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Ref: ACHPR/COMM/429/12/ZAM/458.16  
Date: 21 March 2016

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Dear Sir,

**Subject: Communication 429/12 - The Ngambela of Barotseland and Others v The Republic of Zambia**

I write with reference to the Secretariat of the African Commission on Human and Peoples' Rights letter Ref: ACHPR/COMM/429/12/ZAM/1285/15 of 18 August 2015, informing you that, acting in accordance with Rule 107(3) of its Rules of Procedure, the African Commission on Human and Peoples' Rights ( the Commission), considered the above Communication, during its 18<sup>th</sup> Extra-Ordinary Session, held in Nairobi, Kenya, from 29 July to 7 August 2015, and declared it inadmissible. The said decision is hereto attached.

The decision was approved for publication in the Commission's 39<sup>th</sup> Activity Report, through Executive Council Decision: Ex.CL/887(XXVII), adopted during the 28<sup>th</sup> Ordinary Session of the Executive Council which took place from 27 to 29 January 2016, in Addis Ababa, Ethiopia.

Please accept my best regards.

Sincerely,  
  
f Dr. Mary Maboreke  
Secretary to the Commission

im/AIO

**Decision of the African Commission on Human and Peoples' Rights on  
Admissibility**

**Communication 429/12: The Ngambela of Barotseland and Others v. Zambia**

**Summary of the Complaint:**

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) received a Complaint on 17 December 2012 from the Ngambela (Prime Minister) of Barotseland, on his own behalf and on behalf of Lubosi Imwiko II -the Litunga (King) of Barotseland, the Kuta (Council) and Peoples of Barotseland (the Complainants)
2. The Complaint is submitted against the Republic of Zambia (the Respondent State), State Party to the African Charter on Human and Peoples' Rights (the African Charter).<sup>1</sup>
3. The Complainants allege that, beginning in October 1965, the Government of Zambia unilaterally repudiated the Barotseland Agreement of 1964 (the Barotseland Agreement), a solemn Treaty that was signed between Her Britannic Majesty's Government, the Government of then Northern Rhodesia and the Litunga (King) of Barotseland. They claim that the repudiation came through a series of actions taken unilaterally by the Government of Zambia.
4. The Complainants state that the Government of Zambia, in October 1965, enacted the Local Government Act No 69 of 1965, which allegedly erased the powers, privileges and rights of the Litunga of Barotseland as laid out in the Barotseland Agreement.
5. They also allege that in August 1969, President Kaunda unilaterally announced that Barotseland would thereafter be called Western Province in a speech entitled "I wish to inform the nation".
6. The Complainants aver that in October 1969, the Government of Zambia enacted the Constitution of Zambia Amendment Act No. 33 of 1969, which was an abrogation of the 1964 Barotseland Agreement. Members of the Barotse Royal Establishment, in particular, Nyambela Imwaka, Francis Suu, Messrs Lipalile and Muyangwa with the support of Litunga Mbikusita had

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<sup>1</sup> The Republic of Zambia ratified the Charter on 10 January 1984.





unsuccessfully petitioned the President to drop the bill. Instead, the government of Zambia reacted with mass arrests of the activists who had demanded the repeal of the Amendment. Among those detained were Messrs Lisulo Mucanza, Kuwabo Kaunda, Henry Mulopo and Crispin Mwendabai.

7. The Complainants allege that in November 1969, in Lusaka, Honourable Sikota Wina, Minister of Local Government published a Statutory Instrument abolishing the Barotse National Council, setting up the Five District Councils in Barotseland and announcing the names of the nominated members.
8. Further to this, the Complainants allege that in 1970, in Lusaka, the Government of Zambia took away the residual powers vested in the Litunga (King) with respect to forests, lands, fishing, wildlife and national parks through the enactment of the Western Province (Land and Miscellaneous Provisions) Act No.47 of 1970. They further allege that the Government of Zambia also forcefully took the Barotse Treasury and assets, while salaries and allowances payable to members of the Barotse Government, headed by the Ngambela, were withdrawn.
9. The Complainants also submit that on 18 August 1993, in Lusaka, in a letter addressed to the Ngambela from the Brigadier General Godfrey Miyanda, then, a Minister without Portfolio, the Government of Zambia described the 1964 Barotseland Agreement as "Statutorily stale due to passage of time". This statement curtailed internal dialogue between the Government of Zambia and the Barotse Authorities.
10. The Complainants allege that on 14 January 2011 and 9 September 2012, respectively, in Mongu, there were unprovoked killings and arrests of Barotse youth and activists by Zambian Police.
11. The Complainants submit that the failure of the Respondent State to respect its obligations under the Agreement amounted to a fundamental breach of the Agreement thus releasing the applicants from their obligations under the Agreement.

**Articles alleged to have been violated.**

12. The Complainants allege that these unilateral actions by the Government of Zambia constitute a gross violation of the fundamental rights of the peoples of Barotseland to self-determination, under Article 20 (1) of the African Charter as



read with Article 1(1) of the International Covenant on Civil and Political Rights (ICCPR), and the General Assembly's Declaration on the Granting of Independence to Colonial Countries and Peoples (The Declaration).

13. They further allege the violation of the Vienna Convention on the Law of Treaties, Article 2 of the Charter of the United Nations (UN Charter), Article 3 of the Charter of the Organisation of African Unity (OAU Charter) and Article 4 of the Constitutive Act of the African Union (Constitutive Act).

### Prayers

14. The Complainants request the African Commission on Human and Peoples' Rights (the Commission) to:
  - Declare a violation of their right to self-determination under Article 20(1) of the African Charter;
  - Declare that the Respondent State should cease to administer Barotseland; and
  - Declare that the Respondent State 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.

### Procedure

15. The Secretariat of the African Commission on Human and Peoples Rights (The Secretariat) received the Complaint on 17 December 2012.
16. During the 13<sup>th</sup> Extra-Ordinary Session of the Commission which took place from 18 to 25 February 2013, in Banjul, The Gambia, the Commission considered the Communication and decided to be seized thereof.
17. By letter and Note Verbale dated 1 March 2013, the Secretariat acknowledged receipt of the Complaint and informed both parties of the decision of the Commission and requested the Complainants to submit arguments on Admissibility of the Communication within two (2) months of the notification.
18. By letter and Note Verbale dated 30 April 2013, the Commission informed both parties of the deferment of the case at its 53<sup>rd</sup> Ordinary Session, held in Banjul





the Gambia from 9 to 23 April, as the deadline for the Complainants to make their submissions had not yet expired.

19. On 28 May 2013, the Secretariat received a Declaration of interest in the matter from the Civil Societies and Nationalists for Barotseland Self-determination.
20. On the same day, the Secretariat also received correspondence from Mr. Sinyinda, the Chairman General of the Barotse Freedom Alliance(the Alliance), formerly the Ngambela (Prime Minister) of Barotseland informing the Commission of his resignation as Ngambela and expressing the wishes of the Alliance to take over the case and receive all correspondence relating to it.
21. By letter dated 19 June 2013, the Secretariat acknowledged receipt and informed the Chairman General of the Alliance that the matter would be tabled before the Commission.
22. On 24 July 2013, the Secretariat received Correspondence from the Barotse Royal Establishment, in particular from Mr. Silumbu, the Acting Ngambela of Barotseland informing the Commission of the resignation of the former Ngambela, requesting a time extension in order to submit on admissibility and requesting that further Communication be channelled to the Acting Ngambela and not the former Ngambela.
23. By letter dated 10 September 2013, the Secretariat received submissions on admissibility from the former Ngambela of Barotseland and the Chairman General of the Alliance.
24. At its 54<sup>th</sup> Ordinary Session, held in Banjul, the Gambia from 22 October to 5 November 2013, the Commission deliberated on the request of the Alliance to take over the case and decided against it. This decision, to maintain the Acting Ngambela of Barotseland as the Complainant was communicated to the former Ngambela and to the Acting Ngambela by letters dated 15 November 2013. The Acting Ngambela was also granted a one (1) month extension within which to submit on admissibility.
25. On 12 December 2013, the Secretariat received correspondence from the Complainants acknowledging receipt of the Commission's decision, submitting on admissibility and informing the Commission that the Alliance was part of the "others" among the Complainants cited in the Communication as "the Ngambela of Barotseland and Others".



26. On 24 February 2014, the Secretariat received further supporting documents from the Barotse Royal Establishment on its official revocation of the Barotseland Agreement.
27. On 6 March 2014, the Secretariat also received correspondence from the Barotse Royal Establishment with signatures and endorsements of the evidence and arguments submitted to the Commission on behalf of the Barotse Royal Establishment.
28. On 7 March 2014, the Secretariat received correspondence from the Alliance requesting an update on the Communication.
29. By letter and Note Verbale dated 21 March 2014, the Secretariat acknowledged receipt of the Complainants' submissions on admissibility and transmitted the same to the Respondent State respectively.
30. On 25 July 2014, the Secretariat received correspondence from Dugue and Kirtley AARPI, a law firm in Paris, purporting to represent the Alliance and requesting an update on the matter.
31. By letter dated 13 August 2014, the Secretariat acknowledged receipt and informed the lawyers that a decision had not yet been reached.
32. At its 16<sup>th</sup> Extra-Ordinary Session which took place from 20 to 29 July 2014, in Kigali, Rwanda, the Commission deferred consideration of the Complaint due to time Constraints. This decision was transmitted to the parties by letter and Note Verbale dated 13 August 2014. The Commission also took the same opportunity to inform the Respondent State that the submission deadline on the merits had expired and that the Commission would proceed to make a decision on the basis of the information before it.
33. By letter dated 22 August 2014, the Commission enquired with the Complainants about the letter received from Dugue and Kirtley AARPI purporting to represent the Alliance.
34. The Alliance's response, received at the Secretariat on 8 October 2014 indicated that Dugue and Kirtley AARPI were indeed assisting the Alliance and had indeed been requested to make the follow-up but that they would not represent the Complainants before the Commission.
35. By letter dated 17 October 2014, the Secretariat acknowledged receipt and indicated that it would await the official response of the Ngambela as the recognised representative of the Complainants.
36. On 2 February 2015, the Secretariat received correspondence from the Respondent State in response to the Commission's Note Verbale of 13 August 2014, which the Respondent State alleged to have only received on 27 January





2015. The Respondent State requested that the Commission resend the Complaint and the Admissibility submissions. The Secretariat responded by Note Verbale dated 11 February 2015, informing the Respondent State that its correspondence would be tabled before the Commission.
37. On 5 March 2015, the Secretariat received email correspondence from the Complainants requesting an update on the case to which the Secretariat responded by email first, indicating that an official update would be transmitted in due course and by letter informing the Complainants of the Respondent State's allegations that it had never received the Complaint.
38. Following the Commission's decision to grant the Respondent State's request, the Secretariat re-sent the Complaint together with the Complainants' submissions on admissibility to the Respondent State by Note Verbale dated 5 March 2015. The Respondent State was also invited to make its submissions on admissibility. The Complainants were also informed of this decision by letter dated 5 March 2015.
39. The Secretariat received the Alliance's response to this matter by letter dated 9 March 2015. The Alliance also expressed concern with the delays in the matter to which the Secretariat responded with guarantees that the matter was being processed in a letter dated 11 March 2015.
40. On 20 April 2015 the Secretariat received the Respondent State's submissions on admissibility. The Commission acknowledged receipt to the Respondent State and transmitted the same to the Complainants by letter and Note Verbale dated 14 May 2015.
41. On 18 June 2015, the Secretariat received the Complainants' observations on the Respondent State's Submissions on admissibility. The Commission acknowledged receipt and transmitted the same to the Respondent State on 22 June 2015.

### **The Law on Admissibility**

#### **Submissions of the Complainant on Admissibility**

42. The Complainants submit that the Communication satisfies all the requirements under Article 56 of the African Charter particularly because the Communication: indicates the author; is compatible with the Constitutive Act and the African Charter; is not written in disparaging or insulting language; is not based exclusively on news disseminated through the mass media; and does not deal with a case that has been settled internationally or regionally.



43. With respect to the requirement to exhaust local remedies, the Complainants submit that all effective and available remedies have been exhausted. They cite the decision of the Commission in **Sir Dawda Jawara v the Gambia**<sup>2</sup> (the Jawara Case) in which the Commission stated that a remedy is available if the petitioner can pursue it without impediment, effective if it offers a prospect of success and sufficient if it is capable of redressing the Complaint.
44. They argue that under Article 56 (5) the Charter the requirement for the exhaustion of local remedies is qualified by the provision that those remedies if they exist should have been exhausted, unless it is obvious that the procedure of achieving these remedies would be unduly prolonged. The Complainants submit that given the number of victims involved, local remedies will be unduly prolonged and practically unavailable with the result that there is in fact, no remedy to exhaust.
45. They urge the Commission to follow its reasoning in the Case of **Malawi African Association and Others vs Mauritania**<sup>3</sup> where it held that the great number of victims rendered the channels of remedying the Complaint unavailable in practical terms and their process would be unduly prolonged.
46. The Complainants also submit that all efforts to negotiate the effects of the repudiation of the Barotseland Agreement with successive governments of the Respondent State have been unsuccessful and in some cases have been met with intimidation, harassment and threats of criminal prosecution. They aver that between 1990 and 1991, the Barotse Royal Establishment held several talks, with then President Kaunda to try and find common ground on the issue. The talks yielded very little, save for a written undertaking from President Kaunda, addressed to the Litunga to continue dialogue after the 1991 Presidential and General Elections.
47. They also add that between 1991 and 1992, they retained legal counsel to commence legal proceedings over the abrogation of the Agreement but this retainer was lifted in April 1992 to allow for dialogue with Zambian authorities. In 1992, the newly formed and formally registered Barotse Cultural Association intensified efforts for the restoration of the 1964 Barotseland Agreement. In January 2013, efforts were made to fundraise to hire a new lawyer, after the previous lawyer died in mysterious circumstances.

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<sup>2</sup> Sir Dawda Jawara v the Gambia (2000) AIHRLR 107 paras 31-37.

<sup>3</sup> Malawi African Association and Others vs Mauritania (2000) AIHRLJ p149.





48. The Complainants outline several steps taken between 1992 and 2012 to get a solution on the matter including:
- a) The Third round of talks held in 1993 after mounting pressure on the administration of President Chiluba;
  - b) A written letter from the Litunga Ilute Yeta IV to President Chiluba in 1994 declaring the abrogation from the Barotseland Agreement unconstitutional;
  - c) A special meeting held in November 1995 seeking recognition by the government of Zambia of the 1964 Barotseland Agreement through inclusion of the Agreement in the Zambian Constitution;
  - d) A recommendation made by the Mwanakatwe Constitution Review Commission, but rejected by the Government of Zambia, to renegotiate the Barotseland Agreement;
  - e) Recommendations made in the Green Paper containing Citizens' views, after the 1996 Citizens' Convention, for the continuation of dialogue on the Barotseland Agreement, which recommendations government ignored;
  - f) The petitioning, in 1997, by the Ngambela Maxwell. M. Mtutwa of the United Nations (UN), the Organisation of African Unity (OAU), the Commonwealth Secretariat and the then Southern African Development Coordination Committee (SADCC) for a resolution on the unilateral abrogation of the Barotseland Agreement as a threat to international peace;
  - g) The petitioning of the African Union Assembly of Heads of State in July 2001 by the Forum for the Restoration of Barotseland, to intervene in the matter, citing Article 33 of the UN Charter and Article IV (4) of the OAU Charter which recommend peaceful resolution of disputes in matters that could likely endanger international peace and security;
  - h) The recommendations made by the Constitution Review Commission of 2005 for renewed negotiation between the Government of Zambia and the Barotse Royal Establishment;
  - i) The formal (acceptance), on 27 March 2012, by the Barotse National Council of the nullification and abrogation of the Barotseland Agreement by the Zambian Government and a resolution to peacefully disengage with the Zambian government under the auspices of the UN. This acceptance signified to the Barotseland peoples' freedom from being part of Zambia; and
  - j) The communication, on 14 May 2012, by the Ngambela of Barotseland to the government of Zambia where the former informed the latter of the



recognition and acceptance of the repudiation of the Barotseland Agreement by the Barotseland Royal Establishment.

49. They conclude that all effective and available remedies within the domestic jurisdiction of Zambia have been exhausted since all attempts at dialogue have been met with threats of treason and successive governments have not been serious, sincere and honest in their engagements with the people of Barotseland.
50. In respect of Article 56 (7) the Complainants argue that the matter has not been referred to nor is it under consideration by any other international human rights body.

#### **Submissions of the Respondent State on Admissibility**

51. The Respondent State submits that the Communication should be dismissed on the grounds that it does not satisfy the requirements of Articles 56 (2), (4) and (5) of the African Charter.
52. The Respondent State alleges that the Complaint makes no allegations of specific breaches of human rights guaranteed under the African Charter and so fails to demonstrate the alleged violations or to provide concrete evidence of violation of the African Charter.
53. The Respondent State argues that none of the ten (10) complaints advanced by the Complainants reveal grounds for a prima facie violation of human rights under the Charter. To support this point, the Respondent State relies on Communication 162/97 *Movement des Refugies Muaritaniens au Senegal* where the Commission found the Communication inadmissible on the grounds that the facts did not reveal a prima facie violation of the African Charter and that the provisions allegedly violated had not been stipulated.
54. Further, the Respondent State recalls the Commission's jurisprudence in Communication 1/88, *Frederick Korvah v Liberia* in which the Commission dismissed the case because the matter described in the Communication did not amount to violations of the African Charter.
55. The Respondent State also argues that the Communication is incompatible with the OAU Charter to the extent that the evidence presented by the Complainants does not show that they are denied the right to participate in government as guaranteed in the African Charter or that any of their rights are violated to the point of calling into question the territorial integrity of the





- Republic of Zambia. The Respondent State submits that the Complainants cannot exercise a variant of self-determination which is incompatible with the sovereignty and territorial integrity of the Republic of Zambia.
56. Further to illustrate the incompatibility of the Complaint with the African Charter, the Respondent State argues that the evidence presented by the Complainants does not show that they are denied the rights to participate in government as guaranteed in the African Charter and as such there is no evidence of violations to the extent that the Republic of Zambia's territorial integrity could be called into question.
57. To this end, the Respondent State cites **Communication 75/92 Katangese Peoples' Congress v Zaire<sup>4</sup>(the Katangese Case)** in which the Commission dismissed the case and stated that under the OAU Charter, the Commission has an obligation to uphold the sovereignty and territorial integrity of all OAU member states. The Commission further explained that self-determination can be exercised in different ways including independence, self-government, local government, federalism or confederalism but as a general rule nationals have to make use of one of these alternatives without undermining the sovereignty of the state.
58. The Respondent State also submits that allegation Number 10 in the Complainants submission, that there were unprovoked arrests and killings of Barotse youths by Zambian state agents is vehemently refuted as it is based on news disseminated through the mass media and that consequently the Communication should be dismissed because it is in breach of Article 56 (4) of the African Charter.
59. With respect to the requirement for the exhaustion of local remedies, the Respondent State argues that the Complainants have not demonstrated that they have exhausted local remedies nor has the procedure been unduly prolonged. The Respondent State submits that the Complainants have not lodged any case in any courts of law in the Republic of Zambia and therefore they have not exhausted local remedies. The Respondent State relies on the Commission's jurisprudence in **Communication 221/98 Alfred B Cudjoe v Ghana<sup>5</sup>** in which it stated that local remedies are any domestic legal action that

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<sup>4</sup> Communication 75/92 Katangese Peoples' Congress v Zaire<sup>4</sup>(the Katangese Case) (1995) ACHPR.

<sup>5</sup> 12<sup>th</sup> Activity Report 1998-1999, Annex V para 14. Documents of the African Commission p 753.



may lead to the resolution of the Complaints at the local or national level. The remedy must be an action before the courts of law." The Respondent State argues that the Complainants have not exhausted such judicial remedies and hence the Communication should be dismissed.

60. The Respondent State also contends that should there be any violation of the African Charter, it should be given the chance to remedy the violation at the domestic level before being brought to the Commission. It cites several of the Commission's decisions which set out the principle that "a government should have notice of a human rights violation in order to have the opportunity to remedy such violation before being called before an international body."<sup>6</sup>
61. The Respondent State also argues that the Complaint's cause of action arises from the Barotseland Agreement, which became effective before the period of application of the African Charter. The African Charter entered into force in 1986 and the Respondent State argues that consequently the Communication should be deemed inadmissible. It refers to Article 28 of the Vienna Convention on the Law of Treaties which is applicable by virtue of Articles 60 and 61 of the African Charter which provides that as a general rule "treaties do not bind a party in relation to any act or fact which took place in any situation which ceased to exist before the date of the treaty in respect to that party". The Respondent State argues that this Communication is based on an Agreement which is not within the period of application of the African Charter and therefore the Complainants cannot rely on the provisions of the Barotseland Agreement to invoke the provisions of the African Charter.
62. The Respondent State concludes that in light of the foregoing, the Communication does not satisfy the requirements under Article 56 of the African Charter and prays that the Commission should find it inadmissible.

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<sup>6</sup> Communication 25/89 Free Legal Assistance Group v Zaire  
Communication 47/90 Lawyers Committee for Human Rights v Zaire  
Communication 56/91 Union Interafricaine de Droits de l'homme v Zaire  
Communication 100/93 Less Temoins de Jehovah v Zaire  
9<sup>th</sup> Activity Report 1995-1996, Annex VIII (Documents of the African Commission) p 444.





### Submissions of the Complainants in Response to the Respondent State's Submissions on Admissibility

63. In response to the Respondent State's contention that the complaint does not reveal allegations of specific breaches of human rights guaranteed under the African Charter, the Complainants submit that the Barotse, upon gaining independence from the British chose to exercise self-determination within the framework of a unitary state as an autonomous region under the Barotseland Agreement. To this end they had a right to self-determination. They argue that unilateral termination of that Agreement by the Respondent State, which took away their right of autonomy, is a material violation of the right to self-determination under the African Charter. They also state that legislative provisions and Presidential Proclamations which changed the name of Barotseland to Western Province<sup>7</sup>, the reversal of the agreement's vestion of land in the Litunga and transference of that right to the President declaring Barotseland a Reserve, whose land could be appropriated for state use at the discretion of the President and not the Litunga<sup>8</sup>as should have been the case under the Agreement.
64. The Complainants also distinguish their case from the *Katangese case*<sup>9</sup> by stating that the Katanga region had no prior autonomous status before independence, whereas Barotseland had existed for nearly five centuries as a nation, the subject of international law, a self-governing British protectorate with statehood insignia such as a flag, national anthem, coat of Arms and a church.
65. In respect of the Respondent State's position that the Barotse are able to participate in government, the Complainants argue that the Barotseland Agreement that formed the Unitary State of Zambia did not preclude them from participating as the unitary state was supposed to draw personnel from all the Constituent parts of the nation notwithstanding the powers reserved for some parts to exist with autonomy. They argue that the fact that a few Barotse

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<sup>7</sup> An address to the nation by his Excellency, the President Dr K.D. Kaunda, 25 August 1969 and The Provinces and Districts (Division) (Amendment) Order, 1969 SI No416 of 1969.

<sup>8</sup> The Western Province (Land and Miscellaneous Provisions) Act No 47 of 1970.

<sup>9</sup> Ibid n4 above.



get appointed to seats in government does not compensate for loss of autonomy.

66. They also argue that the contention of the Complaint centers on the termination of the Barotseland Agreement, a Treaty between Barotseland, Northern Rhodesia and Her Britannic Majesty. They argue further that the Constitution of Zambia did not create the Agreement but rather the territorial integrity of the Republic of Zambia is a derivative of the Agreement. They further argue that the Barotseland Agreement did not allow for unilateral abrogation and in doing so, the Respondent State freed Barotseland and its people from the obligation to submit to and uphold the Republic of Zambia's sovereignty.
67. On the temporal jurisdiction of the Commission, the Complainants submit that although the Barotseland Agreement came into force in 1964 before the period of application of the African Charter, which the Respondent State argues is a ground for dismissal; this should not be a ground of dismissal. They argue that the mandate to uphold human rights falls not only within the African Charter but the 1963 OAU Charter (Article 2) which pre-existed the Barotseland Agreement. They argue that since the African Charter is a product of the OAU, its coming into force in 1986 should be interpreted as mere enhancement by the OAU of its work on the observance of human rights in Africa.
68. They argue that the enforcement of human rights under the OAU did not start with the African Charter in 1986 as a specialised organ but began with the OAU Charter in 1963. They also argue that the Respondent State's reliance on Article 28 of the Vienna Convention on the Law of Treaties<sup>10</sup> is out of context in view of the Commission's mandate being drawn from the OAU Charter.
69. With regard to the allegations of killings and arrests of Barotse youth by the Respondent State agents, the Complainants argue that although the allegations are based on media reports, they remain unchallenged. They state that the Respondent State instituted a Commission of Inquiry because it recognised the gravity of the matter but the report of that Commission (The Chongwe Commission of Inquiry into the Mongu Riots of January 14 2011) was never made public. They therefore argue that although they relied on news sources,

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<sup>10</sup> Article 28 on the Non-retroactivity of treaties which provides that:  
*"Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."*





the allegations are in fact true as indicated by the Respondent State's actions of investigation and failure to disclose the report of the investigations.

70. On the matter of the exhaustion of local remedies, the Complainants argue that they had a right to take the matter to court under Clause 9 of the Barotseland Agreement but that right was taken away when the Respondent State enacted Constitution (Amendment) (No 5) Act of 1969 which closed the judicial route. They submit that because courts are creatures of the Constitution, they could not override its provisions which were clear that all rights, liabilities, and obligations under the Barotseland Agreement lapsed with the coming into effect of the Amendment. They state that the only avenue that remained open to them was the political route which they exercised over 43 years in futility.
71. They also argue that the Respondent State's argument that it should be given the opportunity to remedy the violations internally is untenable. They state that the Respondent has made it abundantly clear that it does not recognise any of the events concerning Barotseland as violations so how can it be tasked to remedy violations which it does not recognise as such.
72. Lastly, the Complainants argue that the matter is one that is not excluded under Article 56(7) of the African Charter.

#### **Analysis of the Commission**

73. The admissibility of communications is governed by the requirements of Article 56 of the African Charter. The onus falls on the Complainant to show that these requirements are met, and if not to provide sufficient justifications why any of the requirements could not be met. In the present Communication, the Complainants claim that they fulfilled all the requirements of Article 56 of the African Charter. The Respondent State however submits that four of the requirements on admissibility, that is, Article 56 (2), (3), (4) and (5) have not been met.
74. Following its own assessment, the Commission finds that Article 56(1) has been satisfied as the Complaint clearly indicates the authors who are the Ngambela (Prime Minister) of Barotseland, the Council of Barotseland, the Litunga (King) of Barotseland and the peoples of Barotseland. Further, the present Communication is not one that has been settled in accordance with the



principles of this Charter, the UN Charter or the OAU Charter and therefore it complies with Article 56 (7).

75. On the question of Article 56(2), the jurisprudence of the Commission indicates that Article 56 (2) is satisfied when Communications received by the Commission are compatible with the African Charter or the Constitutive Act (the replacement of the OAU Charter).<sup>11</sup> The Commission has noted that compatibility denotes compliance or conformity with the relevant instruments<sup>11</sup>, in this case both the African Charter and the Constitutive Act.
76. In relation to the African Charter, the compatibility requirement demands that a number of factors be satisfied. These are that; the Complaint specifies right holders by whom communications may be brought to the Commission and the duty bearers against whom such actions may be brought in line with the Charter (*ratione personae*); denotes substantive issues that can be invoked under the Charter (*ratione materiae*); reveals violations that occurred in the time period within which the Charter was applicable to the Respondent State (*ratione temporis*), and points to the place where the alleged violations occurred and that the place is within the territorial boundaries of the Respondent State (*ratione loci*).<sup>12</sup>
77. In this case the Communication has been brought by citizens of a State Party who are rights holders within it and against a State party to the African Charter. Further, the Communication was brought in respect of violations that occurred within the territory of the Respondent State; the Republic of Zambia. To that extent, the Commission finds that the requirements *ratione personae* and *loci* have been satisfied.
78. What needs further analysis is whether the Communication has been brought in respect of violations that occurred within the temporal (*temporis*) and material (*materiae*) jurisdiction of the Commission.
79. With regard to the temporal jurisdiction, it is a well-established principle in the Commission's jurisprudence that, if violations occurred prior to the entry into force of the African Charter, in respect of a State party, they do not fall within the mandate of the Commission.<sup>13</sup> The rule of derives from the Draft articles on

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<sup>11</sup> Communication 308/2005 *Majuru v Zimbabwe* (2008) AHRLR 146 (ACHPR 2008) para 73.

<sup>12</sup> Communication 266/03 *Kevin Mgwanga Gunme et al v Cameroon* 2009 (ACHPR) para 71.

<sup>13</sup> Communication 142/94, (previously 56/91 *Njoka v Kenya* (ACHPR 1995) para 5





Responsibility of States for Internationally Wrongful Acts<sup>14</sup> which provide that an act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.<sup>15</sup> However, some communications can be deemed to be within the jurisdiction *rationae temporis* of the Commission, if the violations alleged therein continue, after the entry into force of the African Charter.<sup>16</sup>

80. The Commission notes the Respondent State's argument that the Communication should be deemed inadmissible because the cause of action arose before the African Charter came into force in The Republic of Zambia. The Republic of Zambia became party to the African Charter in 1984 and the African Charter itself came into force in 1986. The Barotseland Agreement of 1964 and the Constitutional Amendment No. 5 of 1969, respectively, are the two legal instruments upon which the cause of action arises, and the Complainants reiterate this point. Both took place many years before the African Charter came into force.
81. The Complainants do not raise the argument of continued violation but rather argue that the Complaint should be deemed admissible because both the Commission and the African Charter derive their mandate from the 1963 OAU Charter which created the African Union and which predates the cause of action in this case. This argument is erroneous. The Commission's mandate derives from the instrument that created, it and from which the rights being contested by the parties derive. That instrument is the African Charter and the cause of action clearly arose before the African Charter came into force generally and in Zambia.

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Communication 310/2005, *Darfur Relief and Documentation Centre v Republic of Sudan* ACHPR (2009) para 63.

<sup>14</sup> Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001) Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected.

<sup>15</sup> Article 13 Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001. These Draft Articles have assumed the status of International Customary Law as espoused by the International Court of Justice in *Gabcikovo-Nagyamaros Project (Hungary/Slovakia)* ICJ Report 1997 para 47.

<sup>16</sup> Communication 266/03 *Kevin Mgwanga Gunme et al v Cameroon* 2009 (ACHPR) para 96.



82. The only reason that could justify consideration of the matter would be to establish whether the alleged violations, which began before the State Party ratified the African Charter, have continued even after such ratification. The United Nations Human Rights Committee (HRC) has interpreted a continuing violation to mean one whose occurrence pre-dates the entry into force of the Treaty under which an action is brought but whose continued effects could in themselves constitute violations of the said treaty.<sup>17</sup> In yet another one of its decisions, the HRC held that, "a continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of previous violations by the state party."<sup>18</sup>
83. The cause of action in this matter arises from the legal consequences of Constitutional Amendment 5 of 1969 which rescinded the Barotseland Agreement. The Commission concludes that the cause of action of the Complaint arose at a time when Zambia was not a party to the African Charter. The Abrogation in itself does not constitute a violation of the Charter and its effects thereof cannot be construed to constitute a violation of the Charter in the sense that a continued violation is understood, enough to constitute breaches of the African Charter.<sup>19</sup>
84. On the question of material jurisdiction, the Respondent State argues that none of the ten (10) complaints advanced by the Complainants reveal grounds for a prima facie violation of human rights under the African Charter and that the Complainants' claim is one that compromises the territorial integrity of Zambia. The Complainants however allege that the subject matter, the abrogation of the Barotseland Agreement, which created a unitary state of Zambia with the expectation of a semi-autonomous Barotseland, violates the Barotse's right to self-determination (to secede) as contained in Article 20 (1) of the African Charter.

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<sup>17</sup> Communication 910/2000, *Randolph v Togo*, (HRC 2003) Decided at the 79th session, 27 October 2003, CCPR/C/79/D/910/2000, Para 8.3.

<sup>18</sup> Communication 1159/2003, *Sankara et al v Burkina Faso* 2006) HRC Decided at the 86th session, 28 March 2006, CCPR/C/86/D/1159/2003, Para 6.3.

<sup>19</sup> See the same reasoning was applied in Communication 142/94 *Njoka v Kenya* (1995) ACHPR, para 5.



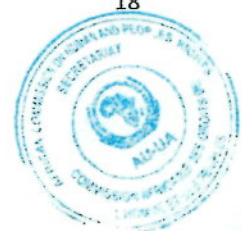


85. The Commission's position is that the subject matter of the Communication must relate to the violation of a right protected under the African Charter and compatible with the OAU Charter.<sup>20</sup> These two requirements are inseparable.
86. In the present communication, the Complainants have raised allegations of arbitrary arrests, detention, and unlawful killings of Barotse Youth who have spoken out demanding the restoration of the Barotseland Agreement. Furthermore, they have illustrated how the abrogation by the Respondent State from the Barotseland Agreement took away their autonomy, a component of the right to self-determination. On the face of it, these allegations do raise violations of the African Charter despite the fact that the Complainants specify violation only of Article 20 (1).
87. However, the second part of the analysis relates to the question of whether the material content of the Complaint is compatible with the OAU Charter and the Constitutive Act. Article 3 of the Constitutive Act of the African Union (which replaced the OAU Charter) sets out one of its objectives as that of defend[ing] the sovereignty, territorial integrity and independence of its Member States. Further in Article 4, the Constitutive Act states that one of the principles of the Union is that of (b) respect[ing] borders existing on achievement of independence. In that regard, secession is manifestly incompatible with the OAU Charter/ Constitutive Act as it seeks to reverse territorial integrity and reverse the borders existing on attainment of independence.
88. The question is, do the Complainants' grievances justify disrupting the territorial integrity of a State Party? The Respondent State has shown, and the Complainants have conceded, that they are able to participate in the politics of the state without discrimination. Their grievance lies in the refusal of the Respondent State to recognise them as an autonomous region, with rights to land, mineral wealth, and identity as was the case under the Barotseland Agreement. The Commission recognises that autonomy and economic self-determination are compatible with the Constitutive Act and should be recognised as rights.<sup>21</sup> However, in this case, the one and only prayer, that the

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<sup>20</sup> Communication 375/09 - Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Center for the Protection of Human Rights) v Kenya (2011) ACHPR para 35.

<sup>21</sup> Communication 266/03 Kevin Mgwanga Gunme et al v Cameroon 2009 (ACHPR) para 96.



Complainants make, to secede from Zambia, is prima facie incompatible with the Constitutive Act and the Complainants have not shown good reason that would justify jeopardising the territorial integrity of the Respondent State. Consequently, the Complaint fails to satisfy the requirements of Article 56 (2) of the African Charter.

89. Following its jurisprudence, that a Communication that does not meet one of the conditions set out under Article 56 of the African Charter, is inadmissible because these conditions are cumulative, the Commission finds that it is unnecessary to consider the other conditions.

#### **Decision of the Commission on Admissibility**


90. In view of the above, the African Commission on Human and Peoples' Rights:

- i. Declares this Communication inadmissible for lack of compliance with the provisions of Article 56(2) of the African Charter;
- ii. Notifies the Parties of its decision in accordance with the provisions of Rule 107(3) of its Rules of Procedure.

**Adopted at the 18<sup>th</sup> Extra-Ordinary Session of the African Commission on Human and Peoples' Rights held from 26 July to 8 August, 2015 in Nairobi, Kenya**





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## **Communication 429/12**

### **The Ngambela of Barotseland and Others**

**v.**

**Zambia**

*Adopted by the  
African Commission on Human and Peoples' Rights  
during the 18<sup>th</sup> Extra-Ordinary Session, from the 29 July to 7 August 2015  
Nairobi, Kenya*

*F. P. Tlakula.*

**Hon. Commissioner Faith Pansy Tlakula**  
Chairperson of the African Commission  
on Human and Peoples' Rights



*Dr. Mary Maboreke*

**Dr. Mary Maboreke**  
Secretary to the African Commission on  
Human and Peoples' Rights