

IN THE AFRICAN COMMISSION OF HUMAN AND PEOPLES
RIGHTS, BANJUL, THE GAMBIA.

COMMUNICATION NO. -----

IN THE MATTER BETWEEN:

THE NGAMBELA OF BAROTSELAND AND OTHERS
APPLICANTS

AND

GOVERNMENT OF THE REPUBLIC OF ZAMBIA
RESPONDENTS

APPLICANTS MEMORIAL

1. INTRODUCTION

- 1.1 The Applicant in this matter is the Ngambela or Prime Minister of Barotseland, a former British Protectorate from 1899 to 1964 when, on the basis of a treaty cited as the Barotseland Agreement 1964, it proceeded to independence as part of Northern Rhodesia to form the sovereign Republic of Zambia. Copy of the Agreement is herewith attached.
- 1.2 The Ngambela herein acts on his own behalf and as mandated by His Majesty Lubosi Imwiko II, the Litunga or King of Barotseland and His Council, acting on behalf of the chiefs and peoples of Barotseland.
- 1.3 The Respondent is the Government of the Republic of Zambia, a member state of the African Union and of the United Nations and a State Party to the African Charter on Human and Peoples Rights, (the Banjul Charter).
- 1.4 This Communication is brought under Article 20 (1) of the Banjul Charter, (See also Article 1 (1) of the International Covenant on Civil and Political Rights, 1966, 1976 and General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples, 1514 (XV) of 14 December 1960).
- 1.5 The Applicants pray for a Declaration that their right to self-determination as peoples under Article 20 (1) of the Charter has been violated.
- 1.6 The Applicants pray for a Declaration that the Respondent cease to administer Barotseland.
- 1.7 The Applicants pray for a Declaration that the Respondent immediately engage the Applicant with the sole purpose of working out the handover of the administration of Barotseland in the shortest possible time under the auspices of the United Nations.

2. QUESTIONS PRESENTED

- 2.1 Whether this Honourable Commission should hear and adjudicate this matter under Articles 55 and 56 of the Charter and Information Sheet No. 2 in terms of the Guidelines for the Submission of Communications?
- 2.2 Whether the Applicants have exhausted all available and effective remedies within the Republic of Zambia?
- 2.3 Whether the unilateral abrogation of the Barotseland Agreement, 1964 amounted to a breach of a fundamental norm of International Law under the Vienna Convention on the Law of Treaties, 1969 and under the Banjul Charter to carry out their international treaty obligations in good faith-Pacta Sunt Servanda?
- 2.4 Whether the Applicants, pursuant to such a unilateral repudiation, are entitled to accept and recognize such the repudiation?
- 2.5 Whether the Applicants are entitled to resort to the original position following the unilateral repudiation?
- 2.6 Whether the Applicants are entitled to further and alternate relief?

3. SUMMARY OF THE APPLICANTS HEADS OF ARGUMENTS

AD 1. ADMISSIBILITY OF COMMUNICATION

- 1.1 The Applicants submit that this Communication is admissible before this Honourable Commission in terms of Articles 55 and 56 of the Charter.
- 1.2 The Applicants have exhausted all available and effective remedies in the Republic of Zambia.
- 1.3 The respondent state has violated the African Charter and other International Law Instruments in respect of all the issues traversed herein.

AD 2. VIOLATION OF THE RIGHT TO SELF-DETERMINATION

- 2.1 The Applicants will argue that the Respondent State has violated the Applicants right to self-determination as authoritatively enshrined in Article 20 (1) of the Charter and other International Law Instruments.
- 2.2 It will be further argued that although the terms “peoples rights” and “peoples” have not been defined in the Charter, the right to self-determination is a collective or group right which belongs to the individuals who make up the collective or constituent parts of Barotseland, in their manifest diversity.
- 2.3 Further that the term “All Peoples” applies to all peoples in a post-colonial context.

AD 3. CONSEQUENCES OF THE UNILATERAL REPUDIATION OF THE
BAROTSELAD AGREEMENT, 1964

- 3.1 The Applicants will argue that as direct consequence of the unilateral repudiation of the Agreement, the peoples of Barotseland have the corresponding right to accept and recognize such a fundamental breach.
- 3.2 Further that the breach of such a fundamental term released the parties from any obligations whatsoever under the Agreement and are entitled to revert to their original positions.

AD 4. DECLARATION THAT BAROTSELAND HAS A RIGHT TO SEPARATE
STATEHOOD

- 4.1 The Applicants will argue that subsequent to the unilateral repudiation of the Barotseland Agreement, 1964, Barotseland has reverted to its original position before entry into force of the Agreement.
- 4.2 Further that the Applicants are entitled to a declaration of rights and to further and alternative relief as the Commission may deem fit.

4. APPLICANTS HEADS OF ARGUMENT

4.1 ADMISSIBILITY OF THE COMMUNICATION

4.1.1 The Applicant submits that this Communication is admissible under Articles 55 and 56 of the Charter.

4.1.2 The Applicants submits that all the seven conditions spelt out under Article 56 of the Charter have been met.

4.1.3 The Applicants submit that all effective and available remedies have been duly exhausted within the domestic jurisdiction of Zambia.

4.1.4 In the leading case of Sir Dawda K. Jawara v The Gambia (2000) AHRLR 107, this Honourable Commission opined that a remedy is available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success; and it is sufficient if it is capable of redressing the complaint (paras 31-37).

4.1.5 Further, under Article 56 (5) of the Charter, the requirement of exhausting domestic remedies is qualified by the rider that, "all local remedies, if they exist, have been exhausted, unless it is obvious that the procedure of achieving these remedies would be unduly prolonged.

4.1.6 In casu, the Applicants respectfully submit that all efforts to negotiate the effects of the repudiation of the Barotseland Agreement 1964 with successive governments of the

respondent state have been unsuccessful, in some case have been met with intimidation, harassment and threats of criminal prosecution for treason.

4.1.7 In the famous case of Malawi African Association and Others v Mauritania (2000) AHRLJ 149, the African Commission held that the great number of victims rendered the channels of remedying the complaint unavailable in practical terms and according to the terms of the Charter, their process would be unduly prolonged. As a result this Honourable Commission declared the petition/communication admissible.

4.1.8 In the premise we respectfully submit that given the number of victims involved, local remedies will be unduly prolonged and practically unavailable, with the result there is, infact, no local remedy to exhaust.

4.2 DENIAL OF THE RIGHT TO SELF-DETERMINATION

4.2.1 The respondent is a State Party to the Charter, having ratified the Charter on 10th January 1984.

4.2.2 The Applicants submit that the unilateral repudiation of the Barotseland Agreement, 1964 constitutes a gross violation of the fundamental right of the peoples of Barotseland to self-determination, under Article 20 (1) of the Charter, as read with Article 1 (1) of the International Covenant on Civil and Political Rights, 1966 and of the General Assembly's Declaration on the Granting of Independence to Colonial Countries and Peoples (The Declaration).

4.2.3 The Applicants respectfully submit that the peoples of Barotseland fall within the broad definition of the term “peoples” as collective beneficiaries of the right in Article 20 (1) of the Charter.

4.2.4 The Applicants humbly beseech this Commission to adopt a purposive and generous interpretation of the term “peoples” as elucidated in the following authorities.

- (a) 75/92 Katanges Peoples’ Congress v Zaire.
- (b) 87/93 – The Constitutional Rights Project v Nigeria.
- (c) S. Kwaw Nyameke Blay, “Changing African Perspectives on the right to self-determination in the wake of the Banjul Charter on Human and Peoples Rights,” [1985] Journal of African Law. Vol 29. No. 2 pp147-159.
- (d) W. Benedek, “The rights of peoples: The main issues.” [1991] 16 (56) Bulletin of Australian Society of Legal Philosophy, pp71-79.
- (e) R.N. Kiwanuka, “The meaning of ‘peoples’ in African Charter on Human and Peoples Rights”, [1988] 82 American Journal of International Law, 86.

4.3 FAILURE TO CARRY OUT TREATY OBLIGATIONS IN GOOD FAITH

4.3.1 The Applicants submit that the unilateral repudiation of the Barotseland Agreement, 1964, a solemn treaty between Her Britannic Majesty’s Government, the Government of Northern Rhodesia and the Litunga of Barotseland, was violative of the Vienna Convention on the Law of Treaties, 1969; Charter of the United Nations (Article 2); Article 3 of the Charter of the OAU;

Article 4 of the Constitutive Act of the African Union and other related Instruments and norms of International Law.

4.3.2 The Applicants further submit that the failure of the respondent to respect its treaty obligations amounted to a fundamental breach of the treaty, thus releasing the Applicants from their obligations under the Agreement, aforesaid.

5. CONCLUSION

On all the above mentioned grounds, it is our submission that the Applicants' case is unanswerable.

WHEREFORE – The Applicants prays for a declaration as set out in para 1.5, 1.6 and 1.7 of the introduction to this petition.

Signed


7th November 2012

The Ngambela of Barotseland
on Behalf of the Litunga in
Council and Peoples of Barotseland.

TO: The Secretary,
The African Commission on Human and Peoples Rights
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TO: The Attorney-General
Government of the Republic of Zambia
Ministry of Justice
Lusaka
Zambia

1. Complainants

The Ngambela of Barotseland, acting on his own behalf and on behalf of the Litunga of Barotseland, Lubosi Imwiko II, the Kuta and Peoples of Barotseland.

- Name: Clement Wainyae Sinyinda
- Age: 60
- Nationality: Barotse
- Occupation and or Profession: Prime Minister
- Address: PO Box K37, Mongu
- Telephone/Fax No.: +260975465495

2. Government accused of the Violation: Government of Republic of Zambia, a State Party to the ACHPR.

3. Facts Constituting alleged violation.

Description of violation	Place	Time and Date
Unilateral action by the government of Zambia to take away the powers, privileges and rights of the Litunga of Barotseland by enactment of the local government Act No. 69 of 1965	Lusaka	October, 1965
Hon. Sikota Wina, Minister of Local Government published a statutory instrument abolishing the Barotse National Council, sets up the five-district councils in Barotseland and announces the names of the nominated members.	Lusaka	November, 1969

<p>President Kaunda unilaterally announced that Barotseland would thereafter be called Western Province in a speech entitled "I wish to inform the nation".</p>	Lusaka	August, 1969
<p>Unilateral action by the government of Zambia to abrogate the Barotseland Agreement 1964 by the constitution of Zambia amendment Act No. 36.</p> <p>Ngambela Imwaka, Francis Suu, Messrs Lipalile and Muyangwa with the support of Litunga Mbikusita petitioned the President to drop the bill. This did not succeed. Instead the government of Zambia reacted by mass arrests of the activists who demanded the repeal of the 1969 Amendment Act. Among the activists who were detained were Messrs Lisulo Mucanza, Kuwabo Kaunda, Henry Mulopo and Crispin Mwendabai.</p>	Lusaka	October, 1969
<p>Unilateral action by the government of Zambia to take away the residual powers of the Litunga vested in him through various enactments such as those in forests, lands, fishing, wildlife and national parks through enactment of the western province (Land and Miscellaneous Provisions) Act No. 47 of 1970.</p> <p>The Barotse Treasury and assets were forcefully taken by the government of the Republic of Zambia while salaries and allowances payable to members of the Barotse government, headed by the Ngambela, were withdrawn.</p>	Lusaka	1970
<p>Government of Zambia described the Barotseland</p>	Lusaka	August, 1993

Agreement as “statutory stale due to passage of time” in a letter to the Ngambela from Brig General Godfrey Miyanda then Minister without Portfolio. This statement curtailed internal dialogue between the Government of Zambia and the Barotse Authorities.		
Unprovoked killings and arrests of Barotse youth and activists by Zambia Police	Mongu	January 14, 2011
Further unprovoked arrests of Barotse activists by Zambia Police	Mongu	September 9, 2012

4. Provisions of the Charter alleged to have been violated – Article 20 (1).
5. Names and titles of government authorities who committed the violation – successive governments of Presidents Kaunda, Chiluba, Mwanawasa, Banda and now Sata.
6. Witnesses to the violation – include addresses and if possible telephone numbers of witnesses.

Hon. Hastings Dangwa Noyo, Mongu

7. Documentary Proofs of Violation – Acts of Parliament, Constitutional Amendments, Letters and other matters incidental thereof.

1990-199—Several talks between President Kaunda who ruled Zambia under a state of emergency from 1964 to 1991 and the Barotse Royal Establishment to try and find a common ground on the issue of the abrogation of the Barotseland Agreement, yielded little save for a written undertaking from Kaunda, addressed to the Litunga, to continue dialogue after the 1991 presidential and general elections.

October, 1991—President Kaunda held a meeting with the Ngambela of Barotseland and his delegation. Arising from this meeting Kaunda wrote to the Litunga that it was his desire and decision to discuss the Barotseland Agreement in detail “piece by piece and step by step until we shall have covered the whole area to the complete satisfaction of all sides”. Furthermore, Kaunda assured the Litunga that “I see no insurmountable obstacles at all in dealing with and resolving any and all anxieties over any aspects of the Barotse Agreement....”

1991-1992—The Barotse Royal Establishment retained RMA Chongwe and Company to commence legal proceedings over the Barotseland Agreement’s abrogation. The court action was lifted in April 1992 to allow for dialogue with the Zambian Authorities.

1992—Push for restoration of the Barotseland Agreement and birth of the Barotse Cultural Association under a new government of Zambia, the Chiluba government. Lozi technocrats regrouped under the “TUKUBAKEBO” to spearhead the call for the restoration of the Agreement in Liaison with the Barotse Royal Establishment.

“Tukubakebo” organizing Committee held a symposium in December, 1992 in Lusaka to Chart a new course on the future of Barotseland and the Barotseland Agreement 1964. The Tukubakebo grouping reconstituted itself into a registered body under the name “Barotse Cultural Association” (BCA). BCA organized information open day for Barotseland at Mulungushi International Conference Centre, Lusaka. Calls for the restoration of the Barotseland Agreement 1964 are intensified.

January, 1993—The Sambi of Nalolo (Mutompehi I. M. Nasilibane) issued a circular letter to appeal for contributions towards legal costs for lawyers Messrs Richard Nawa Ngenda, Kafuba Mboma and Edward Howlingworth (English from England) to take over from Dr. Roger Chongwe Sc. Lawyer Ngenda was killed under mysterious

circumstances.

August 1993—Pressure had begun to mount within the ranks of the BCA and the general population in Barotseland for Governments' response on demands to restore the Agreement. Government bowed to pressure and hurriedly arranged for a third round of talks at state House. The Chiluba government was not prepared to give in on the substantive issues; instead it offered to discuss other political and social matters affecting members of the Royal Establishment.

1994—The Litunga Ilute Yeta IV wrote to President Chiluba and stated categorically that the purported abrogation of the Barotseland Agreement of 1964 were of no effect and void. He continued that “even if the abrogating Acts were to be construed as amending the Zambia Independence Order, 1964, it was Barotseland’s considered view that such amendments were unconstitutional on the ground that the said amendments discriminated against the people of Barotseland in relation to other people to whom the President had similar obligations arising from section 20 of the Zambia Independence Order 1964.”

On Barotseland’s right to secede, the Litunga made the following assertion: -“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.” He added that Zambia has no moral right to hold the people of Barotseland in perpetual enslavement on account of an Agreement, which was entered into voluntarily, “we cannot be expected to adhere to the terms of the Agreement, which the other party to it does not recognize.”

4th November 1995—A special Pizo held at Lealui from 3rd to 4th November resolved that:

(i) That the government of Zambia must unequivocally recognize the Barotseland Agreement 1964 and accept that the rights and obligations therein are still binding upon the government of Zambia.

(ii) The recognition must be incorporated in the constitution of Zambia, as has been the case hitherto as with all other honorable agreements.

(iii) That if the government of Zambia continued to be obstinate, the people of Barotseland shall have the right to self-determination by reverting to the original status before 1964.”

1995—Mwanakatwe Constitution Review Commission recommended talks to be held between the Zambian Government and the Barotse Authorities to renegotiate the Barotseland Agreement 1964. The government of Zambia rejected this recommendation stating that “this is not accepted because this agreement was abrogated by the Constitution (Amendment) Act No. 33 of 1969”.

1996—The Barotse Royal Establishment sent representations to the Citizens’ Convention on the constitution held in March 1996 to present its position on this matter. In response to the representations made by the Indunas, the Citizen’s Convention, in its Green Paper, recommended for the continuation of dialogue on the Barotseland Agreement. However, this effort was in vain as the government of Zambia ignored the Citizen’s views as contained in the Green Paper.

February 1997—Ngambela Maxwell M. Mututwa petitioned the United Nations, Organization of African Unity, Commonwealth Secretariats and SADC, to appeal for their intervention and highlighted the need for a specific resolution concerning the

unilateral abrogation of the Barotseland Agreement 1964. The Ngambela implored the Secretary-Generals of the UN, Commonwealth and OAU to take pre-emptive action to forestall the likely problems that could be generated as a result of this issue which has the effects of threatening international peace (see attachment—letter to the Secretary General, Common Wealth Secretariat, March 7, 1997).

2001—Forum for Restoration of Barotseland petitioned the African Union Assembly of Heads of State which gathered in Lusaka in July 2001. It solicited the AU to intervene, citing provisions of Article 33 of the Charter of the United Nations and Article IV (4) of the Charter of the OAU which adopts the spirit of Article 33 which provides as follows: -

“The parties to a dispute, the continuance of which is likely to endanger the maintenance of international peace and security shall, first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice.”

2005—Mung’omba Constitution Review Commission recommended that the government and the Barotse Royal Establishment must show political will to finally resolve the outstanding issue of the Barotseland Agreement by initiating negotiations between the two parties to the Agreement.

March 27, 2012—The Barotse National Council formally accepted the unilateral nullification and the abrogation of the Barotseland Agreement 1964 by the Zambian government, which action freed Barotseland from being part of Zambia, and committed Barotseland to a peaceful disengage with the Zambian government under the auspices of the United Nations (see attachment—Resolutions of the 2012 Barotse National Council held at Limulunga on March 26-27).

May 14, 2012—The Barotse Royal Establishment (BRE) informed the government of the Republic of Zambia (GRZ) of BRE's recognition and acceptance of the repudiation of the Barotseland Agreement 1964 by GRZ (see attachment—Letter of the Ngambela of Barotseland to the President of Zambia).

8. All effective and available remedies within the domestic jurisdiction of Zambia have been exhausted. All attempts at dialogue have been met with threats of treason. Successive governments have not been serious, sincere and honest with their engagements with us as can be gleaned from attached supporting documents.
9. Other International Avenue –The matter has not been referred to other international human rights body.