

ZAMBIA'S DENIAL OF BAROTSELAND'S RIGHT TO SELF DETERMINATION

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INTRODUCTION

For the sake of those who may not be familiar with the issue of Barotseland, it is important to give a brief background to ensure that we all start from the same starting point.

The territory presently known as the Republic of Zambia came about as a result of a merger of two previously autonomous nations, namely (a) Barotseland, and (b) Northern Rhodesia. The former is presently, roughly depicted as Western Province in the map below.



Barotseland has had a special status as a sovereign state in southern Africa for hundreds of years. Internationally, Barotseland's existence as a State was recognized by the King of Italy, in an arbitration award of 1905 concerning the Anglo-Portuguese Barotse Boundary dispute, and most legal scholars today, such as James Crawford, recognize Barotseland as a classic example of a sovereign to which "the general rules of international law were

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applied,” similarly to Morocco, Algeria, Tunisia, Tonga and the Kingdom of Swaziland – as elucidated by James Crawford in *The Creation of States in International Law*, p. 263.

The Protectorate of Northern Rhodesia had been created through an amalgam of territories acquired through treaty, grant, sufferance and “usage” by the British South African Company of Cecil Rhodes, which was initially operated under a Charter granted by the British Crown, but was eventually administered by the United Kingdom itself. Throughout the period of colonial rule, the successive treaties signed by the Litunga (King) of Barotseland ensured the retention of Barotseland’s power and authority over land, natural resources, regional government, its court system, and other aspects of sovereignty that normally define nationhood. These treaties were to terminate upon the independence of Northern Rhodesia, opening up the possibility of the individual territories constituting Northern Rhodesia to proceed to independence as separate states, or as one unitary state.

The undisputed legal basis for the creation of the modern Republic of Zambia as a **unitary state** was the Barotseland Agreement 1964 (BA’64), which by all accounts was a *bona fide* international treaty signed by Sir Mwanawina III, OBE, then Litunga of Barotseland, Mr. Kenneth Kaunda, the erstwhile Prime Minister of Northern Rhodesia, and the Secretary of State for Commonwealth Relations and the Colonies on behalf of the United Kingdom. The treaty amalgamated the Kingdom of Barotseland and the rest of Northern Rhodesia at the time of decolonisation. At that time, the United Kingdom was overseeing Barotseland as a “protectorate,” the same legal status that had been granted to diverse countries such as Kuwait, Monaco, Andorra, Liechtenstein, Morocco, Botswana, Lesotho and Swaziland, among others.

The net effect of the BA’64, was simply to reaffirm the continued autonomous status of Barotseland as a condition for its incorporation into the Republic of Zambia. More specifically, the BA’64 put on record that the people of Barotseland had consented to be associated with the rest of Northern Rhodesia to form one country, provided that the primary legal aspects of Barotseland’s sovereignty – including the recognition of the Litunga and his Council as the “principal local authority for the government and administration of Barotseland,” the continuation of Barotseland’s legal tribunals, the maintenance of Barotseland control over local taxation, as well as the preservation of its right to land, forests, fishing rights, game preservations, the management of the Barotseland treasury and other rights that it had previously maintained while a British Protectorate – would continue to be enjoyed and exercised.

The Agreement also expressly stipulated as follows at Clause 8:

The Government of the Republic of Zambia shall take steps as may be necessary to ensure that the laws for the time being in force in the Republic are not inconsistent with the provisions of this Agreement.

On behalf of Northern Rhodesia, Prime Minister Kaunda also recognised that “full consultation would have to take place with the Litunga and Council before any land in Barotseland is used for public purposes or in the general interests of economic development”. In this regard, it was further expressly agreed that appeals of decisions made by the Barotse local courts to Zambian jurisdictions could only be made with the approval of Barotseland appellate courts. Prime Minister Kaunda, who would soon become the first President of Zambia, agreed to each of these conditions and, on this basis, the

Litunga signed the Agreement “on his own behalf, and on behalf of his heirs and successors, his Council, and the chiefs and the People of Barotseland”.

BAROTSELAND AS A MINORITY ISSUE

In signing the BA’64, the Litunga was wise to the fact that within the context of the envisaged unitary state, the people of Barotseland descent would constitute a distinct minority. The BA’64 was, therefore, meant to accord the people of Barotseland the full extent, nature and level of **minority human rights standards** as codified in the International Covenant on Civil and Political Rights (Article 27); the Indigenous and Tribal Peoples Convention of 1989; the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992; the two Council of Europe treaties, namely, (a) the Framework Convention for the Protection of National Minorities and (b) the European Charter for Regional or Minority Languages), as well as the Organization for Security and Co-operation in Europe (OSCE) Copenhagen Document of 1990, and the United Nations International Covenant on Civil and Political Rights, adopted in 1966.

As delegates at this conference will be well aware, minority rights typically cover (a) protection of existence of the group concerned, (b) protection from discrimination and persecution, (c) protection and promotion of identity, and (d) participation in political life in ways that are truly meaningful and through which the identified minority group can determine its future. To protect minority rights, many countries have specific laws and/or commissions or ombudsman institutions. Even on this score, Zambia has fallen flat on her face in her failure to ensure that the rights of the People of Barotseland were protected in line with the provisions of the Agreement.

As you all know, ladies and gentlemen, democracy these days requires minority rights to be valued and respected equally, as it does majority rule, no matter how singular or alienated that minority is from the majority society – otherwise, the majority's rights lose their meaning. In the United States, basic individual liberties are protected through the Bill of Rights, which were drafted by James Madison and adopted in the form of the first 10 amendments to the Constitution. These enumerate the rights that may not be violated by the government, safeguarding—in theory, at least—the rights of any minority against majority tyranny. Today, these rights are considered the essential element of any liberal democracy.

The British political philosopher John Stuart Mill took this principle further. In his essay *On Liberty* he wrote, "The only purpose for which power can be rightfully exercised over any member of a civilised community against his will is to prevent harm to others." Mill's "no harm principle" aims to prevent government from becoming a vehicle for the "tyranny of the majority," which he viewed as not just a political but also a social tyranny that stifled minority voices and imposed a regimentation of thought and values. Mill's views became the basis for much of liberal political philosophy since, whether it is free market or economic liberalism or social liberalism.

Madisonian and Millian principles safeguard individual and political minorities. But the danger of majority tyranny lies not just in the infringements of individual rights or the marginalisation of a political minority, but in the oppression of minority groups in society based simply on criteria such as skin colour, ethnicity or nationality, religion, or sexual orientation. Judicial checks on majority tyranny were supposed to expand political and civil

rights over time; however, the American courts were themselves often a part of majority tyranny, as numerous Supreme Court cases attest.

Indeed, the people of Barotseland descent constitute only about 12 percent of the Zambian population. The vote of the Barotse people has been ineffectual and meaningless because they constitute a small proportion of the overall population. Their collective vote can never be sufficient to amount to anything to carry a national vote. It is important to point this out, considering that much of the most extreme ill-treatments of minorities in the world has been carried out by 20th- and 21st-century dictatorships – such as meted out by the totalitarian regimes that carried out genocide to eradicate unwanted groups in society. Notable examples include The Holocaust, perpetrated by Nazi Germany – resulting in a murder of six million Jews, one-third of the total world Jewish population, as well as a significant portion of the Roma ("Gypsy") community; homosexuals have also been a targeted minority for extermination; the Soviet Union, under Stalin, carried out mass executions and deportations of dozens of Caucasian and Central Asian ethnic groups – some of whom now face extinction. More recently, the Russian Federation has waged a brutal war against its own republic of Chechnya, killing tens of thousands of civilians and displacing more than half the population.

Other examples of mass killings of minorities by a dictatorship include the Nigerian campaign against Biafrans; the Hutu genocide of Tutsi in Rwanda, Saddam Hussein's mass killing of Kurds and Shiites in Iraq, and the Sudanese government's sponsorship of mass killing, raping, and deportation in Darfur; the project for an "ethnically pure" Greater Serbia undertaken by Slobodan Milosevic, resulting in the murder of 200,000 Bosnian Muslims and 10,000 Albanian Muslims in Kosovo by a killing machine that was stopped only by military campaigns carried out by NATO.

So, in the blink of an eye, it is very easy to move from



and



Barotse victims of police violence, January 2011

to



The Rwanda genocide: Piles of Bones Illustrating the Hutu Genocide

It is important to learn from the United States, which was founded with the concepts of **majority rule** and **minority rights** as the central focus of a democracy. At each election, the person with the most votes, or the majority, is voted into office. As new laws are passed, it is also done by a majority of the votes, most often meaning one more than 50%. By contrast, those who are not in the majority – i.e. the minority, still have basic rights and expect those rights to be considered when decisions are made. In order to maintain balance, majority rule must continually consider minority rights in a democratic system, as James Madison wrote in Federalist No. 10, “the great danger in *republics* is that the majority will not respect the rights of minority.” In the same vein, President Thomas Jefferson proclaimed as follows in his first inaugural address,

All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights, which equal laws must protect, and to violate which would be oppression.

Like children's rights, women's rights, refugee rights, and rights of persons with disabilities, minority rights are a legal framework designed to ensure that a specific group which is in a vulnerable, disadvantaged or marginalised position in society, is able to achieve equality and is protected from persecution.

The Zambian political community lacks moral capital to correct a half a century of denial of Barotse human and minority rights engendered within in the BA'1964. It has been such a shame – and it continues to be so.

THE GREAT BETRAYAL AND THE DEMISE OF THE UNITARY STATE

Unfortunately for Barotseland, President Kaunda's commitment to the BA'64 would never materialise as he, on the other hand, did everything possible to remove all aspects of Barotseland's special autonomous status. In the months following the celebration of Zambia's independence, three defining acts of betrayal were committed by the Zambian government – contrary to the provisions of Clause 8 of the Agreement, the Zambia Independence Act and Zambia Independence Order:

- 1.0 Relocation of Administrative Staff** – By a mere proclamation made by a provincial Local Government officer (appointed by the Zambian government), the entire administrative departmental staff under the Barotse Government, in all districts, were moved from the royal administrative centres to the respective district administrative

centres. This had the effect of usurping the control of day-to-day administration of the affairs of Barotseland from the hands of the Barotse Royal Establishment (BRE) to Zambia-appointed government officials – with the attendant hierarchy of power and authority shifting away from the BRE and stretching, instead, all the way to the authorities in Lusaka. This was in violation of the BA'64, – as was the case with the pieces of legislation that followed.

2.0 The Promulgation of the Local Government Act No 69 – to repeal the Barotse Native Authority Ordinance – thereby usurping the powers and authority of the Barotse Government by abolishing the Barotse Native Authorities, the Barotse Native Treasury and providing that, henceforth, Barotseland be administered through a uniform local government system applicable to all districts and provinces of the country.

3.0 The enactment of the Chiefs Act Chapter 479 of the Laws of Zambia – which empowered the Republican President to recognise, or withdraw recognition of, “any chief” in the country.

The above acts of betrayal were then followed by one more in 1966:

1966 - The Local Courts Act came into force in April, 1966, to repeal the Barotse Native Courts Ordinance – thereby abolishing the Barotse Native Courts, in turn disfiguring the judicial functioning of the indigenous courts in Barotseland.

In 1969, President Kaunda unilaterally decreed that Barotseland would be renamed Western Province, and then the government introduced and passed the Constitution Amendment Act No. 5 of 1969 which, rather than enshrine the rights agreed to in the 1964 treaty, purported to annul it. Specifically, the Act stated that the Agreement shall on and after the commencement of the Constitution Amendment Act No 5 of 1969 cease to have effect, and all rights (whether vested or otherwise), liabilities and obligations thereunder shall thereafter lapse. The passing of this Act led to mass protests to which the Government responded with mass arrests. Government's intention in passing the Constitutional Amendment Act was to abolish all rights, obligations and liabilities attached to the Agreement. **In legal terms, this unilateral action by the Zambian government brought the union between Barotseland and the rest of the former Northern Rhodesia to an abrupt end.**

Subsequently, the government passed the Western Province (Land and Miscellaneous Provisions) Act No. 47, which stripped Barotseland of its powers over its land and, instead, vested them within the power of the President of Zambia as Zambian Reserves of Barotse nationals.

Such acts, in violation of the spirit and the letter of the BA'64, have continued to this very day, despite the many protests on the part of Barotseland, including Litunga Ilute Yeta IV's warning in his letter of February 1, 1994 to President Chiluba as follows:

In our humble view, secession is a matter of right and is inherent in the Barotseland Agreement of 1964, so that the parties to the said Agreement reserve the right to revert to their original status if the agreement under which they intended to achieve unity can no longer work.

The legal advice we have received on this matter is that all these attempts by the leaders of Zambia to change the Constitution of Zambia, in order to negate the existence of Barotseland, merely represent changes to municipal law, which do not possess the legal

force of international treaties like the Barotseland Agreement 1964. This is a basic principle of international law, as is the principle of *pacta sunt serva*, literally “agreements must be kept,” which is clearly not what occurred with respect to the Barotseland Agreement.

Under Article 60(3) of the Vienna Convention on the Law of Treaties, a material breach is a repudiation of a treaty by a party, or a violation of a provision essential to the object or purpose of the treaty, which entitles the other party or parties to invoke the breach as grounds for terminating it. As noted by the International Court of Justice in the ICJ’s Gabcikovo - Nagymaros (Hungary/Slovakia) case of 1997, the breach must already have occurred for the termination to be legal. Zambia has not only violated each of its obligations under the Barotseland Agreement 1964 by denying the obligations it owed to maintain the special autonomous status of Barotseland and neglecting its obligations to assist in its economic development, but its unilateral attempt to renounce the Barotseland Agreement and to deny its very existence is clearly a repudiatory breach of it, granting Barotseland the right to terminate it once and for all should it wish to do so.

SUSTAINED REPRESSION AND OPPRESSION OF BAROTSE ACTIVISTS

One of the best descriptions of the callousness of the Zambian government towards Barotse activists attempting to reclaim Barotseland’s sovereignty is contained in a letter written by RMA Chongwe and Company, on behalf of the Barotse Royal Establishment (BRE), dated April 21, 1992, to the President of the Republic of Zambia, reading, *inter alia*, at p.2, as follows:

Mr. President Sir, the members of the Barotseland Royal Establishment had constantly reminded the UNIP government about the breach **but due to the perpetual State of Emergency that existed at the time coupled with UNIP’s dictatorial tendencies, it was feared and indeed reasonably so, that any pressure exerted on the UNIP government would have serious repercussions on the members of the Barotse Royal Establishment** and therefore the grievances could not be publicly voiced out. [Emphasis mine].

Indeed, successive Zambian governments have been 100% predictable in their response to anyone attempting to reclaim freedom for the people of Barotseland. The answer has always been a well-orchestrated regime of brutality.

In 2011, when over a hundred persons were arrested and brutalised, the face that captured the insensitivity and ruthlessness of the Zambian government was one of a ninety-two year old man – arrested and charged with treason:



92 year old former Ngambela (Prime Minister) Mr. Maxwell Mututwa



Other victims of police brutality

More recently, under the pretext of unsubstantiated security concerns, the government deployment a large contingent of Zambia army personnel and military aircraft into Barotseland on November 30, 2012, in the hope of intimidating Barotse activists into submission. That action was followed by secret arrests of a number of people whose prosecution has progressed under total media blackout, with most of them being acquitted by the courts of law and no conviction secured to-date.

The 84 people arrested on treason charges recently have been in custody for more than two months and have appeared for mention in the subordinate courts six times, awaiting

committal to the High Court, but instructions from the Director of Public Prosecutions (DPP) in this respect are not forthcoming. Recently, 30 of these detainees were discharged on *nolle prosequi* because the DPP was unable to find sufficient grounds to proceed with their prosecution. This scenario arises from the fact that their arrests were politically engineered and not based on professional investigations and recommendations. We have no doubt that this action by the DPP will manifest in the case of most of the remaining 54 detainees, if not all of them. Thus far, the list of people who have been arrested and charged with treason on the matter of Barotseland since Zambia's independence extends to several A4 pages, but not a single one has ever been successfully prosecuted.

With regard to the 84 people arrested recently, one of the appalling human rights abuses being perpetrated by the Zambian government concerns the arrest of women, primary school juveniles and a physically disabled man – who has to be carried around by fellow detainees:



Notes:

1. Police and prison officials guarding detained Barotse activists have been accused of torturing and making fun of a lame detainee.
2. The woman wearing black and crying is the younger sister to the physically disabled detainee.

It is highly shameful that a well-established state administrative structure can sink so low as to use juveniles, women, disabled and other vulnerable persons as fodder for its war machinery in an unwinnable contest against a well-grounded cause.

The action by the government of President Michael Sata to turn Barotseland into a military zone and have the people therein used for target practice by trigger-happy police and military personnel is of no use in-so-far as the issue of Barotseland autonomy is concerned. To this end, the government is advised to immediately withdraw its forces from Barotseland, cease arbitrary arrests of defenceless citizens and engage in statesman-like dialogue with the people of Barotseland who are prosecuting their legitimate cause by peaceful means.

In violation of the law of treaties, the Government of Zambia has plainly sustained a high level of aggression towards Barotseland, designed to force her to remain within a union to which she is no longer bound. Certainly, trapping Barotseland within the Republic of Zambia without her consent is illegal under public international law. In particular, the legal opinion we have received is that Zambia's recent arrest of the former prime minister of Barotseland amounts to the arrest of an ex-diplomat of a foreign State, and sending soldiers into Barotseland legally qualified as **foreign occupation**.



*Former Barotseland Prime Minister and Member of Parliament: Honourable
Clement Wainyae Sinyinda*

These are hostile acts on the part of Zambia and, in addition to reserving the right to seek compensation for economic harm, Barotseland hereby puts Zambian politicians, soldiers, policemen and other armed groups on notice that their prosecution will be sought for all criminal acts performed by themselves, falling within the scope of the Rome Statute of the International Criminal Court to which Zambia is bound.

GOING FORWARD

Going forward, there is one fundamental fact of life that must be taken note of – and that is that, **there is no government that easily and voluntarily surrenders its power and authority to a third party without compelling pressure to do so.** Unfortunately, this is just the plain truth about life - even when a government has messed up in a big way, as is the case with the issue of Barotseland Agreement 1964. Luckily, the Barotse National Council meeting of 26 and 27, 2012, has spoken. The position of Barotseland going forward has become crystal clear and unequivocal: **complete self-determination.** This position has been communicated to the Zambian government, and this fact has become a matter of public record. Therefore, talk of a process towards the total emancipation of Barotseland, on the part of Barotse nationalists and activities, is not a matter of clandestine or dark-corner, surreptitious activity; it is public talk which one even hears from six year old children playing in the street, or in the forest. This position came about following many futile decades of attempts to persuade the Zambian government to accommodate the people of Barotseland in their constitution by including the Barotseland Agreement 1964. Such calls were met with unspeakable brutality. Enough has become enough. The differences which now stand between Barotseland and the Zambian government, mainly because of sustained brutality against the people of Barotseland, are plainly irreconcilable. Separation is the only viable way out. It is for this reason that Barotseland has chosen to exercise her right to formally recognise the abrogation of the Barotseland Agreement 1964 by the Zambian Government – thereby freeing itself from its union with Northern Rhodesia, and noting the natural consequence that Barotseland has been restored to its original status of an independent nation.

Thus, currently, Barotseland is in a state of transition to becoming a fully-recognised, sovereign member of the international community. In the same vein and spirit, the people of Barotseland hereby request that world governments, especially the former colonial power, Great Britain, which is a signatory to the international treaty that created the union between Barotseland and the rest of Northern Rhodesia, urge the Zambian government to free all Barotse political prisoners and then comport themselves in respect of human rights law and international legal standards. Both States (i.e. Barotseland and whatever remains after Barotseland has pulled out of the unitary state) will clearly be better off if they choose the path of Czechoslovakia – smoothly transitioning into two States on the basis of negotiations, rather than becoming the next Yugoslavia or Biafra. It would indeed be a success story for the increasingly modern and prosperous Africa, and a sign of maturity, if the two States could peacefully revert to the two nations that constituted their union without further delay.

There is nothing sacrosanct with respect to the combination of Barotseland and Northern Rhodesia into modern Zambia, with the encouragement of British Colonialists who appear to have done so purely for the sake of their own administrative expediency. In this regard, it is the hope of the people of Barotseland that the Republic of Zambia recognise its obligations under international law to cooperate with the newly-proclaimed independent State of Barotseland, and that it has the diplomatic maturity to recognize that the two independent nations would be better off respecting international law, and living harmoniously as they did prior to the Barotseland Agreement of 1964, which appears to have been a noble, but failed, experiment.

Certainly, by tossing the Barotseland Agreement 1964 out of the Zambian Constitution, the Zambian government has no further jurisdiction over the territory they excluded from their constitution. This position leads to an immediate commencement of discussions with the government, with the sole purpose, in mind, of working out transitional arrangements towards Barotseland's self-determination. Certainly, given that the element of trust has broken down irretrievably between the Zambian government and the people of Barotseland, the envisaged transition must be managed by neutral, trustworthy, international mediators.

The problem has not been that this position has not been communicated to the Zambian government many a time enough, but rather that the people of Barotseland have consistently lived under successive governments which have not had answers to the problems that they created; governments whose primary preoccupation has been to work tirelessly to project a falsehood as the truth – and the truth and a falsehood; governments which have consistently engaged in malicious indoctrination and the propaganda of fabrication and deception – campaigning, through the various national media they control, to make Zambians and the world believe that Barotseland came into Zambian independence on equal and similar terms as all other “provinces” in the country; that the Barotseland Agreement 1964 was a seditious document – after they co-signed it, thereby agreeing to its terms (they actually hid it away from Zambians for almost five decades). Every time they have been challenged to come up with logical reasons for denying the people of Barotseland their rights and freedoms to self-determination, they have simply responded through acts of intimidation, brutality, harassment, arrests and even killings. They keep on doing the same things over and over again, expecting a different result – such as love and admiration, from the people of Barotseland. Einstein defined **lunacy as doing the same thing repeatedly – and expecting a different result**. Zambian Presidents have so far projected themselves as God-fearing Christians, by day; by night, they have meted out the severest forms of brutality imaginable against the people of Barotseland. It is a situation that clearly illustrates that “in the hands of

dishonest and deceitful individuals, power can be a very dangerous weapon, indeed.” The people of Barotseland are not going to forget this story – and time will come, as it appears imminent now, when justice shall finally prevail and the Barotse people will have an opportunity to exercise their rights and freedoms within their own State.

The reality of being a Mulozi, thus far, has been one of being subjected to well-calculated and orchestrated enslavement and violence. The people of Barotseland have not seen peace and happiness. In any case, what peace could they enjoy when all around are people being maimed and killed; what prosperity could they enjoy when Barotseland stands as the poorest of the poor?



Recent (Nov 19, 2013) Newspaper Report: Sikongo villagers, Western Province, feed on wild fruits and raw mangoes as hunger strikes hard

CONCLUSION

So, as we sit here today, the union between Barotseland and the rest of the former Northern Rhodesia is in its death throes – and in tatters. After nearly five decades of misrule and neglect of Barotseland by the Zambian government, which has seen Barotseland slide from being the most affluent region of Zambia to its poorest, there is nothing left to salvage. Thus, on the basis of public international law, Barotseland, is now seeking formal recognition as the 55th African State, in line with the Barotse National Council resolutions of March 27, 2012. “Recognition” being the proper term, since, on the basis of pure public international law, *de jure* independence has existed since Barotseland chose to terminate the original Barotseland Agreement on 26 and 27 March 2012 – a position that has been made known to the Zambian government. The fact of the matter is that without draconian acts of aggression, repression, suppression, intimidation, harassment, torture, arbitrary arrests – as well as other forms of brutality, Barotseland would have operated as a free, autonomous and sovereign State since 1969. This is what has been the desire of the majority of the people of Barotseland ever since, and this still remains their desire today. Skirting this point will be to do the people of Barotseland an injustice; it will be failing to honour those whose limbs have been amputated, as well as those whose blood has already been shed eternally for this cause.