Improving Extradition Procedure through Strengthening the Legal Status of an Individual and Transferring the Decision Making Right from the Executive to Judiciary Branch of Power

by

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Abstract

A special role amongst various efforts to combat transnational criminal activity belongs to extradition, which has transformed into a form of international cooperation and became an indispensable tool for ensuring criminal responsibility in any part of the world. However, for a long period of time, an individual in the process of extradition has been treated as a passive object of intergovernmental relations which have a significant political component. In this thesis, the claim is that treatment of an individual as a rights bearer and an active subject of legal relationships among other parties of the process, combined with transfer of final decision-making right from the executive to judiciary branch of power, is capable to enable application of the Rule of law principles to particular extradition cases, limit broad discretion of decision makers and minimize political component of extradition.
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Introduction

Over the past decades, international criminal activity has extremely intensified. The existence of transnational links between organized criminal groups in different states impels criminals to move between sovereign jurisdictions. Efforts to combat transnational criminal activity can produce results only through the efficient use of various complex legal instruments. A special role amongst them belongs to extradition, which has transformed into a form of international cooperation in combating crime. Now extradition is an indispensable tool for ensuring criminal responsibility in any part of the world.

In common law systems, “[t]he broad purpose of extradition is the repression of crime by facilitating the return of alleged offenders to the jurisdiction in which the crime was committed, pursuant to a formal request made in compliance with international obligations set out in a treaty.”¹ Moreover, extradition is considered as “… a form of executive privilege designed to accommodate requests from one country to another to apprehend and deliver a person accused or convicted of conduct that is considered criminal by both signatory nations.”² However, “[m]ore narrowly still, it is the actual surrender of such a person by one state to another on request.”³ In civil law systems, extradition is usually defined as “a poly-systemic international legal body, aimed at the delivery of the person who committed a crime to the competent criminal jurisdiction for prosecution or sentencing under international agreements, national legislation or the principle

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² Ibid at 11.
³ Ibid
The process of extradition in the form in which it has developed now involves three parties: the requesting State, the State to which the request is directed and the person (accused or sentenced to criminal punishment).

For a long period of time, an individual has been treated as an object of the extradition process whose rights depended solely on the States concerned. Improvement of human rights protections, especially in the period after World War II, had begun changing the state-oriented concept of the international law, but not of the extradition. Even though some current trends in the international law may be considered as being close to acceptance of a kind of an independent international legal personality of an individual, at least in some particular relations, in the process of extradition a person is still no more than a passive object of intergovernmental relations. However, more and more international agreements contain provisions aimed at the protection of rights and freedoms of human beings, who are, in fact, the main social value of particular states and the international community as a whole.

Moreover, despite the existence of numerous regulations governing extradition-related issues, legal relationships in this field have a significant political component. Thus, most decisions on extradition requests are made taking into consideration the current state of relations between states, practice of previous relationships, and even public opinion or personal contacts between leaders of the states, which also affects the decision-making process. Mismatch of different legal systems such as common law, civil law, Muslim law and mixed law, as well as different cultural and social norms also have significant influence on a person, whose extradition

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is requested since combined they can even lead to different understanding of the international law and its general principles in those respective jurisdictions. However, under such circumstances, a person has very limited means of protection against political will and judicial imperfection.

In my thesis primary attention will be paid to discussion of the legal status of an individual as a rights bearer and an active subject of legal relationships among other parties of the process, as opposed to the treatment of a person as a passive object of intergovernmental relations. I think that it can be strengthened through the recognition of international legal personality of an individual and subsequent development of the latter’s legal capacity by granting strong participatory rights and means of holding states accountable for the conduct, inconsistent with general principles of the international law. In my opinion, estoppel in international law, applied to legal relations between a state and an individual, would be able to play significant role in achieving the abovementioned goal since it could oblige states to be consistent with their previous behaviour within the same legal and factual situation in respect to an individual in the process of extradition.

The second one but no less important, aspect that I will discuss is the limitation of a political component in the process of extradition that shall be set up through the development of efficient legal mechanisms and adjustments of the decision-making process. My claim is that decisions on extradition requests must be made exclusively by judges rather than governmental officials. Transfer of final decision-making right from the executive to the judiciary would enable application of the Rule of law principles to particular extradition cases, limitation of broad discretion of decision makers and achievement of such abstract, but yet practicable phenomenon, as justice. It is reasonable to assume that only highly-qualified judges, with the
help of law professors and scholars, would be able to consider appropriate Rule of law principles and evaluate the category of justice while deciding on extradition cases.

In order to illustrate potential benefits that could have been gained from practical application of the above mentioned concepts and principles, I will analyze the *Viktor Bout* case\(^5\), decided by the courts in Thailand and the United States of America, and compare some of its aspects with the *Burns* case\(^6\), decided in Canada. The *Viktor Bout* case will also illustrate huge political pressure, the influence of which is difficult to evaluate, taking into consideration the possibility of making a foreign prime-minister ready to resign rather than to make a decision on extradition request.

However, it shall be mentioned that none of the proposed developments should allow fugitives to shape justice and misuse the barriers and limits aimed at protecting people from governmental abuse.

Before proceeding to the main discussion of the two abovementioned lines of arguments, I will begin with a brief historical overview and comparative analysis of the development of extradition in different parts of the world beginning form first known ancient extradition treaties to the most recent ones with primary attention paid to North American and European experience. Due to limited size of the thesis, extradition for the purposes of the International Criminal Court and previously created *ad hoc* tribunals will not be covered in the discussion. I will analyze related international legal documents, such as the European Convention on Extradition, and some of the national special laws on extradition. General principles of extradition, which can be found


in state practise, treaties and conventions, will be discussed in relation to both legal documents and cases. In the final part of the thesis, I will draw appropriate conclusions and some suggestions based on the foregoing research.
Chapter 1

Historical overview and current major global trends in extradition procedure

Extradition has a long history. The first known extradition treaty dates back to far 1280 BC. However, one of the famous documents in diplomatic history associated with this issue is an agreement concluded in 1296 BC between the Egyptian Pharaoh Ramses II and King of Hittites HettushiLem III, which provided that “… if one person or two, or three flee from the land of Egypt to come to the King of the country of Hittites, they shall be seized and sent back to Ramses II ... As for man, brought back to Ramses II ... he shall not be charged guilty, nor shall his house be destroyed or his wife and his children … nor shall he be killed, nor his eyes, his ears and legs shall be damaged ...”. Similar obligations were stipulated for Egyptians as well. Agreements between the ancient Greek city-states also contained provisions with respect to extradition of escaped slaves-fugitives as well as the ones concluded between the Roman Empire and Greece. The most ancient extradition treaties include agreements signed by the Dutch Prince William II and the Earl of Brabant Henry II, between the English King Edward III and French King Philip the Fair, Kyivan Rus’ treaties and other.

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8 Ibid at 101- 103.
Subsequent development of extradition succeeded owing to the efforts of royal families of Europe that had been using extradition for political offenders - those who committed crimes against a king (and thus against God). Extradited political criminals were punished most severely, by quartering their bodies. Later, as has been discussed by Prof. Kozochkin, under the Constitution of France of 1848 criminals who, by the figurative expression of Lombroso, "speeded up the course of history" were treated according to the most favourable conditions: they could not be extradited, nor could they be the subject to the death penalty.

In the modern sense, extradition emerged in the 17th century and is now based on a set of rules, developed throughout its history. According to Gary Botting's opinion, they “… are now incorporated in various forms in the current Treaty of Extradition Between the Government of Canada and the Government of the United States …” and include: “the rule of pre-existent treaty” (which is usually a “condition precedent”); “the rule of executive prerogative” (which means that extradition is mostly an executive decision exercised in accordance with the law); “the rule of enabling legislation” (treaties are not enforceable unless domestic legislation authorizes executive acts); “the “extraditable offense” rule” (a crime must be listed or described in an agreement or treaty); “the rule of dual criminality” (the acts of an individual must be considered criminal in both jurisdictions); “the rule of non-injury” (when a treaty exists, the fairness of the laws and judicial system of the requesting state is assumed); “the rule “extradite or prosecute”” (which means that requested party may chose to prosecute an individual instead of his or her extradition); “the rule against double jeopardy” (which means that extradition request

11 Ibid
must not be approved whereas the accused has already faced prosecution or punishment for the same acts); “the rule of specialty” (prosecution of extradited persons is restricted to charges specified in the extradition request); and “the rule of “political offense” exemption” (persons shall not be extradited for political crimes). However, Botting argues that the effect of the abovementioned rules, discussed in his “Extradition Between Canada and the United States” were “…muted by judicial precedent and executive practice…."

The international activity of France and other civil law countries has also made a great contribution to the development of the modern institution of extradition and its fundamental principles throughout history. Extradition has been actively developing from ad hoc agreements to bilateral and multilateral treaties and conventions. In the European Union, for example, the institution of extradition has been replaced by the so-called "European warrant of arrest" with stipulation of general provisions of extradition in special laws. Extradition relations became more and more complicated and therefore more carefully regulated, since the list of “extraditable” crimes gradually expanded. Hence, the necessity to harmonize the laws of different states became undisputable.

In North America, the first extradition treaty of the US was concluded with the UK in 1794. This matter had been subsequently developed by the Webster-Ashburton Treaty of

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14 Ibid at 12, footnote 36.
1842\textsuperscript{17}, concluded between the United States and the United Kingdom. First Canadian extradition treaties were signed with Iceland and Norway in 1873.\textsuperscript{18} Subsequently, Canada has concluded extradition treaties with a number of countries including, but not limited to the United States of America, Germany, India, Brazil, France, Greece, Hungary, Israel, Mexico, Nicaragua, Switzerland, Tonga etc.\textsuperscript{19} New Canadian \textit{Extradition Act}\textsuperscript{20} of 1999 had replaced the old legislation regarding this matter in order to improve combating newly emerged crimes involving internet, drugs etc. and unified extradition with previous rendition process. In my opinion, due to the strong impact of NAFTA on the development of its member-states, unified multinational extradition procedure might be implemented within Canada, US and Mexico in the future.

The adoption of the European Convention on Extradition\textsuperscript{21} was an important step in the development of extradition in Europe. According to the above mentioned Convention, the Parties undertook to extradite to each other all persons sought for prosecution and punishment. In addition, the Convention defines such important issues, as extraditable offenses; political and military offenses, extradition of own citizens; place of extradition; principle of \textit{ne bis in idem} (prohibition of prosecuting twice for the same crime); statute of limitations; the impact on the extradition of the possibility of death penalty, etc. The Convention was developed by the Additional Protocol\textsuperscript{22} (1975), which clarified the concept of "political offenses", and by the

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\textsuperscript{19} \textit{Ibid}  \\
\textsuperscript{20} \textit{Extradition Act}, S.C. 1999, c. 18.  \\
\end{flushleft}
Second Additional Protocol²³ (1978), which *de novo* defined the term of "financial offenses" and stipulated that the extradition requests cannot be approved for an offense for which the amnesty has been declared in requested State given that the latter had competence to prosecute it under its own criminal law. Moreover, the EU Charter of Fundamental Rights²⁴ (2000) strictly prohibited deportation or extradition to a state where extradited person faces serious risk of death penalty, torture or other degrading treatment or punishment.

Since 2004, the institution of extradition, according to the Framework decision of the Council of European Union "On European arrest warrant and extradition procedures between Member States"²⁵, has been replaced in the European Union by "European arrest warrant". At the same time, old extradition rules and procedures remain in force in relations between EU members and third countries. Furthermore, special extradition laws exist in Austria, Belgium, Bulgaria, Holland, Italy, Luxembourg, Norway, Sweden, Finland and France. In some other countries (Germany, Switzerland, etc.), extradition issues are addressed in laws on mutual legal assistance in criminal cases. Conclusion of multilateral regional agreements on extradition (European Convention on Extradition, etc.) became a common rule in international state practice.²⁶

However, despite the fact that each State Party to the ICCPR undertook “[t]o ensure that any person whose rights or freedoms as … [therein] recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity…”\textsuperscript{27}, such individuals still have very limited means of protection against representatives of the state, and as is the case with other domains of law, it looks like only at the international level can states be held accountable for their misconduct.

Thus, I would like to proceed to the next section with the discussion of the issues of international legal personality of an individual in light of extradition procedure and attend of the extradition law to the individual rights of the fugitive instead of attend primarily to the interests of states through the application of general principles of international law.

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Chapter 2

*Strengthening the legal status of an individual in extradition procedure through the application of the doctrine of legitimate expectations based on the concept of estoppel in international law and the problem of international legal personality of an individual.*

In my opinion, the quality of individual participatory rights and legal personality within the process of extradition are the key factors that affect lawfulness of the outcome of any extradition case. Without getting into extensive discussion on the emerging question of international legal personality of an individual, which is not undisputable, I would like to note that there are reasonable grounds to believe that it might become less arguable in future. The ability of an individual to file a claim directly against his or her respective state, for instance, in the European Court of Human Rights does not grant the former a status of the subject of international law, but it does entitle such an individual to a certain type of protection against arbitrary governmental misconduct beyond the national level at a supranational institution. Even though respondent states must accept jurisdiction of such supranational entities by signing onto appropriate conventions, it is a great step forward from strict positivist conceptions in international law towards realism and natural law doctrines. Similar situation exists in rapidly developing international investment law where host states are being held accountable for their misconduct and breach of obligations by individual investors (both juridical and physical
persons) under the treaty arbitration systems within ICSID, NAFTA, etc. Actually, we are witnessing the emergence of the basis for future changes in various fields of international law.

The concept of estoppel, for instance, has become a basis for the doctrine of legitimate expectations in international investment law and now plays a significant role in decisions of investment arbitration tribunals which have authority to order compensation of damages to investors by the default states. If the concept of estoppel in international law provided such a strong basis for development of the doctrine of legitimate expectations in the field of international investment law, it might be reasonable to assume that the same concept combined with the doctrine of legitimate expectations could be applied to protect fundamental human rights, and, in particular, in the process of extradition.

Even though investors are not subjects of international law, states-parties and arbitration tribunals now recognize investors’ capability to refer to the doctrine of legitimate expectations, based on the concept of estoppel in international law, which used to be applicable exclusively to the interstate legal relations.\textsuperscript{28} Hence, it might be fair to assume that states may subsequently recognize capability of their respective citizens to refer to the doctrine of legitimate expectations as well. This might lead to a conclusion that even without being undisputable subjects of international law, individuals may get closer to the recognition of their international legal personality at least in some particular legal relations, such as extradition, and thus they shall not be treated as mere passive objects of intergovernmental relations as they are according to the dominant positivist conception.

\textsuperscript{28} \textit{Suez and ors v Argentina}, Decision on Liability, Case No ARB/03/17; IIC 442 [2010] International Center for Settlement of Investment Disputes at Para. 22.
Significant development of human rights protection in the world, especially after the World War II, makes me think that the minimum standard of treatment in international law had evolved since the well-known Neer case\(^{29}\) was decided. Some authors even argue that “…changes that took place in the last decades of the twentieth century, including establishment of the internationalization of human rights and its applicable standards irrespective of nationality, well over Neer in 1926, outpaced the concept of international minimum standard [of treatment] as such.”\(^{30}\) However, at least within the process of extradition, protection of fundamental human rights is still relatively weak. That is why I suggest that stipulating strong participatory rights of an individual in the process of extradition and recognition of international legal personality of the latter might improve this situation since a person will no longer be treated as a passive object of intergovernmental relations.

In particular, if a person is able to refer to the doctrine of legitimate expectations, requested state will not be able to act on its sole discretion irrespective to its previous behaviour in the same kind of cases with similar legal and factual situation. From the concept of estoppel in international law, the most important for this thesis is the “… requirement that a State ought to be consistent in its attitude to a given factual legal situation. Such a demand may be rooted in the continuing need for at least a modicum of stability and for some measure of predictability in the pattern of State conduct. It may be, and often is, grounded on considerations of good faith.”\(^{31}\) As has been held by the English Court of Exchequer in far 1962, “[a] man shall not be allowed to


\(^{30}\) Suez and ors v Argentina, Decision on Liability, Case No ARB/03/17; IIC 442 [2010] International Center for Settlement of Investment Disputes at Para. 14.

blow hot and cold – to affirm at one time and deny at another …. Such a principle has its basis in common sense and common justice, and whether it is called ‘estoppel,’ or by any other name, it is one which courts of law have in modern times most usefully adopted.”

This consideration is of a primary importance since in the process of extradition states usually make decisions based mostly on political reasons. Hence, such decisions are not consistent with the previous ones made within similar legal facts. Thus, this aspect can be considered as an important issue in the process of extradition because under such circumstances it poses a potential threat to rights of the person whose extradition is requested. If a state gets an extradition request from a politically “friendly” country, it is likely to be approved without real evaluation of evidence etc. On the other hand, when a state receives an extradition request from a country which is not considered “friendly enough”, the request is likely to be denied irrespective to the kind of crimes committed by a given fugitive or sufficiency of the evidence presented. Hence, there is critical need to minimize political component of extradition.

However, as I.C. Mac Gibbon concludes, “[w]hat appears to be the common denominator of the various aspects of estoppel … is the requirement that a State ought to maintain towards a given factual or legal situation an attitude consistent with that which it was known to have adopted with regard to the same circumstances on previous occasions.”

Hence, if experience of international investment law will be followed and the doctrine of legitimate expectations, based on the concept of estoppel in the international law, will be applied to protect fundamental human rights, both states and individuals will only benefit from it. On the one hand,


33 Ibid at 512.
individuals’ benefit will consist of their ability to foresee potential legal consequences of their behaviour, which is not possible under the current state of affairs, even though it is one of the requirements of the Rule of law, as understood in various jurisdictions. On the other hand, requested states will benefit in terms of their ability to counterweight political and diplomatic pressure of requesting states in the process of extradition, since the decision will have to be made based on legal rather than political considerations. I completely agree with the statement that “…[e]stoppel in international law reflects the possible variations, in circumstances and effects, of the underlying principle of consistency which may be summed up in the maxim *allegans contraria non audiendus est*…” and “[l]inked as it is with the device of recognition, it is potentially applicable throughout the whole field of international law in a limitless variety of contexts, not primarily as a procedural rule but as a substantive principle of law.”

Therefore, I support the application of the doctrine of legitimate expectations based on estoppel in international law within the process of extradition, even though I do admit that it is not undisputable. Different points of view exist even regarding its roots and history. In particular, arbitrator Pedro Nikken has written the following regarding this issue:

The concept of legitimate expectations is no stranger to different legal systems, which, to varying degrees and on the basis of good faith, consider the party to legal relationship that engages in self-contradiction to the detriment of the other party reprehensible. In human relationships, in general, your word is your bond and whoever betrays the trust of another must be penalized. However, the specific formulation of this concept varies in the different legal systems. Not even

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the English law concept of estoppel has a uniform wording or matches the same principle in other Anglo-Saxon countries. Neither is the doctrine of actos propios (close to estoppel) in the contract law of some civil law countries identical nor the doctrine of confianza legímita (confiance legitime) in the administrative law of those same countries. One of the areas where there are differences is in the threshold of trust that has to be achieved before the conduct of the party generating it is regarded as having betrayed that trust, for which damages must be paid insofar as the other party is injured thereby. In international law, in relations between States, this principle is embodied in estoppel...\(^{35}\)

Unfortunately, arbitrator Nikken did not go as far as to consider applicability of this concept within relations between states and non-subjects (as of today) of international law (i.e. physical and juridical persons). However, since most of the recent trends in the global field of international human rights protection support an individual’s standing as a claimant against a state (European court of Human Rights, etc.), it might be reasonable to assume that the doctrine of legitimate expectations could be referred to by an individual while arguing state behaviour.

Moreover, as I.C. Mac Gibbon observes, “…international judicial and arbitral activity has provided substantial grounds for the modern tendency to consider estoppel as one of the “general principles of law recognized by civilized nations.”\(^{36}\) Subsequently, it means that the doctrine of legitimate expectations, based on the concept of estoppel in the international law, might be referred to through the Article 38 of the Statute of the International Court of Justice as to one of general principles of international law, recognized by civilized nations. “Although there may still

\(^{35}\) Suez and ors v Argentina, Decision on Liability, Case No ARB/03/17; IIC 442 [2010] International Center for Settlement of Investment Disputes at Para. 22.

be some doubt as to whether … [estoppel] satisfies the criteria relevant to rules of customary international law, it has long been accepted as a general principle of law, in the sense of a principle common, in one form or another, to most municipal systems of law.”

Another argument in support of my statement regarding the applicability of the doctrine of legitimate expectations based on the principle of estoppel in international law within the process of extradition is that “… [i]nternational jurisprudence … [does have] … a place for some recognition of the principle that a State cannot blow hot and cold – *allegans contraria non audiendus est*…” and is obliged to be consistent with its previously adopted behavior not only with respect to other states but also with respect to physical and juridical persons involved in legal relations with states that are governed by international law. However, this question is clear only regarding relations between undisputable subjects of international law, i.e. states. International law has still a long way to go towards recognition of independent international legal personality of an individual even only in some of domains of international law such as international human rights protection, extradition procedures, etc. that involve individual physical persons.

Judge Lauterpacht, for instance, “…when Special Rapporteur to the International Law Commission on the Law of Treaties, commented as follows on paragraph 2 of Draft Article 11 of his Report [:]” “[a] State cannot be allowed to avail itself of the advantages of the treaty when

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38 *Ibid* at 469, footnote omitted.
it suits it to do so and repudiate it when its performance becomes onerous.”

This statement is especially true regarding International Convention on Human Rights, ratified by the overwhelming majority of states. “It is of little doubt whether that rule [requirement of consistency in state’s behaviour] is based on what is English law is known as the principle of estoppel or the more generally conceived requirement of good faith. The former is probably no more than one of the aspects of the latter.”

However, there might be some difficulties in finding an appropriate narrow definition for the concept of estoppel in international law as the basis for development of the doctrine of legitimate expectations, which an individual would be entitled to refer to in his or her relations with a state, since “… it is probably true to say that, in its translation from the municipal to the international sphere, and in its subsequent utilisation by international lawyers, the concept of estoppel has been broadened so substantially that the analogy with the estoppel of municipal systems may be positively misleading.” Many other counterarguments might be found in order to criticize the use of the doctrine of legitimate expectations based on the concept of estoppel in international law within extradition procedures. Many of such counterarguments might be focused on practical applicability of the doctrine of legitimate expectations within the process of extradition. However, even enforceability of the International Convention on Human Rights, for instance, may be argued as well, especially in those cases where states do not comply with their international obligations, break *jus cogens* norms and do not even comply with obligations *erga omnes*. Nevertheless, as has been the case with international criminal law, where Nuremberg and

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41 Ibid
42 Ibid at 477.
subsequent *ad hoc* tribunals such as ICTY or ICTR led to creation of the International Criminal Court under the Rome Statute, it is possible that following the experience of the European Court of Human Rights, its international analog might be created as a permanent supranational institution where citizens of all countries would be able to pursue claims against their respective states for breach of fundamental human rights due to governmental misconduct and outrageous behaviour, including breaches within the process of extradition, and refer to the doctrine of legitimate expectations. However, even without such supranational institution at the present time, the doctrine of legitimate expectations, based on the concept of estoppel in international law, might be applied by various courts at different levels while deciding extradition cases, making decisions on requests for extradition, etc.

As long as a final decision-maker in the process of extradition is consistent in its attitude towards an individual with its previous behavior, given a similar factual and legal situation, it will be a great step forward from what we have at the present time. If a state is bound by the concept of estoppel, on one side, and such a concept gives rise to legitimate expectations of an individual regarding consistency of state’s legal actions in a particular case with its previously adopted attitude within similar circumstances, there will be less room left for political maneuvers in the process of extradition. Instead of evaluating the level of political “friendship” and potential diplomatic or other benefits that could be gained in result of making the “right” decision, authorities would have to make a decision based, first of all, on due legal procedure and their own previous behaviour. Having read and analyzed a number of extradition cases, I can confidently state that even a mere application of this concept of estoppel which gives rise to the doctrine of legitimate expectations would have had significant influence on the decisions made on extradition requests and thus on a number of individuals and their lives.
However, more can be done in order to achieve justice in the process of extradition. The next section of this thesis will be focused on the necessity to transfer the final decision-making right from the executive to judiciary branch of power, since only judges, with the help of the law professors and scholars, are capable of evaluating and applying the principles of the Rule of law to particular extradition, as well as other cases.
Chapter 3

The necessity of transfer of the decision-making right in the process of extradition from the executive to judiciary branch of power as a way to enable the application of the Rule of law principles in particular extradition cases in order to achieve justice; Bout and Burns cases.

Transfer of decision making right from the executive to the judiciary branch of power might be seen necessary due to several reasons. First of all, judges are more likely to prioritize rights of an individual rather than members of the executive, as can been clearly seen in the Burns case. In this case, the Supreme Court of Canada overruled Kindler v. Canada decision, which allowed extradition regardless the risk of execution. In Burns the Court claimed to be considering different kinds of evidence and came to a conclusion that approval of requests for extradition received from countries where an extradited person might be subjected to the death penalty will be in violation of Canadian Charter of Rights and Freedoms, namely Section 7 thereof. However, the question of what was the fundamental justice had to be answered first.

The Court recognized that it had faced both philosophical and practical difficulties while answering this question. As has been held in Re B.C. Motor Vehicle Act\textsuperscript{45}, international law is important in defining fundamental justice. Another evaluative issue before the Court was to define what might “shock the conscience”\textsuperscript{46} of Canadians. However, following this decision, it can be confidently stated that an extradition in violation of principles of fundamental justice will always shock the conscience.

In my opinion, Burns is an illustrative case in terms of discussion of executive discretion since the Minister of Justice of Canada did not exercise his discretion to seek assurances from the U.S. side not to subject the fugitives to the death penalty even though he had a capacity to do it under the U.S. – Canadian Extradition Treaty.\textsuperscript{47} However, the Minister’s view was that the assurances not to subject extradited persons to the death penalty were required only in exceptional cases. Although, Section 25 of the Extradition Act\textsuperscript{48} vests broad discretion within the executive regarding surrender of fugitives and terms of such surrender. Nevertheless, the Court held that the assurances are not required only in exceptional cases, thus the Minister should have obtained appropriate guarantees from the U.S. side.\textsuperscript{49}

Moreover, according to the Universal Declaration of Human Rights, “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”\textsuperscript{50} Even though it is not a legally binding document, it is definitely persuasive authority, especially if

\textsuperscript{47} Extradition Treaty between Canada and the United States of America, Can. T.S. 1976 No. 3.
\textsuperscript{48} Extradition Act, S.C. 1999, c. 18., Section 25.
\textsuperscript{50} UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Article 10, available at: http://www.unhcr.org/refworld/docid/3ae6b3712c.html [accessed 10 July 2012]
evaluated in combination with ICCPR norm stating that “[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” ICCPR norms are more likely to be weighed carefully as the result of activity of the Human Rights Committee, established by Optional Protocol to the ICCPR.\footnote{International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27, Para. 2, Article 9, Part III, available at: http://www2.ohchr.org/english/law/cescr.htm [accessed on July 10, 2012]}

In addition to the abovesaid, I would like to note that transfer of the decision making right from the executive to judiciary would allow individuals, whose extradition is requested, to refer to very abstract, yet much needed doctrine of the Rule of law, its principles and the category of Justice. Also, beyond reasonable doubt, it is fair to presume that only professional judges with references to the works of law professors and scholars will be able to apply the Rule of law principles to particular cases. It might be difficult to find persuasive counterarguments based on the possibility of application of the Rule of law principles by the officials of any state authority belonging to the executive branch of power.

Since extradition involves two or more countries that often belong to different legal and political systems, I find it necessary to discuss some of the principles of the Rule of law which, in my opinion, might be applied in the process of extradition and are more or less similarly recognized in common law and civil law jurisdictions. For this purpose, I would like to proceed with the brief analysis of English and German experience of developing the doctrines of Rule of law and Rechtsstaat respectively in order to illustrate the above mentioned similarities that will

allow me to state that the principles I have selected might be applicable within the process of extradition irrespective of jurisdiction.

Relatively often Rule of law and Rechtsstaat (constitutional state or state of law) are considered as phenomena with similar content since German concept of Rechtsstaat is often tied to English Rule of law. However, the term Rule of law has been introduced almost a half century before the Rechtsstaat.

Without seeking to analyze the whole spectrum of opinions and approaches thereto, I would like to note that the concept of the Rule of law is really multifaceted and multidimensional as it can be seen at different logical and legal levels. The concept of the Rule of law covers values of the good and justice, legal ideals and practical legal experience, legal and common senses, etc. All of these make this category very dynamic. Hence, any attempts to give a kind of universal definition of the Rule of law might be futile. Variety of aspects of this phenomenon does not allow restricting or limiting its scope within any legal definition since no matter how broad the definition is, it will always limit the essence of the Rule of law.  

Historical experience has shown convincingly that written law is not always able to serve as a safeguard against arbitrary government. Therefore, the purpose of the Rule of law is not a mere formal support of governing order, as provided by laws and other regulations enacted by a state. The Rule of law limits the absolutism of the state, particularly, of its executive branch. It puts a state under control of a society by creating appropriate legal mechanisms. However, even the laws perfect in terms of legal technology are not always a panacea for the Rule of law. Hence, the difference between the Rule of law and Rule by law becomes clear when the law

itself is considered as something that is not contained only in statutes and other regulations, i.e. when there is a theoretical and practical distinction between a statute and a law.

This distinction seems to be of primary importance for understanding the core difference between Common law and Civil law systems. Unlike Anglo-American tradition of the Rule of law, which actually never equated he terms statute and law, what has been reflected in legal theory and judicial decisions, in continental Europe, particularly in Germany, the Rule of law (Rechtsstaat in the German version) had gone through more complex development. Theoretical study of Rechtsstaat is closely related to followers of natural law doctrines, including German philosopher Immanuel Kant, who is often regarded as the father of the concept of Rechtsstaat which became crucial for the interpretation of law in the late XVIII - early XIX century. However, the period of natural law or similar approaches to understanding of the concept of law was relatively short. In the second half of XIX century this concept obtained positivist orientation in Germany and at the end of that century formal-legal approaches to its understanding became dominant.

The concept of Rechtsstaat, according to which law must meet certain natural legal criteria, was superseded by its nominal formal meaning under which the meaning of terms "law" and "Rule of law" was reduced to “statute” and “formal legal governance” respectively. As the result, the concept of Rechtsstaat and the ideals of the Rule of law in Germany were deprived of their original content. Unfortunately, as opposed to the English tradition of the Rule of law, which has consistently adhered to natural law position, never considering statute and law as

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56 Ibid at 59-60.
57 Ibid at 62-63.
identical terms, the German concept of Rechtsstaat had experienced a relatively long period of orthodox-positivist formal legal understanding, allowing even the Nazis to call their system of governance a Rechtsstaat in the meaning of the Rule of statute or Rule by law.\(^{58}\)

Only after the World War II, under the influence of campaigns against positivism and rise of natural law doctrine, the concepts of Rechtsstaat and Rule of law in Germany returned to their original meaning. Now they are not limited to formal legitimacy and provide a number of requirements and conditions. As has been mentioned by Birkenmaier, its updated interpretation can be found in German Constitution of 1949. In particular, Article 1 thereof stipulates that public authorities must be subject to certain generally recognized civilized values, the highest of which are inviolable human dignity and inalienable human rights. As has been discussed by the Birkenmaier, the former chairman of the Federal Constitutional Court of Germany, Roman Herzog emphasized that, in contrast to earlier German constitutions, the one of 1949 was aimed at protection not only from the abuse of power by the administration and the courts, but also by the Parliament since the constitution became a kind of counterweight to its power.\(^{59}\) Also, Article 20 of the Constitution had clearly envisaged the recognition of difference between terms “law” and “statute”. Thus, natural legal conception defeated positivism in Germany, since it was recognized that human rights are not limited to what has been written in the statute because they might exist beyond positive legal norms, drafted by states.\(^{60}\)

Consequently, it is fair to conclude that scepticism regarding application of the concept of Rule of law does not have any support in theory, nor does it have any support in legal practice.


\(^{59}\) Ibid at 69-71.

\(^{60}\) Dorsen, N; Rosenfeld, M; Sajó, A; Baer, S. Comparative constitutionalism: cases and materials. Van Erp, Sjef (eds.) (Thomson West, Drobnig, Ulrich, 2003) at 22.
Widespread trends to ignoring Rechtsstaat in continental Europe in the beginning of XX century are clearly overturned by the recognition of similarity between the Rule of law and Rechtsstaat which, under the current circumstances, might be distinguished only by their names and history, but not by their substance.\textsuperscript{61}

The above discussion is very important for this thesis since it shows similarities in understanding and recognition of the Rule of law in both Continental and Anglo-American legal systems, which is now undisputable. Thus, while discussing extradition procedure in countries with different legal systems, I will refer to some of the principles of the Rule of law as to the ones that are similarly understood in appropriate jurisdictions. Moreover, it is important to mention that the doctrines of Rule of law and Rechtsstaat consist of a number of closely related heterogeneous principles, beginning with justice and including the separation of powers and the establishment of judicial control over it. Without claiming to provide their full characteristics, I will discuss only the most important and relevant Rule of law principles, related to this thesis and potentially applicable within the process of extradition.

Before proceeding to the discussion of the Rule of law principles and their potential applicability on the example of the \textit{Viktor Bout} case, I would like to discuss the correlation between the Rule of law and justice, since this idea, introduced by Aristotle and supported by his successors, according to which the main purpose of law can be seen justice\textsuperscript{62} is not losing its positions and becomes even more important at the present time. Appeals to Aristotle’s ideal of justice as to the criterion of lawfulness of any legal act are so common that it is reasonable to

\textsuperscript{61} Werner Birkenmaier, "Rechtsstaat" - The rule of law in the Federal Republic of Germany-its Significance, Principles, and Harzards (Konrad-Adenauer-Stiftung, 1997) at 71-73.
consider the concept of justice as the key factor in determining and interpreting the Rule of law.\textsuperscript{63} Indeed, justice is one of the most significant values and goals of the law, since the law acquires its peculiar and specific content only within the concept of justice, which provides the law with necessary flexibility and dynamism. Justice leads to critical perception of the law.\textsuperscript{64} Therefore, it would be incorrect to deny that the Rule of law is asserting justice, especially after consideration of the fact that even etymologically the term “law” (\textit{jus}) itself is derived from \textit{justitia} - justice.\textsuperscript{65} Hence, principles of the Rule of law, when applied within the process of extradition, must be evaluated in light of abstract, but critically necessary achievement of justice.

A counterargument to the existence of such a strong correlation might be based on the idea that it is not appropriate to narrow down the category of justice solely to the interpretation of Rule of law, since it is well known that the concept of justice has many dimensions and has been differently defined by philosophers, political scholars, pollsters, experts in the field of ethics and lawyers.

Being transient and largely subjective, the concept of justice might be of a little use alone, without combination with other components of the Rule of law. In my opinion, the concept of Rule of law is able to achieve its purpose if it will be associated not only with the abstract category of justice, but, first of all, with fundamental, inalienable human rights, where the idea of justice itself is implemented. Fundamental, inalienable human rights constitute a barrier, which may not be stepped over in a state that is claiming to be called democracy based


\textsuperscript{64} Bergel, Jean Louis, \textit{Teoria Geral do Direito (General Theory of Law)}, (São Paulo: Martins. Fontes, 2002) at 204.

on the Rule of law, in sole discretion of the legislative, executive or judicial. As an criterion of human being that characterizes an individual as a representative of the entire human race, fundamental human rights are now universal, international and supranational regardless of nationalities, ideologies and religions, despite some conceptual differences in their interpretation.

Fundamental human rights have already been protected in international law for a long period of time and acquired attributes of *jus cogens* norms. Hence, protection of fundamental human rights is an obligation *erga omnes* for all members of international community.\textsuperscript{66} This is a reflection of major modern trends of interpretation of the Rule of law in theory and judicial practice, in particular by Constitutional courts of many European countries and by the European Court of Human Rights, indicated in a number of cases.

Since both the doctrines of Rechtsstaat and Rule of law originated in the general line of new legal philosophy, criticism of feudal tyranny, promotion of ideas of humanism, freedom and equality of all people, inalienable human rights and search for legal tools and forms which could have been employed to resist the usurpation of public power, they might be considered as having similarly strong correlation with the category of justice. Since the term Rechtsstaat has finally found its proper meaning in Germany and other civil law jurisdictions as a result of appropriate transformation, the differences between the English Rule of law and German Rechtsstaat are now more terminological than substantive. This conclusion leads to further discussion of generally recognized or universal components (principles) of the Rule of law.

For the purposes of this thesis, I find the following principles potentially applicable within the process of extradition and thus worth discussion herein, namely the principles focused

on: effective protection of natural, inherent and inalienable human rights and freedoms in the relationships between an individual and state authorities; limitation of discretion, which means imposing limits on state authorities and officials in making decisions in their sole discretion; legal certainty, which requires clarity of reasons, objectives and content of legal regulations, especially those addressed directly to citizens; proportionality applies, above all, to the boundaries of the possible restrictions of fundamental human rights; independence of courts and judges. Even though counterarguments regarding practical applicability of the abovementioned are inevitable, it is undisputable that “… human rights should be protected by the [R]ule of law…” and that at least in international law it has been stipulated that “[e]veryone has the right to liberty and security of person …, [n]o one shall be subjected to arbitrary arrest or detention…, [n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” And when an international legal instrument is ratified at the national level, it becomes a part of domestic law and prevails over it.

The extradition case of Viktor Bout has been selected as an example for discussing potential applicability of the abovementioned “universal” principles of the Rule of law and in order to support the argument focused on the necessity of transfer of the decision making rights within the process of extradition from executive to judiciary. Also, this is the most prominent case in terms of illustrating the political component of extradition, where, on one hand, Bout had

68 Supra note 50, Preamble.
69 Supra note 27, Para. 1, Article 9, Part III.
argued that “…he was vindictively targeted for prosecution because the Department of Defense was embarrassed when, in early 2006, it came to light that “Bout front-companies were supplying the United States military in Iraq” with tents, food, and other supplies in violation of the Office of Foreign Assets Control’s designation of Bout as a Specially Designated National…” prohibiting any deals of any U.S. citizen with him.\(^70\) Subsequently, “[a]lthough Bout has committed “no crime against the United States,” in late 2007, then-Deputy Assistant to the President and Deputy National Security Advisor Juan Zarate “threw out the challenge to capture Viktor Bout to the U.S. Drug Enforcement Administration…”\(^71\) and that “… the United States applied “enormous, coercive political pressure” upon Thailand to reverse a lower court’s denial of the United States’ extradition request, denying Bout an “unbiased” extradition hearing in the Thai appellate court and warranting at least a hearing on the manner in which he was brought to a court in the United States.”\(^72\) “His argument is based on two “secret United States State Department cables which [were] leaked to Wikileaks” that reveal “a multy-prolonged effort to seek a successful reversal [of the Thai lower court’s denial of extradition] during the appeals process.”\(^73\) However, on the other hand, as judge Shira A. Scheindlin has noted,

\[\text{[F]ar from any impropriety, the cables merely demonstrate the State Department’s (1) view that Bout was a “high priority for the United States”; (2) concern that the lower court’s ruling was “not justified on legal grounds” and that “Russian supporters have been using money and influence in an attempt to block extradition,” including through the use of “false testimony … that Bout was in}\]

\(^{71}\) Ibid at Para 6, footnotes omitted.
\(^{72}\) Ibid at Para 9, footnotes omitted.
\(^{73}\) Ibid at Para 9, footnotes omitted.
Thailand as part of [a] government-to-government submarine deal;” and (3) determination that the “deficient ruling … receive a comprehensive and meaningful review by the appellate court.74

The case of Viktor Bout is also a perfect illustration of negative legal consequences that might occur due to weak individual participatory rights within the process of extradition and treatment of a person as a passive object of intergovernmental relations. This case helps to discover the difficulties that can arise during the process of extradition between states with different legal and, even more importantly, political systems. The problems of citizenship, state sovereignty, human rights and international relations arise in one extradition case, which makes it suitable for analysis and discussion in this thesis.

First of all, I would like to provide brief description of the case before proceeding with further discussion and in order to clarify the factual and legal situation. In 1991, after the dissolution of the Union of Soviet Socialistic Republics, enormous amounts of military weapons and equipment were left almost unattended due to shortage of military personnel. At that time Viktor Bout is believed to have begun trading weapons to Liberia, Congo, Angola Afghanistan, Philippines and other flash points around the globe. On the other hand, as will be shown below, even the U.S. and French governments as well as the UN had used Bout’s transportation companies.

However, in 2008 Viktor Bout was arrested in Thailand as the result of special operation of the US Government, where its agents posed as assumed representatives of the FARC

(Revolutionary Armed Forces of Columbia or *Fuerzas Armadas Revolucionarias de Columbia*), which is considered a terrorist organization.\(^\text{75}\) Bout’s arrest caused serious political tensions between the United States and Russian Federation since the U.S. sought his extradition for prosecution under the U.S. jurisdiction. Political pressure on Thai authorities from both sides of the conflict was so strong that the Thai Prime Minister was even ready to resign at one moment. Nevertheless, the extradition did take place and Viktor Bout was recently sentenced to twenty five years in prison in the U.S.\(^\text{76}\)

However, the central figure of the case, Viktor Bout or the “War Lord”, had gone through a long way of arrests, dealings with Thai Prosecutor’s office, Ministry of Internal Affairs, Ministry of Justice, Ministry of Foreign Affairs, judicial hearings in Thai courts, etc. Bout and his defense lawyers have also witnessed the outcome of successful diplomatic cooperation of the U.S. authorities with Thailand and Columbia, failure of attempts of Russian politicians to interfere with the process and many other movements and maneuvers which cannot be called regular legal procedures within the process of extradition since they look more like a real political fight. Politics was everywhere in the case. Even the U.S. judge herself admitted that “[t]here is no conceivable reason that Bout’s alleged connection to atrocities committed approximately a decade ago – for which he was never convicted of any crime – require the BOP [Bureau of Prisons] place him in SHU [Special Housing Unit of the Metropolitan Correctional Center]…”.\(^\text{77}\) The judge found even while deciding where to keep Viktor Bout after his arrival in

\(^{75}\) According to the official information of the National Counterterrorism Center, available at: [http://www.nctc.gov/site/groups/farc.html](http://www.nctc.gov/site/groups/farc.html) [accessed on July 10, 2012]

\(^{76}\) *Supra* note 5.

New York “[…] the government’s reliance on Bout’s connection to Charles Taylor and African conflict zones as support for Bout’s solitary confinement creates a strong inference that the BOP is punishing Bout for conduct that was not a basis for his criminal conviction [in this case]”78. This is a small, but illustrative piece of evidence, that helps me to support the argument regarding political component of Bout’s case and show its negative influence in this and many other extradition cases analyzed before.

So, the developments in Bout’s case begun as follows: the initial notice79, sent by the U.S. Embassy in Bangkok to the Thai law enforcement authorities in the end of February 2008 regarding Viktor Bout contained neither accurate or presumed information about the crime nor a copy of an American arrest warrant, as required by paragraph 2 of Article 10 of the Treaty on Extradition between the United States and Thailand with further changes and amendments.80 Moreover, it was done in the form of a statement of American diplomat of the U.S. Embassy in Bangkok to Thai police regarding the alleged crimes committed by Viktor Bout with written entry in the minute book. Even though such action is stipulated by the Thai criminal procedural legislation (due to presumption of guilt on the stage of investigation), it was not supported by Thai Extradition Act of 192981 (which had been in force at the time of the arrest) or by the U.S. – Thailand Treaty Relating to Extradition82, nor has it been foreseen in The Treaty

79 Criminal Lawsuit between Public Prosecutor, Office of the Attorney General and Mr. Viktor Bout, decided by the Court of Appeal in Thailand on May 24, 2010, Black Case No. 3425-3426/2552; Red Case No. 5581-5582/2553 at Para. 1.
82 Supra note 80.
between the Government of the United States of America and the Government of the Kingdom of Thailand on Mutual Assistance in Criminal Matters and the Law of Thailand on Mutual Legal Assistance in Criminal Cases with Foreign Countries of 1992. However, in the result of such controversial action, a court in Thailand issued an arrest warrant for Viktor Bout three days in advance of his expected arrival in Thailand.

Since the U.S. authorities were going to charge Viktor Bout with the conspiracy to murder U.S. citizens, conspiracy to murder U.S. government agents on duty, conspiracy to trafficking illegal anti-aircraft weapons and conspiracy to provide financial assistance to a foreign terrorist organization, committed by Viktor Bout prior to his meeting with the U.S. undercover agents (posing as terrorists) in Bangkok on March 6, 2008, they should have sought his extradition from the Russian Federation, where Bout was present at the time when the first communication between the U.S. and Thai authorities had begun regarding his arrest.

Unfortunately, it is widely accepted practice, used by many states when, by various means, requesting countries make individuals travel to a third country which is more likely to grant extradition or are easier to manipulate. Indeed, beyond any reasonable doubt, it is fair to state that the Russian Federation would have never extradited her national, Viktor Bout, to the United States of America. From this point of view, especially taking into consideration subsequent successful extradition of Viktor Bout to the U.S., they managed to perform a brilliant operation, captured and tried the “War Lord” despite all the attempts to interfere, made by Russia. And, as has been accepted in the U.S. for a long time, “[a] sting operation – even an “elaborate” sting operation – does not violate due process where “its essential characteristic [i]s

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the creation of an opportunity for the commission of crime by those willing to do so.”85 It is very difficult to argue that law enforcement agencies are obliged to do their best in order to capture criminals, especially the ones who pose threat to global peace, safety and security.

As the result, the first arrest of Viktor Bout was made on March 8, 2008. However, during the arrest and search (for which there was no court order), no evidence linking Bout to terrorism was found and three weeks after Bout’s arrest Thai prosecutors withdrew the charges. The second arrest took place immediately after the release of Viktor Bout. It was based on official request for extradition of Viktor Bout received from the United States of America. The legality of the second arrest might be questioned since Paragraph 2 of Article 5 of the Thai-US Treaty on Extradition86 and Article 5 of the Extradition Act of Thailand87 provide that the person convicted or acquitted on charges of crimes cannot be extradited on request, based on the same charges. In this case, inconsistency of texts of the U.S. and Thai laws regarding the definitions and exact wording of crimes must not be taken into account since Paragraph 4 of Article 2 of the Extradition Treaty88 clearly stipulates that such mismatch shall have no legal effect on extradition.

Factual background of Bout’s arrest even allowed the U.S. Judge Shira A. Scheindlin to right the following: “[o]n April 22, 2011, Defendant Viktor Bout moved to suppress certain statements he made to Drug Enforcement Administration (“DEA”) agents following his arrest in Bangkok, Thailand on March 6, 2008 …” and “… submitted an affidavit, dated April 12, 2011

86 Supra note 80 at Para. 2 of Article 5.
87 Supra note 81, Article 5.
88 Supra note 80 at Para. 4 of Article 2.
containing … material allegations…” which included strip-search at the hotel room, confrontation “with forty to fifty member of media”, who took his pictures, denial of Bout’s requests to meet with an attorney and representative of the Russian Embassy, placement in a room with six or seven American agents, who told him that he would be a subject to “heat, hunger, disease and rape” in a jail in Thailand where he can even die if he decides not to cooperate and does not willingly go to the United States of America waiving the extradition procedure.\(^89\) As the judge had mentioned, she need not determine which version of facts to credit (the one of Bout or another one of agent Zachariasiewicz and agent Milione) in order to decide the motion.\(^90\) Judge Shira A. Scheindlin has stated that “[w]hile defendant’s waiver of his \textit{Miranda} rights is a significant factor in the totality-of-the-circumstances analysis, it does not, itself, moot the voluntariness inquiry.\(^91\)

In sum, based on the totality of the circumstances … described – the dramatic arrest, followed by a strip search and a non-consensual search of belonging; handcuffs and a perp walk; the denial of his [Bout’s] request for an attorney and contact with his embassy; the disregard of his statements that he did not wish to meet with the Americans and then that he was not in the frame of mind to speak with them that day; and Bout’s understandable belief that he would be abandoned to the rough conditions of a Thai jail if he did not cooperate with the Americans – I conclude that Bout’s statements were not made voluntarily and must therefore be suppressed.\(^92\)


\(^{91}\) \textit{Ibid} at Para. 7, footnote omitted, (III. LEGAL STANDARD).

\(^{92}\) \textit{Supra} note 89 at Para. 10, (IV [*12] DISCUSSION/CONCLUSIONS OF LAW).
Moreover, if the Rule of Law principle of proportionality which, above all, refers to the boundaries of those potential restrictions of fundamental human rights, where they are indeed necessary, had been applied, a person would have better chances not to be arrested twice on the same grounds. However, it is undisputable that limitations of fundamental human rights should be adequate to the specific situation that requires such limitation and is in an acceptable relation (balance) with the weight and essence of fundamental right in question.\(^{93}\)

On the other hand, there are good chances that Viktor Bout would not have been patiently waiting in Thailand until all misunderstandings between Thai and U.S. sides were solved and the “green light” for extradition was given. Hence, the second, as well as the first arrest of Viktor Bout might be considered as the one which pursued a lawful purpose and had been done in public interest. However, the law shall not forgive breach of due process in any case no matter what kind of intent the law enforcement officers had.

Hence, due to this and other errors, the trial court (criminal court of the first instance in Thailand) decided to decline the request of the United States regarding the extradition of Viktor Bout due to the lack of sufficient evidence of his guilt (according to Article 7 and Article 12 (2) of the Extradition Act\(^ {94}\) the requesting party must submit together with the request for extradition such evidence of guilt of the defendant which would be sufficient for his conviction if he had to be tried for the same crime in Thailand. Also, decision was based on paragraph 3b of


\(^{94}\) Supra note 81, Article 7 and Article 12 (2) thereof.
Article 9 of the Extradition Treaty\textsuperscript{95} that provides for the need to present such evidence that, according to the laws of the requesting state, would have been sufficient for initiating criminal proceedings and conviction in Thailand and could prove non-political nature of the case and of the request for extradition.\textsuperscript{96}

However, the Court of Appeals subsequently overruled the decision of the first instance, even though it lacked capacity to do so since according to Article 17 of the Extradition Act\textsuperscript{97}, the Court of Appeals is only capable to review decisions of the first instance (trial court), as applied to the case of Viktor Bout, with respect to challenging the political nature of the case, but not with respect evaluation of evidence, submitted to the trial court.

Given that there was evidence discovered during the proceedings in the trial court, which constituted the basis for its decision, the Court of Appeals had no authority to interfere with the first instance's decision since it could only review the evidence and arguments regarding the following aspects: identification of extradited person, the nature of the crime from the viewpoint of extradition, political nature of the crime or extradition request or complete absence of evidence that would have allowed the trial court to make a decision. Since the evidence was presented by the American side and included the arrest warrant, extradition request, written testimony of agents, etc., the Court of Appeals could not have stated that there was no sufficient evidence for the trial court to make a decision. At the same time, the trial court determined the evidence as insufficient to prosecute Viktor Bout in Thailand. Consequently, the decision of the

\textsuperscript{95} Supra note 80, Para. 3b of Article 9.
\textsuperscript{96} Supra note 81, Article 13; Supra note 81, Article 3.
\textsuperscript{97} Supra note 81, Article 17.
Court of Appeals which allowed the extradition of Viktor Bout might also be questioned from standpoint of legality and lawfulness.

Moreover, the text of the Extradition Treaty between Thailand and the United States of America does not refer to court hearings as to a basis for extradition. Most articles of the Treaty set obligations of the parties, i.e. states and state agencies operating under the laws of both countries. Hence, the Treaty does not stipulate that the decision by the Court of Appeals of either party shall be decisive or final in extradition cases. On the contrary, it refers to certain decisions made by states as partners under the Treaty. However, it is difficult to talk about the independence of courts and judges within the Viktor Bout extradition case, even though it is one of the principles of the Rule of law, recognized in the overwhelming majority of jurisdictions, taking into consideration a number of official letters and statements, made, for instance, by the Government of Columbia in support of the finding of the U.S. side that FARC is not a political movement but a terrorist organization, as opposed to the decision of the court of the first instance.

Indeed, effective protection of human rights against abuses of legislative and executive authorities and other violations, establishment of the Rule of law and Rechtsstaat are only possible with the existence of strong, independent and impartial judiciary. Court is a sort of test of the Rule of law and Rechtsstaat. Moreover, in a civilized society, courts play the key role in holding the Rule of law and Rechtsstaat, since they represent justice. The higher is the respect to the courts and justice, the more independence in relations with the legislative and executive

98 Supra note 80.
99 Supra note 80.
100 Supra note 80, Articles 1, 11.
branch the court has - the higher is the level of legitimacy and democracy itself and the more reliable is the protection against possible encroachments of rights and freedoms in a society.  

The principle of independence of courts and judges is a starting point in understanding of the place of judiciary in modern democracy since it concentrates on the idea of separation of powers. In fact, consistent implementation of this principle is the cornerstone of any democracy. This principle includes, in particular, institutional and organizational independence of judges from other public authorities, expressed in the formation of self-autonomous court system; obligation of the state to provide appropriate funding that would allow judicial authorities to perform their functions properly; neutrality, impartiality of judges and their subordination only to the law; tenure of judges, etc. Given that this principle had been followed, there would have been different outcome of the Bout and many other extradition cases. And this is not an unfounded statement, since the Burns case has shown that the Supreme Court of Canada “does not dance to the tune” of the Minister of Justice, as is the case in many other countries.

Another important principle to be discussed within the Bout case is the Rule of law principle of legal certainty, which requires clarity of legal regulations, addressed to citizens so that they could foresee the legal consequences of their acts. It is important, since the Extradition Act of Thailand, which was in force at the time of Bout’s arrest, did not provide for the legal finality of the Court of Appeal’s decision, but vested the final decisive right regarding the extradition within the Government of Thailand. Moreover, according to the preamble of the Act, it was adopted in order to declare the right of the Royal Government of Siam (Thailand) to

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101 Supra note 67.
102 Supra note 93.
103 Supra note 81, Article 17.
104 Supra note 80, Preamble, Articles 1 – 4.
transfer, on its discretion, criminals and suspects to foreign countries and to introduce a unified procedure of extradition in Thailand. The Act referred to the Ministry of Interior as to the main authority, responsible for its implementation and as to the one, which had to initiate extradition hearings in the court.105

Thus, according to the Thai prime-minister Abhisit Wechachiwa, the final decision on the extradition of Viktor Bout had to be made by him but “…neither he nor his Cabinet made the decision to extradite Russia's alleged arms dealer Viktor Bout to the United States.”106

In addition, senior Thai officials and the Prime Minister himself have repeatedly recognized that since the Viktor Bout case has had an impact on diplomatic relations with the United States and Russia, safety and security of Thailand as a country were at risk. However, the Law of Thailand on Mutual Assistance with Foreign Countries in Criminal Cases107, as well as a set of articles of the Treaty on Mutual Assistance in Criminal Cases between Thailand and the United States, was specifically designated for cases where safety and security of Thailand might be put at risk. In particular, Article 3 of the abovementioned Treaty108 provides that the "central authority" for cooperation in criminal cases in Thailand is the Minister of Internal Affairs of Thailand or his designee(s). Thereunder, he is the one responsible for making decisions when an act of cooperation with the United States poses a threat to the security or diplomatic relations of Thailand109.

105 Supra note 78.
107 Supra note 84.
108 Supra note 80, Article 3.
109 Supra note 80, Article 2.
On the other hand, the Act on Mutual Assistance in Criminal Cases with Foreign Countries, which was adopted after the Treaty had been signed, refers to the Attorney General of Thailand\(^{110}\) as to the “central authority”. His power, however, is limited by Articles 7 and 8 of the Act\(^{111}\) where the functions of the latter are clearly specified. In particular, Article 8 refers to a Commission, consisting of at least four officials (representatives of the Ministry of Defence, Foreign Affairs, Interior, Justice, Attorney General's Office or other agencies), which cooperates with the central authority in decision-making process regarding requests for mutual assistance that affect the national security interests of Thailand.\(^{112}\) If there is difference of opinions within the Commission or between the Commission and “central authority”, such a case must be addressed to the Prime Minister, who will then have to make the final decision. Thus, taking abovesaid into consideration, the legality of the decision on Bout’s extradition to the United States might be questioned due to the breach of Thai and international laws.

Unfortunately, in this regard there was no certainty whatsoever despite the fact that the Rule of law principle of legal certainty requires clarity of reasons, objectives and content of legal regulations, especially those addressed directly to citizens. According to this principle, citizens should be able to foresee legal consequences of their behaviour, based on previously published effective laws and other regulations as well as on previous state’s conduct within the same factual legal situation.\(^{113}\)

\(^{110}\) Supra note 84 at 1.

\(^{111}\) Supra note 84, Articles 7-8.

\(^{112}\) Supra note 84, Article 8.

\(^{113}\) Supra note 67.
Indicative in this respect is the position of the European Court of Human Rights, consistently supported in several decisions, including *Sunday Times v. United Kingdom*114 and *Olson v. Sweden*.115 According to this position, no legal regulation can be considered the law unless it is formulated with sufficient precision. Sufficient precision means that the citizens themselves or with professional legal help are able to foresee, with the reasonable fate of probability, the legal consequences of any of their actions. Neither Viktor Bout, nor any of Thai or international lawyers were able to foresee any consequences of his acts based on officially published legal instruments since it was not possible even to determine the central Thai authority, responsible for Bout’s extradition. Moreover, this principle has direct correlation with the doctrine of legitimate expectations, discussed earlier herein.

However, it can be stated that absolute certainty is impossible, and the laws that seek to determine all possible legal consequences by excessively rigid formulations cannot respond to new challenges or changes in social life. The law, as it has been held by the Court in *Sunday Times v. the United Kingdom*, must be able to keep up with changing circumstances.116 In this regard, the most important role in implementation of the principle of certainty belongs to judicial practice. In *L. and V. v. Austria*117 and *S.L. v. Austria*118 cases, for instance, it has been held that the Convention is a live instrument that must be interpreted in the light of present conditions. Moreover, requirements of the principle of certainty also relate to the guarantees against arbitrary government interference with individual rights, limitation of discretionary powers, etc.

116 Supra note 114.
117 *L. and V. v. Austria*, ECHR no. 39392/98 and 39829/98 [2003] European Court of Human Rights
118 *S.L. v. Austria* ECHR no. 45330/99 [2003] European Court of Human Rights
Limitation of discretion is the next major issue that shall be resolved in order to achieve justice in the process of extradition. Importance of this Rule of law principle will be illustrated based on the following aspect of Viktor Bout case, where the officials of the American Embassy in Thailand, together with the Thai police officers arrived at the prison with the aim of transferring Bout without any court authorization for escorting him out of prison. They used the Court of Appeals’ decision permitting the extradition of Viktor Bout within three months in which the actual extradition procedure was not specified in any way. Moreover, the decision of the Court of Appeals did not contain any permission to transfer Viktor Bout from the prison to the police authorities as well.\(^{119}\) At the same time, a court in Thailand continued the hearings at the request of Bout’s lawyers to review his extradition case. Hence, Bout was under the imperious authority and jurisdiction of the court at the moment of his transfer out of prison, which occurred despite the fact that Article 12 of the Extradition Treaty\(^{120}\) authorizes requested State to delay the extradition until all legal proceedings against the suspects in other cases are completed.

Although this article is not binding, the discretion to use it or not does not belong to the Ministry of Justice or Prosecutor's Office. The Extradition Act does not define exactly which authority has the right to enforce this article. Nevertheless, the Act clearly explains that the matter of extradition from the Thai authorities must be initiated and monitored by the Ministry of Internal Affairs of Thailand\(^{121}\). In addition, in extradition cases and at the actual surrender of extradited persons "corresponding law of Thailand" shall be applied, i.e. Thai Criminal

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119 Supra note 79.
120 Supra note 80, Article 12.
121 Supra note 81, Article 8.
Procedure Code. Hence, due to unwillingness of the Minister of Internal Affairs of Thailand to exercise his discretion and postpone Bout’s extradition on strong legal grounds, due process of law was ignored again. This is another argument in favour of transfer of decision-making rights from the executive to judiciary since governmental officials are less likely to exercise their discretion unless they are made to do it, as was the case in the Burns hearing, where the Minister of Justice of Canada did not want to seek assurances from the U.S. regarding non-execution of a death penalty, if imposed on extradited individuals.

In general, limitation of discretion means the imposition of limits on state authorities and officials in making decisions in their sole discretion. This principle of the Rule of law and Rechtsstaat requires, first of all, subjecting the whole activity of state authorities and officials, including the legislature, to the obligation to strengthen and protect fundamental human rights and freedoms. In fact, this provision positively defines one of the most essential requirements of the Rule of law and Rechtsstaat, which is the lawfulness requirement applicable to any statute. Inalienable human rights and freedoms limit voluntarism not only of the executive and judicial authorities, but of a Parliament as well by limiting its discretion within the law making process.

The law may allow conditional discretion provided that such powers and manner of their exercise are written with sufficient clarity in order to ensure adequate protection of an individual against arbitrary government interference. Limitation of discretion also means that executive agency cannot itself define authority of its own or its subordinate bodies.

\[\text{Supra note 80, Paragraph 3 of Article 11 of the treaty foresees that the actual surrender of extradited person shall be performed within the timeframes prescribed by the legislation of the requested country.}
\[\text{Supra note 93.}\]
Besides that, due to the absence of the concept of “surrender of a prisoner” in Thai Criminal Procedure Code, a court order was required for actual transfer of Viktor Bout out of a prison\textsuperscript{124}. However, there materials of the case show that there was no such court order obtained and presented. A question regarding the official or officials, in whose discretion all necessary decisions were made, is still open, but the U.S. authorities do not usually take into consideration legality or lawfulness of the extradition procedures initiated by the American side, especially if the fugitive is accused of alleged crimes committed against the interests of the U.S. or American citizens abroad. Ignorance of the due process of law in this case did not play any role in Bout’s subsequent trial in New York because, when deciding the question of the lawfulness of Bout’s extradition, the judge referred to the following: “‘[u]nder the long-standing \textit{Ker--Frisbie} doctrine, the manner in which an indicted individual comes before a court does not affect the court’s jurisdiction.’” and “‘[a]lthough courts of the United States have authority to determine whether an offense is an extraditable crime when deciding whether an accused … should be extradited \textit{from} the United States, … our courts cannot second-guess another country’s grant of extradition to the United States.’”\textsuperscript{125}

Finally, I would like to say that even if counterarguments are found against the application of the abovementioned Rule of law principles within the process of extradition, yet necessity of effective protection of natural, inherent and inalienable human rights and freedoms in the relationships between an individual and a state cannot be argued. Rights and freedoms of


an individual, as has been rightly emphasized by one of the founders of the doctrine of the Rule of law, English constitutionalist Albert Dicey, are the fundamentals (not the outcome) of law in a country and the rules that are included in a Constitution are not the source, but a result of existence of rights of individuals.\textsuperscript{126} The position of one of the founders of the Rechstaat, German Professor Robert von Mol, is close to the view expressed above since he wrote that "[t]he freedom of citizens is the supreme principle of law."\textsuperscript{127}

As can be clearly seen from the current experience of developed countries, inherent, inalienable human rights and freedoms constitute the basis of society-imposed "checks and balances" of governmental power, which usually tends to go out of control. This is a part of restrictive barrier that cannot be overstepped in sole discretion of the legislative, executive or judicial branches of power. In fact, fundamental human rights form a kind of a legal source since their existence outside the law and without the law is impossible, as the law itself is impossible without fundamental human rights and freedoms.

Hence, all possible activities of any state authority must be subjected to this principle of the Rule of law focused on the protection of fundamental human rights and freedoms in their relationships with states. Rights and freedoms of a person may only be limited proportionally to what may be considered permissible according to the concept of the Rule of law and abstract category of justice. Thus, given that the principles of the Rule of law, discussed above, were applied at various stages of the Viktor Bout case, for instance, it is reasonable to assume that the


\textsuperscript{127} Mohl R., \textit{Die Polizeiwissenschaften nach den Corundsätzen des Rechtsstaates} [1832] (Vol. 1, Tubingen: Laupp, 1844) at 8.
outcome of the case would have been different, at least in terms of due protection of fundamental human rights and freedoms.

On the contrary, potential misuse of the abovesaid principles by the individuals, whose extradition is requested and their attorneys is a serious issue as well. Moreover, extradition procedure is aimed at bringing fugitives to justice and requires time effective cooperation of state authorities at the domestic and international level. Hence, a balance, so-called “golden mean” must be found in order to prevent breach of fundamental human rights within the process of extradition, on one hand, and to ensure effective combat of transnational criminal activity on the other hand. However, I believe that it can only be achieved through the transfer of the final decision making right to the judicial branch of power. Even if a kind of time efficient extradition court hearings are designed in order to avoid unnecessary delays, it is better than subjecting human lives to broad executive discretion granted by dispensable legal norms. If societies found it necessary to resolve criminal cases in courts of law and any changes regarding this question were automatically deemed undemocratic, extradition as a part of criminal procedure might also have to be entrusted to the judiciary instead of the executive.
Conclusion

The above discussion shows the development of extradition procedure from ancient times to modern series of bilateral and multilateral agreements which are likely to transform to regional and global regimes, but conclusion has been made that today it still suffers from the lack of protections for extradited individuals. Unfortunately, primary attention is paid to simplification of procedures related to the extradition in favour of state authorities rather than those accused or sentenced to criminal punishment.

Despite the existence of numerous conventions, agreements and statutes, the individual whose extradition is requested is still considered more as a passive object of intergovernmental relations than as an active subject with independent legal capacity and strong participatory rights. Human rights protection in this field is still weak and political aspects often prevail over the due process of law.

The refusal, even a legitimate one, by a country to extradite persons to another one often causes tension in bilateral relations. The requesting state, whose request for extradition is denied, usually attributes the refusal to political reasons. Such misunderstanding has a negative impact on the protection of human rights and often leads to inhumane treatment, kidnapping and even death of the individuals whose extradition is requested. Legal deficiencies and mismatch between national legal systems often hamper efforts to prevent human rights violations and tackle red tape. However, a person has very limited means of protection against political will and judicial imperfection.
It is hard to believe that we are still experiencing the same problems with respect to extradition as those of ancient times. Thus, the abovementioned risks resulting from inadequacies, caused by insufficient legal mechanisms, especially in respect to the legal capacity of an individual, must be minimized.

I have come to conclusion that more efforts should be made to improve the legal capacity of an individual in the process of extradition in different jurisdictions and at the international level, preferably by recognizing international legal personality of an individual, at least with respect to this particular field of law. This would make it possible to avoid or minimize the influence of political aspects on extradition, since states would have to comply with the principle of estoppel in the international law with respect to an individual who, based on the doctrine of legitimate expectations, will be able to refer to these theoretical concepts while dealing with state authorities. This, in its turn, would require state authorities to make decisions on extradition requests consistent with their previous conduct within similar legal and factual situations rather than make decisions in favour of political friendship.

Having done the above analysis, I found that the legal status of an individual as a rights bearer and an active subject of legal relationships among other parties of the process, as opposed to the treatment of a person as a passive object of intergovernmental relations, can be developed through the recognition of international legal personality of an individual and subsequent strengthening of the latter’s legal capacity by granting strong participatory rights and means of holding states accountable for the conduct inconsistent with general principles of international law. Therefore, the principle of estoppel, applied to legal relations between a state and an individual might play a significant role in achieving the abovementioned goal.
However, since it is very difficult to reach consensus between actors in the international arena regarding any controversial question, appropriate procedural norms should at least be envisaged to ensure human rights protection in the process of extradition. With or without recognition of international legal personality of an individual, participatory rights of a person, whose extradition is requested, must be strengthened by at least stipulating the right to initiate judicial review at several stages of the process, the right to provide defence’s opinion regarding the evidence presented to a court and by setting forth additional time frames in clearly written extradition treaties.

On the other hand, I have come to the conclusion that even though ability of an individual to stand against his or her respective state in the European Court of Human Rights, for instance, does not grant the former a status of the subject of the international law, it does entitle such an individual to a certain type of protection against arbitrary governmental misconduct. In addition, protection beyond the national level at a supranational institution significantly strengthens the legal status of a person, who can stand against the entire state having almost equal participatory rights. I think that it is a great step forward from strict positivist conceptions in the international law towards realism and natural law doctrines.

Similar developments were noticed in the field of international investment law where host states are being held accountable for their misconduct and breach of obligations by individual investors (both juridical and physical persons) under the treaty arbitration systems within ICSID, NAFTA, etc., were the doctrine of legitimate expectations, based on the international law principle of estoppel, plays a significant role in decisions of investment arbitration tribunals. Since the concept of estoppel in the international law provided such a strong basis for the development of the doctrine of legitimate expectations in the field of international
investment law, I conclude that, combined with the doctrine of legitimate expectations, it could also be applied to protect fundamental human rights and, in particular, within the process of extradition. These situations might be considered similar because in both of them states, as undisputable subjects of the international law, enter into legal relations with non-subjects who, nevertheless, due to specificity of these relations, must have the ability to stand against their states having equal participatory rights. Even though investors are not subjects of the international law, state-parties and arbitration tribunals have recognized their capability to refer to the doctrine of legitimate expectations, based on the concept of estoppel in the international law, which used to be applicable exclusively to the interstate legal relations. This fact leads to the conclusion that even without being undisputable subjects of the international law, individuals subject to extradition, following the way of individuals and corporations, whose property was, for instance, subject to expropriation or other types of unlawful governmental takings, get closer to the recognition of their international legal personality at least in some particular legal relations, such as extradition.

My second major conclusion is that decisions in extradition cases must be made exclusively by judges instead of representatives of the executive branch of power. First of all, the transfer of final decision-making right from the executive to judiciary would enable application of principles of the Rule of law to particular extradition cases such as the limitation of broad discretion of decision makers and support such an abstract, but yet applicable phenomenon as justice. Having analyzed a number of extradition cases, I found that only highly-qualified judges, with the help of law professors and scholars, are able to apply the appropriate principles of the Rule of law and evaluate the category of justice in particular cases. Also, judges are more likely to prioritize rights of an individual rather than members of the executive, as can be seen in the Burns and the Bout cases.
Thus, the international law, namely its fundamental legal instruments such as Universal Declaration of Human Rights and International Covenant on Civil and Political Rights also support the necessity of entrusting such an important sphere of human right protection to courts of law. Moreover, since the UDHR stands for the protection of human rights by the Rule of law, it is fair to conclude that scepticism regarding the application of the concept of Rule of law has support neither in theory, nor in legal practice.

For the purpose of practical application of the Rule of law in different jurisdictions, I have analyzed and compared development and substance of the English concept of the Rule of Law and Rechtsstaat (which is its German version). I have outlined a number of principles, similarly recognized in both of these concepts, in order to illustrate their universal applicability irrespective of jurisdiction. These principles include the principle of effective protection of natural, inherent and inalienable human rights and freedoms in relationships between an individual and state authorities; the principle of limitation of discretion, which means imposing limits on state authorities and officials in making decisions in their sole discretion; the principle of legal certainty, which requires clarity of reasons, objectives and content of legal regulations, especially those addressed directly to citizens; the principle of proportionality which, above all, applies, to the boundaries of possible restrictions of fundamental human rights and the principle of independence of courts and judges. I came to conclusion that, in order to improve extradition procedure, the abovementioned universal principles of the Rule of law must be included into the set of extradition principles referred to in the last section of this thesis.

Finally, I have illustrated the correlation between the Rule of law and justice, since the achievement of justice, as introduced by Aristotle and supported by his successors, is indeed the main purpose of the law. Also, since appeals to Aristotle’s ideal of justice as to the criterion of
lawfulness of any legal act are so common, it is reasonable to consider the concept of justice as the key factor for the determination and interpretation of the Rule of law in general and, in particular, within the process of extradition. Human beings are too valuable to entrust their future and even lives to the extradition procedure with broad executive discretion aimed at making hasty decisions. Even though extradition cases used to be referred to as simple procedural cases, they have proven to be no less important than substantive criminal trials.

Thus, I believe that the only possible way to achieve the abovementioned goals is to transfer the final decision-making right to the judiciary. Even if a kind of time efficient extradition court hearings will be designed in order to avoid unnecessary delays, it is better than broad executive discretion granted by dispensable legal norms. If societies found it necessary to entrust the courts of law with decision making in criminal cases, and it is undisputable that any changes regarding this question were automatically deemed undemocratic, decisions in extradition cases, as a part of criminal procedure, must be also made by judges.

Having completed the above analysis within this thesis, I can confidently conclude that legal status of an individual, empowered by strong participatory rights, on one hand, and decision-making right, granted to the courts of law, on the other hand, can significantly improve extradition procedure as a transnational legal instrument. Otherwise, I do not believe in justice, achieved by unjust means.
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