OF SOUTH AFRICA AND THE FRONTLIN STATES: LESOTHO AND THE CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES AND IN AND AGAINST NICARAGUA (NICARAGUA VS. UNITED STATES)

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Paper 3

INTERNATIONAL LEGAL ASPECTS OF THE CONFRONTATION BETWEEN THE REPUBLIC OF SOUTH AFRICA AND THE FRONTLINE STATES: LESOTHO AND THE CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA (NICARAGUA V UNITED STATES)

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International Legal Aspects of the Confrontation
Between the Republic of South Africa and the
Frontline States: Lessons from the I.C.J. Judgment
in the Case Concerning Military and Paramilitary
Activities in and against Nicaragua (Nicaragua v.
United States of America)

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Being a Paper to be delivered at the Second Seminar of the
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INTRODUCTION:

On the 27th June 1986, the International Court of Justice at the Hague delivered an important judgment in the Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). This decision on the merits of the case followed earlier proceeding in which the I.C.J. held that it had jurisdiction to hear the complaints filed by Nicaragua in its application against the United States of America and that the same were admissible before it. The court's decision at the jurisdiction and admissibility phase of the proceedings provoked the withdrawal of the U.S.A. from further participation in the case, explaining that the court's decision was contrary to both law and fact. This paper examines the relationship between the Republic of South Africa and the neighbouring independent African States who since the declaration of U.D.I. by the Ian Smith regime in Rhodesia, have been recognized by the O.A.U., the U.N. and other international organizations as constituting the core frontline of states confronting South Africa. By the nature of things, the relationship has been characterized by South Africa's acts of violence, the use of coercion combined with the adoption of economic policies aimed at consolidating existing bonds of economic dependence of the frontline states. In certain instances, South Africa has resorted to direct use of force against these states. However, mostly it has preferred to implement its policies through surrogate movements such as the MNR and UNITA which operate against the governments of the frontline states with its full support.
The members of the O.A.U., the frontline states and the general international community have consistently condemned the South African Government's policy of apartheid, and South Africa's continued illegal occupation and administration of Namibia. Moreover, the Frontline States have expressed the policy of giving diplomatic and political support to the national liberation movements such as the African National Congress, (A.N.C.), the Pan-Africanist Congress (P.A.C.) and the South-West Africa Peoples Organization (SWAPO), in their struggle against colonialism and apartheid. This commitment of the Frontline States is in pursuance of successive resolutions of the O.A.U. and numerous other U.N. General Assembly resolutions condemning the policy of apartheid and colonialism and urging their elimination and the exercise of self-determination by all the peoples of South Africa and Namibia.

In view of the obvious parallels between the problems and issues arising from the confrontation between South Africa and her neighbours on the one hand and those arising between the Republic of Nicaragua and the United States of America on the other hand, it is surprising that the I.C.J. judgment of June 1986 has not provoked a flood of published and accessible commentary on its relevance and repercussions on the Southern African region. This paper is aimed at focussing the legal issues raised in the judgment to the very important events unfolding themselves in the Southern African region. It cannot be claimed that the paper will amply fill the perceived lacuna referred to but, it is hoped that it will in a small way redraw the areas of discussion. It is further hoped that the paper will show that rules of public international law have an important role in promoting the cause for national liberation, the administration of apartheid as a national policy for South Africa and the promotion of equality, independence and justice and peace between South Africa and her neighbours.
The paper is divided into four parts for purposes of analyses. Part I examines the social, economic, political and military aspects of the confrontation relationship between the Republic of South Africa and the Frontline States. This part will set the background or context for the discussion of Part II which deals with the legal and other aspects of the I.C.J. judgment in the case brought by the Republic of Nicaragua against the United States of America. The next part will then evaluate the legal validity of the policies and activities of South Africa in the Southern African region in terms of the I.C.J. judgment in the Nicaragua v. U.S.A. case and public international law generally. The final part, will examine the various responses and options open to the Frontline States in their confrontation with South Africa, considering the social, economic, political and legal realities currently existing.

Part I: The character of the confrontation between the Frontline States and the Republic of South Africa. It has already been pointed out that the internal policies of social, economic and political discrimination and repression of the black majority, conducted by successive South African governments culminated in the adoption of the policy of apartheid in 1948 after the National Party won the "whites only election of that year. With the effluxion of time, it became clear to the national liberation movements such as the ANC, PAC and others and that the South African government had no intention of dismantling apartheid and introducing democratic processes into the country. It was this realisation which led the national National Liberation Movements to expand their activities beyond peaceful demonstrations, boycotts, protests and petitions. They decided to launch an armed struggle which received diplomatic, political and material support from the general membership of the organization of African Unity, members of the non-aligned movement and the socialist states of
Eastern Europe and the Peoples Republic of China.

In the 1960's and the early 1970's, a substantial number of countries in Southern Africa, i.e. the Portuguese Colonies of Angola and Mozambique and the British Colony of Southern Rhodesia were still under white colonial domination. It must however be pointed out that in all these territories had been started wars of national liberation. The tempos of these wars had not however reached such a pitch as to significantly worry the Republic of South Africa whose strategy was to hold these territories as buffer zone or a cordon sanitaire between it and the states of independent Africa. Indeed in the joint planning of strategy between South Africa and her principal western allies particularly the United States of America (which country has historically considered the Republic of South Africa as a bulwark against the influence of the U.S.S.R. and Communism in the Southern African Region), it was not seriously contemplated that the national liberation movements could pose an effective military threat to the order of colonialism and imperialism which on the surface seemed so firmly established in these territories. Evidence of the U.S. thinking and attitudes to the liberation movements in Southern Africa was outlined in a 1969 National Security Council Interdepartmental Group for Africa document, NSSM 39, prepared under the direction of Dr. Henry Kissinger, then chairman of the National Security Council and subsequently the Secretary of State under both Presidents Richard M. Nixon and Ford. According to this document, in American eyes, all those black Africans who demanded equal participation and justice in the political process of the white dominated countries of Southern Africa and who turned to the armed struggle after the systematic frustration of their aspirations, were to be considered dangerous destabilizing elements. Thus, national liberation movements were perceived as a threat which could open the way
for Communist infiltration of the Southern African Region by the U.S.S.R. and the Peoples Republic of China. In order to counteract this, NSSM 39 listed five policy options two of which are pertinent here, which the United States could adopt towards Africa. The U.S. was to consider methods of enhancing its standing in Africa, for the protection of its economic scientific and strategic interests, contain the possibility of violence, encourage moderation of rigid racial and colonial attitudes of the whites and minimize the opportunities for the Chinese and the Soviets to spread their influence in a region traditionally considered a safe sphere of influence for capitalism and the west. The second policy option contained in the document was founded on the premise that whites were in the region to stay for good. As their hold on economic, political and military power was virtually unsurmountable, if any meaningful change was to be afforded, then it had to be through them. It was argued that there was no hope for the black Africans through their political and military organizations to gain any political rights through armed struggle. Such a course of action would only create violence, chaos and instability, thereby creating an opening for communist penetration. It is submitted that in this period the general planning and thinking of policy makers in South Africa coincided with the lines stated in Document NSSM 39, as the Republic of South Africa paraded herself as the bastion of Western democracy, stability and prosperity in the Southern African region.

The Period from the mid 1970's to the early 1980's: In this period, there was a dramatic change in the course of events in the Southern African region. The intensification of the guerrilla war against Portuguese colonialism led to the sudden collapse of Portuguese colonial rule over Guinea Bissau, Mozambique and Angola. The emergence of Mozambique and
Angola as independent states proved an important boost to the other liberation movements in Southern Africa especially ZANU-PF which was based in Mozambique territory. Now both Angola and Mozambique joined the independent states of Botswana, Tanzania and Zambia to form the group of Frontline states which effectively gave diplomatic political and material support to the prosecution of the liberation war in Rhodesia which was successfully completed in 1979 following a negotiated settlement and the conduct of national elections in 1980. The emergence of ZANU-PF as the post-independence nationalist Government committed to joining the ranks of the Frontline states and giving diplomatic, political, moral and material support to the liberation struggle in South Africa itself served further to complicate the picture in the South African eyes. The initial reaction of the Government of the Republic of South Africa to these new developments was to attempt deepening the economic dependence of these states on South Africa. It fashioned a policy of detente aimed at bringing the newly independent states into what it planned as a "constellation of states of Southern Africa" with the Republic of South Africa as the economic, financial and trade hub. By this strategy, it was hoped that South Africa's economic, technological and military might would discourage its neighbours from in any way giving any significant help to the national liberation movements such as the A.N.C., P.A.C. and SWAPO. However, with the intensification of the activities of particularly the A.N.C. inside South Africa and the accession of P.W. Botha the former minister of Defence to power, South Africa's strategy changed to one of "total onslaught."

According to this line of thinking, the Republic of South Africa, as the last remaining bastion of white rule and democracy in the Southern African region, was under an all out assault from the Communist countries which were using the Frontline states and organizations such as the A.N.C. The reasoning went thus: since the external threat to the survival of South was total, the
Republic's response must necessarily be comprehensive, thereby encompassing economic, military and where suitable, diplomatic measures. Here it should be pointed out that the "total strategy" had both domestic and regional or international aspects. Internally, it was geared towards defusing the accelerated radicalisation of the mass of the peoples of South Africa which started in the mid 1970's following the Soweto student demonstrations. These events created a groundswell for the mobilization of black workers in the mines, farms and other work places. A detailed examination of the municipal aspects of the total strategy is thought to be beyond the scope of this paper and will not be pursued any further. At the regional level, the "total strategy" involved the total mobilization of all resources against the Frontline states on all fronts i.e. economic, military and diplomatic and has come to be known as the policy of destabilization which has been deliberately planned and is being implemented by the Republic of South Africa against her neighbours. A commentator has observed of the South African Government's policies against her neighbours as enshrined in the total strategy as follows:

'There seems little doubt that the ANC is seen as a paramount and permanent threat; more especially if the ANC is in collaboration with other powers in the region. Of primary concern is the belief that the ANC represents a close coalition between a major South African nationalist movement and the Soviet Union; this is a coalition to be smashed at every occasion. Given that Pretoria's elementary concern is for the ANC, that the ANC represents the eye of the total onslaught storm, Pretoria's antidote is the elimination of this threat. How has this been attempted?

On the military side Pretoria has adopted a two-pronged approach: direct intervention to flush out the ANC, and extensive support for
local groups wishing to challenge the governments in neighbouring states which help the ANC. These policies have become known in Southern Africa and beyond as 'destabilization'.

At the same time a diplomatic strategy has persisted which consists of impressing upon South Africa's neighbours the extent of their economic dependence on the Republic, while trying to elicit a kind of formal recognition from them. The "Total strategy": the practice of the destabilization of the Frontline States.

In practical terms, "total strategy" has meant the increasing reliance by South Africa on its military might and the deployment of this might directly against its neighbours. In recent years, South Africa has launched direct military raids and incursions into neighbouring countries. In countries such as Botswana, Lesotho and Swaziland, the South African Defence Force (SADF) has conducted raids against alleged ANC centres of operations almost at will. On June 14, 1985, twelve people were killed when a force of 70 South African Commando troops raided 10 alleged centres of ANC operations in Gaborone, the capital of Botswana. Four houses were destroyed and a visiting U.N. team assessed the total damage at U.S. $190,000. In the early hours of December 20, 1985 nine people were killed in two separate raids in Maseru, capital of Lesotho, launched by members of the South African Defence Force. Six of the dead were South African refugees who were believed to be ANC sympathisers, while the rest were Basothos. In Mozambique, South Africa had conducted a campaign of active raids by the SADF against that country. For example, on 17 October, 1983, a group of South African soldiers attacked an alleged ANC planning centre in that country. After the raid, the South African Foreign Minister, Mr. R.F. Botha sent off the following message to Mozambique:
"Acts of violence by the ANC who enjoy facilities in Mozambique, which may lead to follow-up operations with resulting serious implications for the people of the region, continue to be a matter of grave concern to the South African Government. In this connection information received by the South African authorities that acts of violence in South Africa have been planned by the ANC in Mozambique are most disturbing and the South African government therefore in the interest of realistic relations again urged the Peoples' Republic of Mozambique not to give facilities to any organization which directs such actions against South Africa."

Again on May 19th, 1986, the SADF raided alleged ANC offices and camps in three locations in Zimbabwe, Botswana and Zambia. In Botswana one person was killed and three persons injured while in Zambia, two persons were killed and ten injured. The next day, the South African President defended the raids comparing them to the United States' raids on the Libyan cities of Tripoli and Benghasi in purported punishment for Libya's alleged complicity in terrorist acts against United States military personnel in the Federal Republic of Germany.

**Indirect South African acts of Aggression**

In her confrontation with the Frontline States, South Africa has at times chosen indirect methods of destabilization, using surrogate movements against the established governments of these countries. In this respect, the South African Government has financed, trained and directed rebel organizations such as the Mozambique National Resistance against the Peoples' Republic of Mozambique, Dr. Jonas Savimbi and his UNITA movement against the Government of Angola, the relatively unimportant movement of NTSU Makhshle's Lesotho
Liberation Army against the government of the late Chief Leabua Jonathan and the dissidents in the Western Matabeleland province of the Republic of Zimbabwe. A detailed analysis of the origins of each of these organizations is beyond the scope of this paper. It should however be pointed out that in the case of the MNR, the South African Government's control and influence over it increased after Zimbabwe's independence in 1980 when that organization was moved from Zimbabwean territory to Fhalaborwa in the Northern Transvaal. Training facilities were provided by SADF personnel and in many cases general strategy was planned by Dhlakama, the then head of the MNR and under the supervision of one Colonel Van Niekerk, a member of the South African Security Forces. For example, at a meeting between these two people in October 1980, it was resolved that the activities of the MNR should be targeted towards the destruction of all important economic and social infrastructure in Mozambique. As a commentator has observed:

"The area of operation was enlarged until it eventually included ten of Mozambique's twelve provinces. In order to reinforce the economic dependence of Zimbabwe and Malawi on South Africa, the transportation corridor between Mutare in Zimbabwe and the Mozambican port of Beira became the primary target of guerilla raids..."  

In Mozambique, the tactics of the MNR extended to the destruction of civilian villages, food distribution centres, schools, hospitals, railway lines, tea plantations. They also extended their operations to the kidnapping of foreign technicians and aid workers in the country. On December 6 1984 seven East German technicians and one Yugoslavia were killed when the MNR attacked an agricultural complex in the Marsa province. In 1985, a number of foreigners were kidnapped and subsequently released by the MNR. Conditions had deteriorated to such an extent that by January 1985 the Government had to declare that it could
no longer guarantee the safety of foreign nationals in the country. All foreign workers were advised to return to five regional centres and to stop working in the remote areas of the country.  

Similar activities of the other movements have occurred in the other Frontline States such as Angola and Zimbabwe. Generally, it has been estimated that in terms of economic and social infrastructure, the destabilizing activities of South Africa's surrogate movements have cost the Frontline States an amount of U.S. $10 billion. The import of the South African campaign of destabilization has been most devastating in the People's Republic of Mozambique where it has been estimated that over 3 million people are facing starvation partly caused by the disruptive activities of the MNR. Thus, by 1983, an observer was able to remark of Mozambique:

"Virtually every known natural and man-made disaster has struck Mozambique: drought, cyclone, flood, botched social and economic policies, a chronic shortage of skilled manpower (ever since the Portuguese left en masse on independence in 1975), a drop in world prices for the country's agricultural exports and a cancerous armed rebellion backed by South Africa, that threatened the survival of the government."  

The ensuing part will examine the international legal context in which South Africa has conducted her destabilization policies against her neighbours.

Part II: The I.C.J. Judgment in the case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)

A period of long and arduous political and military campaign waged by the Sandinista National Liberation Front (FSLN) culminated in the overthrow
of the regime of President Somoza in Nicaragua in 1979. Subsequently the FSLN assumed power and in coalition with other democratic forces formed the government of Nicaragua. After the conduct of national elections, the FSLN's hold on power was consolidated even through certain opponents of the new government, mainly former members of the Somoza regime and ex-members of the National Guard, formed themselves into irregular military forces. They commenced a small scale armed opposition against the new government. Initially, the United States of America showed a favourable attitude towards the new government in Nicaragua and even arranged a programme of economic aid to the country, but by 1981, this attitude had changed particularly when the new regime let it be known that its aim was the establishment of a socialist oriented economic and political system in Nicaragua founded on the mass participation of the people in the political process at all levels. However, according to the United States the reason for the change of policy was the fact that there were reports of the involvement of the Nicaraguan Government in logistical support and the supply of arms to guerrillas operating against the Government of El Salvador. Following this change of policy, all aid to Nicaragua was cut off and the United States commenced giving actively financial and material support to the fledging armed opposition to the Nicaraguan government. This armed opposition which grew out of various elements, was organized into two main groups, namely the Fuerza Democrática Nicaragüense (FDM) and the Alianza Revolucionaria Democrática (ARDE). The Government of the United States of America advanced a number of reasons apart from legal ones for its acts of hostility against Nicaragua. These range from allegations of the undemocratic nature of the Nicaraguan government, accusations of human rights violations by the Nicaraguan government and the fear that Nicaragua may become a bridgehead for the
export of communism to the other countries in Central America and even the continental United States itself. In 1985, the United States Government publicly explained the rationale conditioning its attitude and actions towards Nicaragua. In a report submitted to the United Congress pursuant to the provisions of the Continuing Appropriations Act, 1985, President Reagan defined United States policy objectives towards Nicaragua as follows:

"United States policy toward Nicaragua since the Sandinista's ascent to power has consistently sought to achieve changes in Nicaraguan government policy and behaviour. We have not sought to overthrow the Nicaraguan Government nor force on Nicaragua a specific system of government."

According to the President, the changes sought were:

- termination of all forms of Nicaraguan support for insurgencies or subversion in neighbouring countries;
- reduction of Nicaragua's expanded military/security apparatus to restore military balance in the region;
- severance of Nicaragua's military and security ties to the Soviet bloc and Cuba and the return to those countries of their military and security advisors now in Nicaragua and
- implementation of Sandinista commitment to the organization of American states to political pluralism, human rights, free elections, non-alignment, and a mixed economy."

The purpose of the proceedings before the I.C.J. was therefore to challenge the international legal validity of U.S. actions against Nicaragua.
The substance of Nicaraguan complaints against the United States of America.

At the merits phase of the proceedings, the Government of Nicaragua made the following submission in its Application filed before the court. It asked the Court to adjudge and declare as follows:

(a) That the U.S., in recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, and directing military and paramilitary actions in and against Nicaragua, has violated and is violating its express charter and treaty obligations to Nicaragua, especially its treaty obligations under:

- Article 2 (4) of the United Nations Charter;
- Articles 18 and 20 of the Charter of the Organization of American States;
- Article 8 of the Convention on Rights and Duties of States;
- Article 2, Third, of the convention concerning the Duties and Rights of States in the Event of Civil Strike.

(b) That the United States, in breach of its obligations under general and customary international law, has violated and is violating the sovereignty of Nicaragua by:

- armed attacks against Nicaragua by air, land and sea;
- aerial trespass into Nicaraguan airspace;
- efforts by direct and indirect means to coerce and intimidate the Government of Nicaragua.

(c) That the United States, in breach of its obligation under general and customary international law, has used and is using force and the threat of force against Nicaragua.
(d) That the United States, in breach of its obligation under general and customary international law, has intervened and is intervening in the internal affairs of Nicaragua.

(e) That the United States, in breach of its obligations under general and customary international law, has infringed and is infringing the freedom of the high seas and interrupting peaceful maritime commerce.

(f) That the United States, in breach of its obligation under general and customary international law, has killed, wounded and kidnapped and is killing, wounding and kidnapping citizens of Nicaragua.

(g) That, in view of the U.S. breaches of the above international legal obligations it is under a legal duty to cease and desist from such violations.

(g) That the United States is under an international legal obligation to pay Nicaragua in its own right and as parens patriae & S citizens of Nicaragua, reparations for damages to person, property and the Nicaraguan economy caused by the U.S. violations of international law.

In the Nicaraguan Memorial on the merits, the Court is requested to receive evidence and determine the quantum of damages at a later phase of the proceedings. But in the interim the court was also requested by Nicaragua to award a sum of US $370, 200,000 representing the minimum valuation of the direct damage caused to Nicaragua excepting damage caused by the killing of Nicaraguan nationals.
As the United States had notified its withdrawal from the proceedings after the court's judgment in the Jurisdiction and Admissibility phase of the case, it filed no counter-memorial and did not make any oral submissions. It must be commented that this decision on the part of the United States is to be regretted as it does not augur well for the peaceful and judicial settlement of international disputes and the development of international law as a whole. In this connection, one cannot but share the regret and concern at the U.S. decision expressed by the Court itself:

"When a state named as party to proceedings before the Court decides not to appear in the proceedings, or not to defend its case, the court usually expresses regret, because such a decision obviously has a negative impact on the sound administration of justice.... In the present case the Court regrets even more deeply the decision of the respondent state not to participate in the present phase of the proceedings, because this decision was made after the United States had participated fully in the proceedings on jurisdiction and admissibility. Having taken part in the proceedings to argue that the court lacked jurisdiction, the United States thereby acknowledged that the court had the power to make a finding on its own jurisdiction to rule upon the merits. It is not possible to argue that the court had jurisdiction only to declare that it lacked jurisdiction. In the normal course of events, for a party to appear before a court entails acceptance of the possibility of the court's finding against that party. Furthermore the court is bound to emphasize that the non-participation of a party in the proceedings at any stage of the case cannot, in any circumstances, affect the validity of its judgment. Nor does such validity depend upon the acceptance of that judgment by one party."  

After these prefatory comments, the court then went on to consider its views on the case, taking into account as far possible, the views, and
objections which could have been raised by the United States of America. In this delicate task, it had to ensure that a fair balance was struck so that the appearing state is not thereby placed at a disadvantage. It is considered that a comprehensive discussion of all aspects of the court's judgment is beyond the scope of this paper. The parts which are pertinent to the burden of the discussion in the paper will will be considered. After a thorough consideration of the issues, the court held in pertinent part as follows:

1. It rejected the justification of collective self-defense advanced by the United States in connection with the military and paramilitary activities in and against Nicaragua. The reason for the rejection of the defense of collective self-defence claimed by the United States was that the international customary law requirements for the exercise of collective self-defense were absent. As the court itself pointed out,

"The court must thus consider whether, as the Respondent claims, the acts in question of the United States are justified by the exercise of its right of collective self-defense against an armed attack. The court must therefore establish whether the circumstances required for the exercise of this right of self-defense are present and, if so, whether the steps taken by the United States actually correspond to the requirements of International law. For the court to conclude that the United States was lawfully exercising its right of collective self-defense, it must first find that Nicaragua engaged in an armed attack against El Salvador, Honduras or Costa Rica."

On further examination, the court concluded that even though arms flowed through Nicaraguan territory to the armed opposition in El Salvador, this was not tantamount to an armed attack on that country to justify
the invocation of collective self-defense. In respect of Honduras, Costa Rica, the court made the same findings. Furthermore, the court noted that at the time of the conduct of hostilities by the United States against Nicaragua, the alleged victim states, i.e. El Salvador, Honduras and Costa Rica did not complain of an armed attack by Nicaragua and did not expressly request military assistance from the United States. In any case, the court observed that the conduct of the United States itself did not show that it believed it was exercising the right of collective self-defense. At no time did it address any report to the Security Council on the measures which it had to take in exercise of its right of collective self-defense under Article 51 of the UN Charter.

2. The court held that the United States of America, by training arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, acted in breach of its obligation under customary international law not to intervene in the affairs of another state. Counsel for Nicaragua had submitted that all along it was clear from the pronouncements of the highest officials of the United States government, the aim of the support for the contras as the armed opposition in Nicaragua has come to be known, was the forcible overthrow of the government of Nicaragua. The court responded as follows:

"The court however does not consider it necessary to seek to establish whether the intention of the United States to secure a change of governmental policies in Nicaragua went so far as to be equated with an endeavour to overthrow the Nicaraguan Government. It appears to the court to be clearly established first, that the United States, intended, by its support of the contras, to coerce the government of Nicaragua in respect of matters which each state is permitted, by the principle of state sovereignty, to decide freely; and secondly that the
intention of the contras themselves was to overthrow the present government of Nicaragua."\(^{29}\)

3. The court held that the United States by its conduct of certain attacks on Nicaraguan territory in 1983-84, namely the attacks on Puerto Sandino on 13 September and 14 October 1983, an attack on Corinto on 10 October 1983, an attack on Potosi Naval Base on 4/5 January 1984; an attack on San Juan del sur on 7 March 1984; attacks on patrol boats on San Juan del Monte on 9 April 1984 together with the acts of intervention, has contravened its obligation under customary international law not to use force against another state.\(^{30}\)

4. The court further held that by laying mines in the internal or territorial waters of the Republic of Nicaragua during the first months of 1984, the United States of America acted in breach of its obligations under customary international law not to use force against another state, not to intervene in its affairs, not to violate its sovereignty and act to interrupt peaceful maritime commerce.\(^{31}\)

5. It held that the United States by directing or authorizing overflights over Nicaraguan airspace, was in breach of its customary law obligation not to violate the sovereignty of another state.\(^{32}\)

6. It held that the United States in failing to notify the location of mines in Nicaraguan territorial and internal waters was in breach of its obligations under customary international law.\(^{33}\)

7. The court held that the United States of America, by producing in 1983 a manual entitled Operaciones sico logicas en guerra in questões as,
and disseminating it to contra forces encouraged the commission by them of acts contrary to general principles of humanitarian law. However, the court could not impute to the United States of America, conduct of the contra which may have been contrary to the principles of humanitarian law.  

Consequently, the court made the following orders: that the United States should immediately cease and refrain from all such conduct which infringed its international legal obligations; that the United States of America was obliged under international law to make reparations to Nicaragua for all the breaches of the principles of customary international law.

Part III: The South African Conduct vis-a-vis the Frontline States and questions of state responsibility in international law.

This part of the paper will examine the question of the international legal validity of the South African Government's conduct towards her neighbours. The principal question to be discussed in this part is whether or not in the light of the I.C.J. Judgment in the Nicaragua case and principles of customary international law generally, South Africa has engaged international responsibility. With respect to the direct acts of aggression such as raids and other acts of destabilization against the territories of the Frontline states, the Republic of South Africa will engage international responsibility for the use of force and violence contrary to the norms of customary international law. It is an important corollary of the twin concepts of sovereignty and equality of states that every state shall respect the territorial integrity of every other state. However, public international law allows for an exception to the prohibition of the use of force as a policy instrument in international relations. Where an armed attack has been committed against a state or group of states, at customary international law and under
Article 51 of the UN Charter, the victim states are entitled to exercise individual self-defense or collective self-defense. In the relations between South Africa and the Frontline States, the matter at issue is whether South Africa can plead self-defense in justification for its attacks on the territories of the Frontline States. To succeed, South Africa would have to establish a case of armed attack against her territory by the Frontline States either individually or collectively. There is no evidence of any of these states having engaged either individually or collectively in an armed attack against the Republic of South Africa.

Nevertheless, South Africa has consistently contended that it is entitled to defend itself against raids or armed incursions conducted by guerrillas of the ANC and SWAPO and other national liberation movements operating from bases allegedly located within the territories of the Frontline States. The position of the Frontline States is that these national liberation movements do not have any bases in their territories. They however maintain that they only give political, diplomatic, moral and material support to the Liberation movements who are conducting a war for the realization of the principle of self-determination in South Africa itself and Namibia. Furthermore, in contemporary international law, principles of customary law outlawing acts such as aggression, slavery, and racial discrimination such as the apartheid policies of South Africa are norms of jus Cogens. Indeed, the view has often been expressed that apartheid should be considered as an international crime against humanity on the same level as genocide. Thus the text of draft Article 19 provisionally adopted by the International Law Commission is as follows:

"Article 19 – International crimes and international delicts

1. An act of a state which constitutes a breach of an international
obligation is an international wrongful act, regardless of the subject-matter of the obligation breached.

2. An internationally wrongful act which results from the breach by a state of an international obligation so essential for the prosecution of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, inter alia, from:

(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that establishment or maintenance by force of colonial domination;

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid.

Clearly, the defense of the right of self-defense will not avail the Republic of South Africa as the reason for the campaign for national liberation by the ANC, SWAPO and other organizations is because of the policy of racial discrimination embodied in apartheid which is an international crime.

Another possible defense which could be raised by South Africa is that
the right of hot pursuit. In practice, the Republic of South Africa has not explicitly justified its raids on targets in neighbouring countries by invoking the right of hot pursuit on land. The obvious reason for this is that at customary international law, there is no right of hot pursuit on land in the absence of treaty provisions. The right of hot pursuit can only be exercised at sea subject to strict legal rules.

The Activities of the surrogate Movements such as the MNR, UNITA etc.

The important question here is to what extent the destabilization campaign of these movements can be attributed to the Republic of South Africa. In the Nicaragua case, the I.C.J. was faced with the same problem concerning the relationship between the United States of America and the Contras. Even though there was evidence of U.S. diplomatic, military and financial support for the contras, the court was unable to attribute responsibility to it for all the actions of the contras violating customary international law. According to the court, the important factor to consider is whether the contras were under such control and influence of the U.S.A. that it could be said that they planned, and directed their policies, strategy and actions. In this respect, the court observed:

"what the court has to determine at this point is whether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government. Yet despite the heavy subsidies and other support provided to them by the United States, there is
On the strength of these findings, the court concluded that it could not for legal purposes attribute international responsibility to the United States of America in respect of the acts committed by the contras in the course of their military or paramilitary operations in Nicaraguan territory. It would seem that at the early stages of the development of at least the insurgent movement in Mozambique, namely the MNR, the South African Government was deeply involved in its relocation from Zimbabwean territory to the Northern Transvaal. There is evidence that members of the SADF planned and directed the policies and strategy of this organization.

It is therefore submitted that in the period soon after Zimbabwean independence up to 1984 after the signing of the Nkomati Accord with Mozambique, the actions of the MNR could be directly attributable to the Republic of South Africa, as that country exercised the requisite control over the formulation of the policies, strategies and even the choice of specific targets of operation of the MNR. After 1984, there is clear evidence that South Africa has continued to supply arms to the MNR and the other surrogate movements. This, it is submitted constitutes an unlawful intervention in the affairs of its neighbours. It should be mentioned that although, no clear-cut evidence has as yet emerged, some commentators are of the view that South Africa's interference in Lesotho's internal affairs actually resulted in the overthrow of Chief Leabua Jonathan in January 1986. In discussing the substance of the customary international principle of non-intervention in the Nicaragua case, the I.C.J. made these very important observations;
Notwithstanding the multiplicity of declarations by states accepting the principle of non-intervention, there remain two questions: first, what is the exact content of the principle so accepted, and secondly, is the practice sufficiently in conformity with it for this to be a rule of customary international law? As regards the first problem - that of the content of the principle of non-intervention - the court will define only these aspects of the principle which appear to be relevant to the resolution of the dispute. In this respect it notes that, in view of the generally accepted formulations, the principle forbids all states or groups of States to intervene directly or indirectly in internal or external affairs of other states. A prohibited intervention must accordingly be one bearing on matters in which each state is permitted, by the principle of state sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural systems, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free one. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another state.

In view of the foregoing, the Republic of South Africa has clearly engaged international responsibility. In the chorzow Factory (Indemnity) case, the Permanent court declared as follows on the legal consequences of an international wrong:
"The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international Law".

In terms of general international law, the Republic of South Africa is obliged to make reparations to the Frontline States for all damage suffered consequential upon the direct and indirect measures of destabilization conducted against them. Furthermore, it is obliged to cease such conduct in her relations with the Frontline states.

Part IV: The responses of the Frontline States

On the strength of the foregoing discussion, each of the Frontline states which has been a victim of South African destabilization measures is entitled to reparations from that state. However, on the basis of published and accessible diplomatic correspondence and other materials, it would seem that the Frontline States have on the whole been less than eager to formally claim compensation from the Republic of South Africa.
either on bilateral basis or before an international tribunal. However, after South African Commando troops raided 10 alleged centres in Gaborone, in June 1985, Botswana held inconclusive talks with the South African Government to deal with the victim state’s request for compensation. The reason for this attitude is perhaps not too difficult to ascertain in view of the outrageous contempt which South Africa has shown for public international law and the international community as a whole. This contempt for the international legal order is best symbolized by South Africa’s continued illegal presence in Namibia.

It should however be noted that an important legal response of the Frontline States in recent years has been the conclusion of non-aggression pacts with the Republic of South Africa. The best known of these is the one concluded between the Peoples’ Republic of Mozambique and the Republic of South Africa on March 16, 1984, which has now come to be known as the Nkomati Accord. A similar agreement had been secretly signed between the Republic of South Africa and the Kingdom of Swaziland in February, 1982. South Africa also concluded an agreement with Angola to formalize a cease fire on the border between Angola and Namibia. The aim of the non-aggression treaties was to enhance cross-border security among the high contracting parties. The contracting parties were to prevent their territories from being used as launching pads for attack by armed bands, irregular forces, or The contracting parties also committed themselves to eliminating any camps, bases etc belonging to such armed bands, and other irregular forces. What is important to observe here is that in spite of the fact that these countries observed their commitments by removing ANC offices and representatives from their territories, South Africa never stopped helping the insurgent movements particularly the MNR in Mozambique. Thus the words of a journalist who commented on the possible scenarios of the post Nkomati era proved prophetic. The journalist, Mr. Keith Somerville said:
"On the other hand, and this is regrettably more likely
the MNR could continue to destabilize Mozambique (fulfilling
a basic South African aim) while Mozambique sticks by its
word."^56

An important aspect of the Frontline States' response to the destabilization policies is the intensification of co-operation among themselves. Facing the threat of disruption of the most important infrastructure of any regional worth in Mozambique, Zimbabwe and Mozambique are now conducting joint patrols of the the 300 km oil pipeline which transports oil from the port of Beira in Mozambique to Mutare in Zimbabwe. After a tripartite meeting was held in Harare between the heads of state of Tanzania, Zimbabwe and Mozambique, it was decided that Zimbabwean troops should be deployed into Mozambique and conduct joint operations. It is estimated that there are currently 7,000 - 10,000 Zimbabwean troops operating in Mozambique. There have also been reports of Tanzanian troops being stationed at the border with Mozambique.57 In December 1986, it was announced that a joint security commission was established by Mozambique and Malawi which had been accused harbouring operatives of the MNR.

An important response from the Frontline states as a collective body, has been the creation of the grouping known as the Southern African Development Conference and co-operation (SADCC) which groups together all the Frontline state plus Swaziland and Lesotho.58 According to the Lusaka Declaration of April 1980, the following objectives of SADCC were identified.

(a) The reduction of economic dependence particularly on the Republic of South Africa;

(b) The forging of economic links to create regional integration;
(c) The mobilization of resources to promote the implementation of national, interstate and regional policies;

(d) To complete the struggle for "genuine political independence" in Namibia and South Africa itself.

These are long-term goals which the Frontline States have set themselves, albeit it is the right course of action.

To attain these goals, the Frontline States need external co-operation and support in terms of technical and financial resources. It is in this connection that one must commend the unstinted support so far given to SADCC by various western donors. During the last non-aligned summit, in Harare in 1986, it was resolved to put together a programme of assistance for the Frontline States.

SUMMARY AND CONCLUSIONS:

The effect of the I.C.J. Judgment in the Nicaragua v. United States of America has been to clarify and bring to the forefront of international relations, the contemporary principles of customary international law governing the threat or use of force by states. A state infringes the prohibition of the use of force or violence against the territory of another state or its nationals where it attacks it by armed force, or organizes, finances and directs insurgent or armed bands to do so. For the acts of such insurgent movements to be attributable to the state, there must be the exercise of sufficient control by that state. In the absence of such control, the court nevertheless held that the state engaged international responsibility
FOOTNOTES


4. The grouping known as the Frontline states comprises the following states of Southern Africa: Angola, Botswana, Mozambique, Tanzania, Zambia and Zimbabwe. With the exception of Tanzania and Zambia, all of these states are territorially contiguous to either the Republic of South Africa itself or Namibia which it controls illegally. Even though, Lesotho and Swaziland border South Africa, they are in view of their peculiar position not members of the Frontline States, even though these two states together with the Frontline States form the larger grouping of the Southern African Co-ordinating Conference (SADCC).


9. The following important South African military statistics and those of the Frontline States may be cited. South African armed Forces total 83,400, with reserves of about 321,000. The airforce includes about 304 combat aircraft and 10 combat helicopters. In addition, there are about 45,500 paramilitary forces such as commandos and police. The 1983/84 estimates of military South African military expenditure totalled about U.S. $2.7 billion. In comparison, the major frontline states of Angola, Mozambique, Zambia and Zimbabwe are estimated to have a total permanent force of about 114,250 with 188 combat aircraft and helicopters. However, these forces have a number of weaknesses: they are not subject to unified command, they have different training backgrounds and they use assorted weapons from various sources. In terms of military expenditure, the total sum of U.S. $1.77 billion is spent by the Frontline States. On the state of military balance between the Republic of South Africa and her neighbours, See: Africa Insight 15 (1985).


13. See: xxxii Keesing's Contemporary Archives, No. 10 at P. 34662 (October, 1986)


17. See: Johnson and Martin: Destructive Engagement, Southern Africa at War, at P. ix.

19. See: 25 I.L.M. No. 5 at P. 1027 (September, 1986)


22. Ibid: at P. 1028 paragraph 27. After making these observations, the court, proceed under Articles 36(6) and 33 of its statute. It pointed out that in spite of the non-appearance of the United States of America, in reaching its decision it would be bound by the following guiding principles: it had to satisfy itself that it jurisdiction under Articles 36 and 37 and that the claims of the party appearing were well founded in law and fact, that the non-appearing state will bound by the eventual result of the case.


24. Ibid: at P. 1078, paragraph 238, by twelve votes to three.

25. Ibid: at F. 1076 paragraph 229


27. Ibid: paragraph 235, also P. 1068 paragraph 195.


29. Ibid: paragraph 241, also P. 1070, paragraph 205, emphasis supplied.


31. Ibid: at P. 1090, The Operative Part, paragraph 6, by twelve votes to three.
32. Ibid: Operative Part, paragraph 5, by twelve votes to three.

33. Ibid: Operative Part, paragraph 8, by fourteen votes to one.

34. Ibid: Operative Part, paragraph 12, by fourteen votes to one.

35. Ibid: at P. 1091, Operative Part, paragraph 12, by twelve votes to three.

36. Ibid: Operative Part, paragraph 13, by twelve votes to three.


39. See: Sørensen: op.cit. PP. 771-772.


42. For a rather weak attempt to extend the right of hot pursuit to land in the case of comparable incursions of Rhodesian troops into Mozambican territory during the national liberation war waged by ZANU-PF, See: A.J. Luttig: "the legality of the Rhodesian military operations inside Mozambique--the problem of hot pursuit on land" 3 South African Yearbook of International Law 36 at P. 140 (1977).

44. See: 25 I.L.M. No. 5, P. 1047, paragraph 109, emphasis supplied.

45. Ibid: paragraphs 110 and 114

46. See: Steven Metz: op.cit. at PP. 494-495.

47. For details of the sequence of events leading to the January 1986 coup in Lesotho, See: xxxii Keesing's Contemporary Archives, PP. 34786-34788 (December, 1986).


49. (1928) P.C.I.J. Ser. A, No.12 P. 47


51. See: xxxii Keesing's Contemporary Archives at P. 34087 (January, 1986). After this raid, a UN mission visited Gaborone and assessed the damage caused at U.S. $190,000. Botswana requested compensation from South Africa and the talks on this request were held between Mr. Roelof "Pik" Botha, the South African Minister of Foreign Affairs and Dr. Gaositw Chiepe, the Botswana Minister of Foreign Affairs.


57. Id.