under the Convention, including Article IX. The Court concluded that Serbia did not take any step inconsistent with this position until 2001.

A number of members of the Court took issue with the majority's failure to consider the effect of Serbia's 2001 accession to the Convention more closely, arguing that if the *Mavrommatis* principle is relied upon to establish Serbia's capacity, it is necessary to show that Croatia could, if it wished, file a new application identical with the previous one. If Serbia's 2001 reservation to Article IX is valid, it would bar any hypothetical future application by Croatia and deny the concern for procedural economy which underlies the *Mavrommatis* principle (see the Separate Opinions of Vice-President Al-Khasawneh and Judge Abraham and the Declaration of Judge Bennouna). They are however of the view that Serbia could not accede to a treaty to which it was already a party and that no account should therefore be taken of the accession or the reservation.

With no further claims pending against Serbia, the complicated question of its capacity to appear before the ICJ between 1992 and 2000 is unlikely to be raised again. However, the Court's finding that Serbia's 1992 declaration and Note constituted sufficient notification of its succession to the Convention enabled it to avoid considering the general law relating to succession of States to, in particular, multilateral and human rights treaties – a difficult area which would benefit from further elucidation.

JILLAINE SEYMOUR

## DOUBLE-PLUS GOOD OR DOUBLE TROUBLE?

EXTRADITION is a municipal legal procedure, often the subject of treaty obligations, by which the criminal justice authorities of one state (the "requested" state) arrest and surrender to those of another (the "requesting" state) a suspect or fugitive convict present in the territory of the former state and wanted by the latter. It is typical for certain conditions to attach to the obligation to extradite imposed on the requested state by an extradition treaty. One classic condition, a consideration for the requested state, is the rule of "double criminality" – that is, the stipulation that the conduct in respect of which extradition is requested constitute a crime not only in the requesting but also in the requested state, and usually a crime of a specified minimum gravity. The requirement is not typically found in the text of extradition treaties *sub nomine* "double criminality" but under the rubric "extradition

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crimes" or "extradition offences". The precise application of the rule of double criminality is a matter for the law of each state.

In *Norris* v. *Government of the United States of America* [2008] UKHL 16, [2008] 1 A.C. 920, the US government sought the defendant's extradition on four counts, the first (under the infamous Sherman Act 1890) alleging his participation in a conspiracy to operate a price-fixing agreement or cartel, the other three alleging a conspiracy to obstruct justice by interfering with witnesses and destroying documentary evidence. On appeal to the Lords, who delivered a composite opinion, it was held that – absent aggravating factors such as fraud, misrepresentation, violence, intimidation or inducement of a breach of contract, none of which was alleged here – the conduct specified in the first count would not, if proved, have constituted a criminal offence in England under either common law or statute at the time of its alleged commission, namely 1989–2000. Moreover, it would be wrong in principle for any court now to hold that there is or was at the time of the events complained of such a common law offence: the rule of law demanded that a person not be punished for conduct that was not, in the words of Lord Bingham in *R.* v. *Rimmington* [2005] UKHL 63, [2006] 1 A.C. 439, "clearly and ascertainably punishable when the act was done", and, as emphasised in *R.* v. *Jones (Margaret)* [2006] UKHL 16, [2007] 1 A.C. 136, the recognition of new crimes was the preserve of Parliament, not the courts. As regards counts two to four, their Lordships first held that the current English law, represented in the context of extradition to the USA by section 137(2) of the Extradition Act 2003, requires merely that the conduct of which the defendant is accused, as opposed to the conduct constitutive of the offence of which he or she is accused, amount to an offence in the UK: there was no need to investigate the legal ingredients of the foreign offence. Next, the Committee emphasised that the double criminality rule went to the essence of the alleged acts, rather than to "adventitious circumstances connected with the conduct alleged". In the instant case, the substance of the criminality charged was not that the defendant obstructed a criminal investigation into price-fixing being carried out by a Pennsylvania grand jury, but that he obstructed a criminal investigation into the matter being carried out by the duly appointed body. The question for an English court, therefore, was whether obstructing in England a criminal investigation into price-fixing being conducted by the appropriate UK investigatory body constituted an offence under English law at the time of the defendant's alleged conduct. Their Lordships reasoned that although price-fixing *per se* was not an offence under English law, it could, when combined with other elements such as deliberate misrepresentation, amount to offences such as fraud or conspiracy to defraud. In this light, had the defendant, with the

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intention of obstructing an investigation by a duly appointed UK body into possible criminal conduct in relation to price-fixing, tampered with witnesses and evidence as he was alleged to have done, he would have been guilty of either obstructing or conspiring to obstruct justice, both of them offences punishable by 12 months' imprisonment and therefore extradition offences within the meaning of section 137(2)(b) of the Extradition Act 2003.

The Lords' decision on both points is unimpeachable. But certain dicta raise, and not for the first time, questions as to the rationale for the requirement of double criminality. Prior to *R* v. *Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)* [2000] 1 A.C. 147, the stipulation had been characterised as one of the public policy of the forum which obviated the invidious necessity for English criminal justice to lend its assistance to the punishment by Johnny Foreigner of the freedom to offend officialdom, the practice of Christianity, the legitimate pursuit of commercial advantage or, indeed, any conduct considered unworthy of criminal sanction by the law of England. In *Pinochet (No. 3)*, however, the Lords, in holding that the time by reference to which double criminality was to be assessed was the time of the alleged offence rather than, as had been thought, the time of surrender, characterised the double criminality rule as a safeguard of the principle *nullum crimen nulla poena sine lege*, a guarantee of the defendant's entitlement to fair warning under the criminal law. The invocation of *Rimmington* in the present judgment and their Lordships' statement that "the underlying rationale of the double criminality rule [is] that a person's liberty is not to be restricted as a consequence of offences not recognised as criminal by the requested state" endorse this second view. But this view is open to doubt, for the reason that the criminal law under which a defendant to extradition proceedings will eventually be tried, and thus the law in relation to which any issues of fair warning would relate, is that of the requesting, not requested state – here, US, not English law. And there was never any suggestion in this case that the US offence of conspiracy to operate a price-fixing agreement or cartel was retroactive.

ROGER O'KEEFE

## SHINING THE TORCH ON PLEA-BARGAINING

GARY McKinnon is a British unemployed computer systems administrator wanted in the US for allegedly gaining unauthorised access to 97 US Government computers from his home computer in London. Amongst other things, he apparently deleted data from operating

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