of provisional arrest pursuant to paragraph 4 shall not prejudice re-arrest and extradition if the request and supporting documents are received subsequently.

~~Article 10~~

~~Decision and surrender~~

1. The Requested State shall promptly communicate through the diplomatic channel to the Requesting State its decision on the request for extradition. It shall provide reasons for any partial or complete rejection. It shall also inform the Requesting State of the time for which the person sought was detained solely for the purpose of extradition.
2. If the extradition has been granted, surrender of the person sought shall take place within such time as may be prescribed by the law of the Requested State. The competent authorities of the Contracting Parties shall agree on the time and place of the surrender of the person sought. If, however, that person is not removed from the territory of the Requested State within the prescribed time, that person may be set at liberty and the Requested State may subsequently refuse extradition for the same offence.



## Federal Office of Justice

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### Extradition

Go to page «International Mutual Legal Assistance in Criminal Matters »

#### Extradition

1. Definition
2. Extradition Proceedings in Switzerland
3. Swiss extradition requests
4. Legal basis
5. Rejection of Extradition

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#### 1. Definition

Extradition means the surrender by force of a wanted person by the requested state to the requesting state. The purpose of an extradition is

- Prosecution  
Example: The investigating authorities make inquiries about a person suspected of committing several white-collar crimes. The person concerned does not appear for a hearing, so they are put on the wanted list at home and abroad. If this person is arrested abroad, their extradition may be requested with a view to concluding prosecution and to bringing them to court for trial.
- or the execution of a custodial sentence.  
Example: A drug dealer, convicted and sentenced to several years in prison, does not return from leave. He is then put on the wanted list at home and abroad. If arrested abroad, extradition may be requested in order that the drug dealer can serve the remainder of his prison sentence.

Extradition should be distinguished from expulsion and deportation:

- Expulsion is the strictest measure that can be ordered by the immigration authorities against a foreigner, and means that they are no longer permitted to remain on Swiss territory. The person concerned is expelled in the interests of the security of the country in which they were staying. Their expulsion is ordered without a request by a third state.
- If a foreigner whose expulsion has been ordered does not comply with his duty to leave the country, he may be deported; i.e. the police will organise and supervise the ordered departure from Switzerland.

#### 2. Extradition Proceedings in Switzerland

##### Search and arrest

An extradition case in Switzerland generally begins with a request from another state for a wanted person to be located. This request will take the form of a notice in the Schengen Information System (SIS), or be sent via a national Interpol bureau or a ministry of justice. The Federal Office of Justice (FOJ, Extradition Unit) then examines whether or not the request contains all the necessary information and extradition is actually possible in the case in question. If the individual's abode in Switzerland is known, the FOJ will order the competent police force directly to arrest the wanted person. If their abode is not known, the FOJ will have the person entered in the RIPOL automatic search system for arrest (unless the person concerned is already entered in the SIS).

When the wanted person is arrested, the cantonal authorities will seize

evidence and goods acquired as a result of the offence, and will also inform the FOJ immediately that the arrest has taken place. The cantonal authorities will give the detainee a legal hearing to respond to the foreign country's request, and will inform them of their right to contact the representatives of their home country in Switzerland, as well as to appoint a lawyer of their choice.

Simplified proceedings apply if the wanted person declares at the hearing that they agree to be extradited immediately. Provided the wanted person gives their consent, the FOJ may approve the extradition immediately and arrange for its execution. If all goes smoothly, a simplified extradition may be completed within hours.

#### **Regular extradition procedure**

If the wanted person opposes their extradition, the FOJ will issue an extradition warrant. At the same time, it will also invite the requesting state to submit a formal extradition request. As a rule, the requesting state must submit the formal extradition request to the FOJ within 18 days. This time limit may be extended up to 40 days. If the formal extradition request is received by the FOJ in due time, the wanted person remains in detention pending extradition until the corresponding proceedings have been concluded. Otherwise, the detainee is released.

The cantonal authorities dealing with the wanted person will issue an extradition warrant on behalf of the FOJ and give the person concerned a legal hearing to respond to the extradition request. The wanted person may appeal against the extradition warrant to the Federal Criminal Court, and appeal against its decision in turn to the Federal Supreme Court. They may also make a petition for release from custody at any time.

Based on this hearing and any statement made by the wanted person's lawyer, the FOJ may take an extradition decision in its capacity as a court of first instance. The FOJ will examine whether or not the formal and material conditions for extradition are fulfilled. Specifically, it will clarify whether the offence that the request alleges has been committed would also be punishable under Swiss law. Questions of guilt and facts are not examined as part of extradition proceedings, i.e. the FOJ does not examine whether or not the wanted person actually committed the offence.

The wanted person may lodge an appeal with the Federal Criminal Court within 30 days of the extradition decision being served. The Federal Criminal Court will rule on the appeal after the FOJ has stated its position. In particularly important cases, an appeal against the decision of the Federal Criminal Court may be lodged with the Federal Supreme Court.

#### **Execution**

The FOJ will order the extradition to be carried out if the extradition decision has become legally enforceable or if the wanted person has not given notice of an appeal against the decision within five days of it being served. In the case of neighbouring countries, the wanted person will generally be handed over at the border. Extraditions to other countries will take place by air. Evidence or goods acquired as the result of an offence may be handed over at the same time.

Especially in complex cases of white-collar crime and when all possible appeals are used, regular proceedings may take up to a year or more.

#### **3. Swiss extradition requests**

The FOJ will submit Swiss search requests to other countries upon application by cantonal or federal prosecution or enforcement authorities. These requests will take the form of a notice in the SIS, or be submitted via Interpol or direct to the competent ministry of justice.

If the wanted person is arrested, the formal extradition request must be submitted to the requested state within the prescribed time. These time periods generally vary between 18 and 40 days. The FOJ makes the Swiss request upon application by that authority that is responsible for the content of the request. In drawing up the request, it acts in an advisory capacity and may also function as an intermediary with foreign authorities.

The extradition request consists of: the FOJ's letter to the foreign ministry of justice, the Swiss arrest warrant or the legally valid and enforceable judgement, a presentation of the facts of the case and the applicable provisions under Swiss penal law. Depending on the country concerned, the request may have to be submitted via diplomatic channels. Many common law (Anglo-Saxon) countries also request, in the case of individuals who have not yet been found guilty, a file of evidence, containing witness statements and other evidence that gives good grounds to find the wanted person guilty.

Extradition proceedings abroad are governed by the law of the state in question. Major differences exist in this regard: while extradition proceedings in some states are handled from start to finish by a court, in other states the responsibility is held jointly by the courts and the political/administrative authorities.

#### 4. Legal basis

Swiss extradition proceedings are governed by the Federal Act on International Mutual Assistance in Criminal Matters (IMAA, SR 351.1). Switzerland has concluded bilateral or multilateral extradition treaties with most European and many non-European States. The IMAA also allows extradition without a treaty obligation, however.

Old extradition treaties contain a list of offences for which provision for extradition is made. More modern treaties, however, such as the European Convention on Extradition, provide for extradition if the alleged offence is punishable by a custodial sentence of a certain minimum duration (one year), or if a sentence of a certain minimum duration (four months) has been imposed.

To qualify as extraditable, the actions of the perpetrator must be punishable in both states (principle of dual criminality). However, the offence does not have to be defined in the same terms in both states: for example, what is classified as theft abroad may be regarded under Swiss law as embezzlement.

Under the principle of speciality, the extradited person may be prosecuted, held in custody or extradited on to a third state only for those criminal offices that were committed prior to their extradition and on the basis of which the extradition was approved. Once extradition has taken place, the requested state may nonetheless approve further prosecution on the basis of a subsequent application. Many states also permit the wanted person to waive the principle of speciality.

If the same person is pursued by several states, extradition may be granted to all of them, provided that the requirements are fulfilled. The extradition treaties do not lay down any clear rules on priority. The requested state must take into account the seriousness of the offence(s), where the offence(s) was(were) committed, the dates of the extradition requests and the possibility of onward extradition. The offender's native country is last if it does not extradite its own nationals.

#### 5. Rejection of Extradition

Switzerland does not grant extradition for political offences, such as membership of an illegal party. Genocide, the hijacking of aircraft or the taking of hostages are not considered as political offences. Extradition is

also refused if proceedings abroad contradict the principles of the European Convention on Human Rights, or if they are carried out to prosecute or punish a person on account of their political opinion, their membership of a certain social group or nationality, their race or religion. Although the possibility of political persecution is examined in extradition proceedings, the asylum authorities must decide on any application for asylum in separate proceedings.

Purely military offences are also excluded from extradition. Military offences are, for example, insubordination or desertion. An ordinary criminal offence (such as rape) committed by a member of the armed forces is not considered a military offence.

As a general rule, extradition is also refused for fiscal offences which were committed with the aim of paying lower taxes or custom duties. Subsidy fraud, where illegal payments are obtained from the state by false pretences, for example, is not considered as a fiscal offence. The terms of cooperation under the Schengen Agreement provide for extradition owing to offences in the realm of consumer taxes, value-added tax and customs duties. However, it is permitted only if the offence on which the request is based is subject to a custodial sentence of at least twelve months.

Like most European states, Switzerland reserves the right to refuse to extradite its own nationals.

As a rule, criminal proceedings that are already pending in the requested state for the same offence take precedence over extradition. Furthermore, an existing conviction for the same offence in the requested state rules out extradition, in accordance with the "non bis in idem" principle. Extradition will be granted in the case of prosecution or sentence execution relating to offences for which the statute of limitations has already expired only if corresponding provision is made in the treaty between the two countries concerned.

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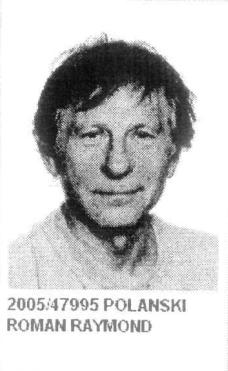
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# Wanted

POLANSKI, Roman Raymond



## Legal Status

Present family name: **POLANSKI**

Forename: **ROMAN RAYMOND**

Sex: **MALE**

Date of birth: **18 August 1933 (76 years old)**

Place of birth: **PARIS, France**

Language spoken: **English**

Nationality: **France, Poland**

## Physical description

Height: **1.66 meter <-> 65 inches**

Weight: **63.5 kg <-> 140 pounds**

Colour of eyes: **BROWN**

Colour of hair: **BROWN**

## Offences

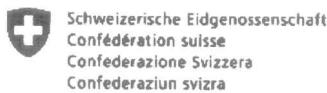
Categories of Offences: **CRIMES AGAINST CHILDREN, SEX CRIMES**

Arrest Warrant Issued by: **LOS ANGELES / CALIFORNIA / United States**

**IF YOU HAVE ANY INFORMATION CONTACT**

**YOUR NATIONAL OR LOCAL POLICE**

**GENERAL SECRETARIAT OF INTERPOL**



**Federal Department of Justice and Police**

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**Statement: Arrest of Roman Polanski**

Information, FDJP, 27.09.2009

- Roman Polanski was arrested on Saturday evening on entering Switzerland and was placed in provisional pre-extradition detention based on a US arrest warrant.
- Roman Polanski is wanted by the US authorities on the charge of committing a sexual act with a minor, specifically in a case dating from 1977 involving a 13-year-old girl in Los Angeles.
- The US authorities have been searching for Roman Polanski worldwide since the end of 2005.
- A US arrest warrant against Roman Polanski has existed since 1978.
- A decision as to whether or not Roman Polanski will actually be extradited to the USA will only be made once extradition proceedings have been completed. An appeal against pre-extradition detention and a decision to extradite can be submitted to the Federal Criminal Court. Those decisions can in turn be taken further to the Federal Supreme Court.
- Due to the ongoing nature of these proceedings no further information can be given at the present time.

**For more information**

Brigitte Hauser-Süess, Information Service FDJP, T +41 31 322 40 90,

Contact

Guido Balmer, Information service FDJP, T +41 31 322 18 18, Contact

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Last modification: 27.09.2009

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Federal Department of Justice and Police (FDJP)

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**The New York Times**

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September 28, 2009

## Polanski's Arrest Could Lead to Extradition

By MICHAEL CIEPLY and BROOKS BARNES

LOS ANGELES — In a surprising move arranged by prosecutors in Los Angeles and Washington, the authorities in Switzerland arrested the film director Roman Polanski late Saturday as he arrived at the Zurich airport, paving the way for his possible extradition to the United States in connection with a 32-year-old sex case.

Mr. Polanski, 76, a French citizen, was detained as he arrived to receive an award at the Zurich Film Festival. Although he is expected to oppose extradition, the arrest raised a strong possibility that Mr. Polanski would be returned to the United States to face sentencing under his conviction for having had sex with a 13-year-old girl in 1977.

The arrest came as a shock to Mr. Polanski and those who have worked closely with him both on movies and in a continuing attempt to lift the outstanding arrest warrant against him. He had just finished shooting a film in Germany and often travels to Switzerland, where he maintains a home.

In Paris the French culture minister, Frédéric Mitterrand, said in a statement that he was astonished by the arrest. In a separate statement the French foreign minister, Bernard Kouchner, said he had spoken with his Swiss counterpart and communicated “the desire of the French authorities that the rights of Mr. Polanski be fully respected and that this affair rapidly find a favorable resolution.”

The Swiss Justice Ministry said in a statement that Mr. Polanski, the director of celebrated films like “Chinatown” and “Rosemary’s Baby,” was put in “provisional detention” pending extradition based on the arrest warrant from the United States. “Whether Roman Polanski will be effectively extradited to the U.S.A. or not can be established only after the extradition process judicially has been finalized,” the

statement said. The ministry's statement added that Mr. Polanski could fight extradition in various courts.

In Los Angeles a representative for prosecutors described the arrest as all but inevitable in a game of cat and mouse they had never stopped playing. "Any time word is received that Mr. Polanski is planning to be in a country that has an extradition treaty with the U.S., we go through diplomatic channels with the arrest warrant," said Sandi Gibbons, a spokeswoman for the Los Angeles County district attorney's office.

Ms. Gibbons said extradition requests had been pursued several times in the past, particularly when Mr. Polanski was believed to be planning a trip from France, where he lives, to Britain, which has laws that would allow extradition.

But American lawyers for Mr. Polanski challenged that. In a statement, Chad Hummel and Douglas Dalton, who represent Mr. Polanski, said that Mr. Dalton "had been told by several prior deputy district attorneys that no efforts had been made to extradite Mr. Polanski — who has resided in Paris, owned a home in Switzerland for many years, and worked throughout Europe during that time."

Jeff Berg, Mr. Polanski's agent, also noted that the director had been in Switzerland over the summer editing his latest film, "The Ghost" and had traveled openly in Italy, Germany and Austria.

The lawyers' statement also said that during an Oct. 16, 2008, meeting, the deputy district attorney then assigned to the case, Richard Doyle, told Mr. Hummel that the prosecutors had never pursued extradition because the crime was not covered by a treaty with France.

This time, said Ms. Gibbons, who spoke by telephone on Sunday morning, prosecutors learned more than a week ago that Mr. Polanski was planning to accept the award in Zurich and asked that the United States government officially request the extradition.

Mr. Polanski has in recent months tried to move the longstanding criminal case out of Los Angeles, claiming that the court system there is biased against him. In January a Los Angeles County Superior Court judge turned down the request; Mr. Polanski's lawyers filed an appeal in July that is pending. But as part of that action, a

California court of appeal ordered the Superior Court to explain why Mr. Polanski needed to be present.

In a separate statement Mr. Dalton, Mr. Hummel and a third lawyer representing Mr. Polanski, Bart Dalton, said they had been unaware that any extradition attempt was being considered and had hoped that their pending appeal would resolve the case. "Separate counsel will be retained for those proceedings," the statement said with regard to the extradition request.

Assuming Mr. Polanski does not waive his right to appeal the extradition, he can challenge the arrest warrant and any eventual extradition order, said Guido Balmer, a spokesman for the Swiss Federal Justice Department, and appeal both issues in the Swiss federal penal court of justice. If he were to lose those appeals, he could then get a final hearing on both issues at the Federal Court of Justice.

Mr. Balmer said he could not estimate how long any appeal might go on, but said, "It's true that it won't be a matter of hours." As of Sunday morning, Mr. Polanski's representatives in Los Angeles did not know precisely where he was being held, according to two people who were briefed on the situation but spoke on condition of anonymity because they were not authorized to comment.

The victim in the case, Samantha Geimer, has long since publicly identified herself and expressed forgiveness for Mr. Polanski, who fled the United States on the eve of his sentencing in 1978 after becoming convinced that a judge in the case, Laurence J. Rittenband, meant to backtrack on a plea arrangement and send him back to prison.

The legal proceedings around Mr. Polanski heated up again in late 2008 with the release of a documentary film, "Roman Polanski: Wanted and Desired," that detailed claims of judicial and prosecutorial wrongdoing at the time of the director's original arrest.

Citing the film and other evidence, Mr. Polanski's lawyers asked in December 2008 that the case against him be dropped. In February in Los Angeles County Superior Court, Judge Peter Espinoza rejected the request, citing Mr. Polanski's fugitive status, though he indicated during a hearing that he was open to arguments that misconduct had occurred in the case.

The documentary, directed by Marina Zenovich, included an interview in which a former deputy prosecutor who was not involved in the Polanski case described

having coached Judge Rittenband, who has since died, about Mr. Polanski's sentencing.

Mr. Polanski was initially indicted in 1977 on six felony charges that included rape, sodomy and providing a controlled substance to Ms. Geimer. He eventually pleaded guilty to one count of having sex with a minor but left the country after becoming convinced he would be sent back to jail after having a 42-day psychiatric evaluation in state prison. He has not openly visited the country since; when he won an Oscar for directing "The Pianist," he did not attend the ceremony.

Famous as the director of "Knife in the Water," "Repulsion" and other films — and as the husband of Sharon Tate, who was killed by the Manson crime family — Mr. Polanski, a French citizen, has long owned a home in Switzerland near the Gstaad resort. Why he would suddenly be arrested after flying in and out of Zurich without trouble for years flummoxed his Hollywood friends on Sunday, although Ms. Gibbons said it was simply a matter of having enough notice that Mr. Polanski would visit a country in which he was vulnerable.

Mr. Polanski has been careful to avoid certain countries — he testified by video link in a 2005 libel trial in London rather than risk entering Britain — but has traveled freely in Europe for decades, partly to direct films.

Mr. Polanski's arrest could hinder the release of "The Ghost." Sales agents for the film have waited for Mr. Polanski to complete it before lining up a United States distributor.

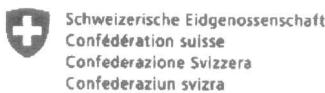
The film, scheduled for release in 2010, is still in postproduction.

*David Jolly contributed reporting from Paris.*

This article has been revised to reflect the following correction:

**Correction: October 7, 2009**

Because of an editing error, an article on Sept. 28 about the arrest of Roman Polanski in Switzerland referred incorrectly to his acceptance of an Oscar in 2003 for directing "The Pianist." Mr. Polanski, who was not at the Oscar ceremony because of an outstanding warrant for his arrest, issued a statement from Europe the following day. He did not give an acceptance speech via satellite.



## Federal Office of Justice

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### United States asks Switzerland to extradite Roman Polanski

#### Federal Office of Justice receives formal extradition request

Press Release, FOJ, 23.10.2009

**Bern. The United States has asked Switzerland to extradite Roman Polanski. The Federal Office of Justice (FOJ) received the formal extradition request yesterday evening.**

The Franco-Polish film director was arrested in Zurich on 26 September 2009 on the basis of a US warrant and taken into custody awaiting extradition. The US Embassy in Berne submitted the formal extradition request to the FOJ on 22 October 2009, within the deadline of 40 days stipulated under the bilateral extradition treaty. The US extradition request is based on a warrant issued by the Superior Court of the State of California for the County of Los Angeles on 1 February 1978, on which date Polanski had failed to appear before the judge as was required by his bail conditions. During the US criminal investigation, Polanski had admitted to having unlawful sexual intercourse with a minor. He is wanted by the US authorities with a view to passing sentence for this offence.

The FOJ will forward the extradition request to the Canton of Zurich for the purpose of holding a hearing for Polanski and will make its decision regarding extradition based on the results of the hearing and the information provided by Polanski's lawyer. In case extradition is considered to be admissible Polanski will have the option of appealing against the FOJ's decision before the Federal Criminal Court and the Federal Supreme Court as the court of last instance.

#### For more information

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Last modification: 23.10.2009

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## Federal Office of Justice

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Federal Department of Justice and Police

### Roman Polanski: no extradition

Press Release, FDJP, 12.07.2010. Corrected version.

**Bern.** The 76-year-old French-Polish film director Roman Polanski will not be extradited to the USA. The measures in place to restrict his freedom have been revoked. This announcement was made by Eveline Widmer-Schlumpf, head of the Federal Department of Justice and Police (FDJP), in Bern on Monday. The decision was due to deficiencies in the US extradition request that could not be satisfactorily resolved despite intensive efforts. Account was also taken of the principles governing state action that derive from international public policy.

At the end of 2005, the US authorities issued an international arrest warrant against Roman Polanski in respect of a sexual offence committed against a minor in 1977. On the basis of this warrant, Roman Polanski was arrested on 26 September 2009 on his arrival at Zurich airport and detained pending extradition. On 22 October 2009, the US authorities filed a formal extradition request. On 4 December 2009, Roman Polanski was released from custody after depositing bail of CHF 4.5 million on condition that he remained under house arrest with electronic monitoring in his chalet in Gstaad.

#### Refusal to disclose records

In the course of the extradition proceedings, the Federal Office of Justice (FOJ) on 5 May 2010 asked the US authorities to substantiate their extradition request by supplying the transcript of an interview conducted on 26 February 2010 with Roger Gunson, the public prosecutor in charge of the case in the 1970s. It had been alleged that the transcript would show that at a meeting held on 19 September 1977, the judge in the case at the time had expressly assured the representatives of the parties that the 42 days that Roman Polanski spent in the psychiatric unit of a Californian prison represented the entire term of imprisonment that he would have to serve. If this were the case, Roman Polanski would in fact have completed his sentence and therefore both the proceedings on which the US extradition request was founded and the request itself would have no foundation.

The request for the testimony transcripts made by the FOJ was rejected by the US Justice Department on 13 May 2010 after a US court had ruled that the testimony transcripts were to remain sealed. In the circumstances, it was not possible to exclude with the necessary certainty that Roman Polanski had not already served the sentence imposed at the time and as a result, the extradition request was seriously flawed. Given the persistent doubts as to the precise facts of the case, the request had to be rejected.

#### Legitimate expectation is a principle of international law

In addition to considerations based on the extradition treaty with the USA, account must also be taken of general international law and international public policy. International treaties should not simply be interpreted literally: the spirit and purpose of the law must also be considered. Treaties must be upheld according to the principle of good faith. The principle of legitimate expectation, which protects parties to litigation from arbitrary decisions, is laid down in specific provisions of both international law and Swiss domestic law, and primarily in Article 9 of the Federal

Constitution (Art. 9 Protection against arbitrary conduct and principle of good faith: Everyone has the right to be treated by state authorities in good faith and in a non-arbitrary manner).

In particular, account must be taken of the fact that it was common knowledge that, since buying his house in Gstaad in 2006, Roman Polanski had made regular visits to Switzerland. Nonetheless it was years before the US authorities filed a formal extradition request. Moreover, although Polanski's name was placed on the Swiss register of wanted persons, he was never subjected to any checks by the Swiss authorities. These circumstances gave rise to a position of trust, and Roman Polanski would probably not have decided to attend the film festival in Zurich in September 2009 had he not been confident that the journey would not entail any legal disadvantages for him.

Having considered all the aspects of this case – and in particular the unsatisfactory presentation of the facts of the case in the extradition request and the principles governing state action that derive from international public policy – the Swiss authorities had no alternative but to reject the request for Roman Polanski's extradition.

**For more information**

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Last modification: 12.07.2010

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**The New York Times**

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July 12, 2010

# Swiss Reject U.S. Request to Extradite Polanski

By NICK CUMMING-BRUCE and MICHAEL CIEPLY

GENEVA — Roman Polanski's repeated claims that there was misconduct at his trial for having sex with a 13-year-old girl in 1977 ran into a brick wall in American courts. But they were enough apparently to convince Swiss authorities that he should walk free.

Switzerland announced Monday that it would not extradite Mr. Polanski, a famous film director, to the United States in part because of fresh doubts over the conduct of the judge in his original trial.

"He's a free man," the Swiss justice minister, Eveline Widmer-Schlumpf, said at a news conference on Monday.

The ruling means that, after nearly a year of courtroom wrangling in the United States and Switzerland, the case is roughly where it has been for decades: Mr. Polanski is free to return to his home in France but remains wanted in the United States. He was arrested at the Zurich airport last September on an international warrant issued by the United States on charges including rape and sodomy dating from 1977. In December, the Swiss authorities allowed him to move to his chalet in the ski resort of Gstaad under house arrest on bail of \$4.5 million pending a decision on his extradition.

Mr. Polanski fled the United States in 1978 after he had pleaded guilty to one count of having unlawful sex with a minor and spent 42 days in psychiatric evaluation in Chino State Prison.

The arrest and the request for extradition opened up a cultural divide both in the United States and Europe as filmmakers, intellectuals, politicians and victims' rights

groups lined up on either side of the debate. At issue: had Mr. Polanski suffered enough for his crimes, as his supporters argued, or were his celebrity and talent obscuring the serious nature of the charges against him?

The French foreign minister, Bernard Kouchner, said he was “delighted” and deeply relieved by the ruling. Samantha Geimer, who at 13 was Mr. Polanski’s victim in the original sex case, has long disclosed her identity and called to end the prosecution.

Joelle Casteix, the western regional director for the Survivors Network of Those Abused by Priests, said she was “grossly disappointed.” Ms. Casteix, whose group assists the victims of sexual abuse, added, “This sends a message that if the abuser is rich and powerful, that person can flee the country and get away scot free.”

The decision to free Mr. Polanski was a sharp defeat for prosecutors in Los Angeles, who had warded off repeated challenges by insisting that Mr. Polanski’s claims to have been wronged by authorities in the past could not be considered until his fugitive status had ended. Steve Cooley, the Los Angeles County district attorney, is the Republican candidate for state attorney general.

In a statement, Mr. Cooley said his office would continue to pursue extradition if Mr. Polanski were arrested somewhere other than Switzerland.

“Our office complied fully with all of the factual and legal requirements” of the treaty with Switzerland, Mr. Cooley said. All of the original charges against Mr. Polanski are still pending, Mr. Cooley noted, because he was never sentenced under a plea agreement that reduced those to just unlawful sex with a minor.

Lanny A. Breuer, the assistant attorney general for the Justice Department’s criminal division, said that the Obama administration was still looking at its options about what to do next but was “deeply disappointed” by the Swiss decision.

“We thought our extradition request was completely supported by the treaty, completely supported by the facts and the law, and the underlying conduct was of course very serious,” Mr. Breuer said.

In effect, Mr. Polanski’s United States legal team worked around the prosecutors, by hammering in many of his claims in appeals court briefs that — while not directly successful in ending the case — appear to have made an impression on the Swiss. In

choosing to free Mr. Polanski, the Swiss, at least to some extent, passed judgment on the conduct of the case in Los Angeles.

"I think they're raising eyebrows about what happened," said Laurie L. Levenson, a professor of law at the Loyola Law School in Los Angeles.

The turning point in the case occurred in mid-March, when Mr. Polanski's lawyers disclosed in an appeals brief that Roger Gunson, a now-retired lawyer who originally prosecuted the case, had given sealed testimony describing a plan by Judge Laurence J. Rittenband, the original judge, to limit Mr. Polanski's sentence to a 90-day psychiatric evaluation, a portion of which Mr. Polanski had served during his 42 days in Chino State Prison.

Mr. Gunson, who gave the testimony in January, also described his own reservations about the handling of the case by Judge Rittenband, who is now deceased.

Courts here refused to open Mr. Gunson's testimony, which was taken provisionally, because he was gravely ill, and was supposed to be used at Mr. Polanski's eventual sentencing. But Mr. Polanski's legal team described the testimony in court filings that were widely described by media outlets.

The Swiss authorities, without success, requested access to the Gunson account, arguing that it would have established whether the judge had assured Mr. Polanski that time he spent in a psychiatric unit would constitute the whole of his period of imprisonment.

"If this were the case, Roman Polanski would actually have already served his sentence, and therefore both the proceedings on which the U.S. extradition request is founded and the request itself would have no foundation," the Swiss Justice Ministry said in a statement.

Mr. Polanski's legal team in the United States declined to comment. Reached by telephone Monday morning, Mr. Gunson said he was unaware of the decision and declined to comment.

Georges Kiejman, one of Mr. Polanski's lawyers in Europe, said Monday's decision was a vindication of sorts, and a step toward resolving what he called an "American misunderstanding" of Mr. Polanski's case. Mr. Kiejman said he hoped Mr. Polanski

would one day be able to return freely to the United States. “Intellectually and artistically, it’s one of his adoptive homelands,” he said.

Mr. Polanski would have faced an uncertain future if he had been returned for sentencing. As he was held over the last nine and a half months, prosecutors did not make clear their specific plans for him, but they signaled that a sentence much longer than 90 days might be in order.

In May, for instance, David Walgren, currently the lead prosecutor in the case, took a sworn statement from Charlotte Lewis, a British actress who, at a Los Angeles press conference, said she was subjected to an unwanted sexual encounter with Mr. Polanski in the early 1980s.

Monday’s decision by the Swiss was presumably a boost for Marina Zenovich, a documentary filmmaker whose “Roman Polanski: Wanted and Desired” brought the case to new prominence in 2008 by airing interviews in which prosecutors and others described Judge Rittenband’s claimed missteps.

Ms. Levenson said prosecutors and judges who have handled the case in recent years appear to have acted correctly, but that clearly was not sufficient in this case.

“The lesson may be that it’s really hard to go back in time 30 years to remedy a case,” Ms. Levenson said. “If you don’t get justice at the right time, you may not get it at all.”

*Nick Cumming-Bruce reported from Geneva, and Michael Cieply from Los Angeles..*



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July 15, 2010

# Access to Testimony at Issue in Polanski Case

By MICHAEL CIEPLY

LOS ANGELES — After Swiss authorities this week refused to extradite Roman Polanski to the United States because they were denied access to secret testimony about his expected sentence on a decades-old sex charge, officials in Washington and Los Angeles were left facing an uncomfortable question: Why was a judge in the case allowed to believe that the Swiss had no interest in the sealed account?

On Monday, officials in Switzerland freed Mr. Polanski, the 76-year-old film director who had been held since September pending possible extradition to face sentencing for having unlawful sex with a 13-year-old girl in 1977. He had entered a guilty plea on that charge but fled the United States the following year before he was sentenced.

In a letter notifying Mr. Polanski's European legal team of the decision, the Swiss justice department said it asked the United States Department of Justice on May 5 for access to sealed testimony of Roger Gunson, the prosecutor who originally handled the case and who is now retired.

Mr. Gunson testified this year about a plan under which the Los Angeles County Superior Court judge who presided over the Polanski case, Laurence J. Rittenband, now deceased, had intended to limit Mr. Polanski's sentence to a 90-day psychiatric evaluation, part of which he had already served. But the testimony was sealed for possible use if Mr. Gunson, who was gravely ill, would not be available.

Mr. Polanski's American legal team asked Judge Peter Espinoza of Los Angeles County Superior Court to unseal the testimony, which might have shown that Mr. Polanski was headed for a sentence too short to qualify for extradition. On May 10, Judge Espinoza denied the request, citing, in part, a written assurance on May 6 by

David Walgren, the county prosecutor handling the case, that the Swiss had never sought the information.

"They have indicated that they need no further information," Judge Espinoza said during the May 10 hearing. "Particularly, they are not interested in what is contained within the four corners of the transcript."

At the hearing, Mr. Walgren said, "No such request has ever been received by the people."

In response to an inquiry, however, a Justice Department spokeswoman said on Thursday that the Swiss had asked for access to the testimony and that authorities in Los Angeles were aware of that request. The spokeswoman, Laura Sweeney, wrote in an e-mail message: "The D.A.'s office was fully informed of all requests from Swiss authorities. The D.A.'s office provided input and approved all responses from the U.S. government to Swiss authorities on this matter, including the response by the Department of Justice to Swiss authorities regarding this testimony."

Ms. Sweeney did not specify on what day Los Angeles prosecutors were informed of the request. The Justice Department denied Swiss authorities access to the testimony on May 13, according to the Swiss account.

In a statement on Thursday, Sandi Gibbons, a spokeswoman for the Los Angeles County District Attorney's Office, said only this about the various accounts: "There is no conflict between statements made by the Los Angeles County District Attorney's Office and the U.S. Department of Justice. The request for a transcript of the sealed testimony was made to the Swiss government by Polanski's lawyer in Switzerland.

"During this entire lengthy and complicated process, we have enjoyed nothing but professionalism and cooperation from attorneys with the Office of International Affairs of the U.S. Department of Justice."

Though Switzerland declined to extradite Mr. Polanski — and though he has lived freely in France for years — Mr. Polanski continues to face prosecution in the United States.