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The Prospects for Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua’s Judgment Against the United States

MARY ELLEN O’CONNELL*

In March 1988, Nicaragua’s Sandinista government asked the International Court of Justice ("ICJ") to order the United States to pay $12 billion for violations of international law, as determined by the Court in June 1986.¹ Before the Court could rule, however, the Sandinistas were voted out of office in national elections on February 25, 1990.² Nicaragua’s new government has recently indicated that it does not intend to give up the claim but will seek a settlement of the

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¹ See Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (Judgment of June 27) [hereinafter Nicaragua]. In June 1986, the International Court of Justice found that the United States had violated general international law in aiding the Contra forces, in overflying Nicaraguan territory, and in laying mines in Nicaraguan waters. The United States also violated a treaty of friendship, commerce and navigation by imposing a trade embargo and by using armed force. The Court ordered the United States to cease these activities and to discuss payment of reparations with Nicaragua. It left the form and amount of reparations to the parties but, failing agreement, the Court reserved “the subsequent procedure in the case.” Nicaragua, supra, 1986 I.C.J. at 149. No discussions on reparations have occurred since the Court’s judgment, the United States taking the position that the Court had no jurisdiction and could not issue an order against it. Nicaragua submitted briefs on damages to the Court in March 1989, requesting $12 billion. Telephone interviews with David Wippman, attorney for Nicaragua (June 16, 1989 and Mar. 16, 1990).

judgment with the United States government. But if the parties cannot reach a voluntary settlement, can Nicaragua enforce an ICJ judgment against the United States — or any other state, for that matter? The efficacy of ICJ judgments is surely important to states which may be contemplating whether to seek monetary damages in current or future cases. States considering such cases must determine whether it is worth expending the significant resources necessary to bring an action before the ICJ if the resulting judgments cannot be enforced.

The enforcement problem obviously does not arise where the judgment debtor is willing to pay the award. Israel, for example, paid reparations following the ICJ's advisory opinion in the Reparation Case. In Corfu Channel, however, in which the ICJ ordered Albania to pay damages to the U.K. in 1954, Albania has refused to pay to this date. If Corfu Channel, even after thirty-five years, remains indicative of the status quo regarding ICJ judgments, it may stand for the proposition that, in the face of a recalcitrant judgment debtor, money judgments are effectively unenforceable.


5. The ICJ could, of course, make a declaratory judgment on the law. See infra text accompanying notes 56-61 (discussing the advantages and disadvantages of awarding declaratory judgments). This Article concerns only enforcement of monetary damage awards. The ICJ has made far fewer monetary awards than other types of decisions, but money judgments are generally considered easier and less controversial to enforce than other types of awards. See, e.g., Uniform Foreign Money-Judgments Recognition Act, 13 U.L.A. 261 (1986). So to the extent that it is difficult for states to get enforcement of these awards, such difficulty makes an even stronger impression that the system of international adjudication is inadequate. Nevertheless, much of the discussion herein would also apply to other types of determinations. For an analysis of the types of awards made by international courts, see C. Gray, Judicial Remedies in International Law (1987).


7. Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4 (Judgment of April 9). Ironically, Albania consented to go to the Court, while Israel's consent would not have been at issue in the U.N.'s decision to request an advisory opinion from the Court. Thus, while consent to go to the ICJ may indicate that a state is more willing to pay a judgment, even with consent, enforcement may sometimes be needed.

8. Judge Abraham Sofaer, the former Legal Adviser to the Department of State, would...
This Article presents an inquiry into the prospects for enforcement of monetary judgments of the ICJ. The introduction attempts to establish the importance to the international community of having enforceable ICJ judgments. The three sections which follow consider the relative merits of different institutional mechanisms available for enforcing decisions: enforcement through international organizations, specifically the ICJ, the U.N. Security Council, and the U.N. General Assembly; enforcement between the parties, either by seeking recognition of the judgment in the courts of the judgment creditor or debtor, or through self-help; and enforcement through third-party assistance.

The Article concludes that prospects for enforcement have in fact improved — not primarily because of developments with regard to the ICJ itself, but more because enforcement of analogous international awards has improved markedly. Various courts and other institutions, recognizing the importance of enforcement, now regularly recognize international awards, thus making it more likely that ICJ judgments will have real effect.

I. INTRODUCTION: WHY WORRY ABOUT ENFORCEMENT?

Despite the fact that in practice many states have resisted recognizing adverse ICJ judgments, e.g., the United States' position on the...
Nicaragua judgment, international law generally requires compliance with the judgments of the ICJ.\(^9\) This mandate suggests, as a corollary, that ICJ judgments should be universally recognized and enforced — in the same manner as domestic judgments at the intra-state level. Yet some international lawyers and commentators, in particular former Judge of the ICJ Sir Gerald Fitzmaurice, have voiced reservations to the idea.\(^10\)

The argument against enforcement is rooted in the assumption that international society has not developed to the point where automatic enforcement of international decisions can be contemplated. There are three bases upon which the argument against enforcement rests: (i) that states will never be cooperative in enforcing judgments because governments are simply unwilling to relinquish control over their affairs, (ii) that efficient enforcement is inconsistent with the formation of customary international law, and (iii) that the impersonal, institutionalized enforcement available on the domestic plane is simply unavailable internationally.\(^11\)

The first argument against enforcement, as explained by Fitzmaurice, posits the existence of a general unwillingness on the part of states to accept greater enforcement of ICJ judgments due to a disinclination to submit to the authority of extranational bodies. Making judgments more easily enforceable would increase such “outside” pressures and have an overall negative effect upon the international system:

By [a]. . . psychological process, the existence of any really certain and efficient means of law enforcement, in particular as regards judicial decisions, could well be detrimental to the wider acceptance of compulsory jurisdiction by acting as an inhibiting factor, and increasing de facto the commitment that governments would be called upon to make by litigating.\(^12\)

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9. See, e.g., Judgment of the International Court of Justice of 27 June 1986 Concerning Military and Paramilitary Activities in and against Nicaragua: Need for Immediate Compliance, G.A. Res. 11, 43 U.N. GAOR Supp. (No. 49) at 18-19, U.N. Doc. A/43/49 (1988): “aware that, under the Charter of the United Nations, the International Court of Justice is the principal judicial organ of the United Nations and that each member undertakes to comply with the decision of the Court in any case to which it is a party.”


12. Id. at 299.
Those who argue against enforcement, however, provide little empirical evidence of this psychological process. One might equally make the opposite argument: states are unwilling to adjudicate their disputes primarily because the results are too uncertain. Governments thus may not wish to commit time, expense and national prestige to a vain pursuit, unless the likelihood of effective enforcement is rendered more certain.

In any event, even if Fitzmaurice's surmise is correct, it merely stresses a potential "negative" result of enforcement — an increased column of adjudication — over another, more preferable likely effect — an increased certainty of result. A unique benefit of adjudication is supposed to be an assured result, namely an end to a dispute. Consistent enforcement promotes that result; lax enforcement does not. States that merely want to air their views or get an opinion on a question of law, without bearing the burden of an adverse decision, have other alternatives. States that want a binding decision have only one option: adjudication, and without enforcement this becomes a hollow option.

The second argument against efficient enforcement is that it would interfere with the formation of customary international law:

13. Without better enforcement, Jenks believes international adjudication will not grow: It may, therefore, be imprudent to envisage a substantial extension of compulsory adjudication, the introduction of a wider range of procedures and remedies, the reference to adjudication of more important and more controversial questions, and the assumption by international courts and tribunals of a more vigorous role in the creative development of the law, without simultaneously reviewing the problem of securing compliance with international decisions and awards. C. Jenks, The Prospects of International Adjudication 666 (1964).

14. In fact, the experience of the European Community bears out this hypothesis — the more efficacious the European Court of Justice has become, the more frequently European states have resorted to it and respected its decisions. See Stuart, The Court of Justice of the European Communities: The Scope of Its Jurisdiction and the Evolution of Its Case Law Under the EEC Treaty, 3 Nw. J. Int'l L. & Bus. 415 (1981); see generally infra notes 135-47 and accompanying text (increasing use of commercial arbitration as a result of enforceable outcomes).


16. States can go to the United Nations and request a debate or resolution; they can ask the United Nations to request the ICJ to give an advisory opinion, see, e.g., Western Sahara Case, 1975 I.C.J. 12, 13 (Advisory Opinion of Oct. 16) (issued as a result of Spain's initiative); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 17 (Advisory Opinion of June 21) [hereinafter Namibia]; or they can convene a panel of jurists to pronounce on the law. Such a panel recently deliberated on the question of whether Kurt Waldheim had committed war crimes during World War II. It concluded that while he lied about his service, he did nothing on the level of the crimes typically tried at Nuremberg. The decision, of course, has no binding effect.
[It] may well be that the very unenforceability in general of international law as a whole — at least in the last resort and except by the use of armed force — has been favorable to its development in the service of the world community; for the truth must be faced that in the absence of any true international legislature, it is not infrequently only by breaking the law that the law can be changed, or rather that those processes can be set in motion which will ultimately lead to the emergence of a new and more generally acceptable rule.¹⁷

This leg of the argument seems particularly deficient. Customary international law is usually made through a subtle, step-by-step process, during which states may occasionally violate an old rule of custom to develop a new one. Yet it seems difficult to argue convincingly that states are developing customary international law when they refuse to comply with an ICJ judgment.¹⁸ Except perhaps for Fisheries Jurisdiction, there seem to be few examples where a state did defy the ICJ as part of its quest to change a rule of customary international law.¹⁹ Even if states create customary law by breaking it, moreover, it seems preferable to encourage states to change international law by operating within the system, such as by treaty, rather than without. One way to do so is by imposing costs on law-breakers, such as enforcing ICJ judgments against them.

The final argument against better enforcement of ICJ judgments maintains that enforcement must be viewed differently in the international system because it is not sufficiently institutionalized. Thus, unlike the impersonal enforcement of the domestic system, enforcement on the international plane is most effective via self-help:

Enforcement must consist, directly or indirectly, of processes of self-help, and even if these take forms that are recognized as normal and legitimate, they will always tend

¹⁷. G. Fitzmaurice, supra note 11, at 299. Schachter writes that “this argument comes close to justifying law-breaking as a necessary evil in the process of the development of customary international law.” Schachter, supra note 10, at 218.

¹⁸. In Corfu Channel, for example, it is unlikely that Albania was trying to change the law when it fired on British vessels in the Corfu Channel, then refused to go to the ICJ to argue its case or to pay the judgment. And in those instances where the process of changing the law is rapid, such as in the adoption of principles regarding outer space, there is little if any time to discuss violating the law before the law has been transformed.

¹⁹. See Fisheries Jurisdiction Case (U.K. v. Ice.), 1974 I.C.J. 3 (Judgment of July 25); (F.R.G. v. Ice.), 1974 I.C.J. 175 (Judgment of July 25). In the end, however, Iceland and the U.K. resolved the dispute by negotiation. Iceland did not rely on its defiance of the ICJ to get the legal changes it wanted.
to encounter hostility and resistance, since the same considerations that were felt by the peccant or defaulting State as justifying the original breach will also be felt as justifying the original will also be felt as justifying resistance to attempts at enforcement.20

This argument, however, seems confused as to whether it is against enforcement per se or in favor of more institutionalized enforcement. In fact, as Fitzmaurice's quote seems to admit, such unilateral self-help might tend to exacerbate the original conflict, rather than cure it,21 while, in the context of judicial enforcement, the risk of exacerbating the situation is less.22 Failure to obey a decision of the International Court is an unequivocal violation of international law and presumably the counter-measures taken after such a violation would be limited to the parameters of the ICJ judgment, but judicial enforcement offers satisfactory safeguards, whether in the courts of third parties or those of the parties themselves.23 The objectivity of a third party and the availability of a fair procedure for enforcement are ultimately preferable to self-help.

The arguments against improving enforcement are thus less persuasive than they might initially appear. Enforcement of judgments is an essential aspect of any system of law, even international law, since such systems provide regulated avenues of dispute resolution. The cultivation of a strong legal enforcement mechanism may result in greater respect for adjudication; without effective enforcement, states have reason to view the recourse to tribunals as pointless and thereby limit a means for the rule of law to have an impact on interstate relations.24 As one commentator writes,

20. G. Fitzmaurice, supra note 11, at 300.
21. See, eg., Case Concerning the Air Service Agreement Between the United States of America and France:
   
   It goes without saying that recourse to counter measures involves the great risk of giving rise, in turn, to a further reaction, thereby causing an escalation which will lead to a worsening of the conflict. Counter-measures therefore should be a wager on the wisdom, not on the weakness of the other Party. They should be used with a spirit of great moderation and be accompanied by a genuine effort at resolving the dispute. But the Arbitral Tribunal does not believe that it is possible, in the present state of international relations, to lay down a rule prohibiting the use of counter-measures . . . or during negotiations, especially where such counter-measures are accompanied by an offer for a procedure affording the possibility of accelerating the solution of the dispute.
23. See infra secs. III & IV.
24. “The obligatory aspect of enforcement should be emphasized, for the ultimate
[the] very fact that recourse to arbitration and judicial settlement is infrequent and uncertain increases the prejudicial effect that a single case of non-compliance will have on future submissions of disputes. If enforcement measures are not available or if they are inadequate, the sense of frustration is compounded, not only to the detriment of the rule of law but also quite possibly to an extent that may involve a direct threat to international peace.\textsuperscript{25}

Simply put, enforcing international decisions is important. The better the enforcement, the more efficacious the system, and, perhaps, the greater the extent the system will be used in settling disputes peacefully. That possibility warrants an analysis of the prospects for increased enforcement of ICJ judgments.

II. Enforcement Through International Organizations

When a judgment creditor ascertains that the debtor is unwilling to satisfy the ICJ's award, the first likely approach to getting the judgment satisfied would be to return to the ICJ itself for help. The Court has the authority and some means available to assist judgment creditors but has often proved unwilling or unable to aid enforcement. A second international organ through which enforcement might be obtained is the U.N. Security Council. The Security Council has specific authority in the U.N. Charter to aid enforcement of ICJ judgments, and may request the assistance of U.N. members, or such powerful agencies as the International Monetary Fund ("IMF") and the World Bank, in aiding enforcement. In many cases, however, the Security Council is unlikely to get the opportunity to assist, due to the possibility of a veto by one of the participating states. The creditor may then have more success seeking enforcement through a third international body, the U.N. General Assembly; it possesses the authority to lend assistance to states with unenforced judgments, though, to date, it has done little to help.

\textsuperscript{25} Schachter, The Enforcement of International Judicial and Arbitral Decisions, 54 Am. J. Int'l L. 1, 5-6 (1960). In October 1988, a decision of a United States Court of Appeals provided some tangible evidence of the concerns expressed by Professors Schachter and Reisman. Judge Mikva noted that, in part because decisions of the ICJ have not been obeyed, he need not enforce ICJ decisions in any respect. See Committee of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 942 (D.C. Cir. 1988).
A. The ICJ

The ICJ can point to a good record of compliance with final judgments. This effectiveness in enforcing judgments seems widely recognized, as prospects for the ICJ appear better than in forty years. States are bringing increasing numbers of cases to the Court — in 1984 and 1989, the ICJ had record numbers of cases on its docket. The U.S. and U.S.S.R. have been discussing a mutual commitment to use the Court to settle certain types of disputes.

The primary rules governing the ICJ's decisions are found in the Statute of the Court and the United Nations Charter. The Statute provides that parties are bound to comply with the decisions of the ICJ. It says nothing, however, about the proper steps to take when a state fails to comply. Indeed the only hint that a state might not comply appears in article 61(3): "The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision."

The jurisprudence of the ICJ and its predecessor, the Permanent Court of International Justice ("PCIJ"), has added little or nothing to this brief reference because the need to do so simply has yet to arise.

26. In September 1984, the International Court of Justice had seven cases pending before it. See 1983-1984 I.C.J.Y.B. 125, 133. In 1989, the Court had eight cases on its docket, the most since the 1950's. See 1988-1989 I.C.J.Y.B. 132-58 (1989); see also Detente Breathes New Life into World Court, Fin. Times, Oct. 4, 1989, at 6-8.

27. The Soviet Union and the United States are currently drafting a new type of adherence to the jurisdiction of the ICJ. The two states will agree on a list of subjects which they consider appropriate for the Court's consideration on a compulsory basis. With this more specific designation of subjects, the consent to the Court would probably be narrower than that of many commercial contracts. See 83 Am. Soc. Int'l L. Proc. ___ (1989) (forthcoming) (comments of Judge Sofaer, Legal Adviser, U.S Dept. of State). See also Judge Abraham Sofaer, Coudert Lecture, Association of the Bar of the City of New York (December 1988).


30. ICJ Statute, supra note 28, arts. 59 & 60. Rosenne points out that these articles restate a general principle of international law that "when States agree to submit their dispute to an international tribunal, they assume the obligation to comply with the decision of that tribunal." S. Rosenne, The Law and Practice of the International Court 127 (1985). The jurisdiction of the International Court of Justice is set out in its Statute. ICJ Statute, supra note 28, ch. II. States may bring cases by special agreement, under a compromisory clause in a treaty or when both states have accepted the Court's compulsory jurisdiction. The latter two types of jurisdiction are referred to here as "compulsory."

31. See C. Jenks, supra note 13, at 703; S. Rosenne, supra note 30, at 125-29.

32. ICJ Statute, supra note 28, art. 61(3).

33. Professor Reisman found in 1971 that "in numerous statements, the Permanent Court and the International Court of Justice have refused to consider even the possibility of noncompliance." W.M. Reisman, supra note 24, at 641.
Since 1970, the Court has not actually had to consider noncompliance with a final judgment. Moreover, in only one ICJ decision — *Corfu Channel* — has a state repudiated an ICJ judgment which to date remains only partially enforced. In a handful of other cases, states began by repudiating the ICJ’s judgment but events obviated the need for enforcement in each case. In *Fisheries Jurisdiction*, for example, Iceland refused to participate in the proceeding before the ICJ. A year after the ICJ’s judgment, Iceland and the United Kingdom negotiated a final settlement of the dispute. The ICJ has faced refusals to comply with provisional measures; although such measures may not have the same status as final decisions, in such cases the Court has taken no action in response, even of a procedural nature. In spite of the seemingly high rate of success of ICJ judgments, however, commentators continue to disparage the ICJ’s capacity to function as and

34. See infra text accompanying notes 44-46.
35. *Corfu Channel Case (U.K. v. Alb.),* 1949 I.C.J. 4 (Judgment of April 9). Albania still refuses to pay the damages awarded, although the channel is open and that, of course, was the basic issue in dispute.
37. See J. Charney, Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation, and Non-Performance in The International Court of Justice at a Crossroads 295 (L. Damrosch ed. 1987). There are other examples in which the need for enforcement was avoided. In the Asylum Case (Col. v. Peru), 1950 I.C.J. 266 (Judgment of Nov. 20), Colombia at first refused to obey the judgment, but in a subsequent opinion, the Haya de la Torre Case (Col. v. Peru), 1951 I.C.J. 71 (Judgment of June 13), the ICJ reversed its decision in *Asylum.* J. Charney, supra, at 294. Also, in United States Diplomatic and Counselor Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (Judgment of May 24), Iran did not participate and did not immediately conform to the ICJ’s judgment, but it did enter into negotiations which eventually resulted in the hostages' freedom and established the Iran-U.S. Claims Tribunal. See Algiers Accords, 81 Dep't. St. Bul. 1 (1981), reprinted in 20 I.L.M. 223-34 (1981). The United States relinquished its claim to damages arising from the ICJ’s decision. J. Charney, supra, at 288.

The Right of Passage Case (Port. v. India), 1960 I.C.J. 6 (Judgment of April 12), is more difficult than the others to categorize. The ICJ ruled that Portugal had a right of passage from its colonial territories on the Indian subcontinent across Indian territory to the coast. A year after the decision, however, India seized the territories. J. Charney, supra, at 294-95. In one sense, India violated the decision, but in another sense, the decision was rendered moot. Portugal has not indicated that it still hopes to see the decision enforced.


39. The Court could, for example, refuse to consider informal communications from states which fail to obey orders. See Sinclair, Some Procedural Aspects of International Litigation, 30 Int’l & Comp. L.Q. 338, 356-57 (1981); see also S. Rosenne, supra note 30, at 125-26.
enjoy the authority of a "real" court. They point out that several states in the last fifteen years have chosen not to appear before the Court and states consistently ignore orders on interim measures.

The state representatives who drafted the Statute of the Court would not be surprised by the ICJ's inaction in the area of enforcement, which they envisioned to be a non-judicial function best left to the Security Council. When devising this plan they could not know how ineffectual the Security Council would become, nor did they even consider enforcement a potential problem at all. The ICJ's predecessor, the Permanent Court of International Justice, had a good record of compliance with its judgments, and the drafters might have expected the ICJ to enjoy the same fortune based on reputation alone.

Despite such broad respect for the ICJ in the international community, however, the historically high rate of judgment enforcement may be due less to compliance compelled by the prestige and stature of the ICJ than to the decentralized enforcement procedures typical to the enforcement of international law. As international law evolves, such a decentralized system of enforcement may no longer be sufficient. An extremely visible repudiation of a monetary judgment, the type most easily enforced in domestic courts, could easily damage the prestige of the Court, which could deal a setback to the use of international fora for the resolution of disputes.

Given that increasing the Court's "prestige" may not be a sufficient approach to increase compliance, the ICJ could consider other actions to limit its scope in order that its judgments might have a higher probability of being respected. While a case is pending, the ICJ has various options for gaining enforcement of its decisions. After the case is decided, however, its options drop off dramatically. Unlike a domestic court, it has no mechanism for seizing the assets of a recalcitrant party.

40. See, e.g., J. Charney, supra note 37, at 291.
41. While not unanimous, most scholars agree that interim measures are binding on parties in the manner of judgments. See, e.g., J. Elkind, Interim Protection (1981); J. Sztucki, supra note 38. On the problem of non-appearance and non-performance, see generally J. Charney, supra note 37; H.W.A. Thirway, Non-Appearance Before the International Court of Justice (1985); Mendelson, Interim Measures of Protection in Cases of Contested Jurisdiction, 46 Brit. Y.B. Int'l L. 259 (1972-3); Sinclair, supra note 39.
43. See J. Charney, supra note 37, at 288; Schachter, supra note 25, at 1.
44. Other international tribunals did not, however, possess such a good record. W.M. Reisman, supra note 24, at 148-49.
45. See supra note 13 (quoting Jenks' view that international adjudication will not continue to evolve until enforcement is improved).
trant state, nor does it have the authority to order states to turn over assets to the judgment creditor, as its orders are binding only on the parties before it. 46 Two possibilities for increasing compliance without developing mechanisms of enforcement that seem initially palatable are by avoiding jurisdiction entirely or by issuing declaratory judgments.

I. Avoiding Jurisdiction

Where the ICJ is concerned that a judgment will not be obeyed, one method of dealing with the matter is avoiding a decision entirely by refusing to take jurisdiction. Reisman suggests that:

[the] continuing authority of a decision process could be jeopardized by an impugned decision. As a result, a decision maker may validly examine the possible effects of non-enforcement of a decision on the organized decision process and on the community’s public order, and he should treat these matters as factors in his ultimate decision. 47

The dangers of such an avoidance strategy are significant, and similar to the criticisms of the Supreme Court’s avoidance of certain volatile issues. 48 First, surely the international community would be aware of avoidance, which could result in harming the prestige of the ICJ rather than shoring it up. The international community knew, for example, that the ICJ was avoiding a decision in South West Africa, 49 and probably no other case has so damaged its reputation. 50 When the ICJ did rule against South Africa’s continuing presence in Namibia, 51 most states hailed the advisory opinion, saying it vindicated the law as a useful tool in the struggle to end apartheid. The

46. ICJ Statute, supra note 28, art. 59.
47. W.M. Reisman, supra note 24, at 149-50.

This approach is akin to the remedy Alexander Bickel prescribed for the Supreme Court. Bickel feared that the Supreme Court would legitimate bad laws if it could find no principled basis for overturning them, and argued that in those cases it would be better for the Court to avoid deciding. See A. Bickel, The Least Dangerous Branch (1962).

48. See Gunther, The Subtle Vices of the “Passive Virtues” — A Comment on Principle and Expediency in Judicial Review, 64 Colum. L. Rev. 1 (1964). Gunther criticized Bickel’s “passive virtues” remedy as vulnerable and dangerous, because the public would likely see the Court’s abstention from decision as a way of legitimating the lower court’s ruling. Gunther believed that the Court has an obligation to decide in some cases, although many times the Court would rather avoid the merits of the case.

fact that South Africa has only recently honored the opinion does not appear to have done as much damage to the ICJ's prestige as the earlier decision to avoid jurisdiction.

A second problem with prescribing avoidance is the difficulty in identifying principles for guiding the ICJ in choosing avoidance. Like the U.S. Supreme Court, the ICJ has some flexibility over its jurisdiction. Nevertheless, the ICJ's Statute and rules do speak to jurisdiction, and it is the principles contained in those documents, rather than political assessment, on which the ICJ should base its decisions.

The risks of following the avoidance path are greater for international law than domestic law. International law is still in its incipiency. Achieving enforcement is important to the further development of international law, but if it is achieved at the expense of justice, the system will suffer rather than benefit. International lawyers cite ICJ decisions for every nuance they contain. If these decisions reflect expedience, then expedience will become embedded in the rules. For the development of international law, therefore, the ICJ should accept even those cases in which its decisions might be resisted.

2. Declaratory Judgments

Another means by which the ICJ could achieve better compliance would be for it to take jurisdiction whenever appropriate, but only make declaratory judgments as opposed to monetary awards. Corfu Channel might be the paradigmatic example: Britain did not get its money, but in fact did get a pronouncement on the law, from which Britain and every other naval power has benefitted ever since.

A policy of avoiding executory awards or even just avoiding mone-

53. See Gunther, supra note 48, at 7.
54. ICJ Statute, supra note 28, art. 36.
55. Jenks writes that, while the prospect of enforceability should be a consideration: where the margin of judicial discretion is particularly wide and the law is generally recognized to be in an early but crucial stage of development, the danger that an excessive preoccupation with enforceability may inhibit unduly the substantive development of the law is a matter for special concern. If the expediency of not risking defiance weighs more heavily in the scales of justice than the evolving needs of the community, international adjudication abdicates its essential function of dispensing justice; it becomes no more than still another barometer of the balance of power.
C. Jenks, supra note 13, at 667.
56. Id. at 668.
tary awards would not, however, improve the stature of ICJ judgments in the eyes of the international community. In most cases the distinction between declaratory judgments and monetary awards would probably not make much difference. In *Monetary Gold*, for example, the Western Allies asked the ICJ for a declaratory judgment to determine whether Albania or Italy owned certain gold recovered during the Second World War.\(^5\) The Court found that it could not rule in the case, but if it had, and the Allies had not returned the gold to the rightful owner, the world’s perception of the ICJ’s abilities would have been the same — the public would hardly distinguish a ruling that the law requires the gold to go to Albania from an order to give the gold to Albania.

Moreover, if the ICJ were not to award monetary damages in certain cases, the international community might conclude that the ICJ had simply not achieved justice. In *Corfu Channel*, ships were damaged and men were killed. If the ICJ ruled only that Albania unlawfully mined an international strait and fired upon ships most people would still believe that reparations were appropriate.\(^5\)

Most important, a refusal to award monetary damages might also render ICJ judgments less significant to international law. In *Nicaragua*, for example, the ICJ found that the United States violated the Treaty of Friendship, Commerce and Navigation by imposing an economic embargo.\(^6\) The mere declaration of that finding adds to the corpus of international law on the binding nature of treaties and may encourage better treaty observation in the future. But a ruling that the United States owes monetary damages, followed shortly thereafter


\(^5\) The Nuclear Tests Cases are also examples of where many observers felt justice was not done, though it might have been, if the parties had requested monetary damages. Nuclear Tests Cases (Austl. v. Fr.), 1974 I.C.J. 253 (Judgment of Dec. 20); (N.Z. v. Fr.), 1974 I.C.J. 457 ( Judgment of Dec. 20). In *Nuclear Tests*, Australia and New Zealand asked the ICJ to order France to stop testing nuclear weapons near their countries. France stated publicly, shortly before the judgments were delivered, that its program of testing was finished. The ICJ decided that this meant the case was moot and that it need not render a decision. For Australia and New Zealand the result was less than satisfactory, because they wanted a ruling on France’s obligation not to test weapons. If they had asked for monetary damages, instead of just a declaration, the ICJ would have had to rule on the lawfulness of France’s past conduct. True, if Australia and New Zealand had won, they would have faced the problem of enforcement, but they also would have had an authoritative pronouncement on the law for use in their own cause as well as by and against other countries. See Lectures by Elihu Lauterpacht, Peaceful Settlement of Disputes, University of Cambridge (1981) (Mr. Lauterpacht advised the government of Australia during the case).

by enforcement of the award against the recalcitrant judgment debtor, would plainly make a greater impact.

The use of declaratory judgments would not necessarily eliminate the enforcement problem. States can already ask the ICJ for declaratory rulings, but the fact that they rarely do but, rather, ask for monetary damages, implementation of boundary lines, return of temples, release of hostages and so on, shows their interest in getting positive outcomes even where the law is eminently clear. The state practice most relevant to the Court — the practice by those states which use the Court — supports retention of executory judgments, including monetary awards. The elimination of the Court’s jurisdiction to issue executory judgments might encourage some states to avoid the Court entirely.

As the analysis of the preceding proposals indicates, either of these two changes is more likely to erode the ICJ’s ability to have its judgments enforced than enhance it. Moreover, regardless of the positive developments in the recognition of ICJ judgments, it is clear that the Court cannot rely on its prestige as its predecessor did. Therefore, the means for enforcement of ICJ judgments will have to be found outside the ICJ itself, either in international organizations such as the Security Council or other mechanisms.

B. The Security Council

The drafters of the U.N. Charter gave responsibility for enforcement to the Security Council:

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.

Until recently, however, it seemed very unlikely that the Council would fulfill this responsibility because of internal ideological divisions reflected in liberal use of the veto. The newfound cooperation between the U.S. and U.S.S.R. may mean, however, that the Security Council will in the future become a more viable means of assistance.

61. See C. Gray, supra note 5, at 77-103.
62. U.N. Charter, supra note 29, art. 94(2).
63. See supra note 27.

The Iraqi invasion of Kuwait has spurred further cooperation between the U.S. and the U.S.S.R. Following the invasion on August 2, 1990, the Security Council passed a resolution
Enforcement through the Security Council is thus technically available at law, although in practice obtaining it depends heavily upon the sense of responsibility of those who occupy its positions and the political situation at the time assistance is sought.

The Council's enforcement role was patterned after that of the League of Nations Council, which did play a useful role in enforcement. In 1933, Greece received an award against Bulgaria from the PCIJ in the Rhodopia Forest case. When Bulgaria appeared unwilling to pay the judgment, Greece simply said it would go to the League and ask for enforcement pursuant to article 13(4) of the Covenant which required that the Council take steps to enforce any judicial decision. As soon as the League put the matter on its agenda, Bulgaria gave assurances that it would comply with the decision.

The mandatory nature of the enforcement clause turned out to be somewhat onerous because in the next case to be brought to the League, the Optant's Case, the Council proved reluctant to enforce the decision for political reasons. The Optant's Case raised questions regarding an institution's obligation to enforce its tribunal's decisions that have never been adequately answered, and were certainly not discussed, when the Security Council took over the League Council's responsibility.

The drafters of the U.N. Charter were at least aware of the questions related to institutional enforcement because they made some significant changes in article 94 from the League's article 13(4). The travaux relating to article 94, however, are scant, and we do not know

condemning the invasion and calling for the immediate and unconditional withdrawal of Iraqi troops; later resolutions imposed trade sanctions, declared the annexation of Kuwait null and void and challenged Iraq's seizure of foreign hostages and the closure of foreign embassies in Kuwait. N.Y. Times, Aug. 30, 1990, at A1, col. 4. On August 25, the Council passed an unprecedented resolution authorizing the use of naval force by member states against any attempts to evade the sanctions. These actions demonstrate an unparalleled level of cooperation among the members of the Security Council and provide a "textbook example of what World War II allies had in mind" when they drafted the U.N. Charter. Wash. Post, Aug. 27, 1990, at A1. While the impact of these actions remains to be seen, the Iraq situation lends support to the argument that the Security Council can work as designed.

64. See 28 Am. J. Int'l L. 760 (1934).
65. W.M. Reisman, supra note 24, at 686.
66. In the Optant's Case, Hungary had a decision against Rumania. See F. Deak, The Hungarian-Rumanian Land Dispute (1928). Rumania did not wish to comply because it claimed the decision would disrupt its agricultural reform program. The Council was sympathetic to the program and decided to consider the issue under article 11(2) rather than article 13(4). A commission was established and the whole matter was investigated. The commission, in effect, decided a different result would be preferable and nullified the tribunal's award. W.M. Reisman, supra note 24, at 687-96.
whether the changes were based on a new view of institutional enforcement or, indeed, whether they were based on much analysis at all. Several delegates may have worried that the Security Council would be overburdened by assuming a new competence not originally considered a part of its role when article 94 was put forth.\textsuperscript{68}

The language of article 94 seems to demonstrate that such concerns did in fact exist. Unlike the League Council, which was required to take steps to enforce a judgment, the Council is granted discretion to enforce a judgment. The Security Council may only deal with matters presented to it by parties rather than \textit{proprio motu} as could the League Council, and it may only be called on to enforce ICJ judgments rather than awards and decisions of other international tribunals.\textsuperscript{69} The language of article 94 gives no specific authority, however, to reexamine ICJ judgments.\textsuperscript{70}

\textsuperscript{68} L. Goodrich, E. Hambro & A. Simons, supra note 42, at 555-57.

\textsuperscript{69} See S. Rosenne, supra note 30, at 148-54; Schachter, supra note 25, at 17.

\textsuperscript{70} This view is reinforced by article 60 of the Court's Statute, which says that decisions of the Court are final. ICJ Statute, supra note 28, art. 60; see also Schachter, supra note 10, at 224.

Some commentators nevertheless question whether decisions of the ICJ should be treated as final. One scholar in particular asserts that, to attain the goals of world order, decisions of international courts, including the ICJ, should not be automatically enforced. Rather, potential enforcers like the Security Council should be permitted a quasi-review power, to consider the possible impact of enforcement and to amend a judgment if it will not enhance world order. W.M. Reisman, supra note 24, at 241-42. Reisman writes that finality of decisions is not a worthy goal in itself unless it enhances the goal of stability which is at the heart of his phrase, the "minimum objective of public order." Reisman, The Enforcement of International Judgments, 62 Am. Soc. Int'l L. Proc. 13, 15 (1968).

This review proposition raises a profound problem for all law enforcement: whether courts should avoid enforcing decisions where they detect that enforcement may result in social instability. The same rule that obtains in the U.S. domestic system is probably applicable to the international community: law serves stability better if it is not ignored. The alternative, non-recognition of judgments to preserve stability, seems laden with hidden dangers. In cases like the Nicaragua/U.S. dispute, for example, the likelihood of instability should the Security Council choose not to enforce the decision because it finds it to be flawed is uncertain.

A similar argument against Security Council recognition of "bad" judgments, \textit{i.e.}, judgments not in conformity with customary international law, also raises the danger of instability as a consequence. Letter from Professor D'Amato to the author (August 25, 1989). D'Amato cites \textit{Nicaragua} as an example of a judgment which he believes wrongly assesses customary international law. See D'Amato, Trashing Customary International Law, 81 Am. J. Int'l L. 101 (1987). It is hard to see, however, how such a concern may be resolved practically, given the difficulty in identifying who is entitled to decide whether a decision is "bad law," or why it is assumed the representatives at the Security Council are likely to reach a better legal decision than the 15 judges of the ICJ, who are "elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law." ICJ Statute, supra note 28, art. 2. But see T. Franck, Judging the World Court 35-36 (1986). On balance, the ICJ judges seem a more appropriate group for making legal decisions than the representatives to the Security
The fact that judgments are final means the Council is restricted from reviewing the merits of a decision. There are, however, questions concerning the circumstances under which the Council should enforce judgments as a general rule. First, the United States has in the past argued that the Security Council should only enforce judgments relating to threats to the peace.\textsuperscript{71} The Security Council certainly possesses special authority for defusing threats to the peace, but the language of article 94 does not support any such subject matter restriction. Moreover, such a restriction would make article 94 redundant since the Security Council may already consider any dispute threatening the peace under chapters VI and VII, regardless of the source of the dispute.\textsuperscript{72}

Second, and more interesting, is whether the Security Council members' rights to veto apply to requests for enforcement under article 94. Some commentators have suggested that, because article 94 is not located in the chapters on peace and security, the veto should not apply. Forty years after the creation of the veto this is a difficult interpretation to support. The United States and the Soviet Union have insisted on the use of the veto in so many different contexts it is difficult to conceive of one in which they would not use it. Article 27(3), for example, appears on its face to prohibit the use of the veto in some cases, by requiring that a party to a dispute brought to the Council under chapter VI must abstain from voting; abstention, however, has not been the norm.\textsuperscript{73} Security Council practice has appar-

\textsuperscript{71} See Charter of the United Nations, Hearing before the Senate Comm. on Foreign Relations, 79th Cong., 1st. Sess. 287 (1945) (statement of Leo Pasvolsky, Special Ass't to the Secretary of State for Int'l Organizations and Security Affairs).

\textsuperscript{72} Schachter, supra note 25, at 19-20.

\textsuperscript{73} Article 27(3) states, "[d]ecisions of the Security Council on all other [non-procedural] matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting." U.N. Charter, supra note 29, art. 27(3). If Nicaragua, therefore, went to the Security Council to get the decision in its case enforced, it would be in a position to insist that the United States not vote on the matter, including not vetoing any request for assistance. Nicaragua, however, has appealed to the Security Council on numerous occasions regarding its dispute with the United States, and even though the dispute has invariably raised questions of peace and security, the United States has vetoed Nicaragua's requests. See, e.g., 41 U.N. SCOR (2704th mtg.) at 54-55, U.N. Doc. S/PV.2704 (1986); 41 U.N. SCOR (2718th mtg.) at 51, U.N. Doc. S/PV.2718 (1986). Nor has the Soviet Union recused itself when states have complained about its behavior. In 1980, the Soviet Union voted against a resolution which called for an emergency special session to examine the question of the Soviet invasion of Afghanistan. See S.C. Res. 462, 35 U.S. SCOR (2190th mtg.) at 2, U.N. Doc. S/PV.2190 (1980).
ently modified the requirements of article 27(3), and today it appears that no permanent member of the Council may be expected to recuse itself.\textsuperscript{74}

Yet regardless of its authority, the Security Council has never received a request to enforce a final ICJ judgment. In 1954 it did receive a request from the United Kingdom for enforcement of ICJ interim measures against Iran resulting from that country's nationalization of oil concessions held by U.K. citizens.\textsuperscript{75} The Council reached no conclusion regarding its capacity to enforce interim measures, however, as the request became moot.\textsuperscript{76}

If not for political difficulties inherent to the body, the Security Council could be quite effective in enforcing judgments, given its ability to call on the member states and specialized U.N. agencies to aid in assisting enforcement.\textsuperscript{77} For example, the Council could call on member states to apply sanctions against a state refusing to comply with a decision of the ICJ.\textsuperscript{78}

\begin{itemize}
    \item\textsuperscript{74} As with contracts, subsequent practice should be able to modify treaties. See Restatement (Third) of the Foreign Relations Law of the United States § 334 reporters' note 2 [hereinafter Restatement].
    \item\textsuperscript{75} Anglo-Iranian Oil Co. Case (U.K. v. Iran), 1951 I.C.J. 4 (Interim Protection Order of July 5). The request produced a considerable amount of disagreement. The Soviet Union and Yugoslavia asserted that the dispute was a matter of Iran's domestic jurisdiction and could not be placed on the agenda under article 94. They also argued that the Security Council could not enforce an order before the ICJ had determined whether it had jurisdiction. 6 U.N. SCOR (559th Mtg.) at 3, U.N. Doc. S/2357 (1951). The British representative argued, on the other hand, that the Security Council could decide its own jurisdiction under article 94 and that the Council had jurisdiction regardless of the ICJ's jurisdiction because the matter involved peace and security. Id. at 20. As to interim measures specifically, the British representative stated that the Council had implied jurisdiction to enforce an interim measures order because in some cases if the parties did not obey interim measures a final decision would be frustrated. The Security Council's ability to enforce the final judgment could be dependent on compliance with the earlier order.
    \item\textsuperscript{76} The departure of all British employees from Iran removed the need for resolving the issue. France finally proposed that the Council postpone further debate until the ICJ determined whether it had jurisdiction. 6 U.N. SCOR (565th mtg.) at 2-3, U.N. Doc. S/2358/Rev. 2 (1951). The Security Council approved this proposal, perhaps giving the impression that it had decided it could not act until the ICJ had ascertained jurisdiction.
    \item\textsuperscript{77} The Council has taken action in other situations which could be very effective in the enforcement context. For example, when Rhodesia's white-controlled government made a unilateral declaration of independence from the United Kingdom in defiance of norms of majority rule, the Security Council called on all member states to observe an economic boycott of Rhodesia. See S.C. Res. 253, 23 U.N. SCOR Resolutions & Decisions at 5, U.N. Doc. S/INF/23/Rev. 1 (1970); see also supra note 63 (Security Council actions regarding the Iraqi invasion of Kuwait).
\end{itemize}
It is less certain, however, whether the Council possesses the authority to instruct a member state to seize the assets of a judgment debtor within the member’s jurisdiction and turn them over to the creditor in order to satisfy a judgment. The Council’s power to call on member states outlined in chapter VII of the Charter is certainly very broad, suggesting that, where a failure to secure compliance with a judgment threatened peace or security, it would indeed possess such authority; but where peace is not threatened, such authority may not obtain.

Another significant variable related to Security Council enforcement of judgments involves the Council’s ability to manipulate or direct the specialized agencies of the U.N. in enforcing a judgment. Most of the specialized agency agreements pledge the agencies to assist the Security Council in maintaining international peace and security, which would imply enforcing ICJ judgments, and the agen-

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79. Art. 41: The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These include complete 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.

Art. 42: Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Art. 43: (1) All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

(2) Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

(3) The Agreement or Agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

U.N. Charter, supra note 29, ch. VII.

80. Not all situations of nonrecognition of ICJ judgments give rise to threats to the peace. While the situation in *Nicaragua* might, it seems unlikely, for example, that Nauru will attack Australia if Australia should refuse to honor an award.

81. Article 57 provides, in part:

(1) The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63.
cies provide a number of mechanisms for obtaining compliance with judgments. For example, the Security Council could order the IMF or the World Bank to turn over the debtor's funds to the creditor, the International Civil Aviation Organization ("ICAO") could require that its members deny a defaulter access to air space and landing rights, or the World Health Organization could withhold its programs and information from the debtor. Each of these organizations could increase pressure on a recalcitrant judgment debtor, either individually or as part of a coordinated effort.

Some stumbling blocks might limit the effectiveness of attempts to utilize such specialized agencies, although they do not appear insurmountable. For instance, the IMF's specialized agency agreement with the United Nations is slightly different from the others. Under its agreement, the IMF:

> takes note of the obligation assumed, under paragraph 2 of Article 48 of the United Nations Charter, by such of its members as are also Members of the United Nations, to carry out the decisions of the Security Council through their action in the appropriate specialized agencies of which they are members, and will, in the conduct of its activities, have due regard for decisions of the Security Council under Articles 41 and 42 of the United Nations Charter.

U.N. Charter, supra note 29, art. 57(1).

82. In addition to assisting the Security Council, several of the specialized agencies require dispute settlement before the ICJ. If members disagree as to the interpretation of agency agreements or if a member is accused of violating an agency obligation, these disputes go to the ICJ. The agency then has the power to enforce an award if a member fails to comply. For example, the International Labor Organization ("ILO") agreement provides in article 33, "[i]n the event of any member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Enquiry, or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith." ILO Constitution, Oct. 9, 1946, art. 33, 62 Stat. 3485, 3542, T.I.A.S. No. 1868, at 68, 15 U.N.T.S. 35, 92. See also Statute of the International Atomic Energy Agency, Oct. 26, 1956, art. XIX, para. B, 8 U.S.T. 1093, 1111, T.I.A.S. No. 3873, at 19, 276 U.N.T.S. 3, 36-37 (persistent violators may be suspended from the "privileges and rights of membership" by the Governing Council). Iran has recently filed a case against the U.S. under the ICAO agreement and could have recourse to the ICAO if it wins a judgment and the U.S. is unwilling to comply. Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295.

83. See W.M. Reisman, supra note 24, at 741-43. ICAO, for example, agrees to render "such assistance to the Security Council as that Council may request, including assistance in carrying out decisions of the Security Council for the maintenance or restoration of peace and security." ICAO Agreement, supra note 82, art. 7.

The term "due regard" implies that the IMF may refuse a Security Council order, and some commentators have stated that it would likely refuse such an order rather than endanger its working capital by allowing attachment for satisfaction of judgments.\textsuperscript{85} The IMF could not refuse to assist the Council in all cases, however;\textsuperscript{86} it could always fashion assistance in a minimally confrontational manner.\textsuperscript{87} Thus, it appears that the Security Council could make effective use of specialized agencies, although not perhaps in every case in which it sought to utilize them.

The Security Council promises to be a more effective enforcer of judgments than the ICJ itself. Certain aspects of the Council's enforcement potential are still unexplored: the use of the veto in cases in which the member state has an interest, the finality of awards, the ability to command third-party states to seize assets and the extent to which the Council can employ its statutory authority to compel action by international organizations. Long dismissed as irrelevant, recent events have shown that the Security Council may yet prove to be an effective enforcer of judgments.

C. The General Assembly

Unlike the Security Council, the U.N. General Assembly has no explicit power to enforce ICJ decisions. Under the U.N. Charter, however, the Assembly possesses indirect authority to do so; it can discuss and make recommendations regarding any question "relating to the powers and functions of any organs provided for in the present charter."\textsuperscript{88} This broad authority probably includes discussing and

\textsuperscript{85} See W.M. Reisman, supra note 24, at 745-53.

\textsuperscript{86} While the IMF does have greater discretion than other agencies, it does have some obligation to help the Security Council, and the United States, for one, took the position during the Hostage crisis that IMF funds could be restricted for some purposes. See De Pardieu, The Carter Freeze Order: Specific Problems Relating to the International Monetary Fund, 9 Int'l Bus. Law. 97 (1981); Cf. the attempt by a French corporation which had won a judgment against Yugoslavia to "garnish the proceeds of World Bank loans to Yugoslavia by serving notice on the European Office of the World Bank." Apparently the attempt was abandoned. Société Européene d'Études et d'Entreprises (SEEE) v. People's Federal Republic of Yugoslavia, reprinted in 14 I.L.M. 71 (1975); see Delaume, SEEE v. Yugoslavia: Epitaph or Interlude, 4 J. Int'l Arb. 25 (1987).

In any event, occasional requests for aid in enforcement are unlikely to undermine the IMF's capital, although a threat to pull out of the organization by a major investor like the United States or Japan might dissuade the IMF from helping, regardless of the legal obligations.

\textsuperscript{87} For example, rather than handing over funds, the IMF could restrict use of funds or assess interest until the debtor has paid.

\textsuperscript{88} U.N. Charter, supra note 29, art. 10.
making recommendations when states fail to comply with ICJ judgments, especially where a judgment is related to peace and security concerns.

Under the Charter scheme the Security Council has primary authority for peace and security, but the General Assembly, via its Uniting for Peace Resolution, can make recommendations which could include calling on members to use force. The Soviet Union has disputed the right of the Assembly to authorize force. Nevertheless the Assembly's actions during the Suez crisis of 1956 and in the Middle East in 1958 under the Resolution show that in the future, the Assembly could plainly recommend economic sanctions against the judgment debtor, deny benefits and services, order a peacekeeping force to patrol borders or send the Secretary General to discuss compliance; nonetheless this avenue for enforcing judgments remains largely unexplored.

III. ENFORCEMENT BETWEEN THE PARTIES

Despite the authority to enforce ICJ judgments codified in the charters of international organizations, most international law is enforced not through formal international institutions but informally by the state members of the system. Domestic, not international, courts are generally considered to be the primary enforcers of international law, and they could potentially play an important role in ICJ enforcement.

A. Courts of the Judgment Creditor

Although domestic courts are its primary enforcers, international law presumably does not require the judgment creditor to resort to its own courts before seizing any of the debtor's assets which may be

90. See L. Goodrich, E. Hambro & A. Simons, supra note 42, at 52.
91. See id. at 125.
94. U.S. courts have a long history of such enforcement. See, e.g., The Paquete Habana, 175 U.S. 677 (1900); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). For an in-depth discussion of the role of municipal courts in enforcing international law, see F.A. Mann, Studies in International Law (1973)(in particular, ch. X, "International Delinquencies Before Municipal Courts"); W.M. Reisman, supra note 24, at 802-35.
within the creditor's jurisdiction. On the other hand, the creditor's domestic law may require judicial process in order to transfer title to property lawfully or to accomplish other types of enforcement measures. This section considers how the average domestic court is likely to respond to the request to enforce an ICJ judgment.

No party to either a PCIJ case or an ICJ case has asked a domestic court to enforce a judgment. Over the years, however, individuals who stood to benefit by the enforcement of a judgment have asked various domestic courts for enforcement and these cases raise many of the questions which would arise regardless of who asked for judicial intervention. One of the most prominent, Socobelge v. Greece, involved a beneficiary's request for assistance from the courts of the judgment creditor.

In 1951, a Belgian company, Socobelge, sought enforcement in Belgium of a PCIJ decision against Greece, which had affirmed certain arbitral awards in favor of Socobelge as valid and binding on Greece. Greece nevertheless still refused to pay the awards, leading Socobelge to attach monies derived from Marshall Aid funds located in a Belgian bank and to seek enforcement of the award through the Belgian courts.

Greece asserted a defense of sovereign immunity against the claim. The Belgian court dismissed this claim, however, on the ground that the assets in question "were derived from economic activities," making the defense of sovereign immunity inapplicable. Yet,
despite its favorable ruling on sovereign immunity, the Belgian court ultimately did not order Greece to pay. Socobelge did not have an *exequatur*, which would have given the ICJ judgment the same effect as the judgment of a Belgian court. The court held that Socobelge required an *exequatur* because "in the absence of an independent power of execution belonging to [the PCIJ], which would enable litigants before it to execute its decisions de plano, these decisions are not exempt from the servitude imposed on Belgian territory on decisions of other than Belgian tribunals." In effect, the Belgian court treated the PCIJ judgment as the judgment of a foreign country.

Commentators have criticized this decision on the grounds that Belgium, as a party to the ICJ decision, was required to enforce the award through all its governmental divisions, including its courts. Such criticism, however, is misplaced. Certainly the Greek courts had the obligation to enforce the judgment, along with all other organs of the Greek government. Belgian courts, however, as beneficiaries of the judgment, had no obligation or duty to enforce the PCIJ's decision in its favor, any more than they were obligated to accept the benefit of the judgment at all.

applying sovereign immunity to the case. If it had, "the long-range results would have been disastrous for the effectiveness of the International Court of Justice. . . National courts, potentially the most effective and economic enforcers of international judgments, would have been unauthorized to enforce any I.C.J. judgment that dealt with an act jure imperii." W.M. Reisman, supra note 24, at 820.

101. "The rule in civil law countries is that a foreign judgment is enforced qua judgment and is in effect transformed into a domestic judgment by the grant of an *exequatur* [meaning "let it be executed"] or similar procedure giving it the same executory effect of a judgment rendered locally." G. Delaume, Law and Practice of Transnational Contracts 211 (1988).


103. Rosenne writes that:

The duty to carry out, or comply with, such a judgment is imposed upon the courts of a State party to litigation before the International Court no less than it is incumbent upon the other organs of that State, and if the municipal courts are unable to do so, then the international responsibility of the State will be engaged. As the Permanent Court itself said in the *Chorzow Factory* case (merits)—it is impossible to attribute "to a judgment of a municipal court power indirectly to invalidate a judgment of an international court."

S. Rosenne, supra note 30, at 132-33.

104. Cf. supra note 75 (position of U.S. courts regarding the *Nicaragua* case).

105. These rights belonging to the judgment creditor belong to all of its governmental organs, including its courts.

106. Although article 59 of the Court's Statute says the judgment is binding on the parties, the international community has not taken the view that the beneficiary of the judgment may not reject the benefit. The U.S., for example, settled its case against Iran on terms other than those ordered by the ICI. Wegen, Discontinuance of International Proceedings: The Hostages Case, 76 Am. J. Int'l L. 717 (1982). How, then, could it have such an obligation when it also had the right to decide to forgive a judgment in its favor at any time or to negotiate an entirely
What is most interesting about *Socobelge* is its treatment of ICJ judgments for purposes of enforcement as foreign domestic judgments. Such treatment may not necessarily be fatal to achieving the goal of enforcement, as it was in *Socobelge*, but there are reasons for trying to convince domestic courts to take a different view of ICJ judgments. Because ICJ judgments are infrequent, state-specific judgments, they are visible to the world community. When not enforced, the community's perception of international law suffers. Only a few domestic courts, at least in the near future, are likely to be called on to enforce ICJ judgments; thus, if those courts are not persuaded that the better approach is to enforce the judgments, damage may occur.

Clearly a major problem in *Socobelge* was the lack of a domestic statute or guideline explicitly calling on the court to enforce the international judgment. Even if Belgium had no legal duty to enforce the judgment as a party to the case, however, it could have relied on other legal bases.107 Under the monist theory, for example, international law and courts are viewed as superior to domestic courts, which cannot dismiss or invalidate, directly or indirectly, the decisions of a higher court.108 Some states have specifically incorporated the monist theory into their constitutions, providing their courts with the needed rule of decision.109 The adoption of a monist view of international law

different sort of settlement than the one ordered by the Court? For examples where states have agreed inter se to modify or ignore ICJ judgments, see supra note 37.

107. Only the Security Council has specific authority to aid in enforcement. See supra text accompanying notes 62-70. Without this specific authority most domestic courts will be unsure of their appropriate role in ICJ enforcement. M. Reisman, supra note 24, at 672. Thus the discussion which follows sets out the theoretical legal basis on which domestic courts may act in enforcement. Rosenne reports that the *Socobelge* court said, in regard to its decision to treat PCIJ judgments as if they were foreign domestic decisions, "if de lege ferenda it seemed proper to conceive that such a judgment should be exempt from exequatur, it was nevertheless clear that at present there was no international arrangement by which such exemption had been introduced into Belgian Law." S. Rosenne, supra note 30, at 131.

108. Monists "regard international law and municipal law as parts of a single legal system. In a prevalent version of monism, municipal law is seen as ultimately deriving its validity from international law, which stands 'higher' in a hierarchy of legal norms." L. Henkin, R. Pugh, O. Schachter & H. Smit, International Law: Cases and Materials 141 (2d ed. 1987) [hereinafter L. Henkin]. "[T]he internationalists may claim that they were the first to perceive what is now known as the monistic view of the relation between international and municipal law. This, in itself, is a valuable contribution on account of the strong ethical appeal to legal conscience made by a philosophy which asserts the absolute and homogeneous character of right and wrong and which denies and combats the principle that what public international law condemns is yet right in municipal law and that what the municipal laws of the world provide for is yet irrelevant for the purposes of public international law." F.A. Mann, supra note 94, at 367.

109. See, e.g., Grundgesetz [GG] art. 25 (W. Germany); Kenpō art. 98 (Japan); Costituzione [Cost.] art. 10 (Italy).
is left up to the individual state and is not clearly compelled by international law.\textsuperscript{110}

In other systems, however, even without monist principles, ICJ judgments should get different treatment than domestic judgments. Treating ICJ judgments as domestic foreign judgments while continuing to accept other sorts of international judgments at face value, \textit{e.g.}, arbitral decisions rendered between two states, such as the Iran-U.S. Claims Tribunal, amounts to an inexplicable disparity. Similarly, subjecting ICJ judgments to the treatment due to foreign awards will in some cases lead municipal/domestic courts to reexamine the decisions.\textsuperscript{111} Such reexamination, although perhaps required under a court’s domestic law, will likely conflict with the ICJ rule that ICJ judgments are final, and will thus violate the international law rule enunciated in the \textit{Chorzow Factory} that no municipal court can render invalid directly or indirectly the decision of an international court.\textsuperscript{112}

At bottom, then, \textit{Socobelge} stands for the “continuing confusion” on the part of domestic courts regarding the enforcement of ICJ judgments.\textsuperscript{113} In response to such confusion, one possible solution would be to encourage states to implement domestic legislation directing courts to enforce ICJ judgments on the same basis as international arbitral awards.\textsuperscript{114} It may be possible, however, to get the desired result without waiting for states to adopt such legislation, if a creditor can persuade a domestic court that ICJ judgments should be enforced as an international arbitral award, or at least like one.

\textit{I. Arbitration Enforcement Under the New York Convention}

The United States Court of Appeals for the Ninth Circuit, in \textit{Minis-
try of Defense of the Islamic Republic of Iran v. Gould,115 made considerable strides toward opening up the categories of international cases which may be enforced under current U.S. statutory law. The Gould court held that a decision of the Iran-U.S. Claims Tribunal in favor of the Government of Iran against a U.S. corporation could be enforced in the U.S. through legislation implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.116 The court of a signatory state must enforce these awards as though they were decisions of its own jurisdiction.117

The advantages to a judgment creditor in analogizing its judgment to an arbitral award are several. Before the advent of the enforcement treaties, arbitral awards were also treated as foreign domestic awards and were subject to all their concomitant difficulties, such as the need for an exequatur. Creditors can evade the Socobelge trap only with arbitral conventions, which provide the judgment creditor with favorable safeguards.

In some regards, the approach adopted in Gould seems easily applicable to ICJ judgments. The court's assumption that states could qualify as "legal persons" for purposes of the Convention (since the Government of Iran was the appellee), for example, has particular applicability to ICJ judgments. Another factor favoring the treatment of ICJ judgments as arbitral awards under the New York Convention arises out of a United States reservation to its acceptance of the New York Convention, stating it will only enforce awards "made" in states party to the Convention. In Gould, the court held that because the Iran-U.S. Claims Tribunal sits in the Netherlands, a party to the Convention, the Tribunal's awards could be enforced in the United States.118 The ICJ also sits in the Netherlands, suggesting similar

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115. 887 F.2d 1357 (9th Cir. 1989), cert. denied, 110 S. Ct. 1319 (1990).

Article I of the Convention states that:

This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

New York Convention, supra, art. I.

117. See New York Convention, supra note 116, art. III.
118. Gould, 887 F.2d at 1364-66.
treatment of ICJ awards.

The same holds true for the court's conclusion that a provision in the Convention requiring that the arbitration in question be held pursuant to a written agreement had been met, even though the plaintiff did not in fact consent to the procedure of the Tribunal. The Ninth Circuit held that the treaty setting up the Tribunal satisfied the requirement of a written agreement, and that the plaintiff actually ratified the written agreement by going to the Tribunal. Special agreements to go before the ICJ in particular cases would plainly meet the written agreement requirement. Some ICJ cases, like *Nixragua*, come before the Court primarily as a result of an open-ended consent to adjudicate disputes under the ICJ's optional clause or pursuant to a dispute resolution agreement in a treaty; these sorts of cases seem potentially troublesome in meeting the written agreement requirement of *Gould*. Such "open-ended" ICJ optional or treaty clauses might be little different, however, from open-ended arbitration clauses in contracts, frequently negotiated decades ago, which parties to the New York Convention contemplate enforcing, and would thus appear to be sufficient under the *Gould* test.

*Gould* does, however, leave unanswered some objections to enforcement of ICJ judgments under the New York Convention. One potential obstacle is the "commercial case" reservation. Some states (particularly the U.S. and France) will only enforce commercial decisions under the Convention. Such a reservation would likely exclude some ICJ judgments, although not all; the recent case between the U.S. and Italy was a commercial case, as were *Anglo-Iranian Oil*, *Interhandel* and *Barcelona Traction*.

119. New York Convention, supra note 116, art II.

120. Rather, it tried first to sue Iran in U.S. domestic courts, but had its case dismissed following the Supreme Court's decision in *Dames & Moore v. Reagan*, 453 U.S. 654 (1981), in which the Court said claimants' recourse against Iran was at the Tribunal. *Gould*, 887 F.2d at 1359-60.

121. *Gould*, 887 F.2d at 1363-64.

122. Id. at 1364. This is surely stretching the point since the plaintiff had no other choice but to bring his claim before the Tribunal.

123. ICJ Statute, supra note 28, art. 36(2).

124. "Open-ended" consent to ICJ jurisdiction, at least on the part of the United States, may become a feature of the past. See generally supra note 8.

125. Other states possessing a commercial reservation include Canada (not Quebec) and the Vatican; states without commercial reservations include Belgium, Denmark, Netherlands, Federal Republic of Germany, Sweden, Switzerland, United Kingdom, and U.S.S.R.


Similarly, it is unclear whether the Convention, which refers specifically to "awards," excludes "judgments." The Convention itself does not seem to contemplate the enforcement of ICJ judgments specifically; traditionally recognized distinctions between arbitral awards, handed down by tribunals organized by the parties to a particular case, and litigated courtroom judgments continue to obtain. Yet such rigid distinctions may no longer be appropriate, as the differences between arbitral "award" and litigated "judgment" begin to blur. Some domestic courts may consequently be persuaded by this analogy, albeit an imprecise one, between arbitral awards and ICJ judgments and choose to enforce ICJ judgments under the New York Convention.

2. Arbitration Enforcement as Customary International Law

Where ICJ judgments cannot be fitted into the constraints of the conventions directly because of the "award/judgment" dichotomy or other reason, a creditor might nevertheless still succeed in obtaining enforcement of an ICJ judgment, if it could show that arbitral awards would be enforced under the same principles as outlined in the conventions on arbitral enforcement, even if the conventions were for some reason to lapse. To argue along these lines, a creditor would need to show that the domestic law of the state in question had evolved away from a discretionary norm in the enforcement of arbitral awards to the point where such awards were to be honored as per

130. See New York Convention, supra note 116, art. 1.
131. For a typical division, see L. Henkin, supra note 108, ch. 8 (cf. § 3, "Arbitration" with § 4, "International Court of Justice"); see also Restatement, supra note 74, §§ 903 & 904. But cf. lecture by Shabtai Rosenne, Reflections on International Arbitration and Litigation in the International Court of Justice, published in Forum Internationale (No. 9), 3-4 (1987) ("Much has occurred in the last twenty years or so to warrant re-examination of some central features distinguishing the one form of judicial settlement of inter-State disputes from the other.").
132. Professor Schachter, a primary drafter of the Convention, does not even mention the possibility in his article on ICJ enforcement, written only two years after the Convention was adopted. See Schachter, supra note 25.
133. The Iran-U.S. Claims Tribunal has been in existence for almost 10 years and may be for a few more. It has adopted its own set of procedures and rules which it employs in regard to all cases coming before it, and does not generally give the parties appearing before it a say in the selection of judges. Parties to a Chamber of the ICJ may, on the other hand, select their own judges. Both methods produce a binding decision.
134. For example, both types are rendered on the international plane and both are based upon the consent of the parties to adjudicate. See Caron, The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution, 84 Am. J. Int'l L. 104, 107 (1990).
se domestic judgments of the enforcing state. This could be achieved either by going to a state where it had proof of such evolution in its domestic law, or, if the creditor found sufficient evidence of a widespread enforcement principle, by arguing that international law had developed a general principle of enforcement which encompassed ICJ awards directly or by analogy.\footnote{135}

Such an international enforcement principle most surely exists. When first confronted with international arbitral awards as the world economy began to internationalize after the Second World War, courts tended to treat them as foreign national awards, just as the Belgian court treated the ICJ judgment.\footnote{136} Probably because they were not just like foreign judgments, however, getting arbitral awards enforced proved even more difficult and unpredictable to achieve and thus limited the efficacy and utility of arbitration.\footnote{137}

To realize better enforcement of arbitral awards, states drafted the New York Convention, which was intended to overcome parochial barriers to enforcement.\footnote{138} Other conventions have followed, increasing the geographic and subject matter reach of the New York Con-

\footnote{135. When a court is confronted with a question of international law it may "resort to the rules of municipal law for the disposal of cases submitted to it, or, to put it technically, Article 38 authorizes the use of analogy" to municipal law. M. Virally, The Sources of International Law, in Manual of Public International Law 116, 147 (M. Sorensen ed. 1968). See also Bin Cheng, The General Principles of Law as Applied by International Courts and Tribunals (1953); H. Lauterpacht, Private Law Sources and Analogies of International Law (1927); Restatement, supra note 74, § 102 comment 1.

The ICJ has frequently relied on analogy to major legal systems for a source of law, especially when questions of judicial procedure, such as an enforcement, has been at issue. This method of finding general principles of international law has come into its own with the work of the Iran-U.S. Claims Tribunal. The Tribunal has relied heavily on analogy to domestic law in resolving disputes between Iran and the U.S. and its nationals.

There is also an argument that principles found in numerous treaties can be customary international law. See A. D'Amato, The Concept of Custom in International Law (1971). The argument is not developed here because the problem of finding state practice outside a treaty is difficult where most states are parties to the treaties and they are in force.

\footnote{136. See Restatement, supra note 74, § 487 comment h.


\footnote{138. See supra note 116. Most writers consider the New York Convention a great success. See, e.g., Paulsson, Arbitration Unbound: Award Detached from the Law of its Country of Origin, 30 Int'l & Comp. L.Q. 358 (1981) ("Apart from unilateral recognition of awards or the operation of bilateral treaties, the arbitral process enjoys transnational efficacy under the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards whose history is one of remarkable success.")}
vention. All together, these conventions are strong evidence that a preponderance of states and most of the regions of the world are committed to enforcement of international awards. The aim of such conventions, to make enforcement easy and efficient, has been successful, to the point where enforcement of international arbitral awards is more or less assumed, which has helped create the success currently enjoyed by international arbitration.

In tandem with such developments, the past several decades have witnessed several legal systems, ones frequently involved with arbitration, modify their domestic systems so that they might better implement the wide-reaching network of treaties requiring enforcement of international arbitral awards. Consequently, most domestic courts now realize that the smooth functioning of international commerce


140. The drafters included several reforms over previous conventions on enforcement, of which the following seem to account most directly for the success of the New York Convention. It shifted the burden of proof to the party opposing enforcement and limited the defenses which the opposing party could raise. See Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier, 508 F.2d 969, 973 (2d Cir. 1974); G. Delaume, supra note 101, at 49; Note, The Validity of the Foreign Sovereign Immunity Defense in Suits Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 7 Fordham Int'l L.J. 321 (1984). The Convention eliminated the requirement that the party seeking enforcement had to seek leave for enforcement (exequatur or recognition) from the country where the award was made before seeking leave from the courts where enforcement was sought. W. Craig, W. Park & J. Paulsson, International Chamber of Commerce Arbitration § 37.02, at 667 (1984). The New York Convention also permits the parties to form the arbitral tribunal and choose the governing law regardless of the law of the place where the arbitration occurs. A.J. van den Berg, supra note 116, at 7. It allows parties to seek enforcement in any state signatory to the Convention, even if the arbitration took place in a non-signing state and even if the parties are not nationals of signatory states. W. Craig, W. Park & J. Paulsson, supra, at 660. However, two-thirds of the states signatory to the New York Convention have made reservations to this provision and will only enforce decisions made in states signatory to the convention. Id. at 661. In addition to these reforms, the several states have gone even further than the conventions in limiting interference with enforcement by their courts. Id. at 666.

ENFORCEMENT OF ICJ JUDGMENTS

requires ease in recognition and enforcement of arbitral awards.\textsuperscript{142} Domestic courts make special efforts to enforce arbitral awards regularly, extending the circumstances under which arbitral awards are enforced beyond the narrow terms of the conventions or domestic legislation,\textsuperscript{143} and would likely continue to honor and implement them without the conventions.\textsuperscript{144}

Recent judicial interpretations of the New York Convention have strengthened the enforcement principle. The Convention does not require reciprocity for enforcement, meaning the state where the award was made need not be a party to the Convention. Although the United States and two-thirds of the contracting states have appended a reservation that they will only enforce awards "made" in another contracting state,\textsuperscript{145} courts have limited the effect of this reservation, holding that it means only that the award must be made in a contracting state — not "in accordance with" the law of the forum state, as was often required before the Convention.\textsuperscript{146} Thus, the basis for enforcement under the Convention is not its connection to a national jurisdiction (and, in turn, to bases like reciprocity or comity) but rather the notion that international decisions should be enforced regardless of their connection to a state.

Some elements of discretion do remain with domestic courts in enforcing ICJ judgments as arbitral awards. For example, although the New York Convention does not require recognition or \textit{exequatur}, it does permit the enforcing court some limited review of the circumstances surrounding the award — fraud, jurisdiction and notice.\textsuperscript{147} Such a restriction should probably not be applied to the ICJ. Under

\textsuperscript{142} See supra note 140.


\textsuperscript{144} U.S. courts, for example, enforce international arbitral awards pursuant to legislation implementing the New York Convention of 1958. See 9 U.S.C. §§ 201-208 (1988). They would arguably continue to enforce arbitral awards consistent with the governing principles of the Convention and not according to pre-1958 methods.

\textsuperscript{145} W. Craig, W. Park & J. Paulsson, supra note 140, at 661.


\textsuperscript{147} The New York Convention, supra note 116, art. V. The International Centre for the Settlement of Investment Disputes enforcement convention, on the other hand, does not permit any review. ICSID Convention, supra note 139. Its decisions, like those of the ICJ, are
International law a municipal court does not have the power to invalidate an international decision; reasons of fraud, lack of jurisdiction, lack of notice, or prejudice (as determined by the municipal court) should not constitute grounds for refusing to enforce a judgment. Other rules of procedure such as the requirement that the judgment be final may be appropriate if they do not invalidate the judgment.

Returning, then, to the Nicaragua case, were Nicaragua's courts to encounter a request to enforce an ICJ judgment, their correct course of action would be to treat the judgment as an international arbitral award and enforce it, either because enforcement of international law is a treaty obligation of all states, because courts now enforce most international decisions, or because a general principle of international law requires enforcement. A judgment creditor should be able to persuade its courts, therefore, to enforce an ICJ judgment.

3. Appropriate Assets

Getting enforcement of a judgment within the courts of the creditor's home state will be of little use where the debtor possesses few assets derived from "economic activities" within that jurisdiction. Governmental assets such as an embassy, or the property of a debtor's citizens, would be inappropriate. Under Socobelge, however, the scope of what may be considered "commercial" is broad enough that even a state like the United States, which does not undertake many commercial ventures, will likely have "real" assets in some jurisdictions, such as scientific equipment (survey vessels undertaking research with commercial applications, for example), pavilions and exhibits at trade fairs and air shows.

International grants and loans, such as those obtained from the World Bank, may be a vast source of attachable funds, although no
state has yet successfully tapped them. In one case in which a private French corporation attempted to attach a World Bank loan made to Yugoslavia, the suit was dismissed. In the future, of course, a judgment creditor may have a final judgment, and, despite the lack of precedent, on balance it appears that judgment debtors cannot exclude World Bank loans or IMF accounts as potential targets for attachment in the context of enforcing ICJ judgments.

B. Courts of the Judgment Debtor

Because World Bank loans and other commercial assets of the debtor do not exist everywhere, some judgment creditors will need to go beyond their own jurisdiction in seeking enforcement. One potential avenue of enforcement would be through the debtor's courts because the debtor generally cannot remove all of its property from beyond the power of its courts. Nevertheless, creditors may face insurmountable difficulties receiving a hearing in which the debtor's government actually agrees to payment.

The first step in securing enforcement in the debtor's courts would be obtaining jurisdiction. In the U.S. court system, for example, a foreign creditor would possess the same basis for standing as any

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153. The Bank's other arguments are worth reviewing. First, it argued it was immune from suit by its members or by those suing based on claims derived from members, and that the SEEE was in the latter category. A garnishment action, however, is not a suit against the Bank and at least U.S. courts have concluded that garnishment actions do not violate immunity like the Bank's. Note, supra note 151, at 902 (citing Earle v. Pennsylvania, 178 U.S. 449 (1900)).

Second, the Bank argued that the attachment was void on public policy grounds, "because the funds sought to be attached were the proceeds of loans it had made to Yugoslavia pursuant to agreements governed by international law." Delaume, supra note 86, at 42. If the World Bank faces attachment in aid of an award also governed by international law, it is not clear which public policy would be superior, but arguably it would be the need for effective methods of peaceful settlement of disputes.

Third, the Bank argued that it had explicit immunity from attachment in aid of execution in the United States under the International Organizations Immunities Act, 22 U.S.C. § 5288 (1988). Again, this argument was correct, but no such law existed in France, so a fortiori without explicit immunity, the loan could arguably be attached.
other judgment creditor seeking enforcement through United States courts.\textsuperscript{154} The Court of Claims has jurisdiction over claims for money damages against the United States,\textsuperscript{155} although an enforcement action may be characterized somewhat differently than a claim for damages. If so, at least the district courts would have jurisdiction based on 28 U.S.C. § 1331, which provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."\textsuperscript{156} A judgment arising out of the United States' acceptance of the Court's compulsory jurisdiction, the United States-Nicaragua Treaty of Friendship, Commerce and Navigation or the ICAO Convention would seem to qualify as just that sort of matter arising from a treaty.\textsuperscript{157} Because international law is an element of United States law,\textsuperscript{158} ICJ judgments interpreting or ruling on international treaties or custom affecting the United States would have the same effect on its courts as on every other organ of its government.

United States courts, regardless of a state's ability to meet jurisdictional requirements, however, often refrain from ruling in cases that might in some way interfere with the executive branch's ability to conduct foreign affairs.\textsuperscript{159} Similarly, the Supreme Court has declined to apply international law where it has felt that the constitutional principle of separation of powers requires retreat from jurisdiction because of the potential for executive embarrassment.\textsuperscript{160}

Given this jurisprudence, U.S. courts would find it difficult to aid a creditor in enforcing an ICJ order if such an order required the Executive to change its foreign policy. A district court, for example, has already refused to give effect to the \textit{Nicaragua} decision on behalf of Americans living in Nicaragua on political questions grounds.\textsuperscript{161} The Court of Appeals in reviewing the decision also dismissed the case, but did so in part on the ground that the plaintiffs did not have a cause of action to enforce the ICJ judgment. Although the court

\textsuperscript{157} See \textit{Nicaragua}, 1984 I.C.J. 392 (Judgment of Nov. 26) (Jurisdiction of the Court).
\textsuperscript{158} See \textit{The Paquete Habana}, 175 U.S. 677 (1900).
seemed to grant a state's right to bring such a case, it also questioned the status of an ICJ decision when the United States has challenged the International Court's jurisdiction to render such a decision. Thus it failed to acknowledge that ICJ decisions are final and that the courts of the debtor have the same obligation to enforce the decision as other organs of the debtor's government. In committing to the jurisdiction of the ICJ for purposes of the case or under the optional clause, a state agrees to accept the Statute of the Court; such consent binds domestic courts not to review.

C. Unilateral Self-Help

International law seems to require that the creditor attempt to enforce its judgment through the friendliest means available, such as judicial enforcement, before attempting self-help, but eventually the creditor is free to try self-help. Under traditional international law, self-help was the primary means of enforcing rights: states could go to war to promote foreign policy and war was used to enforce international law. For enforcing the judgments of international tribunals, states could resort to the guerre d'exécution.

The most recent Restatement describes permissible self-help as consisting of measures "not involving the use of force, that might otherwise be unlawful, if such measures are (a) necessary to terminate the violation, or to remedy the violation and (b) are not out of proportion to the violation and the injury suffered." Nicaragua, for example, could attempt self-help on its own or it could seek the assistance of

162. "Neither individuals nor organizations have a cause of action in an American court to enforce ICJ judgments. The ICJ is a creation of national governments, working through the U.N.; its decisions operate between and among such governments and are not enforceable by individuals having no relation to the claim that the ICJ has adjudicated—in this case, a claim brought by the government of Nicaragua." Id. at 934.

163. See id. at 938.

164. See supra text accompanying note 104.

165. Some writers, particularly in the United States, have criticized the ICJ for taking jurisdiction in Nicaragua and would probably make the argument that if the ICJ takes jurisdiction inappropriately domestic courts should not stay review. The criticisms of Nicaragua appear to rest more on political grounds than legal ones. The case can probably be made that the ICJ has been too cautious about taking jurisdiction. If, however, the ICJ should take jurisdiction inappropriately or commit another error which might impugn the judgment, the proper course is to return to the ICJ with these laws.

166. Restatement, supra note 74, § 905 reporters' note 4.

167. See generally L. Henkin, supra note 108, at 664-68.

168. Restatement, supra note 74, § 905; see also O. Elagab, The Legality of Non-Forcible Counter-Measures in International Law (1988); E. Zoller, Peacetime Unilateral Remedies (1984); Schachter, Self-Help in International Law, 37 J. Int'l Aff. 231, 237 (1984) ("The broad conclusion is that if a state seeks judicial aid to vindicate a legal wrong, it must not
third-party states. Generally, third-party reprisals are unlawful, and third-party judicial enforcement can be a form of third-party reprisal, but international law may make an exception for third-party judicial enforcement, especially in the case of monetary judgments. In attempting unilateral self-help, the creditor decides on the measures to be taken, although international law still lacks precise rules regarding what those measures should be or when they may be taken. For example, it is unclear whether the judgment creditor should go to the Security Council in seeking enforcement.

The permissibility of "reprisals" in a broad sense, as a form of self-help in the context of enforcing a judgment, is similarly uncertain. War has been outlawed, so clearly states are prohibited from using force to get compliance with an ICJ judgment. Beyond this delimitation, however, international law has not clarified what actions remain as appropriate responses. The guidelines governing the "acceptable" use of force were always rather rough; except in prohibiting the most extreme responses, such guidelines regarding reprisals not involving the use of force are rougher still.

The potential for exacerbating the situation through ever-escalating reprisals

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169. The ICJ recently restated this rule in Nicaragua: "[i]t could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica; it could not justify counter-measure taken by a third State, the United States, and particularly could not justify intervention involving the use of force." Nicaragua, 1984 I.C.J. at 127.

170. See Akehurst, supra note 22, at 1-2, 14-15.

171. Id. at 15-16.

172. Professor Schachter has concluded that it should not, perhaps because at the time of his article, going to the Security Council was pointless. Schachter, supra note 25, at 11. Today that may no longer be the case, see supra note 63 (describing Security Council action with regard to Iraq).


174. But see Bowett, Reprisals Involving Recourse to Armed Force, 66 Am. J. Int'l L. 1 (1972) (suggesting that states disillusioned with the Security Council's ability to afford protection against injurious conduct aimed at them have increasingly resorted to self-help in the form of armed reprisals).

175. States originally developed the limitations of necessity and proportionality to apply to the use of force. See, e.g., The Nauilaa, 2 R. Int'l Arb. Awards 1013 (1927-8). This case is widely cited as the locus classicus on the law of reprisal, and yet it concerned reprisal in a case of armed conflict.

176. For example, if a state fails to pay damages of $10,000 it is probably unlawful to respond by terminating treaties providing for vital supplies of food or medicine. But if a state fails to pay damages of $5 billion, it is difficult to say, in the abstract, whether it is proportional or necessary to terminate a treaty for food and medicine, or a treaty for access to ports and canal. See J. Delbruck, Proportionality in Encyclopedia of Public International Law 396-400 (R. Bernhordt ed. 1984).
may not, however, be as great as in other contexts, e.g., where a monetary judgment is involved, which provides a fixed amount as a limit.177

The type of self-help actions which various commentators do consider lawful include suspension and termination of treaties, freezing or confiscating assets, imposing economic sanctions,178 suspension of arms sales, technology, and food shipments, limitation on economic assistance, fishing rights, landing rights, docking rights or rights of overflight.179 In terms of measures aimed at enforcement, the Restatement says "[d]ifferent steps may be taken at different stages of a dispute. For instance, limited measures are most appropriate when a state refuses to negotiate (e.g., freezing the offending state's assets); stronger measures become permissible when a state refuses to comply with a judgment of an international tribunal (e.g., seizure and appropriation of assets)."180 In the most important judicial pronouncement on the legality of peaceful, unilateral reprisals — Air Services181 — an arbitral tribunal held that peaceful unilateral countermeasures are lawful as long as they remain proportional to the breach.182

Attachment of the judgment debtor's property is another possible self-help act. Under international law, only commercial assets belonging to the state can be legally attached; beyond this, it is uncertain whether a party unable to get judicial enforcement may pursue a wider range of property, such as the property of citizens, or property enjoying diplomatic immunity. With a few limitations, the Restatement seems to concede that the judgment creditor may lawfully take a foreign national's property as a reprisal.183 The taking of diplomatic

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177. Questions remain regarding this form of redress. See Restatement, supra note 74, § 905 reporters' note 1.
178. See id. § 905 comment b.
179. See C. Jenks, supra note 13, at 691.
180. Restatement, supra note 74, § 905 comment d.
182. Id. at 443-45.
183. See Restatement, supra note 74, § 905 reporters' note 2. States may not, however, discriminate against a single alien or commit human rights violations in the reprisal context, such as ordering mass expulsions.
or military property, however, may fall in the category of actions which could further exacerbate the conflict, thus constituting a non-proportional act in the enforcement context. \textsuperscript{184}

At the very least, alien property does not appear to deserve privileged treatment, unlike military or diplomatic property. Developing countries, for example, have often nationalized and expropriated this property in retaliation for governmental action. The issue in such cases is primarily whether compensation must be paid, not whether the property is unreachable. A U.S. court has ruled that taking an alien's property is a permissible reprisal. \textsuperscript{185} Presumably, such alien property would include a commercial debt or arbitral award held by aliens against the state seeking enforcement.

As evidenced by \textit{Air Services} and the writings of many commentators, the concern that unilateral reprisals may escalate a dispute perhaps renders it advisable for states to disfavor reprisals. Nevertheless, the general lack of institutional enforcement mechanisms has encouraged reprisals, and unless domestic courts begin to respond to requests for judicial enforcement, judgment creditors such as Nicaragua may be tempted to use unilateral self-help despite the potential risks.

\textbf{IV. ENFORCEMENT THROUGH THIRD-PARTY ASSISTANCE}

Another possible approach for obtaining enforcement of an ICJ judgment would be with the aid of third-party states. While most states, as a matter of foreign policy, may be predisposed toward giving aid to their allies' requests for enforcement of ICJ judgments, "the issue is... how far the third State has an obligation or right to cooperate with the aggrieved State in seeking compliance by the recalcitrant State." \textsuperscript{186} Some commentators argue that third-party states are

\textsuperscript{184} See id. § 905 reporters' note 5. Note that the international community has a very high expectation that states should not interfere with diplomatic and military property. Cf. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (Judgment of May 24).

\textsuperscript{185} A U.S. court has held: "[The U.S.] Constitution protects the alien from arbitrary action by our government but not from reasonable response to such action by his own." Sardino v. Federal Reserve, 361 F.2d 106, 111 (2d Cir. 1966).

\textsuperscript{186} C. Jenks, supra note 13, at 704. Other writers on this subject raise similar questions about the foundation of the right to aid enforcement. Thirty years ago Schachter wrote: "A more interesting and controversial question arises where the judgment creditor seeks to levy on assets which are not within its territory or jurisdiction, and consequently where the collaboration or consent of other states is necessary to effect the attachment. The issue, generally stated, is whether a third state not a party to the litigation has the right, without incurring liability, to transfer assets within its jurisdiction to the state which won a judicial or arbitral award against another state but has been unable to obtain execution of the award."
prohibited from aiding in enforcement because such assistance would amount to unlawful interference with the property or affairs of the judgment debtor approaching the level of expropriation. The documents relating to the ICJ do not mention an explicit right of assistance, but sufficient evidence of state practice suggests that states clearly have a right to aid in enforcement and may even have a duty to do so, although any assistance must be pursuant to fair procedure.

A. *The Right to Assist*

Generally, states are free to act unless prohibited from doing so by the rules of international law. Third-party states seeking to assist in the enforcement of a judgment are free to do so unless a rule exists prohibiting assistance, such as the rules against reprisals or non-interference in the affairs of another state. In such cases, willing third-party states must find applicable exceptions. Rules such as those listed above would be only minor barriers, as they are not very specific and would only require a modest amount of evidence to reestablish a state's right to act.

The evidence will not be found, however, in either the Court's Statute or the U.N. Charter because neither mention a third-party's right to aid in enforcement. Article 94 of the Charter mentions only the Security Council's right to assist, which some commentators have interpreted to mean that third-party states may not assist. Article 59 of the Statute similarly says that the Court's judgment is binding only on the parties; some commentators read this article expansively in order to conclude that states not party to a case must stay out.

Over the last thirty years, however, incidents of third-party assistance in enforcement have occurred, and although state practice in this regard is not yet overwhelming, such customary action, when taken

Schachter, supra note 24, at 8. "Suppose the defaulting state has assets in a third state not a party to the dispute, would the successful state have been legally entitled to those assets to satisfy the judgment? Would the third state have been under a duty to transfer those assets? If no duty exists, would the third state be entitled to transfer the assets by recognizing the international award as being and governed by principles of comity applicable to foreign judgments?" L. Henkin, supra note 108, at 559.

187. See Case of the S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).
188. See supra text accompanying notes 173-77.
189. See Schachter, supra note 24, at 8.
190. "Neither the Charter nor the Statute places any specific obligation upon third parties to comply or facilitate or secure compliance with a judgment of the Court in the absence of a decision by the Security Council that certain measures shall be taken to give effect to the judgment. Indeed at first glance they almost appear to deny any such obligation." C. Jenks, supra note 13, at 703.
191. See W.M. Reisman, supra note 24, at 782; see also C. Jenks, supra note 13, at 702-3.
with the writing of several eminent scholars and reasons of policy, supports the finding of a right to assist.\footnote{192} The domestic enforcement analogy equally provides support to the finding that states have a right, or even an obligation, to assist.\footnote{193}

The most significant judicial precedent available in support of the third-party assistance is \textit{Monetary Gold}.\footnote{194} Although the ICJ did not rule in the case, it reveals the position of three states important to the question of third-party enforcement and in particular, that of the United States. The case arose out of claims asserted by Italy and Albania to monetary gold that had been seized during World War II.\footnote{195} The matter was eventually referred to the President of the International Court of Justice, who appointed an arbitrator; the gold was ruled to have belonged to Albania. The Western Allies, however, had agreed that any judgment awarding the gold to Albania would be "enforced" and, ultimately, turned over to the United Kingdom as partial payment of the ICJ's award to the U.K. against Albania in \textit{Corfu Channel}.\footnote{196} In that event, the Allies nevertheless also pledged that either Italy or Albania could prevent transfer of the gold to the U.K. by initiating a case in the ICJ following the arbitral decision.\footnote{197}

Britain's representative in the case asserted its right to take reason-

\footnote{192} The writing of scholars is cited as a subsidiary source of international law in the Court's Statute, ICJ Statute, supra note 28, art. 38(c), and as evidence of the law in the Restatement, supra note 74, § 103(2)(c).

\footnote{193} Among the writers, Professor Reisman also has argued that for reasons of policy international law does not simply permit but requires third-party states to aid in enforcement. See W.M. Reisman, supra note 24, at 781.

\footnote{194} Monetary Gold Removed From Rome in 1943 (Italy v. Fr., U.K., U.S.), 1954 I.C.J. 19, 45 (Judgment of June 15); see supra note 58 and accompanying text.

\footnote{195} In 1943, as German troops withdrew from Italy following the Armistice with that country, they acquired certain monetary gold from a bank in Italy. The allies later recovered the gold in Germany and deposited it in a pool with other monetary gold. To distribute the gold appropriately, the United States, France and the United Kingdom created the Tripartite Commission for the Restitution of Monetary Gold under the terms of the Paris Agreement on Reparation of January 24, 1946. For detailed accounts of the case, see C. Jenks, supra note 13, at 703-06; E. Nantwi, The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law 138-40 (1966); W.M. Reisman, supra note 24, at 793-801; S. Rosenne, supra note 30, at 142-48; Schachter, supra note 25, at 7-12.

\footnote{196} The Court had ordered Albania to pay reparations for deaths and damage caused by its mining of the Strait of Corfu and firing on British Naval vessels. By the damages phase of the case, Albania was contesting the Court's jurisdiction, but it nevertheless entered into negotiations with Britain regarding the Court's award. It offered £40,000 for a judgment of £843,947. The British rejected the offer and instead tried to satisfy the judgment the monetary gold. See S. Rosenne, supra note 30, at 143.

\footnote{197} Rosenne notes:

This opportunity for judicial control, provided by the States collaborating in the attachment process, meets the general requirements of legality and good faith which should characterize such actions by States, and the value of this precedent, in which
able steps to ensure the enforcement of ICJ judgments (admittedly an act without precedence in the Court's history), but such arguments failed. Italy instituted a case with the ICJ, but because Albania — a necessary party — failed to appear before the Court, questions relating to Albania's behavior could not be decided and the case was dismissed.

Despite the fact that the ICJ could not rule on the Allies' enforcement program, at least one commentator has concluded that the case suggests the following propositions regarding third-party enforcement:

1. That states are entitled under international law (and possibly may be considered under a duty) to assist in the execution of a decision of the International Court, if that decision has not been complied with and the successful party requests such assistance;
2. That such assistance may include transferring to the judgment creditor assets of the judgment debtor which are located in the territory of the third state without obtaining the consent of the debtor state and without obtaining the sanction of the Security Council or a further decision of the International Court;
3. That the right of the third state to effect such transfer is subject to a duty on its party to take necessary measures to safeguard any competing claims of other parties as, for example, by providing for judicial control as to the respective claims of all parties.\(^\text{198}\)

State practice since *Monetary Gold*, although limited, supports these conclusions, which also underscore the argument that, although general third-party reprisals or assistance to the creditor are unlawful, international law provides an exception for assistance which incorporates judicial process. To date, no state which has received a judgment from the ICJ has gone to the courts of a third state, in order to attach the assets of the judgment debtor or to attain some other sort of enforcement. In *Anglo-Iranian Oil Co. v. Jaffrate (The Rose Mary)*, however, a British oil company, which had recently been nationalized by Iran, succeeded in convincing a court in Aden\(^\text{199}\) to enforce a pro-

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the judgment creditor was associated with two other great Powers, is thus extremely high.

Id. at 146.

198. Schachter, supra note 25, at 11-12.

199. While the forum was a British colonial court, it was in some ways akin to a third-party
visional measure of the ICJ\textsuperscript{200} in favor of a British corporation.\textsuperscript{201}

State action also reflects the view that third parties have the right to aid in enforcement by creating the means to do so in the constitutions of international organizations.\textsuperscript{202} The fact that the Security Council may order members to assist indicates a belief that third party assistance, under the rule of law, complements existing institutional processes. Similar provisions appear in the constitutions of other international organizations which envision self-enacted enforcement through the organization, with the aid of its members. The ILO agreement, for example, provides:

In the event of any member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry or in the decision of the


\textsuperscript{200} The U.K. had adopted the company's case and was attempting to have the dispute adjudicated by the ICJ. Anglo-Iranian Oil Co. (U.K. v. Iran), 1951 I.C.J. 4, 89 (Interim Protection Order of July 5). While the Court determined whether it had jurisdiction, the United Kingdom requested the Court to order protection of Anglo-Iranian's assets. The Court ordered that Iran and Anglo-Iranian jointly manage the concession areas pending outcome of the case. Id.

\textsuperscript{201} Many of the writers on this subject include, in addition to \textit{The Rose Mary}, examples of other cases in which domestic courts gave some effect to decisions of the International Court of Justice. Most of these cases are from the courts of the state which won the ICJ decision and do not involve the judgment creditor directly. The cases generally show decisions of the ICJ being used as evidence of international law on particular points. These decisions prove that ICJ judgments are not alien to many domestic courts but perhaps not much more. See, e.g., Re Bendayan, 49 Am. J. Int'l L. 267 (1955), where the French Cour de Cassation invoked the ICJ's judgment in Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), 1952 I.C.J. 176 (Judgment of Aug. 29), to find that French courts in Morocco could try U.S. citizens for exchange control violations. Norwegian courts in Rex v. Cooper, 1953 I.L.R. 166, relied on the Anglo-Norwegian Fisheries case to uphold convictions of individuals guilty of violating Norway's fishing limits.

Cf. Committee of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929 (D.C. Cir. 1988), in which a U.S. court refused to give any effect to the decision in \textit{Nicaragua} on behalf of U.S. citizens living in Nicaragua because, on one hand, it found individuals have no cause of action to enforce ICJ judgments and, on the other, because of subsequent Congressional actions inconsistent with the decision. Id. at 935-38. The court acknowledged that it might have to give effect to principles of \textit{jus cogens} even in the presence of contrary statutes, but refused to find that giving effect to ICJ judgments is a principle of \textit{jus cogens}. The court acknowledged that the prohibition on the use of force is a rule of \textit{jus cogens} which was also the primary subject of the ICJ's decision. But because the plaintiffs only sought to have the ICJ judgment enforced directly rather than using it as evidence of a violation of U.S. law, the court did not rule on whether the United States had violated the prohibition on the use of force. Id. at 938-43.

On the subject of the role of municipal courts in enforcing international law, see generally C. Jenks, supra note 13, at 712-17; F.A. Mann, supra note 94, at 366-90; W.M. Reisman, supra note 24, at 378.

\textsuperscript{202} See supra text accompanying notes 81-87.
International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.\textsuperscript{203}

If a member of the IAEA fails to obey an ICJ decision, it may be suspended from the organization; members of ICAO may lose valuable aviation rights, and so on.\textsuperscript{204}

Several regional organizations also provide for enforcement if members fail to comply with ICJ decisions. The Council of Europe may take measures against a defaulter under the European Convention for the Peaceful Settlement of Disputes.\textsuperscript{205} The Organization of American States Council of Foreign Ministers can aid in enforcement for a party to the American Treaty on Pacific Settlement.\textsuperscript{206}

Similarly, commentators concluding that there does exist a right of third-party enforcement seem to outnumber those that consider third-party assistance to be unlawful interference in the affairs of other states,\textsuperscript{207} providing further evidence in support of such a norm.\textsuperscript{203}

\textsuperscript{203} ILO Constitution, supra note 82, ch. II, art. 419.

\textsuperscript{204} The case Iran has recently filed against the United States is apparently under the ICAO and Montreal Conventions. See supra note 82. Iran could potentially, therefore, have recourse to ICAO for enforcement.

\textsuperscript{205} European Convention on International Commercial Arbitration, April 21, 1961, art. 19(b), 484 U.N.T.S. 349.

\textsuperscript{206} American Treaty on Pacific Settlement (Pact of Bogota), April 30, 1948, 30 U.N.T.S. 55. "If one of the High Contracting Parties should fail to carry out the obligations imposed upon it by a decision of the International Court of Justice or by an arbitral award, the other party or parties concerned shall, before resorting to the Security Council of the United Nations, propose a Meeting of Consultation of Ministers of Foreign Affairs to agree upon appropriate measures to ensure the fulfillment of the judicial decision or arbitral award." Id. art. 50. The United States and Nicaragua are both party to this treaty. The United States has appended reservations to its acceptance but they do not appear to apply to article 50.

\textsuperscript{207} The views of Professors Schachter and Rosenne have previously been explored with regard to Monetary Gold. See supra notes 197-98 and accompanying text. Jenks finds a "general obligation of comity to give whatever measure of co-operation in seeking compliance" with international decisions, that this "general obligation of comity is in the nature of a public duty" and that this "duty is among the factors from which one may deduce a right of States to co-operate with each other in securing the execution of an international decision." C. Jenks, supra note 13, at 705. Nantwi writes that "the conclusion must be drawn [from Monetary Gold] that although States are under no obligation to co-operate with other States to enforce international decisions and awards, they are, nonetheless, free so to act provided they do not incur liability." E. Nantwi, supra note 195, at 175. Akehurst writes that aiding enforcement is an exception to the general rule against third-party reprisals. See Akehurst, supra note 22, at 15-16.

\textsuperscript{208} The Restatement distinguishes primary evidence which includes state practice referenced in "official documents and other indications of government action," from secondary evidence which includes international and domestic judicial decisions and the writings of scholars. Restatement, supra note 74, § 103 comment a.
These views are consistent with those of scholars who believe that all states may aid in the enforcement of international law.209

Additionally, when a third-party's court confronts the problem of whether to enforce, it should also consider whether the New York Convention applies, and if not, whether to enforce by analogy to enforcement of international arbitral awards. Again, it is difficult to see why a French court will enforce a decision from the Iran-U.S. Claims Tribunal in favor of Iran against the government of the United States under the New York Convention, but would not enforce a judgment in favor of Iran against the U.S. from the ICJ. In light of Gould, the United States would be hard-pressed to suggest that the French would be interfering in the affairs of the United States by enforcing such a judgment.

Beyond the right of third-party courts to assist in enforcement of ICJ judgments may lie a duty to do so. Commentators have discussed the existence of such a duty:

In some systems, failure to aid authoritative appliers unaccompanied by the intention of abetting noncompliance, is, under certain circumstances, unlawful. There are few precedents in international decisions that parallel these municipal developments. The Treaty of Washington and the subsequent Alabama arbitration, however, are clear authority that failure to prevent another's noncompliance with prescribed international behavior is itself a wrongful act against the party suffering from the original delict. This precedent has apparently not been applied to third-party aid in judgment or award enforcement, but in light of community policies there is no difficulty in transposing it to this area under a "major purposes" or "effectiveness" construction.210

Such a view, if accepted, would result in more efficient enforcement and is an important statement of policy which third parties should

209. Among these are Grotius: "The fact must be recognized that kings . . . have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever . . . Truly it is more honorable to avenge the wrongs of others rather than one's own, in the degree that in the case of one's own wrongs it is more to be feared that through a sense of personal suffering one may exceed the proper limit [or succumb to prejudice]." Grotius, De Jure Belli ac Pacis, Book II, chap. 20, cited in Akehurst, supra note 22, at 1. Cf. Third United Nations Convention on the Law of the Sea, art. 218, U.N. Doc. A/Conf. 62/22 (1982) (all states may enforce the Convention's anti-pollution provisions against any vessel, regardless of nationality in the state's ports).

210. W.M. Reisman, supra note 24, at 781.
consider when faced with a request to enforce an international judgment.

Finding an obligation under international law to aid in enforcement would arguably require more evidence than establishing a mere right to assist.\footnote{211} Even the Security Council, originally intended to be the agent of enforcement for the Court's decision, has discretion in enforcing decisions; it is not obligated to attempt to do so in all cases. Nonetheless, increasing numbers of states are enforcing international arbitral awards and judgments with fewer exceptions,\footnote{212} leading to the perception that an obligation to do so does exist. By analogy, third-party states may similarly conclude they have an obligation to enforce.

B. The Process of Assistance

Given the principles discussed above, third-party enforcement might be utilized in several ways to render assistance. Upon receiving the award, the judgment creditor must first take steps to ascertain whether the judgment debtor plans to comply with the judgment—in other words, it must attempt to negotiate. Should negotiations fail, judicial enforcement, including third-party judicial enforcement, should be attempted before self-help, as parties should not escalate the dispute where possible and the judicial process is ultimately a "friendlier" means of proceeding than unilateral self-help.\footnote{213}

After the ICJ has issued an enforceable judgment, the judgment creditor should not go immediately to a third-party state and request enforcement. Rather, a reasonable period of time must pass to ascertain whether the judgment debtor intends to pay the judgment. During this period,

\footnote{211} Cf. Case of the S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7). Some evidence does exist, but perhaps not enough at present to resolve the issue. For example, the Draft Convention on State Responsibility characterizes the failure to perform an obligation to be an "internationally wrongful act." Draft Convention, supra note 95, art. 3. In the enforcement context, this could mean that if the judgment creditor failed to get assistance from a third state, it could demand reparations from the third state, a serious consequence for an obligation not overwhelmingly established.

\footnote{212} Comparing the enforcement situation for international commercial awards with that for ICJ awards, courts in states which are party to the enforcement agreements agree to enforce the awards, rather than, for example, agreeing to consider enforcing them. The New York Convention states "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them." New York Convention, supra note 116, art. 3 (emphasis added).

\footnote{213} See Arend, The Obligation to Pursue Peaceful Settlement of Disputes During Hostilities, 24 Va. J. Int'l L. 87 (1983) (a state involved in hostilities has a continuing obligation to seek peaceful settlement of the dispute; one method of fulfilling that obligation is the appointment of a third-party arbitrator); supra note 21 (discussing the Air Services case).
The State under the obligation—the judgment debtor—is in the first place entitled itself to determine the modalities of the discharge of the judgment debt. These modalities thus determined do not definitively bind the State in whose favor the judgment debt operates—the judgment creditor—which is entitled to challenge them. If the resulting dispute is not resolved by the normal diplomatic process, then it will have to be settled by application of the methods for the pacific settlement of disputes.214

As discussed above, international law has not yet established a period of limitations after which the debtor can be said to have defaulted on the judgment.215 If such early attempts at enforcement fail, however, state practice suggests that such unenforced judgments may not lapse for decades. No one has suggested, for example, that the U.K.'s judgment in Corfu Channel is about to lapse, even after forty years; other examples of judgments being satisfied only after protracted negotiations also exist.216

After a period of time has elapsed sufficient to indicate that the judgment debtor will not comply with the award, a violation of international law can be said to have occurred. The preferred approach is to settle disputes using the friendliest means possible rather than

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214. S. Rosenne, supra note 30, at 128.

215. U.S. law implementing the New York Convention, for example, requires that enforcement be attempted within three years of the award. 9 U.S.C. § 207 (1988); see also W.M. Reisman, supra note 24, at 139-40. Professor Charney has some trouble determining which ICJ decisions may have been repudiated because the facts show only that the decisions have not been implemented. See J. Charney, supra note 37, at 293-97.

216. A recent attempt to reopen diplomatic relations was apparently stymied by the fact Albania has not paid this award. J. Charney, supra note 37, at 294.

There are other cases of protracted negotiations after which the debtor finally satisfied the judgment. In the Lena Goldfields Arbitration, the British could not get the Soviet Union to pay the damages awarded. They engaged in long years of negotiations, but only succeeded when the Soviets wanted an economic relations treaty with the U.K. In exchange they settled Lena Goldfield. The original award was for £8.5 million plus 12% interest. The British settled for £3 million in notes payable over 20 years, a good result considering the fact that the property was actually worth £3.5 million. See Nussbaum, The Arbitration Between the Lena Goldfields, Ltd. and the Soviet Government, 36 Cornell L.Q. 31 (1950).

Similarly, Mexico and the United States also resolved the case of El Chamizal only after protracted negotiation. The United States repudiated an arbitral decision awarding El Chamizal to Mexico. Mexico continued to press its claim whenever an opportunity presented itself. When the U.S. suggested arbitrating other matters of contention between the two countries, Mexico refused to do so referring to the award and making the argument that the United States could not be depended upon to carry out binding decisions. See W.M. Reisman, supra note 24, at 792-93. Eventually, the U.S. bowed to Mexican pressure and negotiated a mutually acceptable settlement.
immediately resorting to unilateral self-help, through any of the following measures: enforcing the judgment through the creditor's own courts or the courts of the debtor; seeking the assistance of the Security Council; seeking the assistance of an international organization other than the Security Council; or searching for appropriate assets, attaching them and seeking judicial enforcement through third-party courts. The creditor should not be constrained to resort to what are likely to prove to be useless measures, but it should at least make a serious good faith attempt to seek friendly enforcement. Exhausting all avenues may in fact help to achieve friendly enforcement. Some domestic courts, including United States courts, will be more willing to take jurisdiction if the creditor can show that all other remedies have been exhausted and that the domestic court offers the best means of redress. The creditor might even try interim self-help measures to induce friendly settlement, before resorting fully to self-help to satisfy the judgment.

Like the courts of the parties, third-party courts may have to refuse jurisdiction on grounds appropriate under their domestic law. In the United States, for example, that might be via the political question doctrine or the foreign sovereign immunity defenses for some assets. If the debtor argues that the judgment is flawed in some respect, domestic courts should not reexamine the decision. Third-party courts, like the courts of the parties to the decision, have no right to reexamine the case because such decisions are final.

Third-party judicial enforcement is most likely to work in a case like Nicaragua. Once the ICJ has rendered an executory decision, Nicaragua could search for commercial assets of the United States within the jurisdiction of a country friendly to Nicaragua or interested in the advancement of international law. Sweden, for example,

218. Professor Reisman advises a claimant to plan for enforcement before going to the Court. W.M. Reisman, supra note 24, at 14-15. This may mean attaching assets prior to the Court's judgment. See also Newman, Enforcement of Judgments, 17 Vand. J. Transnat'l L. 77, 81-84 (1984) (claimants should consider attachments before receiving judgments). Yet such action might be a suggestion that the respondent is not willing to obey the Court's judgment and that the Court cannot get compliance, suggestions which might not be welcomed by the Court. Apparently similar considerations have prevented some of the claimants at the Iran-U.S. Claims Tribunal from attaching assets in advance of judgment.
219. See supra note 70 and accompanying text (discussing the finality of ICJ judgments).
220. Under the theory elaborated in this Article, a third-party court probably could not enforce against the assets of a citizen of the state judgment debtor. See supra text accompanying notes 183-85. Attaching such assets is justified above as a reprisal. Generally, third-party reprisals are unlawful and that rule would seem to protect the citizen even though third-party judicial reprisals are an exception to the rule. If this analysis is wrong, it would be
ple, probably fits both categories: a U.S. Geological Survey ship in Swedish waters could be attached and awarded to Nicaragua in partial satisfaction of the judgment.

The degree of assistance which may or must be rendered by third-party states in enforcing decisions of the ICJ is becoming increasingly clear. Third-party states have the option, perhaps even the obligation, to render assistance when requested by judgment creditors. While that assistance may have some significant limitations, such as the proper "waiting period" to determine whether compensation is forthcoming, third-party assistance has become a critical factor in international enforcement.

V. CONCLUSION

Judgment creditors, such as Nicaragua, have a large number of options to get enforcement of ICJ judgments. They may appeal to various organs of the U.N. — the ICJ itself, the Security Council or the General Assembly. They may also try to enforce through their own courts or the debtor's courts. In the pro-enforcement atmosphere created by private international law developments, creditors should have more success than Socobelge in persuading a municipal court to treat an ICJ decision at least as well as an arbitral award. Where the creditor lacks access to assets of the debtor in his own country, he may have to resort to the debtor's court or to unilateral reprisals. Third-party judicial enforcement may be a better way to settle disputes peacefully than unilateral reprisal, and should be available in a world where virtually all other international awards will be enforced. It is time for ICJ judgments to enjoy the same success and recognition as decisions of international arbitral tribunals.

extremely easy for Nicaragua to get enforcement against U.S. citizens' property somewhere in the world.