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Letter dated 29 May 1980 from the Permanent Representative
of South Africa to the United Nations addressed to the
Secretary-General

With reference to my letter of 16 May 1980 in respect of Mr. Zinjiva Winston Nkondo alias Victor Matlou, I wish to bring to Your Excellency's attention the contents of a note which the South African Department of Foreign Affairs and Information addressed to the Lesotho Ministry of Foreign Affairs on 28 May 1980. The text of the note reads as follows:

"As the Honourable C. D. Molapo, Minister of Foreign Affairs of the Kingdom of Lesotho, will be aware, the arrest and detention of Mr. Zinjiva Winston Nkondo on South African territory while he was en route to Lesotho, was the subject of various discussions during which it was explained that his arrest was entirely in accordance with the rules of international law.

"It will be recalled that during these discussions the relevant considerations of law which pertained to Mr. Nkondo's arrest and detention were explained to the Lesotho delegation and that the Honourable C. D. Molapo subsequently indicated that his delegation was not concerned with legalities but that its request for Mr. Nkondo's release was based on considerations of good neighbourliness. Mr. Nkondo's subsequent release was, therefore, an act of goodwill towards the Lesotho Government and was done in order to promote friendship and better understanding between the two States.

"However, since Lesotho, in its letter of 14 May 1980 to the United Nations Secretary-General, 1/ claims that the release of Mr. Nkondo was gained on legal consideration, the Department desires to place on record the South African Government's view on the effect of the relevant rules of law and international conventions:

* A/35/50.

1/ A/35/234-S/13944.

"1. There is today universal acknowledgement that every State has complete and exclusive sovereignty over its superjacent air space. It follows that it is in the complete discretion of each State whether to allow or prohibit the flight of foreign aircraft over its territory, and that any right of passage must depend on conventional arrangement. This principle was confirmed in the Chicago Convention on International and Civil Aviation of 1944.

"2. In consequence of the rule enumerated under 1 supra, there exists no general right of transit at customary international law. That being so, it follows that by that law South Africa is under no general obligation to accord passage to or from Lesotho.

"3. There is general acknowledgement of the paramount right of every State to take all such steps as are necessary in the interest of self-preservation, and it follows that South Africa may lawfully deny even a conventional right of transit to Lesotho - or to any other country for that matter - in circumstances where its exercise may be dangerous to her peace and security. South Africa remains the sole judge of whether those circumstances have in fact arisen.

"4. Such rights of transit as there are, are regulated by treaty:

"(a) In terms of the Agreement relating to Air Services between the Republic of South Africa and the Kingdom of Lesotho, 1967, the designated airlines of the two States may operate between certain airports situated in their respective territories.

"(b) Since both States are parties to the Chicago Convention on International Civil Aviation, 1944, they both enjoy rights of air transit over each other's territory in respect of such of their civil aircraft as do not belong to a scheduled international air service.

"(c) In terms of the International Air Services Transit Agreement, 1944, South Africa and Lesotho are obliged to accord to each other (and the other parties to that agreement), in respect of scheduled international air services

- (i) the privilege to fly across its territory without landing, and
- (ii) the privilege to land for non-traffic purposes.

"All the rights and privileges that are derived from the above-mentioned international treaties, are, of course, subject to the limitations enumerated in those instruments.

"It is therefore clear that there is no rule of customary public international law nor any provision in a convention or treaty which dictates that South Africa erred when it arrested and subsequently detained Mr. Nkondo."

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As the letter from the Chargé d'Affaires a.i. of the Permanent Mission of Lesotho to the United Nations addressed to Your Excellency on 14 May 1980 was circulated on 16 May 1980 as a document of the General Assembly, under item 78 of the preliminary list, and of the Security Council (A/35/234-S/13944), I should appreciate it if this letter could be likewise circulated.

(Signed) J. Adriaan EKSTEEN
Permanent Representative
