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File Folder NICARAGUA (11/16/1984-11/28/1984)

FOIA S09-251

Box Number 33

81

ID	Doc Type	Document Description	No of Pages	Doc Date	Restrictions	
74649	REPORT	RE NICARAGUA ***D 1/4/2013 M259/1***	20	11/16/1984	B1	B3
76054	PROFILE SHEET	 ***R 7/19/2010 M259/1***	1	11/23/1984	B1	B3
76055	ROUTING SLIP	 ***R 7/19/2010 M259/1***	1	ND	B1	B3
74650	MEMO	RAYMOND BURGHARDT TO ROBERT MCFARLANE RE MANZANILLO TALKS (W/ATTACHED TALKING POINTS)	5	11/23/1984	B1	
74651	MEMO	DAVIS ROBINSON TO THE SECRETARY RE NICARAGUA ICJ CASE ***R 6/18/2019 M259/1***	9	11/28/1984	B1	
74652	MEMO	CHARLES HILL TO ROBERT MCFARLANE RE ICJ CASE ***R 4/25/2017 M259/1***	1	12/5/1984	B1	
74653	MEMO	ROBERT MCFARLANE TO THE PRESIDENT RE WORLD COURT CASE ***R 9/20/2017 M259/1***	2	ND	B1	
74654	PAPER	RE COMMUNIST SUBVERSION ***R 4/25/2017 M259/1***	2	ND	B1	

The above documents were not referred for declassification review at time of processing

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

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SYSTEM II PROFILE ~~TOP SECRET~~ 76054 ID 8491203

RECEIVED 23 NOV 84 18

TO MCFARLANE FROM BURGHARDT DOCDATE 23 NOV 84 21

MR 7/7/09

KEYWORDS: NICARAGUA

SUBJECT: SUMMARY OF EIGHTH ROUND OF MANZANILLO TALKS

ACTION: FOR DECISION DUE: STATUS X FILES SII

FOR ACTION: MCFARLANE

FOR CONCURRENCE:

FOR INFO: MENGES, NORTH, TILLMAN, MATLOCK

COMMENTS

REF# LOG 8490861 8490960 NSCIFID (B / B)

ACTION OFFICER (S)	ASSIGNED	ACTION REQUIRED	DUE	COPIES TO
Pres. IP	NOV 28 1984	Information via PDB		
C	NOV 28 1984	Pres. Noted		RB

DISPATCH _____ W/ATTCH FILE _____ (C)

76055

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National Security Council
The White House

System # II

Package # 91203

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RECEIVED
84 NOV 23 P6: 14

	SEQUENCE TO	HAS SEEN	DISPOSITION
Paul Thompson	1	J	
Bob Kimmitt	2	K	
John Poindexter	3	P	
Tom Shull			
Wilma Hall	4		
Bud McFarlane	5		
Bob Kimmitt	6	K	
NSC Secretariat	7		PNDB done 11/28/84
Situation Room		11/28	

I = Information | A = Action | R = Retain | D = Dispatch | N = No further Action

cc: VP Meese Baker Deaver Other

COMMENTS

Should be seen by: (Date/Time)

Pls put in Ray's (Tab I) memo (not B)

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74651 Memos

United States Department of State

Washington, D. C. 20520

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~~CONFIDENTIAL~~/NODIS

INFORMATION MEMORANDUM
S/S

November 28, 1984

TO: The Secretary
The Deputy Secretary

FROM: L - Davis R. Robinson DRR

SUBJECT: Nicaragua ICJ Case: Preliminary Comments on the Decision and Suggested Plan of Action

There follow my preliminary comments on the Court's decision, what options we now see and a suggested plan of action.

PRELIMINARY COMMENTS ON THE DECISION

1. The Court only addressed the issues of jurisdiction and "admissibility" (or justiciability). It found jurisdiction on the basis of previous acceptances of the Court's compulsory jurisdiction by both the U.S. and Nicaragua, and on the basis of a specific provision in the U.S.-Nicaragua Treaty of Friendship, Commerce and Navigation (FCN). A summary of the Court's decision is attached at Tab 1.

2. On the question of Nicaragua's non-acceptance of the compulsory jurisdiction of the Court, I believe the Court's 11-5 decision against us was legally erroneous. The majority decision distorts the facts, the law and the record of the case, and fails to address many of our most compelling arguments. The separate opinions on this issue of Judges Mosler of the Federal Republic of Germany, Ago of Italy, Oda of Japan, Jennings of the United Kingdom and Schwebel of the United States in my view convincingly contradict the majority opinion. Nevertheless, it should be noted that among the 11 in the majority are at least two highly competent and respected jurists (e.g, Judges Ruda of Argentina and de Lacharriere of France) who would not generally be expected to be other than impartial. Thus it would be difficult to make a convincing case that the majority opinion reflects only politics and bias and not law.

3. On the question of jurisdiction under the Friendship, Commerce, and Navigation Treaty, Nicaragua never fully articulated what the basis for its complaint would be under this Treaty. The Court's 14-2 finding of jurisdiction under the Treaty leaves to the future the extent to which the Treaty in

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fact applies to Nicaragua's claims. The Court's finding on the FCN Treaty complicates the options that we will present to you. (I should note that Judge Schwebel was the only Judge in the minority on both the 11-5 vote and 14-2 vote, and it was through a melding of these two votes that the Court reached the general 15-1 vote that it has jurisdiction.)

4. With regard to the Vandenberg multilateral treaty reservation to our 1946 Declaration accepting the Court's compulsory jurisdiction, the Court rejected its applicability at this stage. The Court also ruled against the validity of our April 6 letter modifying our acceptance of the Court's jurisdiction. Among the five separate opinions, however, are strongly reasoned dissents on these issues.

5. On "admissibility" (or justiciability), the Court found against us unanimously, including the vote of Judge Schwebel of the United States. The unanimous decision that the Court is in fact an appropriate forum to hear Nicaragua's complaints will make it more difficult for us to continue to argue otherwise. In his separate opinion, Schwebel in fact reserved his position on the admissibility of Nicaragua's complaints until the merits phase of the case. Sprinkled throughout the Court's opinion on admissibility is the notion that in the Hostages case of 1979, we used the Court to our advantage even though the Security Council was seized of the issue and the Court should not be avoided when the tables are turned.

HAVE WE BEEN RIGHT TO PARTICIPATE IN THE CASE THUS FAR?

No matter how much we may disagree with the Court's decision, I continue to believe that it would have been a serious mistake not to have participated in the case to this point. First, the policy judgment to stay was driven, as I understand it, at least in part by hopes last April that the $21 million for the Contra program was still not lost in the Congress. We should recall that in our last venture before the full Court we won the Hostages case by 15-0. The Gulf of Maine case was pending before a Chamber of the Court in April. Also, it would be contrary to our legal tradition not to appear and argue questions of jurisdiction. Under our domestic Foreign Sovereign Immunities Act foreign governments are expected to contest issues of jurisdiction in our courts (e.g., if we had walked from the ICJ in April, there likely would have been an adverse impact on China's role in the Huguang Railroad Bonds case). Furthermore, we developed an overwhelming case on at least one part of our jurisdictional argument (Nicaragua's non-acceptance). And most importantly, when we include the

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Court's unfair treatment of El Salvador's August effort to intervene in the case as of right, we now have a record on which accusations of political motivation and of lack of due process can at least be made, if not proven.

WHERE DOES THE DECISION LEAVE US?

Having lost on jurisdiction, I have little doubt that, at least in the absence of El Salvador and Honduras, we would lose on the merits, where our case will be much more difficult with regard to both law and fact. It must be remembered that the Court will proceed with the case, whether we continue to participate or not. The relief which Nicaragua seeks includes cease and desist orders against the U.S., such as an injunction against any further "support of any kind . . . to any nation, group, organization, movement, or individual engaged or planning to engage in military or paramilitary actions in or against Nicaragua." Nicaragua also asks for reparations in an unestimated amount that will range in the hundreds of millions of dollars. The odds of a worse result on substance or on damages may increase if we are not before the Court to resist at all. Any decision by the Court is enforceable in the Security Council, where we would undoubtedly have to exercise our veto power to prevent action. Even then, since Court judgments are binding on the parties, Nicaragua may attempt to engage in self-help and chase the United States around the world seeking to attach U.S. assets to satisfy any monetary damages assessed by the Court.

WHAT OPTIONS ARE AVAILABLE TO US?

Our aim is to have an options paper to you by the middle of next week and a Presidential Decision Memorandum to the White House by COB Friday, December 7. (Bob Kimmitt of the NSC tells us the December 7 date is satisfactory.) We are presently developing the following four basic options:

1. Stay and fight the merits of the case. We would argue that Nicaragua has committed armed attacks against El Salvador and Honduras, justifying U.S. action in response in collective self-defense, including our support of the Contras; we might bring a counter-claim against Nicaragua for damages suffered as a result of the war in El Salvador, possibly including U.S. security assistance to El Salvador and/or Honduras. We would strongly encourage El Salvador and Honduras to join us in these actions. We might use various litigation tactics to gain some

advantage, including demands for interim orders against Nicaragua, evidentiary proceedings, or even challenges to individual Court members if we could find support. At the conclusion of the case, assuming an adverse decision, we would then decide what course of action to follow. (This could be coupled with a re-examination of our prior general acceptance of the Court's compulsory jurisdiction, with a view to its possible modification or even withdrawal.)

However, conducting this case on the merits will be exceedingly difficult, especially in the absence of El Salvador and Honduras: we will have serious evidentiary problems, given the sensitive character of most of whatever evidence is available to us of Nicaraguan aggression; we might well have to take an expansive view of the scope of actions permissible under the right of self-defense and the rules of armed conflict, which could cause political problems and set bad precedents which the Soviets and others might later use to our disadvantage; and, while this should not be a decisive factor, the case would require tremendous resources, not only in this Department but in other U.S. agencies as well. I believe that we will very likely lose in the end in any event, and it can be argued that more damage would be done to the rule of law to walk away from an adverse decision of the Court at the end of the process, having argued the merits and lost.

Staying in the case would give us a better opportunity both to argue our commitment to the rule of law and the peaceful resolution of the Central American situation, to answer Nicaraguan charges, and to present the public case as to the appropriateness of our actions in the region. We might be able to limit the amount of any award of damages by the Court, and otherwise moderate or limit the scope of its order. This would include the opportunity to influence the Court's construction of the FCN Treaty--which is similar to a number of others--so as to reduce our exposure. We might delay the handing down of an adverse decision on the merits, which might be helpful with respect to Congressional action on Contra funding and to developments in the region. And there would not be pictures on television of the empty chair in the Courtroom night after night, as there was in Iran's case during the Hostages suit.

2. Withdraw from the case, while reserving our general position on participation in the Court in other areas. We would reiterate that the Court does not have jurisdiction in this case, and that the UN Charter precludes the Court's interference in matters involving armed conflict that are within the Security Council's exclusive competence, or interference with

the rights of individual and collective self-defense. We might adopt a further modification to our original acceptance of the Court's compulsory jurisdiction to preclude jurisdiction over any future case which, in our judgment, affects U.S. national security and/or the conduct of armed conflicts. However, we would not withdraw from the Court's jurisdiction in other areas.

This option would avoid the effort, the difficulties of proof and argumentation, and the negative consequences of closer association with further proceedings in this case. It would clearly establish the principle that the U.S. will not subject itself in future cases to Court decisions in areas more properly reserved to the Security Council (or regional bodies). Compared to Option 3, it would do less damage to our general commitment to international disputes settlement, preserve the option of using the Court in other areas when it is in our interest to do so, and could moderate the negative reaction to our abandoning the case.

On the other hand, our action would still produce a sharp negative reaction in Congress, the press, the U.S. legal community, and abroad; we would still be seen as conceding the illegality of our actions in Central America, as showing contempt for the Court and as abandoning the rule of law when expedient. Any effort to secure renewed funding for the Contra program could be damaged. Our posture in future Court proceedings on other matters could be impaired. The Nicaragua case would not stop; in fact, Nicaragua's charges would go unanswered, an adverse decision on the merits would be accelerated, and the ultimate result could be worse with a higher award of damages.

3. Withdraw from this case, and take steps to withdraw from the Court's jurisdiction altogether. In addition to reiterating that the Court's decision on this case was incorrect, we would also argue that the Court is a politically biased forum in which U.S. interests cannot generally be protected. We would act to withdraw U.S. acceptance of the Court's compulsory jurisdiction, take steps to modify or withdraw from the 80 or so existing international agreements that subject us to the Court's jurisdiction, and decline in the future to accept such provisions.

In addition to avoiding the disadvantages of proceeding with the Nicaragua case (as described above), this action would go as far as possible toward preventing any future situation in which the U.S. would be subjected to adverse action by the Court. Emphasizing the politicization of the Court might help

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us to persuade U.S. constituencies that we cannot remain in the current proceedings.

On the other hand, in addition to the negative consequences of Option 2 (as described above), the domestic and international reaction to this action would be even more severe, since it would seem to call more radically into question U.S. acceptance of the rule of law and the functioning of international bodies. It could preclude us from utilizing the Court in future situations where it would be in our interests to do so. If we attempt to modify existing agreements that subject us to the Court's jurisdiction, we may call into question important U.S. rights and advantages under those agreements and possibly strain relations with some treaty partners. The Senate would probably demand the right to approve any withdrawal of the U.S. acceptance of the Court's jurisdiction, and this could produce a damaging and uncertain confrontation in Congress.

4. Defer a decision, to the extent possible, pending Congressional action on Contra funding and/or regional developments. We would probably not need to take any substantive action in the case for at least 4-6 months, since it will take that long for Nicaragua to file its first brief on the merits of the case. We might attempt to further delay substantive proceedings in a number of ways, such as filing requests for clarification of the Court's decision on jurisdiction (e.g., the relationship of the FCN Treaty to Nicaragua's complaint), or making so-called preliminary objections on procedural points. We would, in the meantime, reserve the U.S. position on whether it would take part in proceedings on the merits of the case. The Court might, however, schedule a date for a responsive United States brief nonetheless.

Deferral would minimize the immediate negative effects of Options 2 or 3, which could be useful with respect to Congressional action on Contra funding or the current regional situation. It would give us further time to evaluate our long-term options, to ascertain better the intentions of El Salvador and Honduras, and to prepare U.S. constituencies for the eventual decision. It should not foreclose any options.

This course of action would not resolve the long-term issues posed by the case, and it is possible that the delay involved in making a final decision might reduce the credibility of our eventual position, or produce an appearance of vacillation and internal division on our part.

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Also along these lines, at an interagency meeting today, Stan Sporkin, CIA General Counsel, suggested the possibility of offering Nicaragua an alternative, more neutral forum for trying the case, such as an ad hoc arbitral panel or a special master for ascertaining the facts. Alan Gerson, Ambassador Kirkpatrick's Counsel, said USUN was considering the possibility of proposing a Security Council resolution requesting the Secretary General to pursue a fact-finding/mediating effort in the region. In both cases, these proposals were suggested as a means of securing delay and, if Nicaragua resisted them, of winning the battle for public opinion. Sporkin and Gerson will be providing their ideas to us in writing by Friday.

A matter common to more than one of the options is how we will present any decision not to proceed further with the case. The major policy question is whether we can say anything with regard to the mining and the Contra program which would basically moot the case (other than the claim for reparations which we would presumably simply refuse to acknowledge). When the French walked away from the Nuclear Tests case twenty years ago, they at the same time basically mooted that case by declaring a policy of no further atmospheric testing. I assume in our case that any comparable action is a non-starter at the present time; whether it might be a possibility later I do not know. However, we should recognize the reaction to walking away will be more severe, including by the Court, without some ameliorating statement of policy.

PLAN OF ACTION

1. When I met this afternoon with representatives of the NSC, White House Counsel, Justice, Defense, USUN, the CIA and the NSA, some ideas emerged, but there was no clear indication of where most agencies would come out.

2. Before any decision on the options is taken, we plan to do our best to inform various quarters of what the Court has done and to explain the difficult situation in which the United States finds itself. For example, we would like to have a chance to consult with the former Legal Advisers, the former Secretaries of State who are attorneys, leading law professors who have already helped us or otherwise indicated an interest in the case, and the leaders of the American Bar Association, the American Society of International Law and possibly others. In this process, we might stimulate sympathetic op-ed pieces by people who have not been involved with the case.

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3. Once a decision is made, we should prepare for an aggressive background effort with the press and public diplomacy.

4. Also, we will have to determine our Congressional posture. There will undoubtedly be stormy hearings if we decide not to proceed. H is developing a separate paper on Congressional strategy which will be provided shortly.

5. We are consulting urgently with ARA as to how best determine if El Salvador and Honduras might file suit against Nicaragua or intervene in Nicaragua's case against us.

Attachment

Tab 1 - Summary of Court's Decision

Drafted:L:DRRobinson
11/28/84
Wang ID 4251C

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United States Department of State

Washington, D.C. 20520

CONFIDENTIAL

December 5, 1984

MEMORANDUM FOR MR. ROBERT C. MCFARLANE
THE WHITE HOUSE

Subject: Nicaragua International Court of Justice Case

The Department is considering what actions the United States should take in light of the recent International Court of Justice finding that the Court has jurisdiction to hear the merits of Nicaragua's complaint against the United States. We are consulting with other concerned agencies including the CIA, the NSA, Department of Defense, Department of Justice, Ambassador Kirkpatrick's staff, the NSC staff and the Office of White House Counsel. The Department is also consulting with outside experts on the Court and concerned members of the private bar, including former Department Legal Advisers, and the international legal academic community. The Department expects to forward its views and recommendations by the middle of next week.

Charles Hill
Executive Secretary

CONFIDENTIAL

MEMORANDUM

~~SECRET~~

THE WHITE HOUSE

WASHINGTON

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~~SECRET~~

ACTION

MEMORANDUM FOR THE PRESIDENT

FROM: ROBERT C. MCFARLANE

SUBJECT: Nicaragua World Court Case

Issue

Whether to approve the recommendation of Secretary Shultz that the US announce in the next few days that it will walk away from the World Court case.

Facts

In April 1984 Nicaragua filed suit in the International Court of Justice (ICJ) alleging that US mining of Nicaragua's harbors and support for the Freedom Fighters were in violation of the UN Charter and international law. The US argued before the ICJ that Nicaragua had initiated aggression against its neighbors, that US actions were valid under the right of individual and collective self- defense, and that the ICJ had no jurisdiction over this type of political case which belonged in the UN Security Council. In August 1984, El Salvador filed a brief with the ICJ contending that it was the victim of aggression by Nicaragua and should participate in the case, but the ICJ refused to hear El Salvador. On November 26, 1984, the ICJ decided that it had jurisdiction in the case.

Discussion

Secretary Shultz presents two options: (1) stay and fight, or, (2) walk away from the case now. He recommends the latter course and points out that this will harm our chances to obtain renewed funding for the Freedom Fighters from the new Congress. Secretary Shultz notes that if the United States litigates the case, this would most likely take about two years and avoid a domestic controversy immediately that could reduce the chances for obtaining congressional funding for the Freedom Fighters. He concludes, nevertheless, that we should walk away from the case now because it would be "harder to defend" our non-acceptance of the Court's jurisdiction and decision after we had participated in the litigation for two years.

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Defense and CIA believe that we should take additional time to explore other alternatives. For example, CIA suggests that the United States request a six-month postponement of the case so that we can carefully study our response. NSC staff suggest we might encourage El Salvador and Honduras to bring their very strong case against Nicaragua before the OAS--building on the precedents when the OAS condemned Castro's export of subversion and authorized sanctions and defensive measures. If the Central American victims of Nicaraguan aggression were making their case in the OAS, we could point to the OAS as the correct arena for the settlement of this issue as we announced a decision not to participate in the ICJ case. More time would permit that to happen, and it would also permit us to make a major effort in the next three months to obtain congressional funding for the Freedom Fighters before the US announces it will not participate in the ICJ case.

Recommendation

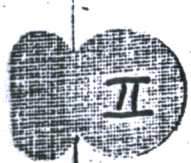
That you make no decision on the recommendation made by Secretary Shultz until the other foreign policy agencies have had additional time to propose alternatives and these have been discussed with you in an NSPG meeting.

OK No

____ ____

Attachment:
Tab A Secretary Shultz's memo to you dated December 26, 1984

Prepared by:
Constantine C. Menges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III

COMMUNIST SUBVERSION AND ACTIONS IN THE WESTERN HEMISPHERE AND RESPONSES OF THE OAS (1951-1980)

74654

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.
953-1954	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 Meeting 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.

(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.
-64	Venezuela alleges that Cuba is depositing arms in Venezuela.	The OAS verified the facts as true and sanctions against Cuba were voted.
7	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.
4	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.
5	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.
0	Guerrillas seize the Dominican Republic Embassy in Bogota and take hostage upwards of seventeen diplomats.	OAS Human Rights Commission sent to the area, the Commission agrees to place observers at trials of political prisoners and the guerrillas abandon the Embassy.