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Enforcement of ICJ Decisions in United States Courts

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ENFORCEMENT OF ICJ DECISIONS IN UNITED STATES COURTS

I. INTRODUCTION

Following World War II The International Court of Justice (ICJ) was set up to settle disputes between nations.[1] Prior to 1985 the United States was an ICJ member, and accepted compulsory jurisdiction in many instances. However, the question of whether an ICJ decision can be successfully enforced against the United States in a U.S. court has never been litigated. Therefore, it is not known whether the United States government could be sued to implement an ICJ decision or whether an ICJ judgment is binding upon the United States Supreme Court. The answer to each of these questions depends upon a variety of issues. First a party seeking enforcement of an ICJ judgment must have standing in a U.S. court. Second, the attempt to enforce an ICJ decision may raise political questions with which a U.S. court would refuse to become involved. Third, it is uncertain whether the ICJ enabling statute, in and of itself, creates any rights which a private party could enforce in U.S. courts. Finally, President Reagan's efforts to suspend ICJ jurisdiction may affect each of these issues, and may raise other issues as well.

This paper will examine the possibility of enforcing an ICJ judgment against the United States. Each of the above-stated issues will be addressed in light of the recent ICJ judgment favorable to Nicaragua

1. Statute of the International Court of Justice, signed at San Francisco, June 26, 1945, 59 Stat. 1031 (1945), T.S. No. 933 (effective Oct. 24, 1945).

in their suit against the United States. Particular attention will be paid to the effect of President Reagan's attempts to modify and suspend ICJ jurisdiction.

II. Ability to Bring Suit

A. *Standing*

To enforce an ICJ judgment a party must be able to bring suit. In other words, the party seeking enforcement must have an interest or injury, rising to the level of a case or controversy.[2] Clearly, Nicaragua has suffered an injury[3] and thus under normal circumstances would have access to U.S. courts. However, it must first be determined whether a foreign nation can be a party to an action maintained in a U.S. court.

The issue of whether a foreign nation can appear as a party in a U.S. court was addressed in *The Sapphire Case*.[4] There, the French Emperor attempted to bring suit in the United States in his capacity as sovereign. Responding to the issue of the Emperor's right to appear as a party in the courts of the United States, Justice Bradley stated;

> On this point not the slightest difficulty exists. A foreign sovereign, as well as any foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts. To deny him this privilege would manifest a want of comity and friendly feeling.[5]

Thus, U.S. courts generally are open to foreign sovereigns.

Furthermore, a foreign nation will not be denied access to U.S. courts merely because that nation is unfriendly with the United States. In *Banco Nacional de Cuba v. Sabbatino*,[6] the Supreme Court rejected the argument that because Cuban courts were closed to United States citizens, Cubans should not be allowed access to United States courts.[7] Only governments at war with the United States, and governments not recognized by the United States will be denied access to United States

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2. U.S. Const. art. III, § 2, cl. 1.

3. Nicaragua v. United States, Merits Judgment, 1986 I.C.J. 14, June 27, 1986. (I.L.M. Vol. XXV, No. 5, Sept. 1986, at 1023-1289).

4. 11 Wall 164, 29 L. Ed. 127 (1860).

5. *Id.* at 167, 29 L. Ed. at 130.

6. 376 U.S. 398, 84 S. Ct. 923, 11 L.Ed.2d 804 (1963).

7. *Id.*

courts.[8] The Supreme Court in *Sabbatino* also rejected the argument that a break in diplomatic relations with a nation should deny that nation access to the courts of United States.

> This Court would hardly be competent to undertake assessments of varying degrees of friendliness or its absence, and, lacking some definite touchstone for determination, we are constrained to consider any relationship, short of war, with a recognized sovereign power as embracing the privilege of resorting to United States courts.[9]

Whether the government of Nicaragua will be able to enforce the ICJ judgment in a U.S. court is not entirely clear. The United States currently maintains diplomatic relations with Nicaragua, however, if the *contras* are able to set up an alternate government and the United States recognizes that government, then the denial of recognition of the present Nicaraguan government would bar them from access to United States courts. Also, because the recognition of a foreign government is a political act of the executive branch, any such determination binds the judicial branch.[10] In addition, the executive branch may also chose to file a brief requesting that the court deny Nicaragua access to U.S. courts due to foreign policy considerations. Although this has never before happened, if the executive department stated that a Nicaraguan suit to enforce an ICJ decision would interfere with U.S. foreign policy the court may feel compelled to deny Nicaragua a right to bring suit to enforce an ICJ judgment.

In the past, U.S. courts have been extremely hesitant to act in ways which appear to interfere with the President's constitutional obligation to direct foreign policy.[11] However, denying Nicaraguan judicial access could raise constitutional issues concerning the scope of the President's power over foreign policy. For instance, Presidential refusal to honor an ICJ decision may violate the President's duty to uphold and support the Constitution and all obligations arising thereunder. To deny Nicaragua standing on the basis that its suit interferes with the President's exercise of constitutional powers would be ironic since the very issue Nicaragua would wish to address is whether the exercise of

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8. *Id.* at 410, 84 S. Ct. at 931. *See also*, Exparte Don Ascanio Colonna, 314 U.S. 510, 62 S. Ct. 373, 86 L.Ed. 379 (1941) (Italy denied access to United States courts in view of the Trading with the Enemy Act.)

9. *Sabbatino*, *supra* note 6, at 410.

10. *Id.* "Political recognition is exclusively a function of the executive."

11. U. S. CONST. art. II, § 2, cl. 2.

these powers is constitutionally valid.

In addition, any attempt to deny Nicaragua access to U.S. courts may create problems under a Treaty of Friendship, Commerce, and Navigation existing between the United States and Nicaragua.[12] Article V (1) of this treaty opens U.S. courts to Nicaraguans "both in pursuit of and in defense of their rights."[13] The treaty, in and of itself, does not grant standing to Nicaragua, but states that Nicaragua has the right to bring suit in a U.S. court if a United States citizen could do so under similar circumstances. Thus, to deny Nicaragua a chance to sue simply because the President requested the courts to deny standing would probably violate this treaty.

The Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua has not yet been implemented by congressional legislation, but the Supreme Court has enforced other non-executed Treaties of Friendship, Navigation and Commerce in the past. For example, in *Asakrua v. City of Seattle*[14] a city ordinance denying aliens a right to engage in business was struck down for violating a Friendship treaty between the United States and Japan which had not been formally implemented by Congress. Therefore, the Treaty of Friendship, Navigation and Commerce between the United States and Nicaragua might prevent a U.S. court from denying access to Nicaragua if standing would exist for a U.S. citizen under similar circumstances.

B. Jurisdiction

Assuming that Nicaragua has standing, suit to enforce the ICJ judgment could be brought in a federal court pursuant to 28 U.S.C. § 1331, *i.e.*, federal question jurisdiction.[15] Specifically, the constitutional question at issue would be the President's authority to disregard an ICJ decision.

Alternatively, suit could be brought under 28 U.S.C. § 1350,[16] which provides aliens with the right to bring suit in a U.S. court for any tort committed in violation of the law of nations or a treaty of the United States. Although the term "alien" is not defined in the statute, the definition should encompass a foreign government thereby allowing

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12. Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, United States - Nicaragua, 9 UST 449, T.I.A.S. No. 4024 (effective May 24, 1958).

13. *Id.* at art. V(1).

14. 265 U.S. 332, 44 S.Ct. 515 (1924).

15. 28 U.S.C. § 1331 (1976).

16. 28 U.S.C. § 1350.

Nicaragua to bring suit. In *Swiss Confederation v. United States*[17] the United States Court of Claims held, under a similar statute, aliens who are citizens or subjects of a recognized foreign government, could sue in U.S. courts.[18] The statute was construed broadly to afford foreign governments the right to sue in the U.S. Court of Claims. Further, the courts have also decided that foreign governments are "persons" who may sue for treble damages under the antitrust laws.[19] In *Pfizer, Inc. v. Government of India*,[20] it was held that even though Congress had never considered whether a foreign government should be considered a person under the antitrust laws, this term should be costrued broadly to cover foreign governments. Taken together *Swiss Confederation* and *Pfizer* seem to indicate that on jurisdictional issues the courts tend to construe statutes broadly to include foreign governments. Therefore it seems very probable that the term aliens in 28 U.S.C. § 1350 would be read to include foreign governments.

Nonetheless, the Supreme Court has recognized that there is broad presidential power to act unilaterally in the area of foreign affairs. Since the exact extent of this power is unclear under the Constitution, a court called upon to consider the legality of military action taken unilaterally by the executive may find this to be a nonjusticiable political question best left for Congress and the President to resolve.

However, even if a foreign government is considered an alien, that government would need to hurdle the problem of sovereign immunity. At least one circuit court of appeals has held that § 1350 is not a waiver of sovereign immunity. In *Canadian Transport Co. v. United States*,[21] a Canadian company was prevented from suing the United States Government for violating the Treaty of Commerce and Navigation of 1815 between the United States and Great Britain. Under the *Canadian Transport* decision a separate basis for waiver of sovereign immunity is required before suit can be brought against the United States under § 1350.[22] It is also possible that, in light of the Court's holding in *Canadian Transport*, a separate basis for waiver of sovereign immunity must exist even when a foreign government wishes to sue under § 1331, i.e., federal question jurisdiction.[23]

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17. 70 F. Supp. 235 (1947).
18. 28 U.S.C., § 261 (1940 ed.). (Presently codified at 28 U.S.C. § 2502.)
19. 15 U.S.C. § 15 (1914).
20. Pfizer, Inc. v. Government of India, 43 U.S. 308, 98 S. Ct. 584 (1978).
21. 663 F.2d 1081 (D.C. Cir. 1980).
22. *Id.* at 1092-93.
23. 28 U.S.C. § 1331, *see supra* note 15 and accompanying text.

In most cases the Federal Tort Claims Act[24] is the basis for the waiver of sovereign immunity. However, under a special exemption[25] the United States does not waive sovereign immunity for torts occurring in a foreign country. Because the damage and treaty violations for which Nicaragua wishes to recover occurred in Nicaragua, the Federal Tort Claims Act will not serve as a basis for waiver of sovereign immunity in this case.

To overcome these problems, Nicaragua could bring suit in a federal district court requesting a writ of mandamus requiring that the ICJ judgment be implemented under 28 USC § 1361.[26] In order for the mandamus to issue the court must find that the ICJ decision is considered the law of the land,[27] because a writ of mandamus cannot be granted if there is any discretion in the execution of the act. In addition, the court must find an affirmative duty to act.[28] Therefore, a writ of mandamus will only be available only if the President has an affirmative duty to enforce the ICJ decision.[29]

Further, even if the standards for issuance of the writ of mandamus are met, the court may still exercise a certain discretion. "That the statute *permits* the issuance of mandamus does not *require* its issuance. Mandamus is issued at the discretion of the court."[30] Therefore, the court could deliberate on the merits, find the decision binding on the United States and still refuse to issue the writ of mandamus, because the writ ordering enforcement of the ICJ judgment would clearly embarrass the government. The court might also determine that it should not involve itself in foreign affairs and therefore refuse to issue the writ. Finally, the court might refuse to decide the merits of the case and simply state that mandamus is an inappropriate remedy even if the

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24. 28 U.S.C. § 2674 (1948).

25. 28 U.S.C. § 2680(K). "The provisions of this chapter and section 1346(b) of this title shall not apply to . . .

(K) Any claim arising in a Foreign country."

26. 28 U.S.C. § 1361, "The district court shall have original jurisdiction of any action in the nature of mandamus."

27. That is to say the ICJ treaty must be self-executing. For a discussion of this *see infra* at 81-87.

28. *See*, Rural Electrification Administration v. Northern States Power Co., 373 F.2d 686, *cert. denied* 387 U.S. 945, 87 S. Ct. 686 (1967).

29. It is permissible to issue a writ of mandamus against the President of the United States, *see*, Wildlife Federation v. United States, 626 F.2d 917, 923 (D.C. Cir. 1980).

30. *Id. See also, United States ex rel Greathouse v. Dern*, 289 U.S. 352, 260, 53 S. Ct. 614, 77 L.Ed. 1250 (1933). "The Court, in its discretion, may refuse. . .to give a [mandamus] remedy which would work a public injury or embarrassment." *Id.* at 360.

President has a duty to follow the ICJ decision.

It seems, therefore, that even if the ICJ decision is binding on the United States, it is not at all clear whether Nicaragua could enforce decision in United States courts. Lastly in the event that the United States is bound by treaty to the ICJ, Congress or a group of congressmen may be allowed to challenge the President if he fails to implement the decision. Whether congressmen have standing to sue the executive is still uncertain. In 1979, the Supreme Court dismissed a suit brought by several congressmen against President Carter for terminating the Mutual defense treaty with the Republic of China,[31] but did not resolve the standing issue. Four members of the Court[32] believed that the issue was a political question;[33] of the remaining five, none specifically addressed the issue of standing.

A few lower court decisions, however, have addressed this issue. In *Kennedy v. Sampson*,[34] the Court found that a Senator possessed standing to challenge an attempted pocket veto of legislation for which that Senator had voted. However, *Harrington v. Bush*[35] involved a suit brought by congressmen against the director of the CIA; standing was denied. Standing in *Harrington* was claimed on three grounds. First, the plaintiffs asserted that disclosure of the information sought would "bear upon" their ability to consider impeaching the defendants.[36] Second, disclosure would bear upon the plaintiff's duty to make appropriations.[37] Third, disclosure would bear upon the plaintiff's right to enact other civil legislation.[38] The D.C. District Court of Appeals ruled that none of these interests constituted real injury which would confer standing to the plaintiffs. The court went on to state that, even assuming the CIA's action was illegal "[t]hese assumptions as to illegality do not in and of themselves confer standing on anyone to challenge the illegality."[39] Thus, a Congressman still might lack standing to sue the President for failure to comply with an ICJ decision binding on the United States.

In response, however, it could be argued that because a President's

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31. Goldwater v. Carter, 444 U.S. 997, 100 S. Ct. 533, 62 L.Ed.2d 428 (1979).

32. They were Chief Justice Burger and Justices Rehnquist, Stewart and Stevens.

33. *See infra* at 80-81 for a more detailed discussion on the political question issue.

34. 511 F.2d 430 (D.C. Cir., 1974).

35. 553 F.2d 190 (D.C. Cir., 1977).

36. *Id.* at 198.

37. *Id.* at 199.

38. *Id.*

39. *Id.* at 197.

failure to comply with a valid treaty is tantamount to a unilateral amendment to the treaty without the consent of the Senate; the President's failure to honor an ICJ judgment is tantamount to an amendment of the ICJ treaty. The acceptance of the ICJ statute was ratified by the United States Senate in accordance with the Constitutional requirements.[40] If such an unilateral treaty amendment is allowed, the Senate's power to advise and consent on treaties would be undercut — once a treaty was ratified by the Senate, the President could change the terms of the treaty by simply ignoring provisions of which he did not approve. This unilateral executive action would cause institutional harm to the Senate. This argument would be much more analogous to *Kennedy*, where standing was found, than *Harrington*, where standing was not found. On the other hand, the weakness of this argument is that it could also extend to invalidate any Presidential action in violation of law. Any executive action that might violate a law could be arguably a unilateral change of the law depriving the Congress of its authority to change or suspend the law. Thus, anytime the President took action which might violate a law Congress would have standing to sue. It should be noted that the courts have been very reluctant to accept such a conclusion.

C. Political Question

Assuming a court did find that a plaintiff had standing and that a court had jurisdiction to entertain a suit to enforce an ICJ decision, the court would next consider whether the issue presented a political question. The political question doctrine, as developed by the Supreme Court in *Baker v. Carr*[41] states that, under certain circumstances, a court should refuse to adjudicate an issue that should properly be decided by another branch of the government. The Supreme Court in *Baker* identified several areas, including foreign relations, where the courts should defer to another branch. However, Justice Brennan's majority opinion stated, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[42] Thus, a political question is not automatically raised merely because foreign relations are at issue in a case. In the case of a law suit brought by Nicaragua, the President may request that the courts to abstain from rendering a judgment because it may interfere with the administration's policy toward Nicaragua. Such a suit would certainly

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40. 59 Stat. 1055, T.S. No. 993, 3 Bevans 1153.
41. 369 U.S. 186, 82 S. Ct. 691, 7 L.Ed.2d 663 (1962).
42. *Id.* at 211.

address allegations of hostile actions by the United States government against the Nicaraguan government and Justice Brennan has stated, in *Baker v. Carr*, that dates and durations of hostilities shall be considered political question.[43]

The President may be required to conform to certain constitutional procedures if he expects the courts to honor his request. For instance, although Congress has the power to declare war, and is empowered to appropriate all moneys that the government spends. Past administrations have carried out military actions without a Congressional declaration of war.[44] Courts may find that the political question doctrine does not apply to hostilities if the President is acting unilaterally because in such circumstances the judiciary may be the only branch that can check the President.

On the other hand, the Supreme Court has, in the past, recognized very broad Presidential powers in the area of foreign affairs[45] so that even if the President did act unilaterally, a court might decide that the issue is a political question. Since the exact extent of the President's power to take unilateral military actions under the constitution is not clear, a court might decide that the President and the Congress should work out this issue. This position is similar to that adopted by a plurality in *Goldwater v. Carter*[46] where four Justices led by Justice Rehnquist, stated that since the constitution does not specify which government branch has the power to terminate treaties, the matter should not be judicially settled but rather the other two branches should resolve the issue. Although that issue seems distinguishable from the question considered in this article, it does demonstrate that U.S. courts are often reluctant to interfere with activities involving foreign affairs undertaken by another branch of government, even if the action would be reviewable under other circumstances. Therefore, a court might still refuse to hear a suit to enforce an ICJ judgment involving United States hostilities against a foreign government even if standing and jurisdiction are recognized.

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43. *Id.* at 213.

44. For example, President Truman's actions in Korea and the actions of Presidents Johnson and Nixon in Southeast Asia.

45. United States v. Curtis-Wright Export Corporation, 299 U.S. 304, 57 S. Ct. 216 (1936).

46. *See supra* notes 31-32 and accompanying text.

III. Enforcing a Treaty

A. *Self-Executing Agreements*

In general, treaties are merely compacts between nations and create no rights for individuals. This principle was set forth by Chief Justice Marshall in *Foster and Elam v. Neilson*:[47]

> A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.
>
> In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.[48]

Despite the fact that treaties are the law of the land under the Constitution, the Supreme Court has consistently distinguished between statutes and treaties. Treaties which are self-executing are treated like statutes. Treaties which are not self-executing do not grant rights to anyone absent Congressional action. The distinction between self-executing and nonself-executing treaties is not always easy to ascertain. The Supreme Court gave a brief description of a self-executing treaty in the *Head Money Cases*:

> A treaty then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizens or subjects may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would a statute.[49]

The rule from the *Head Money Cases* lends little aid in interpreting the ICJ statute. The ICJ statute lays out very exact procedures as to how disputes between nations are to be settled.[50] If the ICJ has al-

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47. 27 U.S. (2 Peter) 253, 7 L.Ed. 415 (1829).

48. *Id.* at 313-14, 7 L.Ed. 415, 436.

49. Head Money Cases, 112 U.S. 580, 598-99, 5 S.Ct. 247, 254, 28 L.Ed. 798 (1884).

50. Dreyfus v. Von Fink, 534 F.2d 24, 30 (1976). "It is only when a treaty is self-

ready adjudicated the issues involved, these issues might very often be of a nature to be enforced by a court. However, this presumption may be disputed with regards to Nicaragua's suit against the United States. When the United States first appeared before the ICJ to dispute that tribunal's exercise of jurisdiction over Nicaragua's suit, the United States argued that the dispute was so intertwined with political factors that no court could settle it.[51] Although the ICJ rejected this argument, it may be renewed before a U.S. court in order to dissuade the judiciary from enforcing the ICJ judgment and to compel the court to hold that, considering the political nature of the dispute, the ICJ judgment in favor of Nicaragua cannot be enforced.

Such a decision raises the question of whether a U.S. court should ever enforce an ICJ judgment because some of them surely involve political questions. Any attempt to enforce some ICJ decisions but not others would be difficult under present judicial philosophy regarding treaties. For example, a self-executing treaty has the force of an act of Congress and must therefore be enforced by courts as the law of the land. Thus, courts do not have the discretion to enforce a self-executing treaty some of the times but not at others. On the other hand, if the treaty is not self-executing, there can never be a suit under the treaty absent Congressional action. Under present judicial reasoning then, the court must decide to enforce all ICJ decisions or else refuse to enforce any of the decisions.

In *People of Saipan v. United States Dept. of Interior*,[52] the Ninth Circuit Court of Appeals laid out several factors to consider in determining whether a treaty is self-executing. One factor to consider is the purpose of the treaty and the objectives of the treaty's creators. The principal objective of the ICJ creators was to promote international peace which would be an argument for making the treaty self-executing. Peace is not promoted if countries refuse to abide by ICJ decisions. Possibly, the attempt to use the ICJ to promote peace has become so eroded that United States courts will not consider this purpose sufficient to find the statute self-executing. Several major powers, such as the U.S.S.R. and China, have refused to accept mandatory jurisdiction of the ICJ.[53] Recently Iran refused to follow a judgment of the ICJ.[54]

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executing, *when it prescribes rules by which private rights may be determined*, that it may be relied upon for enforcement of such rights." *Emphasis added.*

51. Case concerning military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States), Countermemorial of the United States submitted August 17, 1984.

52. 502 F.2d 90, 97 (9th Cir. 1974).

53. Reservation By the Union of Soviet Socialist Republics To the Convention on

In deciding if a treaty is self-executing, the intent of the parties is the determining factor. According to *Diggs v. Richards*,[55] "in determining whether a treaty is self-executing courts look to the intent of the signatory parties as manifested by the language of the instrument."[56] Language is used to determine that intent. A treaty with the wording that certain acts "shall be ratified"[57] is not self-executing. A treaty stating that certain acts are "ratified" is self-executing.[58] The United Nations Charter states: "Each 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."[59] The important word here seems to be *undertakes*. Unfortunately, this is a very ambiguous word. It could mean "will be bound" in which case an ICJ decision would be self-executing. *Undertakes* could also mean that "the United States government agrees to take action to implement decisions of the ICJ." In this case Congress would be required to act before any rights could vest under an ICJ decision. At the present time there is no judicial decision guiding the interpretation of this word thus making it impossible to determine if the ICJ statute is self-executing. However, it does seem firmly established that the final decision on whether the treaty is self-executing must be made by the courts. According to § 154 of the Restatement of Foreign Relation Law;

> (1) Whether an international agreement of the United States is or is not self-executing is finally determined as a matter of interpretation by courts in the United States if the issue arises in litigation.[60]

While the opinion of the executive branch would probably be given great weight on this matter, the judicial branch alone will decide this issue ultimately.

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the Privileges and Immunities of the United States, 173 U.N.T.S. 369, (deposited Sept. 22, 1953). *See also* L. HENKIN, INTERNATIONAL LAW 872 (1980).

54. United States Diplomatic and Consular Staff in Tehran, (United States v. Iran), 1980 I.C.J. 3, May 24, 1980 (I.L.M. Vol. XIX, No. 3, May 1980 at 553-584).

55. 555 F.2d 848 (D.C. Cir., 1976).

56. *Id.* at 851.

57. *Id.*

58. *Id. see also*, A. EVANS, *Self-Executing Treaties in the United States of America*, BRIT. Y. B. INT'L L., at 185-86.

59. U.N. CHARTER art. 94.

60. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 154 (1965).

B. *Obstacles to Enforcement at Self-Executing Agreements*

Another factor to consider is the availability and feasibility of alternative enforcement measures. The United Nations Charter itself sets up an alternative method of enforcing ICJ judgments. Article 94 (2) states:

> 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.[61]

Under this Charter the United Nations Security Council clearly has the authority to enforce ICJ decisions. Taking the UN Charter and the ICJ statute together, it can be argued that the treaties envisioned the Security Council as the proper body to enforce ICJ decisions. However, the United States retains a veto power over actions taken by the Security Council.[62] If the President of the United States decides not to honor an ICJ decision he can simply instruct the United States Ambassador to veto any resolution placed before the Security Council to implement the ICJ decision. Given this situation, the feasibility of enforcing an ICJ judgment in the Security Council can be seriously questioned. A U.S. court, however, might still require the plaintiffs to go to the Security Council, since that is the alternative method of enforcement specified in the Charter.

A court deciding that the Security Council was the proper body to enforce an ICJ decision, has two options. First, because the Security Council possesses the power to enforce ICJ decisions, the court could find that the Security Council is the only body capable of enforcing an ICJ decision. However, this conclusion would seem to be inconsistent with the main purpose of the Charter which is to foster the peaceful resolution of disputes.[63] In accordance with this purpose, the drafters of the Charter would not have intended to severely limit the impact of an ICJ decision. Given a desire to maintain peace and security, it would seem that any method available to enforce an ICJ decision would be acceptable to the drafters. Thus, it is very unlikely that the drafters intended such strict interpretation of the Charter.

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61. U.N. CHARTER art. 94, para. 2.

62. A veto power is given to permanent members of the United Nations. *See* U.N. CHARTER art. 24(1) and art. 27(3).

63. *See* U.N. Charter art. 1, paras. 1-4 for the purposes of the United Nations.

The court's second option would be to rule that the parties must first go before the Security Council, but that a United States courts will accept jurisdiction in the case that the dispute is not resolved. This solution is analogous to the exhaustion of remedies concept in other areas of law. Since the UN Charter establishes a method by which to enforce an ICJ decision, the parties should at least follow all proceedings prescribed by the Charter before instituting suit in a U.S. court. This solution would allow the courts to stay out of the dispute until there remains no other way to settle the controversy.

A final factor to consider is the immediate and long range consequences of finding the treaty to be self-executing or nonself-executing. This would appear to be the most important factor for a court to consider because the court might not want to restrict future Presidential actions regarding the ICJ. However, even if the ICJ statute is self-executing, the United States government is not bound in a true sense for Congress could pass a statute forbidding enforcement of an ICJ judgment at any time. Subsequent legislation always overrides antecedent treaties.[64] Thus, although Congressional action violates treaty obligations under the ICJ statute, there would be no redress in United States court for such violation. Therefore, even if the ICJ statute is self-executing, a court could only intervene in the event of a unilateral Presidential decision to disregard an ICJ judgment. A U.S. court is never bound by an ICJ judgment if both the President and the Congress actively opposed enforcement. As a result, this factor has less significance than it would appear to have on the surface.

The Supreme Court has been reluctant to pass on issues involving similar provisions of the United Nations Charter. One case in which the Court had a chance to rule on the status of the United Nations Charter in the domestic forum was *Shelley v. Kraemer*.[65] It was briefed and argued in that case that the UN Charter outlawed racial discrimination, and that these sections of the Charter were binding on the United States government. The Supreme Court refused to consider this issue.

Similarly, the District of Columbia Court of Appeals has held that a Security Council resolution is not judicially enforceable against the

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64. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 145(1) (1965).

(1) An act of Congress enacted after an international agreement of the United States becomes effective, that is inconsistent with the agreement, supersedes it as domestic law of the United States, if the purpose of Congress to supersede the agreement is clearly expressed.

65. 334 U.S. 1 (1948).

United States government. In *Diggs v. Richardson*,[66] the plaintiff tried to enforce a UN resolution calling on its members to sever relations with South Africa. The court refused to enforce the resolution, stating "we find that the provisions here in issue were not addressed to the judicial branch of our government."[67] In this respect, however, an ICJ decision might differ from a resolution of the Security Council or the General Assembly. The ICJ is itself a judicial body. Whereas the resolutions of the UN are always based on political considerations, the ICJ supposedly bases its decisions solely on international law. Therefore, the judicial nature of an ICJ decision may make it more relevant in domestic legal proceedings than a UN resolution.

C. Money Damages

If a court determines that the ICJ statute is, by its own terms, self-executing, the court must then determine whether the United States government can be required to pay any money damages awarded by the ICJ. According to Henkin:

> A treaty cannot appropriate funds: the Constitution expressly provides that 'no money shall be drawn from the treasury, but in Consequence of appropriations made by law'; and a treaty is apparently not law for this purpose.[68]

Henkin only cites one source to support this statement, a 1852 circuit court case *Turner v. American Baptist Missionary Union*.[69] The Supreme Court has never ruled on this issue. If the Supreme Court adopts Henkin's view, no treaty which appropriates money will be self-executing.

Henkin's view appears valid. Congress had to appropriate funds for both the Louisiana Purchase and the purchase of Alaska, even after the relevant treaties had been ratified by the Senate. Furthermore, a federal agency cannot spend money merely because it has been chartered. Every time a federal agency wishes to spend money, Congress must first make an appropriation. Therefore, it seems logical that treaties would operate in the same manner. In addition, because the House of Representatives has no participation in matters involving treaties other than the appropriations process, the House has an even

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66. *Supra* note 55.
67. *Id.* at 851.
68. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION, 159 (1972).
69. 24 Fed. Cas. 344 (1852).

greater interest in controlling appropriations under treaties than appropriations under other domestic laws, which the House helps exact.

Modern tort law provides another analysis of this issue. Over the past decades Congress has passed statutes that allow recovery of tort damages from the government without specific legislation authorizing each recovery. Under 28 U.S.C. § 2414,

> Payment of final judgments rendered by a state or foreign court on tribunal against the United States, or against its agencies or officials upon obligations or liabilities of the United States, shall be made on settlements by the General Accounting Office after certification by the Attorney General that it is in the interest of the United States to pay the same.[70]

Since the ICJ is a foreign tribunal, collection of the judgment can only be obtained after the Attorney General has certified that payment of the ICJ judgment would be in the interest of the United States. Given the almost certainty that the present Attorney General would refuse to sign such a certification, there appears to be no way to collect the ICJ judgment under this statute. The decision whether or not to certify a judgment for collection seems to be at the sole discretion of the Attorney General. The Department of Justice Report recommending the passage of this legislation stated:

> The draft bill provides that judgments of State and foreign courts or tribunals shall only be paid after certification by the Attorney General that it is in the interest of the United States to pay the same, thus precluding automatic payment with respect to cases in which such judgments are considered to have been improperly rendered. The draft bill does not and is not intended to waive any immunity from suit which the United States may otherwise have.[71]

Since the United States' position is that the judgment by the ICJ is not valid because the ICJ lacked jurisdiction, the Attorney General, under this statute, has no duty to sign a certification. It is very unlikely that any court would attempt to review a denial of certification by the Attorney General. The words "in the interest of the United States" seem clearly to imply that matters of foreign policy are to be considered when the Attorney General considers whether or not to sign a certification. Therefore, unless at some future date an Attorney General signs a

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70. 28 U.S.C. § 2444.

71. 1961 U.S. CODE CONG. & AD. NEWS at 2440.

certification to have this judgment paid, it is very unlikely that recovery can be obtained under the tort recovery laws.

D. Constitutionality of the ICJ Statute

Finally, there may be a very serious constitutional problem if it is held that the ICJ statute is self-executing and that ICJ judgments are binding on the United States government. The United States Constitution states that:

> The judicial Power of the United States, shall be vested in one Supreme Court, and in such *inferior* Courts as the Congress may from time to time ordain and establish.[72]

Henkin claims that United States' membership in the ICJ does not violate this section of the Constitution[73] and focuses on the concurrent jurisdiction of United States and international courts. There is certainly nothing unconstitutional about allowing international tribunals to deal with international issues. But the ICJ statute goes on to state in Article 60 that:

> The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon request of party.[74]

If the ICJ statute is self-executing and binds the United States, the Supreme Court could be asked to enforce a judgment over which it has no right of review. The Court must address whether the ICJ could possibly be considered an inferior court as required by the Constitution.

Clearly, the ICJ acts in a judicial capacity. It is questionable whether the Congress and the President have the power to set up judicial processes which create binding decisions upon the United States courts if all United States courts are forbidden to review the decisions. This would turn on the interpretation of the term "inferior courts." It seems unlikely that the Supreme Court would allow a treaty to create judgments binding on United States courts without a right of review absent constitutional amendment.

This problem does not exist if the ICJ statute is not self-executing. If the statute requires Congressional action to implement ICJ decisions,

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72. U. S. CONST. art. III § 1.
73. L. HENKIN, *supra* note 68, at 197.
74. Statute of the International Court of Justice, *supra* note 1, art. 60.

the judiciary would not be bound simply by a judicial act of the ICJ. Congress has the power to pass legislation implementing an ICJ decision, indeed, Congress is free to adopt the recommendations of any organization it chooses without giving rise to constitutional questions. Congress could also make the ICJ decision advisory with respect to United States courts. A constitutional problem exists only if the ICJ decision is binding on the Supreme Court, and if the Court has no right of review.

If the Supreme Court found that the treaty was an attempt to create binding judgments on the Court, the whole treaty might be struck down as unconstitutional. This would be a very drastic action, and it is unlikely that the Supreme Court would nullify the United States' participation in the ICJ. The Supreme Court has held that the treaty power is very broad.[75] More than likely the Court would construe the ICJ statute to be nonself-executing in order to avoid the constitutional issue. It then would be impossible to enforce an ICJ judgment absent Congressional legislation.

IV. Treaty Modification

Recent actions by President Reagan have changed the status of the United States' involvement in the ICJ. On April 6, 1984 the United States notified the ICJ that for two years the United States would not recognize the Court's jurisdiction over issues relating to Central American.[76] It is questionable whether the President has the power to do this.

The ICJ refused to accept the withdrawal. The acceptance of jurisdiction by the United States requires six months notice before withdrawal from ICJ jurisdiction.[77] Therefore, the ICJ did not recognize the withdrawal immediately. Under Article 36(6) of the ICJ Statute, the ICJ has the authority to settle jurisdictional disputes. As stated earlier, ICJ decisions are not reviewable by member states under Article 60 of the Statute.[78]

Under U.S. constitutional law it is questionable whether the President has the power to unilaterally change a treaty. The constitutional issues involved in an attempt to modify the terms of acceptance of ICJ

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75. Missouri v. Holland, 252 U.S. 416, 422-23, 40 S. Ct. 482, 64 L. Ed. 641 (1920).

76. 1984 ICJ Rep. 392, 398 (I.L.M. Vol. XXIV, No. 1, Jan. 1985).

77. 61 Stat., 1218, T.I.A.S. No. 1598, 1 U.N.T.S. 9, deposited with the United Nations, Aug. 26, 1946.

78. Statute of the Internation Court of Justice, *supra* note 1, art. 60. *See supra* note 74 and accompanying text.

jurisdiction are discussed generally in a recent note.[79] In essence the President has attempted to amend the Senate's acceptance of ICJ jurisdiction without Senate consent. Under normal procedures, however, a treaty is amended by seeking the Senate's consent to modifications of the original treaty. Even in 1979, when the President terminated the Mutual Defense Treaty with the Republic of China, the State Department assured the Congress that although the President possessed the right to terminate treaties, he did not possess the authority to unilaterally amend treaties.[80]

Because the President's power to modify or amend a treaty is uncertain, a court might not want to rule on the issue, and *Goldwater v. Carter*[81] seems to suggest that the Supreme Court is not yet ready to deal with this type of issue. But, if suit were brought to enforce an ICJ judgment, the Supreme Court might have no choice but to decide whether the President's attempted modification is valid. However, this issue would only be reached if the Court first found that the party instituting suit possessed standing, that the ICJ statute is self-executing, and that the suit did not raise a nonjusticiable political question. As discussed above, each of these three issues present serious obstacles to enforcement of an ICJ decision.

V. CONCLUSION

On October 7, 1985, the President notified the ICJ that the United States was withdrawing from compulsory ICJ jurisdiction.[82] Even if the President's termination of the ICJ's jurisdiction is valid, Nicaragua might still be able to sue to enforce an ICJ decision, so long as the ICJ had jurisdiction over Nicaraguan's case at the time the suit was first brought. In *Chae Chan Ping v. United States*[83] the Supreme Court stated:

> [W]hatever of a permanent character had been executed or vested under the treaties was not affected by its [termination]. In that respect the abrogation of the obligations of a treaty operates, like the repeal of a law, only upon the future, leaving transactions executed

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79. Lennon, *Note: Nicaragua v. United States*, AM. J. INT'L L., Vol. 79, 682-89, July 1985.

80. Treaty Terminations: Hearings before the Senate Comm. of Foreign Relations, 96th CONG., 1st SESS., 214 (1979).

81. Goldwater v. Carter, *supra* note 31.

82. I.L.M. XXIV, No. 6, No. 1985.

83. 130 U.S. 581, 9 S.Ct. 623, 321 L.Ed. 1068 (1889).

under it to stand unaffected.[84]

Likewise, under 70(1)(b) of the Vienna Convention on the Law of Treaties the termination of a treaty "does not affect any right, obligation, or legal situation of the parties created through the execution of the treaty prior to termination."[85] At least one court has held that the Vienna Convention is self-executing.[86] Therefore, in order for the Nicaraguan government to succeed in a suit to enforce a judgment rendered by the ICJ, Nicaragua must show that rights under the treaty vested before the United States' withdrawal from the jurisdiction of the ICJ. Nicaragua could argue that rights vested under the ICJ statute when the suit was filed, and subsequent United States withdrawal should not affect Nicaragua's right to have the treaty enforced. There is no way to determine how successful this argument would be.

Given all of the uncertainties in this area of the law, it is impossible to determine definitely whether an ICJ judgment could ever be enforced in a United States court. Several serious obstacles would have to be overcome before a court would enforce an ICJ judgment. First, the party instituting suit must obtain standing. This might be possible but it is not clear if anyone would be able to meet the standing requirements. Second, the spectra of the political question doctrine looms over this area of the law, ready to preclude a court from even considering the issues involved. In addition, the greatest problem comes in the area of the self-execution of treaties. If the ICJ statute is not self-executing, United States courts cannot enforce an ICJ judgment absent Congressional action. On the other hand, if the statute is self-executing, several potential constitutional problems arise. Thus, either determination on the issue of self-execution may defeat the suit. Finally, action by the President to modify and suspend ICJ jurisdiction creates even greater uncertainty with regard to the suit brought by Nicaragua against the United States. Given all of these factors, it would be very difficult to succeed in any suit to enforce a judgment of the ICJ.

Colton Brown

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84. *Id.* at 601-02, 9 S.Ct. at 628.
85. U.N. Doc. A/Conf. 39127 (1969), 63 AJIL 875 (1969).
86. United States v. Enger, 472 F. Supp. 490 (1978).