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CASE COMMENT: *United States v. Flores*

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CASE COMMENTS

United States v. Flores—The United States Court of Appeals for the Second Circuit confirmed that the doctrine of specialty does not bind the United States, as requesting State, to a limitation imposed by a Spanish extradition order where the limitation does not concern the nature of the offense for which the extradited fugitive may be tried, but instead attempts to impose restrictions upon evidentiary or procedural rules.

INTRODUCTION

Extradition by treaty is a relatively new means of obtaining the return of a fugitive from justice. Prior to the existence of treaties providing for extradition, the rendition of fugitives was accomplished on the basis of international reciprocity, or comity.[1] Whether extradition is obtained on the basis of comity or by treaty,[2] the requested State is protected against abuse of its extradition order by the international legal doctrine of specialty.[3] This protection arises from the right of the requested State, under that doctrine, to limit the prosecution of the fugitive to the extradition offense.[4]

The United States Court of Appeals for the Second Circuit recently considered whether Spain, by its extradition order, could determine the admissibility of evidence of the prosecutable offense under the doctrine of specialty in the same manner as it might limit the nature and scope of the offense. In *United States v. Flores*,[5] the Second Circuit, holding that such a limitation has

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1. United States v. Rauscher, 119 U.S. 407, 411 (1886). Rendition by comity is still practiced today. However, as the Supreme Court has pointed out, "while a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice . . . , the legal duty to demand his extradition and the correlative duty to surrender him . . . exist only when created by treaty." Factor v. Laubenheimer, 290 U.S. 276, 287 (1933) (citations omitted). The United States very rarely requests extradition on the basis of comity because, by statute, it is prohibited from reciprocating, that is, it may not extradite in the absence of a treaty with the requesting State. 18 U.S.C. § 3184 (1970). *Cf.* Fiocconi v. Attorney Gen., 462 F.2d 475 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972) (extradition requested by United States on basis of comity).

2. Fiocconi v. Attorney Gen., 462 F.2d at 479.

3. United States v. Paroutian, 299 F.2d 486, 490 (2d Cir. 1962). *See* text accompanying notes 26-35 *infra*.

4. W. FRIEDMANN, O. LISSITZYN, & R. PUGH, INTERNATIONAL LAW 493 (1969).

5. 538 F.2d 939 (2d Cir.), *modifying* 411 F. Supp. 38 (S.D.N.Y. 1976).

no effect upon the American forum,[6] refused to expand the modern construction of the doctrine of specialty "to permit foreign intrusion into the evidentiary or procedural rules of the requisitioning State."[7]

I. BACKGROUND

During the late 1960's and early 1970's, Antonio Flores, among others, was the subject of an ongoing investigation by the United States government into international narcotics traffic. He was reputed to have been the sole American buyer for 600 pounds of heroin worth $65 million.[8] Flores was indicted in the United States district courts for both the eastern[9] and southern[10] districts of New York [hereinafter referred to as Eastern District and Southern District, respectively] for his alleged participation in a conspiracy to import and distribute narcotics.[11] After his French supplier was arrested in April 1971, and before Flores' trial on the Eastern District indictment, however, he fled the United States for France, then Spain.[12] Shortly after the Southern District indictment was returned (almost two years after he had left the United States), the United States requested Flores' extradition from Spain. In proceedings lasting nearly eight months, Flores unsuccessfully fought extradition. On November 13, 1973, the Provincial Court of Barcelona issued the requested extradition order.[13]

The extradition order was peculiar in one respect. In construing the applicable extradition treaty,[14] the Spanish court held that Flores could be prosecuted only for a conspiracy that existed after September 3, 1970, the effective date of an international agreement to control narcotics[15] to which Spain had recently become a contracting party.[16] Therefore, Flores was not extraditable

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6. *Id.* at 944-45.

7. *Id.* at 944.

8. N.Y. Times, Aug. 27, 1976, at B3, col. 4.

9. Indictment No. 70 CR 543 (E.D.N.Y. Aug. 6, 1970).

10. Indictment No. 73 CR 19 (S.D.N.Y. Jan. 8, 1973).

11. Both indictments charged single-count conspiracies involving many defendants.

12. Brief for Appellant at 6.

13. Limited Proceedings No. 53 of 1973, Barcelona Court No. 6 [hereinafter cited as Limited Proceedings], *reprinted in* Brief for Appellant at A-34-42.

14. *See* text accompanying notes 52-75 *infra.*

15. Convention for the Suppression of Dangerous Drugs, *opened for signature* June 26, 1936, 198 L.N.T.S. 299 [hereinafter cited as 1936 Convention].

16. Limited Proceedings, *supra* note 13, at 3, 4.

to the Eastern District because the conspiracy charged there existed between January and August 1968, a period prior to the effective date of the agreement.[17] The Southern District indictment had charged a conspiracy stretching from January 1968 to April 1971, in which two of the eleven overt acts in furtherance of the conspiracy occurred after September 3, 1970. On this basis, the Spanish court ordered Flores returned to the Southern District but required that the United States promise not to try him for acts committed prior to the effective date of the agreement.[18]

Flores was not extradited to the United States until February 1976[19] upon completing a prison sentence imposed on him by Spain for possession of marijuana and a forged passport.[20] At a pre-trial conference in the United States District Court for the Southern District of New York, soon after his arrival in the United States, Flores moved to exclude evidence of all acts allegedly committed by himself and his co-conspirators prior to September 3, 1970 on the ground that the doctrine of specialty required literal construction of the extradition order.[21] District Judge Dudley B. Bonsal ruled that Flores' prior acts merely constituted evidence of the "defendant's knowledge and intent" concerning the conspiracy and, as such, were admissible.[22] At a subsequent conference, however, the court ruled that evidence of the defendant's co-conspirators' prior acts would be excluded.[23] The Government, at Judge Bonsal's repeated urgings, appealed.[24]

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17. *Id.* at 4.

18. *Id.* at 7. A diplomatic communiqué from the United States to Spain conveyed "the specific assurance on the part of the Department of Justice that Antonio Flores will not be prosecuted . . . for prior infractions or infractions different than those which are concretely referred to by the decision portion of the [extradition order] . . . ." Verbal Note No. 136 from the United States Embassy to the Spanish Ministry of Exterior Affairs (Feb. 13, 1974), *reprinted in* Brief for Appellant at A-43.

19. 538 F.2d at 941-42.

20. Limited Proceedings, *supra* note 13, at 7.

21. 538 F.2d at 942.

22. 411 F. Supp. at 39.

23. 538 F.2d at 942.

24. *Id.* Pursuant to 18 U.S.C. § 3731 (1970), the Government may file an interlocutory appeal from a pre-trial decision excluding evidence. The Second Circuit held that the appeal was not time barred because it was filed within thirty days of the oral rulings. 538 F.2d at 942-43.

At the pre-trial conference of April 19, 1976, Assistant United States Attorney John Flannery attempted to elicit from the trial court the effect its suppression order would have on certain evidence the Government wished to introduce at trial. The court repeatedly suggested that the issue be raised on appeal; thus, it would appear that the court realized that its ruling might have been incorrect. *See* Brief for Appellant at A-147-69.

In *United States v. Flores*, the Second Circuit held that evidence of prior acts committed by any of the co-conspirators was admissible.[25]

II. The Doctrine of Specialty

The international legal doctrine of specialty has been defined as a limiting principle "placed upon the requesting state that it may try and punish an extradited person only for the act for which extradition is obtained."[26] The doctrine was first enunciated in the United States in *United States v. Rauscher*,[27] a case turning on the construction of an extradition treaty between the United States and Great Britain. The Supreme Court held that the treaty limited the prosecution of a person extradited pursuant to the treaty to the offense charged in the extradition request despite the absence of a provision to that effect in the treaty.[28] The *Rauscher* Court considered the doctrine to be "an appropriate adjunct to the discretionary exercise of the power of rendition . . . . It is unreasonable that the country of asylum should be expected to deliver up such person to be dealt with by the demanding government without any limitation, implied or otherwise, upon its prosecution of the party."[29]

The specialty doctrine represents an international policy designed to protect the "dignity and interests" of the asylum State[30]

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25. 538 F.2d at 945.

26. Harvard Research in International Law, *Draft Convention on Extradition*, art. 23, Comment, 29 Am. J. Int'l L. 15, 213 (Supp. 1935). *See* Note, *The Status of Political Fugitives and Refugees under United States Law*, 2 Brooklyn J. Int'l L. 266, 267-68 (1976).

27. 119 U.S. 407 (1886). This decision reflected difficulties which arose between the United States and Great Britain over the extradition of Ezra Winslow, an American citizen arrested in Great Britain. The British Parliament had enacted a statute in 1870 which allowed extradition only in those cases in which the United States was specifically prohibited by its law from prosecuting the fugitive for any but the offense named in the extradition order. The Extradition Act, 1870, 33 & 34 Vict., c. 52, § 3. As a result, Great Britain refused to grant Winslow's extradition. Hamilton Fish, then Secretary of State, wrote to the chargé ad interim at the American Embassy in London: "Surely Great Britain will not allow the legislature of another state to prescribe or to limit the cases, or the manner in which justice is to be administrated in her courts, and she will not expect the United States to be less tenacious of its independence in this regard." Letter from Hamilton Fish to Wickham Hoffman (Mar. 31, 1876), *reprinted in* 34 Foreign Rel. U.S. 210, 215 (1876). *See* United States v. Rauscher, 119 U.S. at 415-16.

28. 119 U.S. at 422-23.

29. *Id.* at 419.

30. Shapiro v. Ferrandina, 478 F.2d 894, 906 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973). *Accord*, Judgment of May 12, 1961, 87 Entscheidungen des Schweizerischen Bundesgerichts, Amtliche Sammlung IV, at 57 (Switz. 1961), 34 I.L.R. 132 (1961).

"against abuse of its discretionary act of extradition."[31] The *Rauscher* Court stated that a violation of the doctrine of specialty carried "an implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his extradition."[32] In such a case, the Court suggested, the requested State or the extradited individual himself may demand, and is entitled to, his release.[33]

In interpreting *Rauscher*, however, the Second Circuit has determined that the doctrine represents merely a "privilege of the asylum state . . . rather than a right accruing to the accused."[34] The appropriate test for determining whether the extradited individual is being tried for a crime other than that for which he was extradited is "whether the extraditing country would consider the offense actually tried 'separate'" when it is not clear that the prosecuted offense is "truly unrelated" to the extradition offense.[35]

Because Flores was charged with conspiracy, the question of whether the doctrine of specialty applied in this case was complicated by the implication in the extradition order that the Spanish court considered the overt acts listed in the conspiracy indictment to be separate offenses.[36] By analogy, if Flores had been

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31. United States v. Paroutian, 299 F.2d 486, 490 (2d Cir. 1962).

32. 119 U.S. at 422.

33. *Id.* at 430-31. In 1907, an individual extradited from Canada to serve a term of imprisonment to which he had been sentenced after trial in an American court was released and returned to Canada. The crime for which he had been extradited was not the crime for which he had been convicted; the latter was a non-extraditable offense under the applicable treaty, but the former, with which he had been charged solely for the purpose of extradition, was extraditable. In Johnson v. Browne, 205 U.S. 309 (1907), the Supreme Court held that he must be discharged.

34. Shapiro v. Ferrandina, 478 F.2d 894, 906 (2d Cir. 1973); United States *ex rel.* Donnelly v. Mulligan, 76 F.2d 511 (2d Cir. 1935) (rights of asylum and immunity arising under extradition treaty belong to State, not to criminal).

> Since the requested state is designed to benefit from this doctrine and has the right to claim its enforcement, the question arises as to the right of the relator to insist on that requirement as a participant in the process. In practice, when the issue arises the relator will have already been surrendered . . . [to] the prosecuting state. His . . . only recourse at that point will be limited to the remedies afforded by that very state. Thus, unless the surrendering state objects to the variance, the individual in question will not really benefit from this doctrine.

M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 354-55 (1974). *Cf.* Waits v. McGowan, 516 F.2d 203 (3d Cir. 1975) (rights accrue to extradited individual for benefit of requested State).

35. 299 F.2d at 490-91.

36. Actually, Spain's definition of conspiracy is very similar to that utilized by various American states in their penal codes. The Spanish definition states that "[l]a con-

charged with multiple counts of forgery, and some act of forgery had occurred outside the American forum's statute of limitations,[37] the Spanish court would have been justified, under a 1904 treaty, in limiting extradition to those crimes that could be lawfully prosecuted in the American forum.[38] If one of the forgeries had occurred prior to the effective date of the treaty, the Spanish court could have extradited Flores on the condition that he not be tried for that offense. The justification for either limitation would have rested on the terms of the extradition treaty and the doctrine of specialty. The issue, in this hypothetical case, would have been whether Spain could have made a valid objection, under the doctrine of specialty, to the introduction into evidence of the prior act of forgery, for which Flores could not have been extradited, as going to the defendant's motive, opportunity, or intent.[39] The court would have held the objection without merit since he was being tried only for the offenses for which extradition was granted.

The same analysis was appropriate with respect to the conspiracy charge in this case. An indictment for conspiracy, brought in federal court in the United States, enumerates overt acts allegedly committed in furtherance of the conspiracy. Such acts alone may not be criminal; however, when viewed as acts in furtherance of a criminal purpose, they become evidence of the conspiracy.[40] In addition, at the trial of a conspiracy charge, evidence of acts

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spiración existe cuando dos o más personas se conciertan para la ejecución de un delito y resuelven ejecutarlo." Decree No. 691 (Mar. 28, 1963), Codigo Penal, art. 4 (2d ed. 1971) (Spain) (a conspiracy exists when two or more persons agree upon the execution of a crime and resolve to execute the same) (author's translation). In New York, "[a] person is guilty of conspiracy . . . when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause performance of such conduct." N.Y. PENAL LAW § 105.00 (McKinney 1975). *Accord, e.g.*, ILL. ANN. STAT. ch. 38, § 8-2 (Smith-Hurd Supp. 1977); OR. REV. STAT. § 161.450 (1975). Nevertheless, it is possible that the definition is applied differently by Spanish courts.

37. In reality, under 18 U.S.C. § 3290 (1970), there is no statute of limitations applicable to the prosecution of fugitives from justice.

38. Extradition Treaty, June 15, 1904, United States-Spain, 35 Stat. 1947, T.S. No. 492, at art. V [hereinafter cited as 1904 Treaty].

39. FED. R. EVID. 404(b). *See* 2 J. WIGMORE, EVIDENCE § 370 (3d ed. 1940).

40. The eleven overt acts alleged in the indictment in this case are a good example of the possibly innocent character of acts in furtherance of a conspiracy. The indictment charges that various co-conspirators "arrived in the vicinity" of specified hotels on specified dates, sometimes in the possession of large sums of money. One overt act is a conspirator's entry into St. Patrick's Cathedral in New York. A somewhat less innocent activity is charged in the allegation that one co-conspirator received the shipping papers and a parking receipt for a car containing 93 kilograms of heroin. Indictment No. 73 CR 19 (S.D.N.Y. Jan. 8, 1973).

either prior to the passage of a statute making the goal of the conspiracy a crime[41] or falling outside the period of the conspiracy charged (as long as one overt act occurs within the statute of limitations[42]) is admissible to show the motive and intent of the conspirators[43] and the existence and purpose of the conspiracy.[44]

Since Spanish law permits extradition only in the presence of a treaty in force at the time the offense was committed,[45] the Spanish court tried to restrict Flores' prosecution by limiting the extradition offense to acts committed after a certain date.[46] The Second Circuit did not reverse[47] the district court's decision, to which the Government had offered no protest, that the Government must prove that a conspiracy existed between that date and the last date named in the indictment.[48] However, it was the opinion of the Second Circuit that this requirement would not compel a United States court to adhere to the terms of the extradition order when the result would be to suppress evidence which demonstrated the existence and purpose of the conspiracy.[49] The court also held that the doctrine of specialty would not be available to Spain to protest non-compliance.[50] If the doctrine of spe-

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41. *E.g.*, United States v. Fino, 478 F.2d 35, 38 (2d Cir. 1973), *cert. denied*, 417 U.S. 918 (1974).

42. *E.g.*, Grunewald v. United States, 353 U.S. 391, 396 (1957).

43. *E.g.*, United States v. Brettholz, 485 F.2d 483, 487 (2d Cir. 1973), *cert. denied*, 415 U.S. 976 (1974).

44. *E.g.*, United States v. Ferrara, 458 F.2d 868, 874 (2d Cir.), *cert. denied*, 408 U.S. 931 (1972).

45. Extradition Law of Dec. 26, 1958, art. 1(1) (Spain). "There is no doubt that, from the time of [the 1936 Convention's] entry into force, . . . it had the force of law and its application was an inescapable obligation of the courts." Limited Proceedings, *supra* note 13, at 3-4.

46. It is curious and inexplicable that on a set of facts very similar to those here, Spain extradited François Rossi without limiting the extradition order in any way. Rossi had been indicted in the Eastern District of New York in 1972 for conspiracy to traffic in narcotics between January 1969 and September 1972. Extradition was requested in February 1973 and granted without any of the complications which arose in Flores' extradition. According to Assistant United States Attorney Peter Schlam, who represented the Government at Rossi's appeal of his conviction, Flores and Rossi were held in the same Spanish jail pending extradition and were represented by the same attorney at the extradition proceedings, presumably held before the same court. Conversation between author and Assistant United States Attorney Schlam (Dec. 6, 1976). *See generally* United States v. Rossi, 545 F.2d 814 (2d Cir. 1976).

47. 538 F.2d at 945.

48. 411 F. Supp. at 39.

49. 538 F.2d at 944.

> It is clear . . . that even as the specialty doctrine has been defined and broadened in this century, it has never been construed to permit foreign intrusion into

cialty does not justify the imposition of an evidentiary restriction, Spain's justification, if it is to be binding upon a United States court, must lie elsewhere.[51]

III. The Applicable Extradition Treaties

The Spanish court found that its authority to grant Flores' extradition existed by virtue of not only a bilateral treaty between the United States and Spain, but also a multilateral convention designed to control international trafficking in narcotics.[52] Until 1971, the United States and Spain undertook extradition pursuant to a bilateral treaty[53] [hereinafter referred to as 1904 Treaty] concluded by the parties in 1904 and effective, as amended by a protocol signed in 1907, on May 21, 1908. However, the 1904 Treaty alone could not have served as the basis for Flores' extradition because it did not include violations of narcotics laws among the list of extraditable offenses.[54]

Over the past sixty-five years, numerous attempts have been made to control international traffic in narcotics.[55] Nevertheless, of the more than half-dozen multilateral agreements that have been concluded, only two conventions have sought to provide a basis for international extradition of narcotics traffickers. In 1936, under the auspices of the League of Nations, the Convention for the Suppression of the Illicit Traffic in Dangerous Drugs[56] [hereinafter referred to as 1936 Convention] was opened for signature at Geneva; by 1939, with the ratification by the requisite number of States, the Convention entered into force.

One of the purposes of the 1936 Convention was to create an enforcement procedure for the provisions of the previous interna-

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> the evidentiary or procedural rules of the requisitioning state . . . . Where, as here, the defendant is indicted and tried for the precise offense contained in the extradition order . . . , the doctrine does not authorize us to disregard the normal evidentiary rules followed by this forum.

Id. at 944-45.

50. *Id.* at 944-45.

51. *Id.* at 945.

52. Limited Proceedings, *supra* note 13, at 3-4.

53. 1904 Treaty, *supra* note 38.

54. *Id.* art. II.

55. *See* Waddell, *International Narcotics Control*, 64 Am. J. Int'l L. 310 (1970).

56. 1936 Convention, *supra* note 15.

tional agreements concerning narcotics.[57] Article 2 provided that the possession, distribution, and importation of narcotics, where not otherwise authorized, were to be made severely-punishable crimes by the contracting parties. Article 9 made such offenses extraditable by operation of any extradition treaty "which had been or may thereafter be concluded" between the contracting parties. However, in recognition of the right of sovereign States to establish and maintain an independent criminal justice system free from international control, the 1936 Convention expressly provided that the parties were not "undertaking . . . to adopt in criminal matters any form or methods of proof contrary to their laws" in determining whether or not to extradite.[58] In addition, the Convention was not to be understood as "affecting the principle that the offences referred to in Article[] 2 . . . shall in each country be defined, prosecuted and punished in conformity with the general rules of its domestic law."[59]

Technically, with respect to its contracting parties, the entire 1936 Convention is still in force. However, the extradition article was specifically abrogated in 1961 by the United Nations-sponsored Single Convention on Narcotic Drugs[60] [hereinafter referred to as Single Convention] unless a party to both the 1936 Convention and the Single Convention should decide to retain the extradition provisions of the former in preference to those of the latter.[61] To avoid any suggestion that a single criminal justice system was sought to be imposed, the language of the Single Convention was chosen as carefully as that of the 1936 Convention.[62] Article 36 specifies that a contracting party is bound by the

57. "One loophole in the new system [of international narcotics control] was the ineffectiveness of sanctions in dealing with traffickers. The [1936 Convention] tried to obligate the contracting parties to adopt in their penal systems principles aimed at deterring traffickers." Waddell, *supra* note 55, at 313 (footnote omitted).

> The 1936 Convention was specifically designed
> to strengthen the measures intended to penalise offences contrary to the provisions of the International Opium Convention signed at The Hague on January 23rd, 1912, the Geneva Convention of February 19th, 1925, and the Convention for limiting the Manufacture and regulating the Distribution of Narcotic Drugs signed at Geneva on July 13th, 1931 . . . .

Preamble to 1936 Convention, *supra* note 15.

58. 1936 Convention, *supra* note 15, art. 13.

59. *Id.* art. 15.

60. *Done* Mar. 30, 1961, [1967] 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 151 (effective with respect to the United States June 24, 1967, and with respect to Spain Mar. 1, 1966) [hereinafter cited as Single Convention].

61. *Id.* art. 44.

62. *See* Waddell, *supra* note 55, at 319.

Single Convention "subject to its constitutional limitations, . . . its legal system and domestic law";[63] it also reiterates that offenses made extraditable by the Single Convention are to be "defined, prosecuted and punished in conformity with the domestic law of a Party."[64]

The Single Convention entered into force with respect to the United States in June 1967; the United States never specifically subscribed to the 1936 Convention. The Spanish court stated that Spain became a contracting party to the 1936 Convention in September 1970 and that the United States had been a contracting party to that convention since 1947.[65] While it is true that, in 1947, the United States became a party to an international protocol[66] amending six previous multilateral agreements concerning narcotics traffic, including the 1936 Convention, it had been a party to only two of the six agreements so amended. The parties to the protocol were merely acceding to the transfer of supervision from the defunct League of Nations to the newly-formed United Nations with respect to only those agreements to which they were already contracting parties. Therefore, as a contracting party to the protocol, the United States did not become a contracting party to the agreements amended by the protocol to which it had not previously been a party.[67]

The Spanish court rejected[68] the suggestion that extradition could be granted on the basis of the most recent bilateral extradition treaty between the United States and Spain[69] [hereinafter referred to as 1970 Treaty], which had been concluded in 1970 and entered into force in June 1971. Despite the fact that it expressly made extraditable violations of narcotics laws, whether committed by an individual or as part of a conspiracy,[70] the 1970 Treaty contained an explicit proviso that crimes committed before it entered into force were "subject to extradition pursuant to the provisions of [the 1904] Treaty . . . ."[71] Since the conspira-

63. Single Convention, *supra* note 60, art. 36, § 2.

64. *Id.* § 4.

65. Limited Proceedings, *supra* note 13, at 3.

66. Protocol Amending Agreements on Narcotic Drugs, *opened for signature* Dec. 11, 1946, 61 Stat. 2230, T.I.A.S. No. 1671, 12 U.N.T.S. 179.

67. *Id.* art. I.

68. Limited Proceedings, *supra* note 13, at 3.

69. Extradition Treaty, May 29, 1970, United States-Spain, [1971] 22 U.S.T. 737, T.I.A.S. No. 7136 [hereinafter cited as 1970 Treaty].

70. *Id.* art. II.

71. *Id.* art. XVIII. The United States probably did not attempt to rely upon the 1970 Treaty because American case law requires strict application of such a provision. In a case

cies for which Flores had been indicted were alleged to have existed only between 1968 and April 1971, they constituted crimes committed before the effective date of the 1970 Treaty and were subject to extradition, if at all, only under the 1904 Treaty.

Because the 1904 Treaty did not provide for extradition for narcotics offenses, the Spanish court was compelled to look to the 1936 Convention. By its terms, the 1936 Convention's extradition provisions were to be read back into any extradition treaty which had been concluded between the parties to the 1936 Convention.[72] Therefore, the Spanish court concluded, apparently with some reluctance, that narcotics offenses were extraditable as a consequence of the incorporation of the 1936 Convention into the 1904 Treaty.[73] Refusing to give this result retroactive effect, however, despite the absence of a specific provision to that effect in either agreement, the court held that "[i]f it is concluded . . . that the [1904] Treaty is applicable, it is also concluded some limitations must be clearly stated."[74] The limitation in the extradition order stated that Flores was to be extradited only for acts committed after the 1936 Convention had entered into force with respect to Spain, that is, September 1970.[75]

IV. The American Response

The United States District Court for the Southern District of New York was faced with a difficult choice once Flores was actually extradited pursuant to the 1973 extradition order. The United States Department of State had conveyed a promise to Spain not to prosecute Flores "for prior infractions or infractions different than those which are concretely referred to" by the extradition order.[76] The district court was required to balance the effect to be given the limitation imposed by the order, coupled with the American assurance of compliance, against the principle

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construing the extradition convention with Italy, Judge Blatchford made an examination of all extradition treaties to which the United States was a party at that time. He concluded that "past crimes would be included, where the language was capable of a construction including them, *unless they were expressly excluded.*" *In re* DeGiacomo, 7 F. Cas. 366, 369 (C.C.S.D.N.Y. 1874) (No. 3747) (emphasis added). *See also* 6 M. Whiteman, Digest of International Law 753 (1968).

72. 1936 Convention, *supra* note 15, art. 9.

73. Limited Proceedings, *supra* note 13, at 4. *See* note 18 *supra.*

74. Limited Proceedings, *supra* note 13, at 4.

75. *Id.* at 7.

76. Verbal Note No. 136 from the United States Embassy to the Spanish Ministry of Exterior Affairs (Feb. 13, 1974), *reprinted in* Brief for Appellant at A-43.

that a State's complete control over its internal criminal justice system is an essential element of its sovereignty.[77] Obviously, some showing of compliance was mandated, but the precise extent of the compliance required was not clear. Therefore, it is understandable that the district court suggested that the order was open to various interpretations and that if the prosecution did not agree with the court's interpretation, an appeal should be taken.[78]

On one point, the district court and the Government were in agreement—that the Government had to prove that the conspiracy existed within the period prescribed by the Spanish court in its order.[79] Nevertheless, the court equivocated on the question of the introduction into evidence of the conspirators' prior acts.[80] Its final determination was that the order precluded evidence of any but Flores' acts prior to September 3, 1970.[81] The reason for the distinction is not clear. The Second Circuit concluded that the court below, "[w]hile acknowledging that such evidentiary restrictions differ from the practice in the 'ordinary case,' . . . felt itself bound by its reading of the Spanish decree."[82]

The Second Circuit did not agree with the trial court's ruling. The Government's argument that a distinction must be drawn between "the *crimes* for which Flores may be charged and tried . . . and the *evidence* that might be introduced to illuminate and establish the crimes charged"[83] was more persuasive to the court of appeals than it had been to the district court. The Second Circuit's decision clearly demonstrates that it considered this distinction dispositive of the issue: "[U]nless it is unequivocally clear that Spain was authorized under principles of international law and intended to limit the manner by which United States prosecutors might try a conspiracy case, we would feel constrained to follow domestic evidentiary rules."[84]

The court's choice of words is either revealing or merely

77. Harvard Research in International Law, *Draft Convention on Jurisdiction with Respect to Crime*, art. 3, Comment, 29 AM. J. INT'L L. 439, 480-81 (Supp. 1935). *Cf.* The License Cases, 46 U.S. (5 How.) 504 (1847) (Taney, C.J.) (police powers of State are powers of government inherent in every sovereignty).

78. *See* note 24 *supra*; United States v. Flores, 538 F.2d at 942.

79. 538 F.2d at 942.

80. *Id.*

81. *Id. See also* Brief for Appellant at A-169.

82. 538 F.2d at 942.

83. *Id.* at 943.

84. *Id.* at 944.

harmless error. The verb "to constrain" is defined as "to force by imposed limitation."[85] It may be inferred from the use of the word "constrain" that the court would not be compelled "to follow domestic evidentiary rules" except in extraordinary circumstances. Such an approach seems illogical. If the court feared that domestic evidentiary rules would make the Government's case much simpler of proof, resulting in certain conviction of the defendant, the court was probably correct in its fear. Nevertheless, such a consideration should not have been entertained by the court. The issue is whether the court was forced to limit the application of domestic evidentiary rules in this case, not whether it was forced to utilize them.

If the court sought an excuse not to apply domestic rules of evidence, it could have begun with the apparent position of the Spanish court that overt acts in furtherance of a conspiracy are separate offenses. In such a case, the question clearly would have been whether Flores' trial would violate the doctrine of specialty if evidence of those prior acts was introduced; the answer would have been that it would have been an act of bad faith to try Flores for acts specifically excluded by the extradition order. This would have been so whether the intended consequence of the order was a limitation on the offense or on the manner of proof. However, the Second Circuit was no more constrained to follow the Spanish court's understanding of conspiracy than to limit the manner of proof in a trial in an American court on the basis of an extradition order.[86]

Either lack of firm conviction in the correctness of its decision or fear that Spain would lodge an official protest as a result of this decision compelled the court to try to determine what result the Spanish court intended to accomplish by its imposition of the limitation in this case.[87] If it were not Spain's intent to limit the manner of proof, then Spain could not possibly be offended if the ordinary evidentiary rules of the forum were applied, notwithstanding that those rules permitted evidence of acts for which Spain had forbidden prosecution.[88]

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85. WEBSTER'S NEW COLLEGIATE DICTIONARY 243 (8th ed. 1974).

86. *See* text accompanying notes 49-51 *supra*.

87. *See* 538 F.2d at 945. The only evidence of Spanish objection to the proceedings consisted of two letters from the Spanish Consul General in New York. The court was "inclined to accept [the] representation" of the United States Attorney that the letters were not "official intergovernmental communiques." *Id.* at n.4.

88. This was the Government's position in the court below:

The Second Circuit relied on two rather weak premises to infer that Spain merely had intended to limit the scope of the prosecutable offense. First, "the totality of the circumstances" provided a means to see through the "ambiguity" of the Spanish court's language in the extradition order; the Second Circuit found no intent to limit anything but the scope of the offense.[89] Second, the language of the 1936 Convention, if applicable to the grant of extradition, must be applicable to the limitation. If the Spanish court was obliged to extradite Flores because of the existence of the 1936 Convention, that court was similarly bound by the terms of the Convention in other matters. Pointing to Articles 13 and 15, the Second Circuit announced that "[w]e are not persuaded that the Spanish judges, in extraditing Flores pursuant to the [1936] Convention, intended to violate two of its central proscriptions."[90] Articles 13 and 15 embody the principle that the Convention does not affect the definition, prosecution, or punishment of crimes by any party to the Convention.[91]

CONCLUSION

The decision of the Second Circuit, despite its negative tone, should settle the issue of whether the doctrine of specialty imposes an obligation of compliance with a limitation in an extradition order which goes to the manner of proof and not to the scope and nature of the offense. The court's response was, as expected, that the doctrine does not require the requisitioning State to alter any of its domestic rules of evidence or procedure. Failure to comply with a limitation which would only affect the manner of proof should not lead to international scandal because limitation on proof is not included within the scope of the doctrine of specialty. The doctrine "reflects a fundamental concern of governments that persons who are surrendered should not be subject to *indiscriminate prosecution* by the receiving government."[92] Neither Spain nor Flores can complain that, by its deci-

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> [I]t is . . . clear that the Spanish public policy rationale in limiting the order of extradition has to do with insuring that the defendant is convicted only for a crime which occurred after the effective date of the [1936] Convention . . . . The Spanish court has no interest in the method of proof.

Government's Memorandum of Law at 2.

89. 538 F.2d at 945.

90. *Id.*

91. *See* text accompanying notes 58-59 *supra.*

92. Fiocconi v. Attorney Gen., 462 F.2d at 481 (emphasis added).

sion, the Second Circuit was subjecting Flores to "indiscriminate prosecution" by permitting the introduction of certain evidence pursuant to the rules of the American forum during his trial for the precise crime for which he was extradited.

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