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File Folder [NICARAGUA WORLD COURT CASE/ NICARAGUA 'S ICJ CASE] (2 OF 2)

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ID	Doc Type	Document Description	No of Pages	Doc Date	Restrictions
19498	MEMO	DRAFT FROM ROBERT MCFARLANE TO THE PRESIDENT, RE NICARAGUA ICJ CASE	2	ND	B1
19499	MEMO	GEORGE P. SHULTZ TO THE PRESIDENT, RE NICARAGUA WORLD COURT CASE	5	12/26/1984	B1
	D 6/22/2006				
19500	MEMO	CHARLES HILL TO ROBERT MCFARLANE, RE NICARAGUA WORLD COURT CASE	1	1/3/1985	B1
	D 6/22/2006				
19501	MEMO	SUPPLEMENT TO THE MEMO OF 12/26 FROM THE SECRETARY OF STATE TO THE PRESIDENT ON THE NICARAGUA WORLD COURT CASE	2	ND	B1
	D 6/22/2006				
19502	MEMO	CAP WEINBERGER TO BUD MCFARLANE, RE NICARAGUA WORLD COURT CASE	1	12/28/1984	B1
	D 6/2/2006				
19503	MEMO	CAROL DINKINS TO MCFARLANE	1	ND	B1
	R 10/5/12 F2005-139/1				
19504	MEMO	RALPH W. TARR TO MCFARLANE, RE AUTHORITY OF THE PRESIDENT....	31	1/10/1985	B1
	R 11 11				

Freedom of Information Act - [5 U.S.C. 552(b)]

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Name of Correspondent: Robert M. Kennedy

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Subject: Nicaragua ICJ Case

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
DUTRO	ORIGINATOR	85/01/14			/ /
	Referral Note:				
OMFIEL	I	85/01/14			/ /
	Referral Note:				
DURTO4	D	85/01/14		S	85/01/14 COB
	Referral Note:				
LAUNT 18	D	85/01/14		S	85/01/14 COB
	Referral Note:				
		/ /			/ /
	Referral Note:				

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
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MEMORANDUM

~~SECRET~~

THE WHITE HOUSE

WASHINGTON

9326

~~SECRET~~ ATTACHMENT

January 14, 1985

MEMORANDUM FOR FRED F. FIELDING
M.B. OGLESBY

FROM: ROBERT M. KIMMITT RMK

SUBJECT: Nicaragua ICJ Case

Bud proposes to send the attached memorandum to the President before Thursday. We would like to associate your views with his and would appreciate comments by COB today if possible.

Thanks.

Attachment
Draft memo to the President

~~SECRET~~ ATTACHMENT
Declassify on: OADR

~~SECRET~~

MRH 3/14/08

A

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US Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice

The United States has consistently taken the position that the proceedings initiated by Nicaragua in the International Court of Justice are a misuse of the Court for political purposes and that the Court lacks jurisdiction and competence over such a case. The Court's decision of November 26, 1984, that it has jurisdiction is contrary to law and fact. With great reluctance, the United States has decided not to participate in further proceedings in this case.

US Policy in Central America

United States policy in Central America has been to promote democracy, reform, and freedom; to support economic development; to help provide a security shield against those -- like Nicaragua, Cuba, and the USSR -- who seek to spread tyranny by force; and to support dialogue and negotiation both within and among the countries of the region. In providing a security shield, we have acted in the exercise of the inherent right of collective self-defense, enshrined in the United Nations Charter and the Rio Treaty. We have done so in defense of the vital national security interests of the United States and in support of the peace and security of the hemisphere.

Nicaragua's efforts to portray the conflict in Central America as a bilateral issue between itself and the United States cannot hide the obvious fact that the scope of the problem is far broader. In the security dimension, it involves a wide range of issues: Nicaragua's huge buildup of Soviet arms and Cuban advisers, its cross-border attacks and promotion of insurgency within various nations of the region, and the activities of indigenous opposition groups within Nicaragua. It is also clear that any effort to stop the fighting in the region would be fruitless unless it were part of a comprehensive approach to political settlement, regional security, economic reform and development, and the spread of democracy and human rights.

The Role of the International Court of Justice

The conflict in Central America, therefore, is not a narrow legal dispute; it is an inherently political problem that is not appropriate for judicial resolution. The conflict will be solved only by political and diplomatic means -- not through a judicial tribunal. The International Court of Justice was never intended to resolve ongoing armed conflicts and is

patently unsuited for such a role. Unlike domestic courts, the World Court has jurisdiction only to the extent that nation-states have consented to it. When the United States accepted the Court's compulsory jurisdiction in 1946, it certainly never conceived of such a role for the Court in such controversies. Nicaragua's suit against the United States -- which includes an absurd demand for hundreds of millions of dollars in reparations -- is a blatant misuse of the Court for political and propaganda purposes.

As one of the foremost supporters of the International Court of Justice, the United States is one of only 43 of 159 member states of the United Nations that have accepted the Court's compulsory jurisdiction at all. Furthermore, the vast majority of these 43 states have attached to their acceptance reservations that substantially limit its scope. Along with the United Kingdom, the United States is one of only two permanent members of the UN Security Council that have accepted that jurisdiction. And of the 16 judges now claiming to sit in judgment on the United States in this case, 11 are from countries that do not accept the Court's compulsory jurisdiction.

Few if any other countries in the world would have appeared at all in a case such as this which they considered to be improperly brought. Nevertheless, out of its traditional respect for the rule of law, the United States has participated fully in the Court's proceedings thus far, to present its view that the Court does not have jurisdiction or competence in this case.

The Decision of November 26

On November 26, 1984, the Court decided -- in spite of the overwhelming evidence before it -- that it does have jurisdiction over Nicaragua's claims and that it will proceed to a full hearing on the merits of these claims.

This decision is erroneous as a matter of law and is based on a misreading and distortion of the evidence and precedent:

-- The Court chose to ignore the irrefutable evidence that Nicaragua itself never accepted the Court's compulsory jurisdiction. Allowing Nicaragua to sue where it could not be sued was a violation of the Court's basic principle of reciprocity, which necessarily underlies our own consent to the Court's compulsory jurisdiction. On this pivotal issue in the

November 26 decision -- decided by a vote of 11-5 -- dissenting judges called the Court's judgment "untenable" and "astonishing" and described the US position as "beyond doubt." We agree.

-- El Salvador sought to participate in the suit to argue that the Court was not the appropriate forum to address the Central American confict. El Salvador declared that it was under armed attack by Nicaragua and, in exercise of its inherent right of self-defense, had requested assistance from the United States. The Court rejected El Salvador's application summarily -- without giving its reasons and without even granting El Salvador a hearing, in violation of El Salvador's right and in disregard of the Court's own rules.

-- The Court's decision is a marked departure from its past, cautious approach to jurisdictional questions. The haste with which the Court proceeded to a judgment on these issues -- noted in several of the separate and dissenting opinions -- only adds to the impression that the Court is determined to find in favor of Nicaragua in this case.

For these reasons, despite our respect for the Court's decisions in other instances, its conduct in this case calls into serious question whether the United States will receive a fair hearing consistent with the law. We are forced to conclude that our continued participation in this case could not be justified.

In addition, much of the evidence that would establish Nicaragua's aggression against its neighbors is of a highly sensitive intelligence character. We will not risk US national security by presenting such sensitive material in public or before a Court that includes two judges from Warsaw Pact nations. This problem only confirms the reality that such issues are not suited for the International Court of Justice.

Longer-Term Implications of the Court's Decision

The Court's decision raises a basic issue of sovereignty. The right of a state to defend itself or to participate in collective self-defense against aggression is an inherent sovereign right that cannot be compromised by an inappropriate proceeding before the World Court.

We are profoundly concerned also about the long-term implications for the Court itself. The decision of November 26

represents an overreaching of the Court's limits, a departure from its tradition of judicial restraint, and a risky venture into treacherous political waters. We have seen in the United Nations, in the last decade or more, how international organizations have become more and more politicized against the interests of the Western democracies. It would be a tragedy if these trends were to infect the International Court of Justice. We hope this will not happen, because a politicized Court would mean the end of the Court as a serious, respected institution. Such a result would do grievous harm to the goal of the rule of law.

These implications compel us to clarify our 1946 acceptance of the Court's compulsory jurisdiction. Important premises on which our initial acceptance was based now appear to be in doubt in this type of case. We are therefore taking steps to clarify our acceptance of the Court's compulsory jurisdiction in order to make explicit what we have understood from the beginning, namely that cases of this nature are not proper for adjudication by the Court.

We will continue to support the International Court of Justice where it acts within its competence -- as, for example, where specific disputes are brought before it by special agreement of the parties. One such example is the recent case between the United States and Canada before a special five-member Chamber of the Court to delimit the maritime boundary in the Gulf of Maine area. Nonetheless, because of our commitment to the rule of law, we must declare our firm conviction that the course on which the Court may now be embarked could do enormous harm to it as an institution and to the cause of international law.

Drafted: S/P:PWRodman
12/26/84:x22372
WANG 0209S

Date(s)	Communist Subversion and Actions	OAS Responses
1951	Under the OAS Carter, OAS member states met in Washington, D.C. as the Fourth Meeting of Consultation to confer on the threat to the peace of the Hemisphere posed by the expansionist policies of international communism, after the invasion of South Korea by North Korea.	Prompt measure were taken by OAS member states to ensure the military defense of the Hemisphere.
1953-1954	Guatemala asserts aggression by others. Ten nations call for Meeting of Consultation over international communism.	OAS Council despatched an investigating committee to Guatemala via Mexico but it was denied access by Guatemala. Before the OAS Meeting of Consultation could be convoked the Government was overthrown.
1959	Panama asked for an OAS meeting of Consultation under Rio Treaty saying its territory had been invaded by forces composed almost entirely of foreign elements and cited reports that 80 to 100 fully armed men had left Cuba destined for Panama.	The OAS appointed an investigating committee and called for aircraft and patrol boats to be put at the disposal of the investigating committee. For example Colombia among others furnished pursuit planes and a frigate. The invading forces unconditionally surrendered, and the Cuban Government promised cooperation. The threat of new landings did not materialize.
1961	Peru alleges Cuban intervention and subversion.	The OAS Council referred Peru's allegation to the OAS Inter-American Peace Committee which submitted a report confirming Cuban subversion. The report was submitted to the OAS Meetin of Consultation in Montevideo, Uruguay.
1962	Colombia alleged that Cuba was a threat to the peace and security of the hemisphere.	The "present" Government of Cuba was excluded from participation in the OAS.

e(s)	Communist Subversion and Actions	OAS Responses
2	Installation of nuclear weapons in OAS member state of Cuba by an extra-continental power (the USSR).	OAS authorizes individual and collective measures including force to halt flow of weapons in quarantine of Cuba.
3-64	Venezuela alleges that Cuba is depositing arms in Venezuela.	The OAS verified the facts as true and sanctions against Cuba were voted.
67	Allegations of Cuban intervention in Venezuela and Bolivia.	OAS decided to condemn Cuba and to extend sanctions including cutoff of governments sales and credits to Cuba for example.
74	OAS member states meet in Quito, Ecuador to review changes in political situation since sanctions against Cuba were adopted in 1964.	A two-thirds vote was required to remove sanctions against Cuba and the OAS member states were not able to muster the necessary votes to remove the sanctions--in effect confirming that Cuba had not ceased to be a threat to the peace and security of the Hemisphere.
975	OAS member states meet in San Jose, Costa Rica once more to review political situation since sanctions were adopted against Cuba in 1964.	While not finding that Cuba had ceased to be a threat to the peace and security of the continent, Freedom of Action was approved to restore normal relations with Cuba and amendments to the Rio Treaty were proposed which when ratified would permit future removal of sanctions by majority rather than two thirds vote.
980	Guerrillas seize the Dominican Republic Embassy in Bogota and take hostage upwards of seventeen diplomats.	OAS Human Rights Commission sent to the area, the Commissio agrees to place observers at trials of political prisoners and the guerrillas abandon the Embassy.

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THE WHITE HOUSE
WASHINGTON

1/14/85

Mr. Roberts:

Per Bob Kimmitt's request, please find the most recent Justice memo re: ICJ attached.

U.S. Department of Justice

Office of the Deputy Attorney General

~~CONFIDENTIAL~~

The Deputy Attorney General

Washington, D.C. 20530

MEMORANDUM TO HONORABLE ROBERT C. McFARLANE
ASSISTANT TO THE PRESIDENT
FOR NATIONAL SECURITY AFFAIRS

On December 26, 1984 Secretary of State Shultz transmitted to the President an options memorandum concerning the adoption of a position on behalf of the United States regarding Nicaragua's pending case against the United States in the International Court of Justice.

By memorandum of December 27, 1984, your office asked for the comments of this Department on the Department of State's options memorandum and the recommendation it contained. We subsequently advised John M. Poindexter of your office that we believed additional staffing was required in order to provide the President with sufficient background upon which to make a decision. We raised three specific areas in which we believed legal analysis was required.

Pursuant to our offer at that time, attached is a memorandum prepared by the Office of Legal Counsel discussing the legal issues in two of the areas. As we advised you, this Department is without the necessary information to provide the legal analysis of issues raised in the third area, and the Department of State will therefore need to provide that legal analysis.

If this Department can be of any further assistance in this matter, please let us know.

Carol E. Dinkins

Carol E. Dinkins
Deputy Attorney General

Attachment

cc: George P. Shultz
Secretary of State

~~CONFIDENTIAL~~

Fred F. Fielding
Counsel to the President

Confidential MATERIAL ATTACHED

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Office of the
Assistant Attorney General

Washington, D.C. 20530

JAN 10 1985

MEMORANDUM FOR ROBERT C. McFARLANE
ASSISTANT TO THE PRESIDENT
FOR NATIONAL SECURITY AFFAIRS

Re: Authority of the President to Decide that the United States Will Not Participate Further in the Nicaraguan ICJ Case and the Legal Ramifications of Such a Decision

In order to assist the President in his consideration of all available options to respond to the recent decision of the International Court of Justice ("ICJ") that it has jurisdiction over the Application filed by the Government of Nicaragua against the United States, you have asked for our views on certain aspects of one of those possible options. Specifically, you have asked whether the President has the legal authority to determine that the United States will refrain from further participation in the litigation and what the potential legal ramifications of such a decision would be. 1/ In our opinion, such a decision would be within the scope of the President's constitutional and statutory authority to conduct United States foreign policy and to supervise litigation to which the United States is a party. (C)

With regard to the potential legal ramifications of such a decision, we think it likely that Nicaragua would nevertheless

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1/ We understand that the Department of State is addressing these questions as well, but from an international rather than a domestic law perspective. We further understand that the State Department is preparing an analysis of the litigation aspects and strategies of this case. The Department of Justice does not have the necessary information to analyze such matters in this case. (U)

~~CONFIDENTIAL~~

Classified By: E.O. 12356
Declassify On: January 10, 2004

~~CONFIDENTIAL~~

appear and litigate the case on the merits. 2/ After Nicaragua made its factual and legal presentation, the Court could then determine, under Art. 53 of the Statute of the ICJ, whether the Application was "well founded in fact and law," and, if the Court so found, award a judgment for monetary or injunctive relief, or both, against the United States. If the United States failed to comply with that judgment immediately, 3/ three categories of potential legal ramifications might occur: first, Nicaragua might attempt to enforce the ICJ's judgment against the United States through international organizations or through self-help; second, Nicaragua might attempt to enforce the ICJ's judgment directly against the United States in either a United States or a foreign court; and third, third parties (individual aliens, United States citizens, or Members of Congress) might seek domestic remedies against the President and the executive officials responsible for the nonsatisfaction of the judgment. (C)

Part I of this memorandum examines the President's authority to select the options that the United States not participate further in the pending ICJ litigation and that the United States not immediately comply with any adverse ICJ judgment that might be entered against it. The remainder of the memorandum examines, within the context of the three categories described above, the potential legal ramifications of such a presidential decision. (C)

I

PRESIDENTIAL AUTHORITY REGARDING ICJ LITIGATION

Contentious litigation before the ICJ presents a situation in which the President's broad powers derived from two constitutional sources converge. Consequently, the range of actions

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2/ You may recall that United States continued its action against a nonappearing respondent, Iran, in the Hostages case, Case Concerning United States Diplomatic and Consular Staff in Tehran, [1980] I.C.J. Rep. 3. In that case, Iran made no formal appearance before the Court at any stage of the proceedings, although it sent the Court several written communications during those proceedings. (U)

3/ We do not believe there is any legal obstacle to a decision by the President immediately to satisfy an ICJ monetary judgment against the United States. See Part II.B.2.a., infra. (C)

which the President could take in the exercise of those discretionary powers is extremely expansive and would, in our view, include reasonable determinations: (1) not to participate further in the litigation of the ICJ case on the ground, for example, that such participation might require disclosure of confidential information potentially damaging to national security interests, (2) not to direct the immediate compliance with an ICJ judgment ordering monetary or injunctive relief against the United States. (C)

With regard to the conduct of the litigation itself, the President has his powers under the "take Care" Clause, U.S. Const. Art. II, § 3, to enforce the laws and defend the interests of the United States through litigation. See, e.g., Buckley v. Valeo, 424 U.S. 1, 138 (1976) (per curiam) ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.' Art. II, § 3."); Confiscation Cases, 74 U.S. (7 Wall.) 454, 458-59 (1868) (all the litigation involving interests of the United States is subject to the discretion and under the control of the President's delegate, the Attorney General). In specific situations, Congress has expressly acknowledged the Government's right, and the courts have upheld the practice, to refuse to disclose certain information in the course of litigation, even though the consequence would be that the Government will be unable to pursue a prosecution or will have damaging facts found against it. E.g., Fed. R. Civ. P. 37(b)(2) (sanctions for noncompliance with a discovery order), 4/ see In re the Attorney General of the United States, 596 F.2d 58, 65-66 (2d Cir.), cert. denied, 444 U.S. 903 (1979); and the Classified Information Procedures Act, 18 U.S.C. app. § 6, see United States v. Collins, 720 F.2d 1195, 1197 (11th Cir. 1983). (U)

Moreover, in this case, the President's discretion to refuse to participate further in the litigation in order, for

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4/ Fed. R. Civ. P. 37(b)(2) provides, in pertinent part, that discovery sanctions may include: (1) an order that designated facts shall be taken to be established; (2) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; and (3) an order striking out pleadings or parts thereof or rendering a judgment by default against the noncomplying party. (U)

example, to avoid disclosure of sensitive intelligence information, would be reinforced by his plenary and exclusive power to conduct foreign policy, 5/ U.S. Const. Art. II, § 2 (President's Commander-in-chief and treatymaking powers); id. § 3 (President's power to receive ambassadors and ministers). (U)

Historically, the Supreme Court has spoken of the President's authority over foreign affairs in the most expansive terms. See, e.g., C & S Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 109-10 (1948) ("The President also possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs."); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) ("the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of foreign relations"). See also Dames & Moore v. Regan, 453 U.S. 654 (1981); Haig v. Agee, 453 U.S. 280 (1981); United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937) (all upholding presidential actions in the foreign affairs realm). See generally Berger, The Presidential Monopoly of Foreign Relations, 71 Mich. L. Rev. 1 (1972). As Commander-in-chief, the President also has broad discretion over actions to protect intelligence secrets in the interest of national security. See, e.g., C & S Air Lines v. Waterman S.S. Corp., 333 U.S. at 111; United States v. Curtiss-Wright Export Corp., 299 U.S. at 320 ("Secrecy in respect of information gathered . . . may be highly necessary, and the premature disclosure of it productive of harmful results."). See also New York Times Co. v. United States, 403 U.S. 713, 729-30 (1971) (Stewart, J., joined by White, J., concurring) ("it is the constitutional duty of the Executive -- as a matter of sovereign prerogative and not as a matter of law as the courts know law -- . . . to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense"). Certainly, to the extent that further United States participation in any particular litigation might require the disclosure of sensitive, confidential information, we believe that the President would thus be within his constitutional powers to decide not to participate further in that litigation. (C)

5/ There may be other foreign policy or national security bases upon which the President could make this decision in this case. Because our knowledge of the precise facts surrounding this case is limited, we are not in a position to determine whether there exist the facts necessary to provide such other bases. (C)

Addressing this issue in a domestic context, the Supreme Court declared in C & S Air Lines v. Waterman S.S. Corp., 333 U.S. at 111, that:

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.

Given the Supreme Court's holding that the President may act within his constitutional authority when he withholds secret or sensitive information from domestic courts, we believe that conceivably there are circumstances in which the President would act within his constitutional authority by refusing to submit such confidential information to an international tribunal, such as the ICJ. We would leave to the President the determination of that specific issue in this case. (C)

We also believe that the President has domestic authority to decide that the United States should not immediately comply with an ICJ judgment ordering monetary and injunctive relief against the United States. Unlike a decision not to participate further in the litigation, however, such a decision might be characterized by some as a violation of United States treaty obligations. 6/ It might be alleged, for example, that the United States' failure to comply with an ICJ judgment constituted a violation of three different international obligations of the United States: (1) Art. 94 of the UN Charter, which obliges the United States to comply with ICJ judgments in cases in which it is a party; (2) the 1946 Declaration accepting the compulsory jurisdiction of the ICJ, whereby the United States agreed to "recogniz[e] as compulsory ipso facto and without special agreement, in relation to any State accepting the same obligation, the jurisdiction" of the ICJ over certain legal disputes; and (3) Art. XXIV(2) of the 1956 Treaty of Friendship, Commerce, and Navigation between the United States and Nicaragua ("FCN Treaty"), whereby the United States agreed that "[a]ny dispute [with Nicaragua] as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice . . . ." (C)

6/ In our view, Nicaragua could not reasonably claim that any of these international obligations would be violated solely by a decision of the United States not to participate further in the actual litigation of this case. (C)

Whatever the force of these treaty provisions may be under international law, they do not circumscribe the President's authority under domestic law, because "the President, at least by formal official acts, can take measures within his constitutional authority that are contrary to a treaty or a principle of customary international law." Henkin, International Law as Law in the United States, 82 Mich. L. Rev. 1555, 1569 (1984). The President "can denounce a treaty when he deems it in the national interest to do so, even when such denunciation is a breach of international law. If he does so, the United States is responsible for the breach under international law, but the treaty is dead for the United States and is no longer law in the United States." Id. at 1568. (C)

Moreover, with respect to the monetary aspects of the judgment, we believe that the President could decline to take immediate steps to order payment without denouncing the underlying treaty obligation, on the ground that he was continuing to pursue other remedies, such as further negotiations with Nicaragua. 7/ In Frelinghuysen v. Key, 110 U.S. 63 (1884), the President relied on this ground to withhold payment from third parties under a treaty between the United States and Mexico that provided for the settlement of claims by citizens of both countries. In that case, the private claims were referred to a joint arbitral panel (a claims commission) whose decisions were to be "absolutely final and conclusive upon each claim decided." 110 U.S. at 66, quoting Art. II of the treaty. The party States promised "to give full effect to such decision without any objection, evasion or delay whatsoever." 110 U.S. at 66. Money received by the Secretary of State from the Mexican government was "required" to be paid to claimants.

7/ Such declination might take the form of a failure to certify the matter under the Judgment Fund, 31 U.S.C. § 1304, or some other statute specifically passed by Congress to pay the judgment. We assume for the purposes of this memorandum that any statute passed specifically to pay this judgment would have the same kind of discretionary language found not only in the Judgment Fund statute, but also in prior statutes enacted to pay similar judgments of international tribunals. With regard to foreign judgments, the judgment fund is available for payment only upon certification by the Attorney General "that it is in the interest of the United States to pay the same." See 28 U.S.C. § 2414. A prior statute concerning the judgments of international tribunals is Pub. L. No. 70-167, § 2(a), 45 Stat. 254 (1928), as interpreted in Z. & F. Assets Realization Corp. v. Hull, 311 U.S. 470, 486-87 (1941). See Part II.C.3., infra. (C)

Id. at 67, quoting 20 Stat. 144 (1878). In 1875, the Claims Commission awarded plaintiffs approximately $500,000 for a confiscated mine. Because of charges that the claim was fraudulent, however, the President undertook an investigation of the matter and decided to negotiate with Mexico about a rehearing in the case. 110 U.S. at 67-68. (C)

During these negotiations, the claimant sought to obtain a writ of mandamus ordering the Secretary of State to pay him the money which the Claims Commission had awarded, arguing that, given the mandatory language of both the treaty and the statute, the Secretary's duty was purely ministerial. The Supreme Court rejected this argument, stating:

> Under these circumstances it is, in our opinion, clearly within the discretion of the President to withhold all further payments to the relators until the diplomatic negotiations between the two governments on the subject are finally concluded. That discretion of the Executive Department of the government cannot be controlled by the judiciary.

Id. at 75 (emphasis added). (U)

Even after the new treaty produced by the negotiations was rejected by the Senate, the Court again upheld the President's continuing discretion over payment of the claim. See Boynton v. Blaine, 139 U.S. 306, 323-26 (1891); La Abra Silver Mining Co. v. United States, 175 U.S. 423, 438-41 (1899). The Court held that even though the negotiations had failed, the political branches of the government had not "parted with its power over the matter." Boynton v. Blaine, 139 U.S. at 326. The President or Congress may continue to explore alternative routes of resolution "and the intervention of the judicial department cannot . . . be invoked." Id. (U)

The President took almost a decade before deciding to ask Congress to pass a statute resolving the problem. See La Abra Silver Mining Co. v. United States, 175 U.S. at 440-41. Congress eventually passed a law referring the matter to the Court of Claims, which held that the original claim had been based on fraud and should, therefore, not be paid, notwithstanding that it had been awarded under a treaty. The Supreme Court affirmed, thereby barring payment of any money to the claimant. Id. at 461. (U)

The courts have also rejected the further argument that, unless the Executive Branch is ordered to act, the rights of third parties will be effectively obliterated by the slow

pace of negotiations or presidential decisionmaking:

> While international affairs may move at a pace of bewildering rapidity, often negotiation is conducted with persistence and patience at snail's pace. Negotiation may be deferred while relationships are left to simmer without stirring, in order to strengthen any possible thread of international accord or reconciliation.

Logan v. Secretary of State, 553 F.2d 107, 109 n.4 (D.C. Cir. 1976) (dismissing as political question a motion for declaratory judgment as to claimants' entitlement to gold held by international tribunal to which United States was party), quoting Nielsen v. Secretary of Treasury, 424 F.2d 833, 845 (D.C. Cir. 1970). (U)

Thus, we believe that the President would act within the scope of his domestic legal authority if he were to decide that the United States would no longer participate in the litigation of the Nicaraguan ICJ case or immediately comply with any adverse ICJ judgment in that case. Because such a presidential decision would not eliminate the existence of a judgment by the ICJ against United States, however, Nicaragua could still attempt to enforce the ICJ's judgment through international organizations, self-help, or in the courts of the United States or foreign countries. Moreover, third parties, such as aliens, United States citizens, or Members of Congress, might still seek domestic remedies against the President and executive officials within the United States based upon allegations that these actions constitute international law violations. The remainder of this memorandum examines each of these possibilities and the likelihood of its success. 8/ (C)

II

POTENTIAL LEGAL RAMIFICATIONS

A. NICARAGUAN ATTEMPTS TO ENFORCE THE JUDGMENT THROUGH INTERNATIONAL ORGANIZATIONS OR SELF-HELP

Under Art. 59 of the Statute of the ICJ, which the United States has ratified, an ICJ judgment in a contentious case has

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8/ We hasten to emphasize that the potential uses of a default judgment, as set forth in this memorandum, do not differ from the potential uses of an ICJ judgment that followed litigation on the merits of a case. (C)

"binding force" between the parties. Art. 94(1) of the UN Charter further provides that "[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." In accordance with these provisions, UN members have voluntarily complied with many of the ICJ judgments in the forty-two contentious cases which the ICJ has considered. There have been notable exceptions, however, the most prominent being Albania's refusal to pay a $ 2.5 million judgment in the Corfu Channel Case (United Kingdom v. Albania), [1949] I.C.J. Rep. 244, 250, and Iran's noncompliance in the recent Hostages Case. See Case Concerning United States Diplomatic and Consular Staff in Tehran, [1980] I.C.J. Rep. 3. 9/ (U)

In addition, the ICJ's 1982-83 Yearbook at 120, n. 2, lists six other cases in which the Court has issued either judgments or orders in the respondent State's absence with which the respondent refused to comply. See, e.g., Nuclear Tests Case, [1973] I.C.J. Rep. 99, 135 (Australia & New Zealand v. France) (France continued to conduct nuclear tests in the Pacific in defiance of ICJ provisional measures and refused to participate after its preliminary jurisdictional objections had been denied); Fisheries Jurisdiction Case, [1973] I.C.J. Rep. 3, 49 (United Kingdom & Federal Republic of Germany v. Iceland) (Iceland refused to appear or obey ICJ interim orders in Northern Atlantic cod war); South-West Africa Case, [1971] I.C.J. Rep. 16 (Advisory Opinion) (South Africa remained in Namibia after the ICJ had declared its continuing presence there illegal). (U)

The United States has complied with the one final ICJ judgment in a contentious case in which it was the respondent. 10/ If the United States were to determine in this case not to

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9/ A judgment by the ICJ's predecessor, the Permanent Court of International Justice ("PCIJ"), was not carried out in The Wimbledon Case, P.C.I.J., Ser. A, No. 1 (1923), because the Reparations Court, to which respondent France belonged, refused to order payment of the judgment. The appendix attached to this memorandum briefly describes those contentious ICJ cases in which the respondent state has refused either to participate or to comply with the final judgment. (U)

10/ Prior to the Nicaraguan case, the United States participated in 12 contentious cases before the ICJ: eight as an

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comply with a judgment immediately, the international enforcement mechanisms available to Nicaragua would include the United.

10/ (footnote cont'd from prior page)

applicant (i.e., plaintiff); three as a respondent (i.e., defendant); and one submitted to a special chamber under a treaty. In the eight cases in which the United States was an applicant, only the Hostages Case went to judgment. That judgment granted the United States most of the injunctive relief which it sought but deferred the determination of a monetary award until another phase of the proceeding. The respondent, Iran, ignored the judgment granting injunctive relief and subsequently avoided it through the negotiation of an intergovernmental agreement that secured the release of the American hostages. (U)

The United States was a respondent in Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States), [1952] I.C.J. Rep. 176; Case of Monetary Gold Removed from Rome in 1943 (Italy v. United States, United Kingdom, & France), [1954] I.C.J. Rep. 19; and the Interhandel Case (Switzerland v. United States), [1959] I.C.J. Rep. 6. The latter two cases were dismissed before final judgment for want of an indispensable party and for nonexhaustion of local remedies, respectively. In the Morocco case, the United States chose to comply with a detailed ICJ judgment defining the rights of United States nationals in Morocco, which related principally to those nationals' obligations to pay certain Moroccan taxes. (U)

Recently, the ICJ rendered a judgment in the Gulf of Maine case, Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States) (Special Chamber) (decided Oct. 12, 1984), the one case which the United States submitted to a special chamber pursuant to a treaty. (U)

The United States has, however, occasionally refused to comply with awards issued by international arbitral tribunals in boundary disputes, particularly when we have believed that the arbitral tribunal acted in excess of its jurisdiction, rendering its decision null, or that the judgment was impossible to perform. See, e.g., the 1831 Northeastern Frontier Dispute; the 1911 Chamizal Boundary Dispute with Mexico, discussed in 49 Dep't State Bull. 199 (1963). On other occasions, however, the United States has chosen promptly to pay an international arbitral award "even in the face of a decision proclaiming certain theories of law which it cannot accept." See Norwegian Shipowners' Claims, 1 U.N.R.I.A.A. 309, 344 (1922). (U)

Nations Security Council, the General Assembly, various other international organizations, and self-help. (C)

1. Security Council: Art. 94(2) of the UN Charter states that "if any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment." (Emphasis added.) Precisely how this provision would be applied in practice is unclear, however, because only one nation has ever invoked Art. 94(2) in an effort to enforce an ICJ ruling, and, in that case, was unsuccessful. 11/ (C)

By using the word "may," however, Art. 94(2) expressly makes Security Council enforcement of any particular ICJ judgment discretionary. Moreover, the Security Council itself has apparently never decided what limits, if any, may be placed upon the "measures to be taken to give effect" to a judgment. Art. 39 of the UN Charter makes a "threat to the peace, breach of the peace, or act of aggression," the prerequisite to the Security Council's exercise of its enforcement authority under Chapter VII of the Charter. For that reason, upon accepting the ICJ's compulsory jurisdiction in 1946, the United States took the position that, unless the respondent State's noncompliance with that judgment constitutes an imminent threat to peace, breach of the peace, or an act of aggression, the Security Council may not enforce an ICJ judgment by either of the measures provided in Chapter VII: armed force, as permitted by Art. 42 of the Charter, or economic measures "not involving the use of armed force," as provided by Art. 41 of the Charter (e.g., "complete

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11/ In the Anglo-Iranian Oil Case (United Kingdom v. Iran) (Interim Protection), [1951] I.C.J. Rep. 89, the Court indicated provisional measures against Iran in the early stages of a dispute. When Iran refused to obey those measures, the United Kingdom sought to enforce the ICJ's order in the Security Council, citing Art. 94(2). The Iranian representative opposed enforcement of the order on the ground that provisional measures of the Court cannot be regarded as a "judgment rendered by the Court" for Art. 94(2) purposes. Without definitively accepting the Iranian response, the Council chose to postpone further discussion of the matter until the ICJ had affirmatively determined whether it had jurisdiction to decide the merits. When the Court subsequently concluded that it lacked jurisdiction, the enforcement issue lapsed. See also note 13, infra. (U)

or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations"). See Compulsory Jurisdiction, International Court of Justice: Hearing on S. Res. 196 before a Subcomm. of the Senate Comm. on Foreign Relations, 79th Cong., 2d Sess. 142 (1946) (statement of Charles Fahy, Legal Adviser to the State Department). (U)

Thus, although "[t]he matter has not been clarified by [either] doctrine or practice," Riesman, The Enforcement of International Judgments, 63 Am. J. Int'l L. 1, 17 (1969), the United States could seek to oppose Security Council enforcement of an ICJ judgment on the ground that its noncompliance with that judgment does not constitute the kind of "imminent threat to the peace, breach of the peace, or act of aggression" upon which any exercise of the Security Council's enforcement authority is contingent. As a practical matter, the likelihood that the Security Council would actually enforce any adverse ICJ judgment against the United States seems virtually nil in any event, because, as a permanent Security Council member, the United States could block any proposed Security Council enforcement action simply by exercising its veto. 12/ Because the issue of the powers of a Permanent Member of the Security Council to veto an enforcement action in an ICJ case in which it has been a party has never been joined, 13/ however, such a veto could raise significant international debate over the issue. (C)

12/ Art. 27(2) of the UN Charter requires the concurring votes of all Permanent Members in support of any decision on a matter that is not "procedural." Although the question has been debated, "it appears to be generally agreed by writers that action by the Council under Article 94 is not procedural and hence is subject to the veto." Schachter, The Enforcement of International Judicial and Arbitral Decisions, 54 Am. J. Int'l L. 1, 23 (1960). If the Security Council were to call upon Nicaragua and the United States to settle their dispute by pacific means, rather than by undertaking an enforcement action under Chapter VII of the UN Charter, the United States could potentially be barred from participating in the Council's vote under Art. 27(3) of the Charter, which provides that "in decisions under Chapter VI [governing "Pacific Settlement of Disputes"] . . ., a party to a dispute shall abstain from voting." (C)

13/ This statistic may be attributable to the failure of three of the five Permanent Members of Security Council (the Peoples'

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2. General Assembly: Although it could be argued that the Security Council has exclusive authority to enforce an ICJ judgment, it has been suggested that "[s]hould one of the veto Powers block action under Art. 94(2) in the [Security] Council, it is not unlikely that the [General] Assembly will arrogate an enforcement role." Riesman, supra, 63 Am. J. Int'l L. at 16, n.49. Under the UN Charter and General Assembly Resolution 377 (V) (the so-called "Uniting for Peace" Resolution), the General Assembly has "secondary responsibility" within the United Nations for keeping the peace. Art. 10 of the UN Charter further authorizes the General Assembly to "discuss any questions or any matters . . . relating to the powers and functions of any [UN] organs" and to make recommendations to the Members or the Security Council or both on such matters. Thus, the General Assembly arguably has the competence to discuss the United States' failure to satisfy a judgment of the Court and to make "recommendations" not only to the United States, but also to all other Member States. (C)

Such General Assembly recommendations might include resolutions expressly or impliedly condemning the United States for its perceived noncompliance with obligations under Art. 94(1), or calling upon other Member States to interrupt economic or diplomatic relations with the United States to help bring about compliance. Although such recommendations would have no legally binding force on the United States or on the nations called upon, see Suy, Innovations in International Law-Making Processes, in The International Law and Policy of Human Welfare 187, 190 (MacDonald, et al., eds. 1978), they might be read by third-party states as some evidence of a customary international

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13/ (footnote cont'd from prior page)

Republic of China, France, the U.S.S.R., the United Kingdom, and the United States) to accept the compulsory jurisdiction of the ICJ. France, which had previously recognized that jurisdiction, terminated its acceptance in 1974 during the Nuclear Tests Cases, [1974] I.C.J. Rep. 253, 457, cases which had been brought against it by Australia and New Zealand, and in which France refused to participate. Currently, only the United States and the United Kingdom accept the compulsory jurisdiction of the ICJ. Moreover, the United Kingdom's current declaration provides for the immediate effectiveness of any modification or termination of its declaration accepting the Court's compulsory jurisdiction. (U)

law obligation. See Bleicher, The Legal Significance of Recitation of General Assembly Resolutions, 63 Am. J. Int'l L. 444 (1969). Such a reading by other countries would assist Nicaragua in the enforcement of the ICJ's judgment in fora other than the General Assembly. (C)

Alternatively, in the absence of Security Council action, Nicaragua or the General Assembly might seek to enforce a monetary judgment directly through one of the UN's functional agencies. For example, the United States has a "current account" in gold and national currency in both the International Bank for Reconstruction and Development and the International Monetary Fund. As a judgment creditor, Nicaragua might ask those agencies to attach funds belonging to the United States or to transfer funds in the amount of the judgment to its own account in those bodies. Because these agencies use national funds as working capital, however, and generally resist politicization of their activities, they would likely refuse a request absent an express Security Council directive. To avoid an appearance of "politicization," the General Assembly might ask those agencies to initiate an interpleader action by paying the contested funds from the United States' account directly to the ICJ. Nicaragua could then assert a claim against those funds before the ICJ based on the default judgment in its favor, which the United States would have an additional opportunity to challenge. See Riesman, supra, 63 Am. J. Int'l L. at 17. (C)

Yet another possibility is that the General Assembly might seek to deduct the amount of a monetary judgment directly from the United States' financial contributions to the United Nations. If such a deduction were effected and placed the United States significantly in arrears, the action might conceivably bring into play Art. 19 of the UN Charter. That provision denies a vote in the General Assembly to any Member "which is in arrears in the payment of its financial contributions . . . if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years." Although the United States took the position during the Certain Expenses Case (Advisory Opinion), [1962] I.C.J. 151, that application of this provision is automatic, the Soviet Union as well as other nations have been sufficiently in arrears to bring Art. 19 into play, but, to our knowledge, none of them has actually been deprived of its General Assembly vote. Thus, the likelihood of successful General Assembly enforcement of an ICJ judgment does not seem substantial, although that forum would be available to Nicaragua for further attempts to embarrass the United States politically. (C)

3. Other International Organizations: As a judgment creditor, Nicaragua might also initiate diplomatic activity against

the United States within the Organization of American States (OAS) to seek voluntary compliance with an ICJ judgment, as occurred, for example, following the international arbitral dispute settling the 1960 Honduras-Nicaragua Boundary Dispute. 14/ (C)

Additionally or alternatively, Nicaragua might seek to secure compliance by triggering provisions in the constitutions of a number of specialized functional international agencies to which the United States belongs. Art. 87 of the Convention of the International Civil Aviation Organization (ICAO), for example, provides that each Contracting State "undertakes not to allow the airline of a contracting state to operate through the airspace above its territory" if the Council has decided that the State is not conforming to a final decision of the Court, without regard to the subject matter of the ICJ's decision. Art. 88 further provides that the Assembly of that body shall suspend the voting power of any Member not conforming to a decision of the ICJ. Because we know of no case in which these provisions have been invoked, and because we are not in a position to evaluate fully Nicaragua's ability successfully to mobilize political support in these other international organizations, the likelihood that any of these sanctions would actually be imposed would have to be evaluated on an organization-by-organization basis. (C)

4. Self-Help: Even in the absence of organizational action, Nicaragua would still have recourse to traditional diplomatic measures to seek compliance by the United States with an adverse judgment -- e.g., negotiation (either direct or through third parties), diplomatic protests, or a rupture in diplomatic relations -- as well as any economic sanctions it could muster. The latter might include revocation of tariff concessions, shutting of Nicaraguan ports to United States flagships, or the freezing or expropriation of private or public American assets or currency held in Nicaragua. The ICJ has not passed on the legality of such self-help measures, but as long as the actions taken were proportional to the alleged

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14/ Nicaragua would probably cite as the basis for such efforts Article 3 of the OAS Charter, which sets forth as the guiding principles of the Organization that "[i]nternational law is the standard of conduct of States in their reciprocal relations;" that states should seek to further "faithful fulfillment of obligations derived from treaties and other sources of international law;" and that "[c]ontroversies of an international character arising between two or more American States shall be settled by peaceful procedures." (C)

violations of international law by the United States as adjudicated by the ICJ, they might be viewed, under international law, as permissible "reprisals" for the acts of the United States. At a minimum, the concept of self-help would seem to provide Nicaragua with the authority to enforce the judgment by seizing United States assets to satisfy a monetary judgment. As one commentator has noted, "if the successful state is free under international law unilaterally to apply coercive measures against the recalcitrant state . . . , it should be free to seize the assets of the debtor state within its control for the purpose of satisfying an award of damages." Schachter, supra, 54 Am. J. Int'l L. at 7. (C)

Nicaragua might also adopt a coordinated enforcement strategy along with other countries, without seeking the aid of a formal organization. If, for example, Nicaragua sought to levy on assets owned by the United States, not only within its own territory, but also within the territory of third countries who were UN members, those third countries might consider themselves to have an obligation under customary international law to aid such an effort by their own executive action, particularly if they also considered themselves bound by the compulsory jurisdiction of the ICJ. After World War II, for example, the United Kingdom sought the cooperation of other nations in its effort to obtain satisfaction of its unpaid judgment against Albania in the Corfu Channel Case (United Kingdom v. Albania), [1944] I.C.J. Rep. 244, 250. In that case, certain monetary gold taken from Rome by the Germans in 1943 became part of an Allied gold pool that was contested between Albania and Italy. The United States, the United Kingdom, and France, which jointly had control of the gold, entered a tripartite agreement whereby they agreed to submit to an arbitrator the question whether Italy or Albania had the right to the gold, further agreeing that if the arbitrator ultimately upheld Albania's claim of entitlement, the three governments would transfer Albania's share to the United Kingdom in partial settlement of the Corfu Channel judgment. Although the share was never transferred for other reasons, it has been suggested that the "case will probably be considered a precedent for any future efforts to satisfy a judgment debt through the seizure of assets under the control of a third person." Schachter, supra, 54 Am. J. L. Rep. at 10. Moreover, at least one commentator has argued that "the right of the third state to attach assets to satisfy a judgment that is binding in international law prevails over the sovereign immunity that the debtor state may possess in respect of the assets in question." Id. at 12. (C)

On the other hand, other commentators have argued that such third-party attachments would be unlawful absent a further

decision by the ICJ or the Security Council expressly authorizing the transfer, see, e.g., Oliver, The Monetary Gold Decision in Perspective, 49 Am. J. Int'l L. 216 (1955). If an express ICJ authorization were a prerequisite to third-party attachments, Nicaragua could simply apply to the Court for such authorization; there appears to be no bar to such application. Moreover, if the United States attempted to oppose such application, and the Court viewed the opposition as an attempt by the United States to secure a revision of the earlier judgment, the ICJ might prevent the United States from pleading under Art. 99(5) of its 1978 rules, which authorizes the Court to make proceedings to revise judgments "conditional on [the parties'] previous compliance with the judgment." (C)

B. NICARAGUAN ATTEMPTS TO ENFORCE THE JUDGMENT THROUGH MUNICIPAL COURTS

1. Foreign Courts: Some commentators have asserted categorically that national courts are obliged, as a matter of customary international law, directly to enforce an unexecuted ICJ monetary judgment without regard to whether the country in which the foreign court sits itself recognizes the ICJ's jurisdiction. See, e.g., S. Rosenne, The International Court of Justice 87-88 (1957). Although this conclusion has not been directly tested with respect to a an ICJ judgment, foreign court decisions, when discussing a judgment of the PCIJ (the ICJ's predecessor body), suggested that the domestic law of the particular state in which enforcement was sought would limit and modify that obligation. (U)

In Socobelge v. Etat Hellenique, April 30, 1951, 18 I.L.R. 3 (1957), a Belgian company had won an arbitral award against the Greek Government. The PCIJ upheld the award, and the company sought to enforce the judgment by garnishing money owed to Greece in Belgium. The Belgian Civil Tribunal refused to enforce the PCIJ judgment directly in favor of the company, instead requiring the company to seek a new executory judgment (or exaquetur) in Belgium, as was required by Belgian law. Although the Socobelge ruling reflects the law of only one country, it suggests that ICJ judgments have no greater right to enforcement in domestic courts than judgments issued by any foreign court, and are therefore subject to those grounds for nullification or nonenforcement provided by local law. 15/ (U)

15/ This conclusion depends on the assumption that ICJ judgments possess no greater status for enforcement purposes than PCIJ

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Thus, if Nicaragua were to seek to enforce an ICJ monetary judgment against the United States in Belgium, for example, the Belgian courts would retain the right to review the ICJ's decision and to refuse to enforce it for those reasons for which Belgian law otherwise permits nonenforcement of foreign judgments. Although the United States could plead foreign sovereign immunity in such a case, a significant subsidiary holding in Socobelge was that a foreign state was not entitled to sovereign immunity from execution of a PCIJ judgment in Belgian courts with regard to its economic activities. Because most nations of the world, including the United States, similarly adhere to the doctrine of "restrictive" foreign sovereign immunity, it seems likely that Nicaragua would be able to meet the legal prerequisites imposed by some foreign nations for enforcing an ICJ monetary judgment in the courts of that country, particularly the courts of nations generally hostile to the United States (although it seems unlikely that the United States would intentionally locate significant amounts of nonimmune property in a hostile forum). Nevertheless, as we suggest below, even if an order of a foreign court were never executed in that country, Nicaragua could still present the foreign court's enforcement order for payment out of the Judgment Fund of the United States Treasury. See Part II.B.2.a, infra. (C)

2. United States Courts:

a. District Courts: United States district courts generally enforce foreign court judgments in accordance with the Supreme Court's holding in Hilton v. Guyot, 159 U.S. 113, 202 (1895), which permits enforcement of a foreign judgment when there has been an opportunity for a full, fair, and regular trial before a court of competent jurisdiction, after voluntary appearance of the defendant, under a system of jurisprudence likely to secure impartial administration of justice for foreigners, and when there is no evidence of prejudice in the court, the body of law applied, or fraud in the procurement of the judgment. If the United States did not participate in the trial on the merits of this case, the United States might challenge enforcement of the ICJ's monetary judgment on the ground that the

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15/ (footnote cont'd from prior page)

judgments, an assumption which might be challenged on the grounds that more nations have accepted the compulsory jurisdiction of the ICJ than previously accepted the compulsory jurisdiction of the PCIJ and that all UN members are not only "ipso facto parties to the Statute" of the ICJ, UN Charter Art. 93(1), but have also endorsed the principles regarding enforcement of ICJ judgments stated in Art. 94 of the Charter. (C)

judgment lacks these legal prerequisites to its enforcement. The United States' voluntary participation in the jurisdictional phase of the case, and its failure to raise any of these objections before the ICJ itself, however, would seriously detract from the force of such a challenge to enforcement. (C)

The United States could make the further argument that an ICJ monetary judgment does not constitute the judgment of a "foreign court" for purposes of the Hilton rule. The United States could contend that ICJ awards are not self-executing, and are domestically unenforceable absent a statute specifically authorizing their enforcement. See, e.g., 22 U.S.C. § 1650, 1650a (specifically declaring that awards of arbitral tribunals under the World Bank Convention on the Settlement of International Investment Disputes create rights and pecuniary obligations "arising under a treaty of the United States" that "shall be enforced and given the same full faith and credit [in the federal district courts] as if the award were a final judgment of" a state court in the United States). See also Part II.C.2., infra. Additionally, the United States could argue that it has not waived its sovereign immunity against the execution of an ICJ monetary judgment in its own domestic courts. 16/ Although Nicaragua could argue in response that the 1946 Declaration by which the United States accepted the ICJ's compulsory jurisdiction and the United States' ratification of Art. 59 of the ICJ Statute and Art. 94 of the UN Charter jointly or severally constituted such a waiver, the United States could counter that those actions constituted submissions only to international adjudication, and not waivers of sovereign immunity with regard to attachment or execution of United States government-owned property by domestic courts. 17/ Finally, the United States

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16/ The defense of sovereign immunity might not be available, however, in an action to enforce the injunctive aspects of the ICJ judgment. (C)

17/ In support of this argument, the United States could point out that when it ratified these international agreements, it still adhered to an absolute theory of sovereign immunity in domestic courts, which it did not renounce until 1952, when the State Department issued the so-called "Tate Letter" formally adopting the restrictive theory of sovereign immunity. Nicaragua's likely counterargument would be that the United States has continued to accept the Court's compulsory jurisdiction long after it ceased to adhere to the absolute theory of sovereign immunity. (C)

could put forward the political question doctrine, as well as the President's foreign affairs authority, as reasons why a federal court should not examine an Executive Branch refusal to comply with the monetary or injunctive aspects of an ICJ judgment in this case. (C)

Even if such defenses would be successful against enforcement of the ICJ judgment generally, Nicaragua might seek to avoid those defenses in this case by attempting to enforce those commercial aspects of an ICJ judgment based upon the 1956 Nicaragua-United States Treaty of Friendship, Commerce, and Navigation ("FCN Treaty"). Nicaragua might seek to rely either on the arbitration provisions of the treaty itself or on the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 38, done, June 10, 1958, entered into force, September 30, 1970. 18/ That Convention, known as the "New York Convention," has been implemented as federal law by the 1970 Arbitration Act, 9 U.S.C. §§ 201-08 (1976). Such enforcement seems unlikely, however, for three reasons: (1) the United States could still invoke sovereign immunity against enforcement; (2) the Convention itself contains numerous reciprocity prerequisites to its application which arguably are not met in this case; and (3) Art. V of the Convention lists seven substantive grounds for refusal to enforce an award that jointly exclude a large body of prospective claims. Although the likelihood of successful enforcement of an ICJ judgment with respect to the FCN Treaty seems small, we do not think it negligible, particularly in light of recent cases holding that arbitration provisions of the type contained in the FCN Treaty may themselves constitute an implied waiver of sovereign immunity, cf. Ipitrade Int'l v. Federal Republic of Nigeria, 465 F. Supp. 824 (D.D.C. 1978), and recent novel methods that have been applied to enforce international arbitral awards that are not subject to the New York Convention. See generally Note, Enforcing International Commercial Arbitration Agreements and Awards Not Subject to the New York Convention, 23 Va. J. Int'l L. 75 (1982) (describing these methods). (C)

A possible alternative to a federal court action by Nicaragua to enforce a monetary judgment against the United States would be Nicaragua's presentation of its certified ICJ judgment

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18/ Nicaragua could not, however, attempt to invoke the 1966 Hague Convention on the Recognition and Enforcement of Foreign Judgments, which has not yet received a sufficient number of ratifications to come into force, and which the United States has signed, but not yet ratified. (U)

directly to the Attorney General or the General Accounting Office (GAO) for payment from the Judgment Fund under 28 U.S.C. § 2414. That section provides that "[p]ayment of final judgments rendered by a . . . foreign court or tribunal against the United States . . . shall be made on settlements by the GAO after certification by the Attorney General that it is in the interest of the United States to pay the same." (Emphasis added.) This Office has recently concluded that a final judgment of the Iran-United States Claims Tribunal is presumptively an award by a "foreign tribunal" for § 2414 purposes, particularly because Art. IV(3) of the Algiers Accords, 20 Int'l Leg. Mats. 230, 232 (1981), provides that awards of that Tribunal shall be enforceable in the courts of any nation in accordance with its laws, and thus may be easily converted into judgments of a "foreign court." See generally Memorandum from Deputy Assistant Attorney Simms to Acting Deputy Attorney General Jensen, Re: Authority to Approve Settlement in Excess of $750,000 of Claim by Iran, at 3-4 (Feb. 24, 1984). By parity of reasoning, Nicaragua might claim that an ICJ monetary judgment was a judgment of a "foreign tribunal." Alternatively, Nicaragua might attempt to enforce an ICJ monetary judgment in the courts of a foreign country friendly to it, and present the foreign country's enforcement judgment to GAO and the Attorney General under § 2414. If the Attorney General then refused to certify payment of the judgment, or the GAO refused to release the money upon certification, Nicaragua could theoretically bring a mandamus action in federal court against the Attorney General or the Comptroller General seeking a judicial order of the requested action. We believe it unlikely that a federal court would issue such a writ of mandamus in these circumstances, however, because of the extraordinarily high standards necessary to procure such a writ. (C)

b. Claims Court: The Claims Court possesses exclusive jurisdiction to entertain any claim for money in excess of $ 10,000 against the United States which is founded on the Constitution, an Act of Congress, an executive regulation, or an express or implied contract of the United States. See 28 U.S.C. § 1491(a). In the past, foreign sovereigns have been permitted to sue the United States in the Claims Court. See, e.g., Swiss Confederation v. United States, 108 Ct. Cl. 388 (1947), cert. denied, 332 U.S. 815 (1944); Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931). (U)

With regard to an attempt by Nicaragua to sue in the Claims Court, no statute or regulation appears to bind the United States to pay an ICJ judgment. Nor are the claims for which payment might be sought contract claims. Rather, they are claims arising out of international agreements, such as the UN Charter

and the 1946 Declaration of the acceptance of the compulsory jurisdiction of the Court, which would appear to be excluded from Claims Court jurisdiction by the so-called "treaty" exception, 28 U.S.C. § 1502. That exception expressly denies the Claims Court the power to hear any claim against the United States "growing out of or dependent upon any treaty entered into with foreign nations." (C)

Nicaragua might perhaps allege that the ICJ judgment constituted "property" that was "taken" by the United States for a public purpose without just compensation in contravention of the Fifth Amendment. Moreover, Nicaragua might contend that the treaty exception should not bar its claim against the United States Government, relying on United States' own concession in Dames & Moore v. Regan, 453 U.S. 654, 689 (1981), that that exception did not bar private individuals from suing the United States Government in the Claims Court on the ground that the United States took their "property" -- commercial claims they would otherwise have been able to assert against Iran -- by concluding the Algiers Accords. Although Nicaragua might argue that a claim reduced to a final ICJ judgment constitutes "property" more clearly than a claim against Iran which had not yet gone to judgment, the United States would probably prevail on the grounds that an otherwise unenforceable ICJ judgment is not "property" so much as it is a mere expectancy thereof, cf. Deltona Corp. v. United States, 228 Ct. Cl. 476, 491 (1981), and that foreign states simply do not enjoy the protection of the Fifth Amendment's takings clause. (C)

c. State Courts: Although it seems highly unlikely that any state court would entertain an enforcement action brought by Nicaragua against the United States or federal officials, particularly if the defendants pleaded official or sovereign immunity, sought removal to federal court, or moved for forum non conveniens, the possibility cannot be entirely discounted. Because twelve states, including California, New York and Illinois, have enacted the Uniform Foreign Money-Judgments Recognition Act, and because state courts have traditionally recognized foreign judgments on the basis of comity and without statutory aid, there is a slim, albeit highly remote, chance, that Nicaragua might be able to enforce the monetary aspects of a judgment in a state court unsympathetic to the United States' refusal to litigate. (C)

C. THIRD-PARTY ATTEMPTS TO OBTAIN DOMESTIC REMEDIES AGAINST THE PRESIDENT AND EXECUTIVE OFFICIALS

We have noted above that, if the President were to decide that the United States should not participate further in the

litigation of the Nicaraguan ICJ case and should not immediately comply with an adverse judgment entered against it, Nicaragua might characterize these decisions as violations of various United States treaty obligations. As we have discussed in Part I, we believe that the President has the power under domestic law to make these decisions regarding litigation strategy and compliance with the judgment. Nevertheless, third parties might still attempt to hold the President and other executive officials accountable for these decisions by pursuing three possible domestic remedies against them based on their alleged violations of international law: (1) impeachment; (2) alien suits under the Alien Tort Statute, 28 U.S.C. § 1350; and (3) suits under the federal question provision, 28 U.S.C. § 1331. Each of these remedies is discussed below in turn. (C)

1. Impeachment: Although impeachment is, to a great extent, a political and not a legal process, there are legal standards which are relevant to an impeachment proceeding which might be brought against the President based upon his decision not to participate further in the ICJ litigation or not immediately to comply with any ICJ judgment against the United States. Given our view that the President has the inherent constitutional authority to make these decisions, we certainly do not foresee success in any possible impeachment attempt. The applicable legal standards are, however, set forth below. (C)

There has historically been considerable disagreement over what constitutes an impeachable offense under Article II, § 4 of the Constitution. 19/ The disagreement has centered on the meaning of the phrase "high Crimes and Misdemeanors," specifically, whether a high crime or misdemeanor must be a criminal offense. 20/ The Office of Legal Counsel, in January

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19/ U.S. Const. Art. II, § 4 provides the substantive standards for impeachment. That section provides:

> The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors. (U)

20/ For example, among the eleven articles of impeachment adopted by the House of Representatives against President Andrew Johnson in 1868, nine were based upon the President's removal

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1974, compiled a document entitled "The Law of Impeachment" (hereinafter "OLC Memorandum"), which discusses the few Supreme Court opinions containing dictum regarding impeachment; materials on the history of the Constitution; congressional precedents in impeachment cases; and scholarly works. The OLC Memorandum concluded, at p. 70, that it is difficult to determine from these sources a firm meaning of the phrase "high crimes and misdemeanors." 21/ See also Congressional Quarterly, Guide to Congress 246 (3d ed. 1982) ("high crimes and misdemeanors" have been "anything that the prosecution has wanted to make them").

The most recent debate over the meaning of "high Crimes and Misdemeanors" occurred in the course of impeachment

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20/ (footnote cont'd from prior page)

from office of Secretary of War Edwin W. Stanton, allegedly in violation of the Tenure of Office Act. Two articles, however, were broader in scope. They were based upon a Resolution which recited not only indictable crimes, but also actions which were not indictable, including preventing the execution of Reconstruction laws and attempting to bring Congress into ridicule and disrepute. See generally M. Benedict, The Impeachment and Trial of Andrew Johnson 114-15, 143-44 (1973); Congressional Quarterly, Guide to Congress 250-51, 254 (3d ed. 1982). Of course, the Senate failed to convict President Johnson, albeit only by one vote.

21/ After discussing historical materials, American impeachment precedents, and certain scholarly works, the OLC Memorandum concluded:

> There are persuasive grounds for arguing both the narrow view that a violation of criminal law is required and the broader view that certain non-criminal "political offenses" may justify impeachment. While the narrow view finds support in the language of the Constitution, the terms, particularly "high misdemeanor," are not without ambiguity. Post-convention historical materials, such as the Federalist and the records of the state ratification conventions, lend support to the view that impeachment that may be based upon certain types of non-criminal conduct.

See OLC Memorandum at 70-71.

proceedings against President Nixon. The Articles of Impeachment adopted by the House Judiciary Committee charged the President with obstruction of justice, abuse of presidential power, and contempt of Congress. Only the first constitutes criminal conduct. The second and third indicate a broader view of the scope of impeachable offenses. 22/ (U)

Given the uncertainty over the legal standard, as well as the inherently political nature of the impeachment process, we cannot rule out the possibility that some Members of the House of Representatives might attempt an impeachment proceeding on the basis of the President's decisions not to participate further in the Nicaraguan ICJ litigation or not immediately to comply with an adverse judgment against the United States, on the theory

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22/ In the Nixon impeachment proceeding, for example, the House Judiciary Committee adopted, as the second article of impeachment against the President, the allegation that he had used the powers of the office of President

> in violation of his constitutional oath faithfully to execute the Office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in disregard of his constitutional duty to take care that the laws be faithfully executed, has repeatedly engaged in conduct violating the constitutional rights of citizens, impairing the due and proper administration of justice and the conduct of lawful inquiries, or contravening the laws governing agencies of the executive branch and the purposes of these agencies.

See Debate on Articles of Impeachment: Hearings on H. Res. 803 before the Committee on the Judiciary of the House of Representatives, 93d Cong., 2d Sess. 334 (1974); see also id. at 445, 447. Certain particular actions were alleged as the basis for this charge. Id. at 334-35. In the debate on the article of impeachment, Rep. Wiggins raised a point of order that the article failed to state an impeachable offense because "the gravamen of that article is abusive power on the part of the President of the United States," id. at 335, and, in essence, an abuse of power did not fall within the meaning of the phrase, "high crimes and misdemeanors." Id. at 335-37. The point was debated at length, id. 334-445 passim, and was ultimately rejected by the adoption of the article of impeachment. (U)

that these decisions violated treaty obligations and thus constituted the failure to enforce the laws of the United States, or simply constituted an abuse of presidential powers. 23/ (C)

2. Suits Under the Alien Tort Statute: The Alien Tort Statute, 28 U.S.C. § 1350, confers subject matter jurisdiction on the federal courts to hear suits brought by "an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The Second Circuit has read this provision to authorize two Paraguayan nationals to recover $ 10.4 million in compensatory and punitive damages from a Paraguayan police official who tortured their relative to death in Paraguay, while acting under color of official authority. See Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980). Very recently, the United States District Court for the Central District of California awarded a $2.6 million default judgment against the Government of Argentina for allegedly torturing an Argentinian citizen in Argentina. See Siderman v. Republic of Argentina, No. CV 82-1772-RMT (MCx) (C.D. Cal. September 28, 1984). (U)

It is possible, therefore, that Nicaraguan plaintiffs might sue the United States Government or its officials under § 1350, charging that those officials have sponsored or ratified "torts in violation of the law of nations" against them during the course of Central American hostilities. Indeed, such a suit is currently pending against President Reagan, Secretary Weinberger, and other Executive Branch officials before a panel of the United States Court of Appeals for the D.C. Circuit. In that case, Sanchez-Espinoza v. Reagan, No. 83-1997 (D.C. Cir., argued May 24, 1984), six Nicaraguan and three European plaintiffs have alleged that they or members of their families were tortured and assaulted by anti-Sandinista terrorists supported and directed by the United States Government. In support of their claim that United States support of covert activities in Nicaragua constitutes an adjudicated "violation of the law of

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23/ Indeed, on November 10, 1983, eight Members of the House of Representatives called for the President's impeachment for ordering United States troops into Grenada, alleging that the President had committed the "high crime or misdemeanor of ordering the invasion on October 25, 1983, of Grenada, a foreign state at peace with the United States, . . . in violation of treaty obligations of the United States, including obligations under the Charter of the United Nations and the Charter of the Organization of American States . . . ." H. Res. 370, 98th Cong., 1st Sess. (1983). (U)

nations," plaintiffs have cited the ICJ's May 10, 1984, order indicating provisional measures against the United States. If the ICJ were to rule against the United States on the merits of Nicaragua's application, these plaintiffs would presumably claim that the ICJ's ruling that the United States had violated international law conclusively established the "law of nations" violation upon which their § 1350 suit is premised. (C)

The United States could seek to have such a suit dismissed by contending that the Nicaraguan government's ICJ suit has espoused all claims that could be brought against the United States government by individual Nicaraguan plaintiffs for miliitary and paramilitary activities in their country. Such an argument would not, however, eliminate the possibility of a § 1350 suit by an alien from a country other than Nicaragua, for example, the European plaintiffs in Sanchez-Espinoza or a foreign shipowner whose ship was damaged by the alleged United States mining of the Nicaraguan harbors. Alternatively, the United States Government could seek to have these claims dismissed by asserting that Congress simply never intended the Alien Tort Statute to permit aliens to recover tortious damages from the United States government and its officials. A similar defense has been asserted against allegations that certain federal officials violated the Neutrality Act by their actions in Central America, although the defense has been unsuccessful so far. See Dellums v. Smith, 577 F. Supp. 1449, 1452 (N.D. Cal. 1984), appeal pending, No. 84-1525 (9th Cir. 1984). (C)

In addition, the United States could adopt any of the defenses suggested by the three concurring opinions recently issued by the D.C. Circuit in Hanoch Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (per curiam), which is currently pending on a petition for certiorari before the Supreme Court (and in which the Court recently invited the views of the Solicitor General as amicus curiae). In Tel-Oren, three D.C. Circuit judges (Edwards, Bork, and Robb) concluded, for different reasons, that Israeli plaintiffs could not maintain a suit under the Alien Tort Statute against the Palestine Liberation Organization, the Libyan Arab Republic, and three Arab-American groups for torture and terrorism that occurred in Israel. Judge Robb concluded that the plaintiffs' suit was barred by the political question doctrine. Judge Bork concluded that § 1350 was purely jurisdictional, did not confer any private right of action upon individual plaintiffs, and separation of powers concerns militated against implying such a right of action from either nonself-executing treaties or customary international law. Cf. Part II.B.2.b., supra.

Judge Edwards concluded that neither terrorism nor unofficial torture constituted recognized violations of the law of nations, and would have permitted jurisdiction under § 1350 only for certain acts that customary international law has recognized as "international crimes," namely, official torture, slavery, piracy, summary execution, and genocide. Applying these rationales in the context of an alien tort suit based on an ICJ judgment, the United States could argue that the suit presented a political question, 24/ that the plaintiffs had no private right of action, and that in any event the conduct for which the United States had been held liable in the ICJ, even if a violation of international law, did not rise to the level of an "international crime." (C)

The United States could further assert, as it already has in Sanchez-Espinoza, that § 1350 does not constitute a waiver of its sovereign immunity, see Canadian Transport Co. v. United States, 663 F.2d 1081 (D.C. Cir. 1980); that the Federal Tort Claims Act does not recognize an exception to sovereign immunity for suits arising in foreign countries, see 28 U.S.C. § 2680(k); and, finally, that the President of the United States and high Executive Branch officials are in any event immune, either absolutely or qualifiedly, from tort suits for actions committed within the outer perimeter of their official duties. See Nixon v. Fitzgerald, 457 U.S. 731 (1982); Harlow v. Fitzgerald, 457 U.S. 800 (1982). Given the range of defenses available, it seems unlikely that a § 1350 suit against the President or executive officials would succeed, although such a suit might proceed far enough to have significant harassment potential. (C)

3. Suits under the Federal Question Provision: The third domestic possibility is that either aliens or citizens could sue federal government officials, charging that the alleged violation of international law raises a federal question. Such

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24/ Although the Government could theoretically attempt to relitigate the merits of Nicaragua's international law charges regarding the United States role in ongoing Central American hostilities in the federal courts, it is highly unlikely that any federal court would hear such arguments in light of past holdings that the political question doctrine precluded the federal courts from deciding challenges, for example, to the lawfulness of the Vietnam War. See, e.g., Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), cert. denied, 416 U.S. 936 (1974). (C)

plaintiffs would likely premise subject matter jurisdiction in such a case on the general federal question provision, which authorizes federal courts to hear cases "arising under" treaties and laws of the United States. To assert that their claim arose under the laws of the United States, plaintiffs would likely cite the Supreme Court's famous statement in The Paquete Habana, 175 U.S. 677, 700 (1900), that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." Alternatively, such plaintiffs might argue, on the theory that treaties and international law are part of the laws of the United States, that it is within the constitutional duty of the President to "take Care" that those "Laws be faithfully executed" pursuant to Art. II, § 3 of the Constitution. (C)

Even if the courts were to find subject matter jurisdiction over such claims, such cases would likely be dismissed for failure to state a claim upon which relief may be granted. See Fed. R. Civ. P. 12(b)(6). The plaintiffs cannot derive their cause of action from the treaties allegedly violated because the courts have held that only treaties with an express or clearly inferrable provision permitting a private right of action provide a cause of action. "Absent this kind of provision, . . . the courts can give no redress to a person who is injured by a failure of a government to observe the terms of a treaty; such is a political question and one claiming injury must look to his government for relief." Canadian Transport Co. v. United States, 430 F. Supp. 1168, 1172 (D.D.C. 1977) (dismissing as political question Executive Branch's denial of landing rights to Polish nationals in asserted violation of treaty), aff'd in part and reversed in part on other grounds, 663 F.2d 1081 (D.C. Cir. 1980) (footnote omitted). See also Huynh Thi Anh v. Levi, 586 F.2d 625, 629 (6th Cir. 1978) (no private right of action under the Geneva Convention, the Refugee Convention, or the U.N. Declaration of Human Rights); Diggs v. Richardson, 555 F.2d 848, 850-51 (D.C. Cir. 1976) (no private right of action to force the Government to comply with U.N. Security Council Resolution on Namibia); Z. & F. Assets Realization Corp. v. Hull, 114 F.2d 464 (D.C. Cir. 1940), aff'd on other grounds, 311 U.S. 470 (1941); Pauling v. McElroy, 164 F. Supp. 390, 393 (D.D.C. 1958) (no private right of action for alleged violations of either the U.N. Charter or the Trust Territory Agreement), aff'd, 278 F.2d 252, 254 (D.C. Cir.), cert. denied, 364 U.S. 835 (1960). (C)

Nor do we think that plaintiffs could allege a cause of action deriving directly from customary international law, as

incorporated into federal common law. Cf. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (act of state doctrine is a doctrine of international law incorporated into federal common law). The statement in The Paquete Habana that "[i]nternational law is part of our law" contained the crucial qualification that federal courts "are bound to take judicial notice of, and to give effect to" rules of customary international law only in the absence of a "controlling executive or legislative act or judicial decision." 175 U.S. at 700. As we have suggested in Part I, a decision by the President not to comply with customary international law is valid under domestic law if he has taken a "controlling executive act[ion]" that the United States should not be so bound. Thus, any suits by private individuals alleging that the Executive Branch had violated either treaty obligations or customary international law by failing immediately to comply with an adverse ICJ judgment would probably be dismissed for failure to state a cause of action. (C)

Even if the courts were willing to overlook the absence in any relevant treaty of a private right of action or were willing to imply a cause of action from international law, the defendants could further assert that the President's duty to "take Care" that our international obligations be faithfully executed is not judicially enforceable, that in any event that duty cannot be enforced by mandamus or injunction, and that the President's conduct raises a nonjusticiable political question. Moreover, if the plaintiffs could surmount these obstacles, suits brought by Members of Congress alleging that the President had deprived them of their right to advise and consent to the contructive abrogation or termination of United States treaty obligations would probably be dismissed on grounds of standing, equitable discretion, or lack of ripeness. Cf. Goldwater v. Carter, 444 U.S. 996 (1979). If the remaining plaintiffs were private citizens, the defendants could attack their standing to sue on the ground that their "injury in fact" was a generalized one that would not, in any event, be remedied by an Executive Branch decision to comply immediately with an ICJ judgment. (C)

Finally, if a court were to reach the merits in a case alleging a violation of the United States' treaty obligations, any suit brought against the President or executive officials for failure promptly to comply with an ICJ judgment would run into the precedents established by the Mexican Claims Cases, discussed in Part I, supra. Those precedents could be cited for the proposition that steps taken by the President and Congress to reexamine, modify, or even nullify the judgment of an international tribunal are lawful. The defendants could assert that,

so long as the political branches are determined to explore other routes to resolution of the international dispute, such action would not constitute a violation of a treaty obligation, but rather, the holding in abeyance of executive action on a judgment of the ICJ that fell within the scope of the President's foreign affairs power. Although it is difficult to predict which of the defenses described above would ultimately succeed, it seems highly unlikely that plaintiffs would be able to overcome all of these defenses and recover in this type of suit. (C)

III

CONCLUSION

We conclude, therefore, that the President has the authority under domestic law to decide that the United States will not participate further in the Nicaraguan ICJ litigation and will not immediately comply with any adverse judgment thereafter entered against the United States. We further conclude that Nicaragua could probably not enforce an ICJ monetary judgment through international organizations, although it would probably be able to engage in self-help, as well as seek to embarrass the United States by attempting to obtain satisfaction of any monetary judgment through any international enforcement mechanisms available to it. Moreover, Nicaragua's actions to obtain international enforcement might produce embarrassment to the United States because of the injunctive aspects of an ICJ judgment and might conceivably result in sanctions imposed by other countries against the United States on the basis of any perceived noncompliance by the United States with an injunctive order. Furthermore, we conclude that, although it appears unlikely that Nicaragua could successfully enforce an ICJ monetary judgment against the United States in a United States court, Nicaragua has a reasonable chance of enforcing a monetary judgment in some foreign court hostile to the United States. Finally, we conclude that third parties would probably not succeed in obtaining domestic relief against the President and Executive Branch officials based upon such actions. (C)

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Acting Assistant Attorney General
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Attachment
(unclassified)

APPENDIX

Re: International Court of Justice Contentious Cases in which Respondent States Have Either Refused to Participate or to Comply with the Judgment

A. Corfu Channel Case (United Kingdom v. Albania) (Compensation), 1949 I.C.J. Rep. 244: In 1946, two British warships passing through the Corfu Channel, which separates Albania from Greece, struck Albanian mines and were damaged. The United Kingdom filed an application against Albania in the ICJ seeking damages. Albania litigated the case until the Court had awarded an adverse judgment on the merits against it. Albania then failed to present pleadings at the final phase of the case, which was limited to the question of compensation. In Albania's absence, the Court gave the United Kingdom judgment for $2.5 million.

It does not appear that the United Kingdom ever sought enforcement of the ICJ judgment through the Security Council, probably because a Soviet Union veto would have been inevitable. Years later, however, the Allied Powers asked the ICJ to determine whether certain monetary gold taken from Rome belonged to Albania or Italy. They further agreed that if the gold belonged to Albania, that they would transfer it to the United Kingdom in partial satisfaction of the Corfu Channel judgment. Albania again refused to submit to the jurisdiction of the Court for the purpose of making this determination. The ICJ then accepted Italy's request to dismiss the case on the ground that Albania, an indispensable party, was absent. See Case of Monetary Gold Removed from Rome in 1943, [1954] I.C.J. Rep. 19.

B. Trial of Pakistani Prisoners of War (Pakistan v. India), [1973] I.C.J. Rep. 328: After the war between Pakistan and India in 1972, the new state of Bangladesh announced its intention to try some 195 Pakistani prisoners of war being held in Indian custody on charges of genocide. Pakistan filed an application against India asking the Court to declare that Pakistan had exclusive jurisdiction over the prisoners. India refused to appoint an agent and become a party to the proceedings, but engaged in extensive informal communications with the Court. The case was ultimately discontinued before conclusion of the merits by an order of the court, at Pakistan's request, on the ground that the matter had been settled by negotiations between the two countries.

C. Fisheries Jurisdiction Case (United Kingdom & West Germany v. Iceland), [1974] I.C.J. Rep. 3, 175: When Iceland wanted to enforce a fifty-mile fishing zone around its shores, the United Kingdom and Germany protested, and brought suit against Iceland in the ICJ. Iceland refused to appoint an agent to defend any phase of the proceedings. The Court found that it had jurisdiction and in 1974, ruled on the merits that Iceland could not unilaterally exclude British and German fishing boats from the 50-mile zone. Iceland did not comply with the Court's interim measures, but did negotiate to permit a specified number of British ships to fish in the disputed waters. In the end, the issue was ultimately rendered moot, however, by the emerging international consensus, embodied in the views of the United Nations Conferences on the Law of the Sea, permitting nations to observe exclusive 200-mile fishing zones.

D. Nuclear Test Cases (Australia & New Zealand v. France), [1974] I.C.J. Rep. 253, 457: Australia and New Zealand asked the ICJ to rule that further atmospheric testing of nuclear weapons in the South Pacific would be inconsistent with international law and to order France not to carry out any further tests. The Court issued an interim order barring France from atmospheric testing during the course of the proceedings, which France disobeyed. France then withdrew its declaration of acceptance of the Court's compulsory jurisdiction before judgment was entered. Taking note of unilateral statements made out of court by French officials that France intended to abandon atmospheric testing and pursue underground testing, the Court ultimately ruled that the case was moot.

E. Aegean Sea Continental Shelf Case (Greece v. Turkey), [1978] I.C.J. Rep. 3: Turkey had granted permits to a state-owned petroleum company for petroleum exploration in the Aegean Sea in areas that Greece claimed encroached upon the continental shelf adjacent to certain Greek islands. Greece filed an application and request for provisional measures before the Court, alleging that Turkey had violated Greece's sovereign rights in the Aegean continental shelf and asking the Court to declare that the Greek Islands were entitled to the continental shelf under international law. Turkey refused to appoint an agent and did not appear at either the provisional measures or the jurisdictional stage, confining its remarks to a written letter addressed to the Court

denying its jurisdiction over the dispute. The Court ultimately issued a judgment that the merits could not be considered, because it was without jurisdiction to entertain the Greek application.

F. Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran), [1980] I.C.J. Rep. 3: After Iran seized the U.S. Embassy in Tehran, the United States sought provisional measures from the ICJ. Iran did not appoint an agent or appear at the proceedings, but sent a letter to the Court asking it not to take cognizance of the case or indicate interim measures. The ICJ promptly issued provisional measures ordering Iran immediately to restore the embassy premises to U.S. control, to release all the hostages, and to afford all the U.S. diplomatic and consular personnel the privileges and immunities that they were entitled under treaties in force. About two weeks after that order issued, the Security Council adopted a resolution calling on Iran to release the hostages in compliance with the ICJ order. Iran's Foreign Minister called the order "absolutely ridiculous." Several weeks later, the U.S. drafted a second Security Council resolution, which would have required all UN members to refrain from exports of goods and services to Iran, which the Soviet Union vetoed on the ground that the situation did not pose a threat to international peace and security.

In Iran's absence, the Court then heard the case on the merits, determined that it had jurisdiction and that the U.S. claims were well-founded in fact and law, and found that Iran had an obligation to make reparation in a sum to be determined at a subsequent stage of the proceedings. Because of the earlier Soviet veto of the second Security Council resolution, the United States chose not seek enforcement of the judgment in the Security Council. After the Algiers Accords were concluded in January 1981, the United States asked the Court to discontinue all proceedings relating to its claims against Iran for reparation, subject to a reserved right to reinstitute such proceedings if Iran failed to live up to its commitment under the Accords.

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THE WHITE HOUSE

WASHINGTON

January 17, 1985

ACTION

MEMORANDUM FOR THE HONORABLE GEORGE P. SHULTZ
The Secretary of State

SUBJECT: Nicaragua World Court Case (U)

The President has approved your recommendation that the United States withdraw from the Nicaragua World Court case. Announcement of this decision should be made on Friday, January 18, at the Department of State. (S)

FOR THE PRESIDENT:

for Robert C. McFarlane

cc: The Honorable Caspar W. Weinberger
The Secretary of Defense

The Honorable William French Smith
The Attorney General

Ambassador Jeane Kirkpatrick
U.S. Representative to the U.N.

The Honorable William Casey
Director of Central Intelligence

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Declassify on: January 19, 1985

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