IN THE INTERNATIONAL COURT OF JUSTICE

The Hague, Netherlands

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

V.

UNITED STATES OF AMERICA

MEMORIAL FOR THE UNITED STATES OF AMERICA

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United States of America

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PHILIP C. JESSUP INTERNATIONAL MOOT COURT COMPETITION
Washington, D. C., April 1965

Columbia Society of International Law
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JURISDICTION

The applicant, the Government of the United Kingdom of Great Britain and Northern Ireland, has instituted this proceeding against the respondent, the Government of the United States of America. Respondent not having asserted that this case concerns a dispute which falls within one of the classes of exceptions to its acceptance of the Court's compulsory jurisdiction, the jurisdiction of the Court may therefore be said to rest on Article 36(2) of the Statute of the International Court of Justice. Respondent has submitted to the jurisdiction of this Court so that this case may be decided in accordance with Article 36(1) of the said Statute, which directs the Court to decide disputes in accordance with international law, applying (a) "international conventions," (b) "international custom, as evidence of a general practice accepted as law," (c) "the general principles of law recognized by civilized nations," (d) " judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law."

STATEMENT OF FACTS

On December 1, 1964, the governments of the United Kingdom and the United States entered into an informal and secret agreement for the purpose of conducting space research programs. The essential terms of the agreement were as follows:

1. The United Kingdom would make available to the United States all information concerning its latest method for increasing the thrust power of a spaceship.
2. The United States would prepare an expedition that would leave before January 15.
3. The United Kingdom and the United States would each choose one of its citizens to be a crew member. Both astronauts were to be scientists and volunteers; neither was to be under any contract to his government, to hold any position therewith, or to be a military officer.

In full accordance with the terms of the agreement, Sir Roland Magdalen of the United Kingdom and Dr. Jacob Armstrong of the United States were chosen as crew members and thoroughly trained in space flight techniques.

The spaceship was launched on January 2, 1965, and landed on the moon three days later. Television cameras set up to monitor the activities of the crew transmitted pictures to observing scientists on earth. At stated times, the pictures were also transmitted to the public. The two astronauts, upon landing, established a base and began scientific investigations. During the first period for transmission to the public, Sir Roland, acting in accordance with prior instructions from his government, placed a Union Jack and a flag of the United Nations in the surface of the moon, outside the base. He stated that, "Mindful of United Nations' Resolutions on

the subject, the United Kingdom makes no traditional claims of sovereignty to the moon but thus evidences the priority of the United Kingdom, with the aid of her friend and ally, on and to the moon."

On January 8, 1965, Dr. Armstrong, who had been brooding over Sir Roland's actions, assaulted Sir Roland while the two were outside the base. Sir Roland died almost instantly. Dr. Armstrong removed the Union Jack from the moon's surface and tore it up; he left the flag of the United Nations standing.

Asked by the United States to return to earth, Dr. Armstrong left the moon on January 10, 1965. Although the flight plan called for a descent into Lake Michigan near the United States shore, Dr. Armstrong's capsule in fact landed in Canadian waters. Despite the protests of Canadian officials, a helicopter of the United States Air Force made contact with the space vehicle, attached it to the helicopter, and flew it to Chicago. Dr. Armstrong has since remained in the United States.

QUESTIONS PRESENTED

1. WHETHER THE UNITED STATES IS REQUIRED UNDER INTERNATIONAL LAW TO TRY DR. ARMSTRONG FOR HIS ACTS ON THE MOON.
2. WHETHER THE UNITED STATES IS REQUIRED UNDER THE CIRCUMSTANCES OF THIS CASE TO EXTRADITE DR. ARMSTRONG TO THE UNITED KINGDOM.
3. WHETHER THE UNITED STATES IS LIABLE IN DAMAGES FOR FAILURE TO TRY OR EXTRADITE DR. ARMSTRONG.
4. WHETHER THE UNITED STATES IS LIABLE TO THE UNITED KINGDOM FOR DAMAGES SUFFERED BY THE FAMILY OF SIR ROLAND MAGDALEN.
5. WHETHER THE UNITED STATES IS REQUIRED TO PAY DAMAGES TO THE UNITED KINGDOM FOR DESTRUCTION OF THE UNION JACK BY DR. ARMSTRONG.
6. WHETHER THE UNITED STATES IS REQUIRED TO PAY DAMAGES TO THE UNITED KINGDOM FOR THE ENTRY INTO CANADIAN AIRSPACE OF A UNITED STATES HELICOPTER.
7. WHETHER THIS COURT SHOULD DECLARE THAT THE AGREEMENT OF DECEMBER 1, 1964 IS NO LONGER IN EFFECT.

I. THE UNITED STATES IS NOT REQUIRED UNDER INTERNATIONAL LAW TO TRY DR. ARMSTRONG.

International law recognizes several valid bases for the exercise of criminal jurisdiction by states. Harvard Research in International Law, Jurisdiction With Respect to Crime, arts. 3-10 (1935) [hereinafter referred to as Harvard Research, Jurisdiction]. The international law of jurisdiction is, however, not compulsory; it may be characterized as 'voluntaristic'. Falk, Toward a More Responsible Procedure for the National Assertion of Protested Claims to Use Space, in TAUBENFELD, SPACE AND SOCIETY 114 (1964). Therefore we should examine the jurisdictional principles in the United States.

The United States Code, 18 U.S.C. Sec. 7, (1958) defines the "special maritime and territorial jurisdiction of the United States" as:

> 1. The high seas, any other waters within the admiralty and maritime jurisdiction of the United States....and any vessel belonging in whole or in part to the United States or any citizen thereof....when such vessel is within the admiralty and maritime jurisdiction of the United States....
> 3. Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof....
> 4. Any island, rock, or key containing deposits of guano....

United States courts have restrictively interpreted this provision. In United States v. Cordova, 89 F.Supp. 298, 303 (E.D.N.Y. 1950), the court, in interpreting "admiralty and maritime jurisdiction of the United States," held that acts of the defendant in an airplane of United States registry and ownership, flying over the high seas, were not punishable by the United States, since they were not committed "on" the high seas. In response to this decision,

Congress amended 18 U.S.C. Sec. 7, so as to extend United States criminal jurisdiction to:

> 5. Any aircraft belonging in whole or in part to the United States or any citizen thereof...while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State. 66 Stat. 589 (1952).

It is clear that 18 U.S.C. Sec. 7, as amended, does not provide United States criminal jurisdiction in the instant case.

Although municipal law is no defense to a breach of an international obligation, it is submitted that there is no rule of international law which requires that a state enact legislation authorizing the exercise of criminal jurisdiction in a case such as the instant one.

In considering the United Kingdom's claim that the United States be required to try Dr. Jacob Armstrong, the Court should bear in mind that the state asserting the existence of a rule of international law must affirmatively prove that rule. Case of the S.S. "Lotus", P.C.I.J., ser. A, No. 10, at 23 (1927).

Any argument that United Nations General Assembly Resolution 1962 (XVIII), U.N. Gen. Ass. Off. Rec. 18th Sess., Supp. No. 15 (A/5515), creates such a rule must be rejected. Paragraph (7) of that Resolution states,

> "The State on whose registry an object is launched into outer space is carried shall retain jurisdiction and control over such object, and personnel thereon, while in outer space."

The United States recognizes that General Assembly Resolutions may have an important role in the development of international law, but it is submitted that General Assembly Resolutions do not create binding international standards. The framers of the United Nations

Charter intended only that the General Assembly should "initiate studies and make recommendations for the purpose of promoting international cooperation in the political field and encouraging the progressive development of international law and its codification," U.N. CHARTER art. 13, para. 1(a). See generally Asamoah, The Legal Effect of Resolutions of the General Assembly, 3 COLUM. J. TRANS. L. 210 (1965). Thus, as a recommendation, a resolution is only the first step in creating an international standard. It embodies principles not yet ripe for formal agreement.

Paragraph (7) of Resolution 1962, supra, does not even evidence a principle of customary international law. "International custom as evidence of a general practice accepted as law" is one of the primary sources of law which may be applied by the International Court of Justice. STAT. INT'L CT. JUST. art. 38, para. 1(b). However, because there has been no state practice relating to the exercise of jurisdiction over crimes in outer space, there can be no rule of customary international law in this area. Perhaps there has been enough state practice to augment the force of paragraph (2) of Resolution 1962, supra, i.e., that "outer space and celestial bodies are free for exploration and use by all states on a basis of equality and in accordance with international law." To this date, no state sending an object into outer space has made a claim of sovereignty, and no state over which an object has crossed has objected that its airspace has been violated. Clearly, no similar state practice exists which could reinforce paragraph (7) of Resolution 1962. Finally, assuming arguendo that a General Assembly Resolution could create a binding standard in international law, Resolution 1962 would not. This Resolution recommends only that

"States should be guided by the following principles...." These are not words from which compulsory legal obligation may be inferred.

The United States submits that there is no international rule regarding a minimum standard of criminal jurisdiction, other than that a state claiming sovereignty must exercise such territorial administration as is sufficient to support that claim. Legal Status of Eastern Greenland, P.C.I.J., ser. A/B, No. 53, 22 (1933). One element of administration is the exercise of territorial jurisdiction over crime to afford adequate assurance that the nationals of states respecting the claim to sovereignty will not thereby be harmed. 1 OPPENHEIM, INTERNATIONAL LAW 325 (8th ed. Lauterpacht 1955) [hereinafter referred to as OPPENHEIM]; Island of Palmas Arbitration, [1927-1928] Ann. Dig.(No. 1,)at 4.

II. THE UNITED STATES IS NOT REQUIRED UNDER THE CIRCUMSTANCES OF THIS CASE TO EXTRADITE DR. ARMSTRONG TO THE UNITED KINGDOM.

A. The United Kingdom Had No Jurisdiction to Punish the Acts of Dr. Armstrong.

The United Kingdom has demanded that if the United States does not try Dr. Armstrong, the United States should extradite Dr. Armstrong for trial in the United Kingdom.

In international law the obligation to extradite is imposed solely by international agreement. Harvard Research in International Law, Extradition, 41 (1935); 1 OPPENHEIM 696-98. In effect, the extradition treaty is the lex specialis governing all matters relating to the extradition process. The extradition treaty in

effect between the United States and the United Kingdom, December 22, 1931, 47 Stat. 2122, T.S. No. 849 (effective June 24, 1935), [hereinafter referred to as Extradition Treaty], requires in art. 1 that the state requesting extradition have jurisdiction over the crime under its own law.

English criminal jurisdiction is primarily territorial in nature. The United Kingdom exercises criminal jurisdiction under the common law over its subjects when they are within England, or under the Offenses Against the Person Act, 1861, 24 & 25 Vict., c. 100, when they are abroad. English admiralty jurisdiction also extends to British vessels on the high seas. Jurisdiction in respect of acts committed elsewhere than in the United Kingdom or on a United Kingdom ship is derived from statute. Macleod v. Attorney-General for New South Wales, [1891] A.C. 455, (P.C.).

Jurisdiction over aliens is purely territorial and extends only to "all aliens within the territory of England, on board a British ship or on the open sea within the territorial waters of the Queen's dominions...." 10 HALSBURY, LAWS OF ENGLAND, sec. 577, (3rd ed. Simonds 1955). Jurisdiction over aliens has been extended by statute to acts committed in British aircraft. Civil Aviation Act, 1949, sec. 62(1), 12, 13 & 14 Geo. 6., c. 67. The Offenses Against the Person Act, supra, which renders a British citizen liable for certain felonies committed outside England, apparently does not apply in the case of a foreigner. R. v. Jameson, [1896] 2 Q.B. 425, 430.

It remains to be answered whether the moon, at the time of Dr. Armstrong's acts, was part of the territory of the United Kingdom. The United States submits that it was not.

Under traditional rules of international law, mere discovery,

without possession by at least symbolic acquisition, did not result in the acquisition of sovereignty. Moreover, customary international law as developed in the nineteenth century required "effective occupation" of a territory in order for it to be considered as under the sovereignty of any state. Simsarian, The Acquisition of Legal Title to Terra Nullius, 53 POL. SCI. Q. 111 (1938); 1 OPPENHEIM 558; 1 HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 347-355 (2d ed. 1945) [hereinafter referred to as HYDE]; 1 HACKWORTH, DIGEST OF INTERNATIONAL LAW 393-409, 449 ff. (1940) [hereinafter referred to as HACKWORTH]. See generally KELLAR, LISSITZYN AND MANN, CREATION OF RIGHTS OF SOVEREIGNTY THROUGH SYMBOLIC ACTS, 1400-1800 (1938). Possession was more important than discovery, and effective occupation created the best title. HILL, CLAIMS TO TERRITORY IN INTERNATIONAL LAW AND RELATIONS 146-158 (1945). Thus, under traditional international law, what might be an analogy to the Roman Law concept of occupatio (long term use and control) was the basis of territorial claims.

In more recent cases, the requirement of effective occupation has been somewhat relaxed where the land in question was difficult to settle. Island of Palmas Arbitration, [1927-1928] Ann. Dig. (No. 70) at 109, 22 AM.J. INT'L L. 815(1928), Clipperton Island Arbitration, [1931-1932] Ann. Dig. (No. 50) at 107, 26 AM. J. INT'L L. 390 (1932). In these cases, "continuous and peaceful display of actual power" or "administration" was held to be sufficient. In the case concerning Legal Status of Eastern Greenland, P.C.I.J., ser. A/B, No. 53, at 45-46, 52, 63 (1933), the Court held that discovery by Norway was insufficient to confer title on Norway, but that Denmark's "continued display of authority" was sufficient to give Denmark a valid claim. It is to be noted that the Court stipulated

that a continued display of authority had to be accompanied by an intent and will to act as sovereign (animus occupandi), in addition to the actual exercise of sovereignty (corpus occupandi). Legal Status of Eastern Greenland, supra, at 46.

In the case before this Court, even had the planting of the Union Jack been sufficient to comprise the corpus occupandi, the simultaneous disclaimer of any intention to exercise sovereignty implicit in Sir Roland Magdalen's citation of the United Nations Resolutions which declare that celestial bodies are not subject to claims of sovereignty, removes the necessary animus occupandi.

The United States therefore submits that the United Kingdom did not have territorial jurisdiction over the moon at the time of the acts of Dr. Armstrong, and that because the courts of the United Kingdom, under the law of that state, do not have jurisdiction over acts of aliens done outside the territory of the United Kingdom, the United Kingdom has therefore failed to establish the first requirement of the extradition treaty.

B. The United Kingdom Has Not Followed the Procedures Required By the Extradition Treaty.

The United Kingdom, in its Application, has requested that the United States be required "to deliver Dr. Armstrong, in accordance with international law and applicable treaties, to the United Kingdom for trial." Application, p. 5. It has already been noted that under international law, a state's obligation to extradite arises solely from treaty. In the Extradition Treaty in force between the United Kingdom and the United States, supra, the two states have bound themselves to extradite in accordance with procedures therein

provided. Here, where the United Kingdom has not followed the prescribed procedures, the United States is under no obligation to extradite Dr. Armstrong to the United Kingdom.

Under the terms of the extradition treaty, United States law regulates the extradition process when a demand for extradition is made by the United Kingdom. Article 8 of the treaty provides,

> The extradition of fugitive criminals under the provisions of this treaty shall be carried out in the United States and in the territory of his Britannic Majesty respectively, in conformity with the laws regulating extradition for the time being in force in the territory from which the surrender of the fugitive criminal is claimed.

United States statutes provide that two steps must be taken by a state demanding extradition. 18 U.S.C. sec. 3184 (1958); see full text in Appendix. First, a representative of the state making the demand files a complaint under oath in a court in the United States, so that a magistrate may hear evidence and determine whether there is a proper case for extradition. 18 U.S.C. sec. 3184 (1958); 2 HYDE 1047-51. If the magistrate determines that a proper case for extradition has been made, he certifies the hearing to the Secretary of State, who may then issue a warrant of surrender. 18 U.S.C. sec. 3184; 2 HYDE, op. cit. supra, at 1048. See In Re Keene's Extradition, 6 F.Supp. 308 (S.D. Tex. 1934). Although the procedure to be followed is clear, the United Kingdom has not filed a complaint in a court of the United States. Since filing a complaint is, under the treaty, the only way to initiate the extradition process the United States is under no present obligation to extradite Dr. Armstrong. The United Kingdom has complied with the second step in the extradition procedure by filing a formal requisition with the Secretary of State, but the formal requisition bears no relation to the complaint which must be filed before an obligation to extradite arises

18 U.S.C. sec. 3184 (1958), 2 HYDE, op. cit. supra, at 1037-1039.

The United States acknowledges that on January 14, 1965, the Secretary of State replied in a note to the United Kingdom that "Dr. Armstrong had done no act cognizable under the laws of the United Kingdom and/or any extradition treaty so no demand for extradition could be entertained." Application, p. 4. Under the procedures just discussed, however, the Secretary of State cannot make his decision until a magistrate has certified that there is a proper case for extradition. 18 U.S.C. sec. 3184 (1958). If a complaint were properly filed and a magistrate found a proper case for extradition, there would be no reason to assume that the Secretary of State would not then determine that Dr. Armstrong should be surrendered. We should note further that the Secretary of State is vested with discretion in his final determination of whether there should be surrender of an alleged criminal. 18 U.S.C. sec. 3184 (1958); Comment 62 COLUM. L. REV. 1313 (1962). The United States will concede that if the Secretary of State should abuse his discretion, the United Kingdom might then be entitled to claim that the United States had breached an implied condition of the extradition treaty.

III. THE UNITED STATES IS NOT LIABLE IN DAMAGES FOR FAILURE TO TRY OR EXTRADITE DR. ARMSTRONG.

The United Kingdom has claimed $1,000,000 damages in the event that the United States should fail either to try or to extradite Dr. Armstrong. It is submitted that there is no rule of international law which requires either trial or extradition, and that therefore no liability arises from the United States' refusal to try or extradite.

The amount of damages imposed upon a state for failing to prosecute a person who injures an alien is dependent upon the degree of that state's dereliction in performing its duties. Janes (United States v. Mexico), General Claims Commission, Opinions of Commissioners 108 (1927). See DUNN, THE PROTECTION OF NATIONALS 175-187 (1932); Borchard, Important Decisions of the Mixed Claims Commission: United States and Mexico, 21 AM. J. INT'L L. 518 (1927); Brierly, The Theory of Implied State Complicity in International Claims, 9 BRIT. YB. INT'L L. 49 (1928). See generally 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW sec. 520 (1943). In the present case, where the alleged crime was not committed within United States territory, and where the United States has no jurisdiction under its laws to prosecute Dr. Armstrong, and furthermore is under no international obligation to have such jurisdiction, the United States has not been derelict in its duties and should not be penalized.

Admittedly, if the United States prevails in its arguments, Dr. Armstrong's assault upon Sir Roland may go unadjudicated. But the adjudication of Dr. Armstrong's acts is only one of the considerations to be weighed in this case. Any decision rendered by the Court must consider the objectives of the sovereign states which have created it and which have also dictated the sources of the law which it may apply. These sources, all of which are sources of existing international law, appear in article 38(1) of the Statute of the International Court of Justice:

> The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law.

It would require international legislation to impose a duty upon the United States to try or extradite Dr. Armstrong, or to serve as a basis for finding that the United States is liable in damages for failure to do either. The International Court of Justice has no competence to render such a decree. Moreover, it should be noted that principles of justice cannot be the basis for a decision in this case. Although Article 38 (2) of the Statute of the International Court of Justice allows for a case to be decided ex aequo et bono, this may be done only with the agreement of the parties.

Since the deterrence of crimes in outer space is most urgent and desirable, the United States hopes that this case will serve to encourage all states to join together in considering the problem of jurisdiction over crimes in outer space. The United States submits that a proper resolution will be found in treaties or conventions. "The advantage of enacted law so greatly outweighs its defects that there can be no doubt as to the ultimate issue of its rivalry with the other forms of legal development and expression." SALMOND, JURISPRUDENCE 180 (7th ed. 1924).

IV. THE UNITED STATES IS NOT LIABLE TO THE UNITED KINGDOM FOR DAMAGES SUFFERED BY THE FAMILY OF SIR ROLAND MAGDALEN.

Damages of $1,000,000 have been claimed by the United Kingdom on behalf of Sir Roland's family. This claim is not admissible, for Sir Roland's family has not been denied justice by the United

States. Although the courts of the United States are open for the deceased's family to present a civil claim against Dr. Armstrong, no such proceeding has been instituted.

If justice were wholly lacking in the United States, or if the courts were controlled by mobs or superseded by military, Sir Roland's family would not be required to look to the United States for its remedy. MS Department of State, file 400.00/34 (July 21, 1930). Surely it cannot be said that any of these conditions prevail in the United States. In addition, the deceased's family would not be required to exhaust municipal remedies in the United States if such an attempt would be futile because of the inability or unwillingness of the courts to do justice. 5 HACKWORTH, 511; Panevezys-Saldutiskis Railways Case (Estonia v. Lithuania), P.C.I.J., ser. A/B, No. 76, at 4 (1939). Thus, we should examine further the adequacy and availability of municipal remedies in the United States. In so doing, we should note that it is the United Kingdom's burden to show that municipal remedies in the United States are inadequate. Ibid.

It is submitted that the appropriate remedy is a wrongful death action against Dr. Armstrong in a federal or state court in Massachusetts, where Dr. Armstrong is a domiciliary. Massachusetts statutes provide for a wrongful death action against any person who "...by wilful, wanton or reckless act causes the death of a person under such circumstances that the deceased could have received damages for personal injuries if his death had not resulted." MASS. ANN. LAWS ch. 229, sec. 2 (1958). The action for wrongful death may be maintained even though the injury causing death took place in a foreign jurisdiction. Hanlon v. Frederick Leyland & Co., 233 Mass. 438, 111 N.E. 907 (1916).

Although Dr. Armstrong's acts took place on the moon, Massachusetts courts will have no difficulty in finding an appropriate body of law to apply. Normally courts in the United States will apply the law of the place where an alleged tort occured. GOODRICH, CONFLICT OF LAWS Sec. 92 (Scoles ed. 1964). But where that place has no law, courts will apply the law most closely connected with the parties concerned, which is in most cases the law of the forum. Leary v. Gledhill, 8 N.J. 260, 84 A.2d 725 (1951); Slater v. Mexican National R.R. Co., 194 U.S. 120, 129 (1904) (dictum); Cf. Walton v. Arabian American Oil Co., 233 F. 2d 541 (2d Cir. 1956) (dictum).

No serious problems would arise from the nature of the evidence in this case. To obtain a favorable judgment, Sir Roland's family would have to introduce into evidence the television tapes which monitored Dr. Armstrong's activities on the moon. Trial courts in the United States have wide discretion in determining whether to admit this type of evidence. This discretion has been favorably exercised where the films are of spontaneous activities and where their probative value is great. McCORMICK, LAW OF EVIDENCE sec.181 (1954). In addition,the persons in charge of the monitoring operations could authenticate the tapes. If Sir Roland's family cannot obtain a favorable judgment based solely upon the television tapes, the United States will have nonetheless discharged its obligations. The United States need not guarantee success to Sir Roland's family; it must guarantee only a system of justice and rules of law which meet the standards of internation law.

V. INTERNATIONAL LAW DOES NOT REQUIRE THAT STATES PAY DAMAGES FOR INSULTS TO, OR DESTRUCTION OF, THE FLAG OF ANOTHER STATE BY ITS NATIONALS.

There is no doubt that the flag of one state should not be treated with disrespect by another state. The government of a state, its organs, and its agents are bound by rigid duties of respect and restraint. 1 OPPENHEIM 282. There is no duty under international law, however, that requires a state to make reparations for insults arising out of the acts of its nationals. Id. at 283.

In the absence of treaty or convention, this court must look to custom as embodied in state practice. The usual practice of states in regard to insults to foreign flags has been for the state of the person committing the insult to express regret over the incident. The United States has followed this procedure in the past. 2 MOORE, DIGEST OF INTERNATIONAL LAW 139 (1906); 2 HACKWORTH 128. Similarly, where the United States flag has been insulted, no part of any award has specifically been made for the insult to the flag, but rather for property damage (The Montijo (United States v. Colombia), 1871 FOR. REL. 230-238, 239-241; 1872 FOR. REL. 138-141, 142-156; 1875 FOR. REL. 426, 427; 1876 FOR. REL. 84, 85; 2 MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 1421, 1427 (1898), seizure of property (The Ellen Rizpah, The Rising Sun, (United States v. Spain), 1873 FOR. REL. 769, 773, 775-780, 784; 1879 FOR. REL. 956; 1878 FOR. REL. 775; 1879 FOR. REL. 956), and the arbitrary arrest and imprisonment of a United States consul (John A. Sutter (United States v. Mexico), 1877 FOR. REL. 406-409).

There is no precedent, then, for an award of damages for the destruction of the flag of a foreign state. It is more suitable that diplomatic channels, not international tribunals or commissions, be used to determine the appropriate redress for insults by the government or citizens of one state to the flag of another

state. Matilde Miliani (Italy v. Venezuela), RALSTON'S REPORT 754, 762 (1904).

It can be seen from the cases cited above that the United States has fulfilled the requirements of customary law by tendering its apology and expressing its regret for Dr. Armstrong's destruction of the Union Jack. The United States submits, therefore, that no international liability has arisen for the destruction of the United Kingdom's flag.

VI. THE UNITED STATES IS NOT REQUIRED TO PAY DAMAGES TO THE UNITED KINGDOM FOR THE ENTRY INTO CANADIAN AIRSPACE OF A UNITED STATES AIRCRAFT.

The entry of the United States helicopter into the airspace above Canadian territorial waters was pursuant to an air search and rescue agreement between the United States and Canada, effected by an exchsnge of notes on January 24 and 31, 1949, T.I.A.S. No. 1882, 63 Stat. 2328-2329. The agreement provides that public aircraft of either state may enter the territory of the other state when engaged in emergency air search and rescue operations, without fulfilling the normal immigration and customs requirements. In the case before the court, the United States helicopter was engaged in just such activities as were contemplated by and provided for in the agreement.

The agreement also requires that the state of the rescue aircraft, or the Rescue Coordination Centre, give notice to the nearest customs and immigration offices of the state whose territory the aircraft is entering. Loc. cit. Supra, art. 2. It is not clear whether notice was given in this case, although Canadian officials at the scene protested. However, failure to give notice would not

consequently deprive the United States of all its privileges under the agreement, since Canada was not thereby deprived of an essential benefit.

The most generally applicable method of interpreting international agreements is to ascertain the intention of the parties and the general aim and purposes of the agreement. MC NAIR, LAW OF TREATIES 380-81 (1961) [hereinafter referred to as MCNAIR]; see Harvard Research in International Law, Law of Treaties, art. 19(a), commentary at 948-953 (1935) [hereinafter referred to as Harvard Research, Treaties][1]; RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES, Proposed Official Draft (1962), sec . 150, at 538, 541. Rights of Nationals of the United States of America in Morocco, [1952], I.C.J. Rep. 176. The exchange of notes between the United States and Canada concerning emergency air search and rescue was intended to facilitate such rescue operations. The requirement of notice by the Rescue Coordination Centre was intended to apprise the immigration and customs officials of the extent and nature of the search mission. This is to be done not as a restriction on the right of entry, but as can be more clearly seen in article 2(2) of the agreement, to enable local officials to aid in the rescue.

A material violation of the terms of the agreement which would constitute a breach would be entry into Canadian territory or airspace for purposes other than search and rescue. This would violate

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[1]It is noted that the Harvard Research in International Law, Law of Treaties, art. 1(b) at 657 excludes exchanges of notes from the classification "treaty." There is no reason, however, to believe that the applicable rules of interpretation are different. Id., Comment at 698. RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES, Proposed Official Draft (1962), sec. 118(a) at 422, sec. 124 at 446. treats executive agreements as international agreements.

the essential purpose of the agreement as contemplated by the parties, and would justify either unilateral termination (see infra, VII) or an international claim if damage resulted.

It is to be noted that Canada has not taken any action subsequent to the immediate informal protest. There has been neither an international claim nor a formal protest to the United States.

Even had there been an unlawful violation of Canadian airspace, the Government of the United Kingdom would not be entitled to bring a claim in this matter before an international tribunal. Canada must be regarded, insofar as international law is concerned, as a fully sovereign state. MC NAIR 113-115. Under international law, a sovereign state must have a people, a territory, a government, and independence. Harvard Research, Treaties, art. 2(a) at 703. The very act or practice of entering into international agreements is sometimes the only test of whether an entity has such personality or capacity, or indeed, "statehood." Lissitzyn, Efforts to Codify or Restate the Law of Treaties, 62 COLUM. L. REV. 1166, 1183 (1962). Canada has long had the capacity to enter into international agreements without the prior approval of either the Crown or the government of the United Kingdom. With regard to the treaty-making power, there is now no doubt as to the full independence in the international sphere of members of the Commonwealth. 1 OPPENHEIM 198; MC NAIR 113-115; MacKenzie, The Treaty Making Power in Canada, 19 AM. J. INT'L L. 489-504 (1925).

The Imperial Conference of 1923 confirmed the practice of treaty-making by Commonwealth members. Imperial Conference of 1923, Summary of Proceedings, Cmd. No. 1987, 13-15. The Imperial Conference of 1926 declared that members of the Commonwealth are autonomous communities within the British Empire, equal in status and in

no way subordinate to one another in any aspect of domestic or external affairs. Cmd. No. 2768, 14. The procedure for conclusion of treaties was set forth in the Report of the Inter-imperial Relations Committee, adopted by the Imperial Conference of 1926. Imperial Conference of 1926, Summary of Proceedings, Cmd. No. 2768, at 20, 23, 24. The Statute of Westminster, 1931, 22 Geo. 5, c. 4, was an expression of the equal status and full autonomous statehood of members of the Commonwealth. It removed the remnants of dependence on the Imperial Parliament.

In Attorney-General for Canada v. Attorney-General for Ontario and Others [1937] A.C. 326, 349, Lord Atkin, delivering the opinion of the Privy Council, stated:

> The obligations [incurred in 1935 under certain International Labour Conventions] are not obligations of Canada as part of the British Empire, but of Canada, by virtue of her new status as an international person, and do not arise under a treaty between the British Empire and foreign countries.

Canada acquired the Great Seal in 1932, and the Canadian Seals Act, 1939, 4 Can. Rev. Stat. c. 247, 4921-22, made it unnecessary to obtain Crown signature of treaties.

The United Kingdom cannot bring a claim for invasion of a dominion of the Queen. The Crown is no longer "indivisible" but is assimilated to the statehood of each individual member of the Commonwealth which chooses to accept the Crown as titular head of state. Royal Titles Act, 1953, 1 & 2 Eliz. 2, c. 9. The agreement on Royal Style and Titles reached at the Commonwealth Economic Conference of December 1952 may be regarded as heralding the disappearance of the rule that the Crown is one and indivisible. 33 HALBURY'S STATUTES OF ENGLAND 28 (2d ed. 1954).

Just as a state cannot espouse the claim of individuals who are not its nationals (since this would be an espousal of a claim properly belonging to another state), the United Kingdom in this case cannot espouse the claim of Canada. Nottebohm Case (Liechtenstein v. Guatemala), [1955] I.C.J. Rep. 4. Canada, as a member of the United Nations and a party to the Statute of the International Court can bring its own claim before this Court. STAT. INT'L CT. JUST., art. 38(1).

The United States respectfully submits, therefore, that (1) the entry into Canadian airspace by a United States aircraft was pursuant to a valid international agreement between the United States and Canada, and that (2) even if the entry into Canadian airspace was a violation of international law, the government of the United Kingdom has no standing to present the claim.

VII. THE EVENTS OCCURRING DURING AND AFTER THE EXPEDITION TO THE MOON DO NOT JUSTIFY TERMINATION OF THE AGREEMENT OF DECEMBER 1, 1964.

There are several ways in which international agreements may cease to have effect. The circumstances relevant to the agreement in question are: expiration by accomplishment of purpose (i.e. by performance);breach by one party justifying the aggrieved party in considering the agreement at an end; and a fundamental change in the vital circumstances underlying the agreement. Harvard Research, Treaties, arts. 27, 28; MC NAIR 510-14, 539-86, 681-91; 1 OPPENHEIM 936-44; International Law Commission, Draft Articles on the Law of Treaties, Report on the Work of its Fifteenth Session 6 May-12 July 1963, U.N. Gen. Ass. Off. Rec. 18th Sess., Supp. No. 9, (A/5509), in 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (1963), arts. 39, 42,

44 at 201, 204, 207 [hereinafter referred to as International Law Commission].

A. The parties to the agreement involved in the case now before the court contemplated a series of expeditions, in relation to each of which the parties would have respective rights and duties. The United Kingdom bound itself to furnish all information regarding the "new technique." For its part, the United States pledged to continue, in cooperation with the United Kingdom, a program of space exploration. The provisions of the agreement regarding the date of the first launching, the necessity of anticipating the Russian launching (art. c of the agreement), relate only to the first expedition, and are severable from the more general provisions regarding cooperation and furnishing of information (art. a of the agreement). International Law Commission, Second Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, (A/CN.4/156 and Add. 1-3), in 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (1963), art. 26(4)(a) and Commentary at 64-68 [hereinafter referred to as International Law Commission, Second Report]; MC NAIR, ch. 28. The agreement has therefore not been terminated by performance.

B. An international agreement may be unilaterally denounced, even with notice, only when such denunciation is provided for in the agreement or consented to by all parties. Harvard Research, Treaties, art. 34 and 1173-1183. MCNAIR 501-05; 1 OPPENHEIM 938. A more permissive view of unilateral termination is that an agreement which contains no provision regarding termination or is not subject to denunciation or withdrawal unless it appears from the character of the agreement and from the circumstances of its conclusion that the parties intended to admit such a possibility. International Law Commission, art. 39. Even where withdrawal or denunciation can be

inferred from these criteria, a party may denounce or withdraw only upon giving notice to the other party, or to the depositary. State practice indicates that notice, as provided in some treaties, is required to be at least six months prior to the intended effective date. International Law Commission, Second Report, art. 17, commentary 19, at 68. The International Law Commission recommends twelve months' notice. Id., art. 17(3), at 64; International Law Commission, art. 39, at 200.

The United States submits that the agreement, the circumstances surrounding its conclusion, and the intention of the parties, do not contemplate unilateral denunciation or withdrawal. Even if withdrawal should be permissible, it would be premature for this Court to declare the agreement as terminated, since not even six months has elapsed since the United Kingdom requested termination in its note to the United States.

The denunciation of an international agreement is justified where one of the parties has been guilty of a substantial breach of its provisions. 5 HACKWORTH 342, or where the breach is material or fundamental, MC NAIR 571; 2 HYDE 1543; Harvard Research, Treaties, art. 27, 1077, 1091-92. Such a breach is an international delinquency, and can be committed only by the head of a state, by the government, by state officials, or by subjects acting under the command or authority of the state. Subjects not so commanded or authorized do not, by engaging in activities contrary to or prohibited by the agreement, ipso facto involve the state in a breach unless the state has agreed to give the acts such effect. MC NAIR 550-51; Brierly, Theory of Implied State Complicity in International Claims, 9 BRIT. YB. INT'L L. 42-58 (1928). In the absence of willingness on the part of the state to be charged with the breach, the responsi-

bility of the state consists only of a duty to take all reasonable measures of prevention and punishment to ensure that subjects do nothing contrary to the agreement's provisions. MC NAIR 551.

In the case at hand, Dr. Armstrong was not authorized by the United States to do any act which would jeopardize the contractual relationship between the two states, nor has the United States agreed to give that meaning to Dr. Armstrong's acts.

Furthermore, Dr. Armstrong's acts were not a breach of the agreement, and certainly not a material, fundamental or substantial breach. The weight of authority is that a breach, in order to afford the injured state the option of denunciation, must be "material" (2 HYDE 1541; HALL, INTERNATIONAL LAW 409 8th ed. 1924 International Law Commission, art. 42; or "substantial" or "fundamental". MC NAIR 571, Harvard Research, Treaties, art. 27 . A material breach is one which violates a provision of the agreement that is essential to the accomplishment of any of the objects or purposes of the agreement. International Law Commission, art. 42(3)(b), at 204-206; Hooper v. United States, 22 Ct. Cl. 408 (1887); Karnuth v. United States, 279 U.S. 230 (1929). In order to establish that there has been a material breach by the United States, the United Kingdom must show that the actions of the United States have resulted in conditions which would operate to "frustrate the carrying out of" the agreement. Tacna-Arica Arbitration, . . . [1925-1926] Ann. Dig, (No. 269), at 358; 19 AM. J, INT'L L. 393, 398 (1925).

C. The United States further submits that circumstances have not changed in so fundamental a way as to permit the United Kingdom to invoke the principle rebus sic stantibus. It is generally recognized that international law permits denunciation or withdrawal from

an international agreement where the underlying circumstances essential to the original agreement have so changed as to make the agreement fruitless or inequitable. 1 OPPENHEIM 938-44; MC NAIR 681-91; Harvard Research, Treaties 1096-1126. However, the circumstances which have changed must have provided the basis on which the parties consented to the agreement, and the effect of the change in circumstances must be to transform, in an essential respect, the character of the obligations undertaken. Harvard Research, Treaties 1096, 1098, 1099, 1100.

Within a limited context it cannot be denied that the doctrine rebus sic stantibus is reasonable. 1 OPPENHEIM 940. It is to be noted, however, that the concept is apparently so limited that it has never been applied by an international tribunal. In Free Zones of Upper Savoy and Gex, P.C.I.J. ser. A/B, No. 46 (1932), the Court found that the facts of the case did not warrant application of the principle. In the advisory opinion on Nationality Decrees in Tunis and Morocco, P.C.I.J. ser. B, No. 4 (1923), the Court found it unnecessary to pass on the issue. Municipal courts have recognized the principle rebus sic stantibus, but have refused to apply it to cases before them. Hooper v. United States, 22 Ct. Cl. 408 (1887); In re Lepeschkin, [1923-1924] Ann. Dig. (No. 189), 323; Bremen v. Prussia, [1925-1926] Ann. Dig. (No. 266), 352; Rothschild & Sons v. Egyptian Government, [1925-1926] Ann. Dig. (No. 14), 20; Canton of Thurgau v. Canton of St. Gallen, [1927-1928] Ann. Dig. (No. 289), 420, 422; Bertacco v. Bancel and Scholtus, [1935-1937] Ann. Dig. (No. 201), 422; Stransky v. Zivnostenka Bank, [1955] Int'l L. Rep. 424, 427.

Within these properly narrow limits (i.e. that the change must affect a condition which induced the consent of both parties), the

doctrine embodies a general principle of law which has been characterized as analogous to the doctrines of frustration and supervening impossibility. 1 OPPENHEIM 939; Harvard Research, Treaties 1111-13; Fischer Williams, The Permanence of Treaties, 22 AM. J. INT'L L. 89-104 (1928). The acceptance of the principle rebus sic stantibus must not be allowed to weaken the security of treaties; it must certainly not be allowed to provide an easy means for circumventing the much more generally accepted and applied principle pacta sunt servanda. Fischer Williams, op. cit. supra, at 93-94. The use of the terms "fundamental" and "essential" is intended to preclude termination of an agreement on the basis of a mere change in policy or a subjective "loss of confidence" by either party. 2 HYDE 1543-45.

The United States submits that the circumstances set forth in the application to the court by the United Kingdom do not show a change in circumstances which would warrant the application of the principle rebus sic stantibus. On the contrary, the United States is willing to fulfill all its obligations under the agreement of December 1, 1964. The United States submits that the agreement continues in force, and should not be declared terminated by this Court.

CONCLUSION

FOR THE FOREGOING REASONS, the government of the United States of America respectfully submits that the Court should find that;

THE UNITED STATES IS NOT LIABLE TO THE UNITED KINGDOM for failing to try or to extradite Dr. Armstrong, and that

THE CLAIM FOR DAMAGES ON BEHALF OF SIR ROLAND'S FAMILY IS INADMISSIBLE because local remedies in the United States have not been pursued, and that

THE UNITED STATES IS NOT LIABLE TO THE UNITED KINGDOM for any of the other claims put forward in this case.

THEREFORE, the government of the United States respectfully requests that the Court adjudge and declare that the United Kingdom is not entitled to the relief which it requests.

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APPENDIX

18 U.S.C. sec. 3184 (1958).

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any commissioner authorized to do so by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If on such a hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the committment of the person so charged to the proper jail, there to remain until such surrender shall be made.

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