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In reply please quote

No...BRE/A/1/1

Barotse Royal Establishment

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7th March, 1997

The Secretary General,
Commonwealth Secretariat,
Marlborough House,
Pall Mall,
London, S.W1 Y511.K
United Kingdom.

Att: The Conflicts Resolutions Committee

Dear Sir,

PETITION ON THE CONFLICTS ARISING OUT OF THE
ABROGATION OF THE BAROTSELAND AGREEMENT 1964
AND THE NEED FOR INTERVENTION AND RESOLUTION.

I, the undersigned, having the mandate of the Litunga of Barotseland, the Council, the Chiefs and all the people of Barotseland, hereby take the liberty to petition the Conflicts Resolutions Committee and to draw its attention to an explosive issue which is fast developing into a conflagration with a likely effect of a physical confrontation between the people of the former territories and or protectorates of Barotseland and Northern Rhodesia who, on mutual trust and understanding, had agreed and voluntarily decided to come together to form a Unitary State called Zambia.

In reply please

BRE/1/1

1. Background

From the outset, I would like to inform and advise the Committee that the coming together of these two separate protectorates was as a result of serious and careful discussions, consultations and negotiations involving the Governments of the United Kingdom, Northern Rhodesia and Barotseland which were represented by the Rt. Hon Duncan Sandys, Her Majesty's Principal Secretary of State for Commonwealth Relations and for the Colonies assisted by Sir Richard Hornby, Parliamentary Under Secretary of State for Commonwealth Relations and for the Colonies, Dr Kenneth David Kaunda, Prime Minister of Northern Rhodesia assisted by Sir Evelyn D. Hone, Governor of Northern Rhodesia and Sir Mwanawina Lewanika III, KBE, the Litunga of Barotseland assisted by Imenda Sibandi the Ngambela of Barotseland. These discussions, then, culminated into an agreement known as "The Barotseland Agreement 1964" which was signed by all the relevant parties on the 18th May 1964. I forward herewith, a copy of this Agreement in order to afford The Committee an opportunity for easy perusal and a better understanding of the matter hereunder presented.

To illustrate the free willingness of the parties to the Agreement, I wish to draw the attention of the Committee to a provision reflected under the third paragraph of the preamble which reads as follows:-

"And whereas, it is the wish of the Government of Northern Rhodesia and of the Litunga of Barotseland, his Council and the Chiefs and the People of Barotseland that Northern Rhodesia should proceed to independence as one country and that all its peoples should be one nation"

Further, a proviso was made in the Agreement to the effect that the Government of Northern Rhodesia would reaffirm the Agreement at independence as couched under the second paragraph of page 1 in which it is stated as follows:-

"The Prime Minister of Northern Rhodesia undertook, on behalf of his Government, that the Agreement would be reaffirmed by the Government at independence."

In order to affirm the undertaking and in appreciation of the fact that the Protectorates that were coming together had two separate status this position was entrenched in the Zambia Independence Act 1964 as reflected at page 1 and states as follows:-

Establishment of Republic of Zambia 1. "On 24th October 1964 (in this Act referred to as the appointed day) the territories which immediately before the appointed day are comprised in Northern Rhodesia shall cease to be a Protectorate and shall together become an independent Republic under the name of Zambia and on and after that day Her Majesty shall have no jurisdiction over those territories."

In order to appreciate the significance of what was referred to as the two territories which had agreed to come together to form a Unitary State styled Zambia one has to take recourse to what was provided for under section 125 of the Zambia Independence Order 1964 in which it was provided as follows:

Interpretation 125 1. "In this constitution unless the context otherwise requires:-

"Barotseland" means the territory that on the 23rd October 1964 was comprised in the former Barotseland Protectorate.

"The former Protectorate of Northern Rhodesia" means the territory that on 23rd October 1964 was comprised in the Protectorate of Northern Rhodesia."

Having agreed that the two territories were to merge, it was further agreed that the Government of Her Majesty should be absolved of its obligatory responsibilities with regard to concessions and treaties that had been entered into between Her Majesty the Queen and King Lewanika of Barotseland. To this extent the following was reflected under the fourth paragraph of the preamble:

"And whereas having regard to the fact that all treaties and other agreements subsisting between Her Majesty the Queen of the United Kingdom of Great Britain and Northern Ireland and the Litunga of Barotseland will terminate when Northern Rhodesia becomes independent sovereign Republic and Her Majesty's Government in the United Kingdom will thereupon cease to have any responsibility for the government of Northern Rhodesia including Barotseland, it is the wish of the government of Northern Rhodesia and of the Litunga of Barotseland to enter into arrangements concerning the position of Barotseland as part of the Republic of Zambia to take the place of the treaties and other agreements hitherto subsisting between Her Majesty the Queen and the Litunga of Barotseland"

In order to highlight this provision, it was provided under section 8 of the Zambia Independence Act 1964 as follows:

Agreements relating to Barotseland § (1) "Subject to the next following subsection, all agreements which immediately before the appointed day have effect as agreements between Her Majesty or the Government of Northern Rhodesia and the Litunga of Barotseland

shall on that day cease to have effect in so far as immediately before that day they confer any rights or impose any obligations on Her Majesty or the Government of Northern Rhodesia”

(2) “ The preceding subsection shall not apply to the Barotseland Agreement 1964; that is to say, the agreement dated 18th May, 1964 between the Governments of Northern Rhodesia and the Litunga of Barotseland which provides that it may be cited by that title or to any agreement whether made before or after the passing of this Act whereby that agreement has been varied or revoked.

(3) “In this section, Agreement includes any concession, undertaking, whether given or made orally or in writing and for the purpose of the subsection (1) of this section, it is immaterial in relation to any agreement whether Her Majesty or the Government of Northern Rhodesia or the Litunga of Barotseland was an original party to the agreement or not or whether there are any parties to the agreement other than Her Majesty and

the said Government and
the Litunga."

2. Government treachery and abrogation of the Agreement

At this stage I would like to, emphatically, state that while the Litunga and the People of Barotseland were sincere and went into these negotiations with an open mind and in good faith, the other side representing Northern Rhodesia only sought to use the Barotseland Agreement 1964 as a mere camouflage and tool to secure independence. This is borne out by the fact that barely a year passed after signing the Agreement that the government embarked on an orgy of destruction which was orchestrated through a series of legislative processes which took the following pattern:

- a) the Local Government Act No 69 of 1965 was enacted and had the effect of taking away the powers, privileges, and rights of the Litunga of Barotseland contrary to the provisions of the Barotseland Agreement 1964 which had upheld and affirmed those rights which he and the people of Barotseland had enjoyed prior to the effectual coming into force of the Agreement. Section 113 of Act 69 of 1965 had the following provisions

113. "The provision of this Act shall apply in Barotseland and the powers contained here may be exercised in relation to Barotseland notwithstanding anything to the contrary contained in any other written law as or in the Barotseland Agreement 1964."

- b) The Constitution of Zambia Amendment Act No. 36 of 1969 was not ambiguous in its endeavours and efforts to abrogate and bury the Barotseland

Agreement 1964. Section 2(3) of the Act provided as follows:

2.(3) "This section shall not apply to the Barotseland Agreement 1964 (that is to say, the Agreement dated 18th May, 1964 between the Government of Northern Rhodesia and the Litunga of Barotseland which provides that, it may be cited by that title) which agreement shall, on and after the commencement of the Constitution (Amendment) (No 5) Act 1969 cease to have effect, and all rights (whether vested or otherwise), liabilities and obligations thereunder shall thereupon lapse."

c) The Western Province (Land and Miscellaneous Provisions) Act No 47 of 1970 drove the last nail in the coffin for purposes of abrogating the Barotseland Agreement 1964 and the total dismemberment of Barotseland by taking away the residual powers of the Litunga vested in him through various enactments such as those of Forests, Lands, Fishing, Wildlife and National Parks, and all these became vested in the President of Zambia, contrary to the provisions of the Barotseland Agreement 1964. Section 2 of the Act provides as follows;

"All land in the Western Province is here by vested in the President as a Reserve within the meaning of and under the Zambia (State lands and Reserves) Orders 1928 to 1964"

While taking these various arbitrary actions, the Government of Zambia had neither the courtesy nor morality of referring to the method and provision as to what could be done in the event that any party to the Agreement was aggrieved and sought to have the grievance interpreted. This was provided under section 9 of Barotseland Agreement 1964 and reads as follows:

Interpretation 9 "Any question

concerning the Agreement may be referred by the government of the Republic of Zambia to the High Court of the Republic for consideration in which case the opinion thereon of the Court shall be communicated to the Government and to the Litunga of Barotseland and his Council and any such question shall be so referred if the Litunga acting after consultation with his Council so requests"

All these abrogatory actions were taken contrary to the affirmative assurances by the then Prime Minister of Northern Rhodesia Dr Kenneth D. Kaunda at various fora and commitments in written as quoted below:

Firstly, in an address to the Litunga and the Council on the 6th August 1964 he had, inter alia, this to say:

"I should now like to turn to the Barotseland Agreement which was reached in London in May, and I wish to give an assurance that it is the Government's full intention that the Barotseland Agreement will be honoured fully after Independence. I believe that the Agreement reached in London was an honourable Agreement from the point of view of both the Central Government and the Barotseland Government, and I believe that the way to ensure that it is implemented to the advantage of us all is by means of a close personal relationship between the Litunga and the Prime Minister- and later the President- through the under Minister. I am very glad that the basis of the Agreement is that Barotseland is an integral part of Zambia, and I can assure you, Sir Mwanawina, and all members of the

Barotse Royal Family and of the Barotse Government, that the Government has no wish to interfere with the day to day running of the internal affairs of Barotseland. This is the responsibility of the Barotse Government and the intention of the Central Government will be no more than to give to the Barotse Government its maximum assistance and co-operation. I can give an absolute assurance that the customary rights in Barotseland will remain with the Litunga and National Council, the District Heads of Kutas, and the Government is satisfied that Government requirements for land for development projects in Barotseland will receive the active co-operation of the Barotse Government. This is all that the Central Government asks for and I am sure that there need be, and will be, no difficulty with regard to land, the use of land, and land rights in Barotseland."

Secondly, in a letter to the Litunga dated 25th September, 1964 he had the following to say:

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"I have received a letter from certain members of the Barotse Government in which they have demanded that a supplementary agreement to the 1964 Barotseland Agreement be negotiated. I cannot support this proposal for reasons which I am sure will be apparent to you. The 1964 Agreement was the result of careful discussion and consultation between Her Majesty's Government, the Government of this country and yourself, and it would be inappropriate to reopen the discussions after all the parties had signed the Agreement in acceptance. I think we should all now concentrate on the implementation of the Agreement in the spirit with which it was made. For that reason, I do not intend to pursue this matter further and I shall advise the Secretary of State for Commonwealth Relations

accordingly. Assuring you of my personal wishes for your good health".

In a continuing process to disregard the Agreement, the current Zambian government enacted the Lands Act of 1995 inspite of serious protests by the people who, even at that late hour, were still insisting that the new Act should be based on the provisions of the Barotseland Agreement 1964. The main thrust of the Agreement is on the question of land which was guaranteed to be the permanent preserve of the Litunga for and on behalf of the people of Barotseland, who would facilitate the provision of land to the Government for public works and utilities.

3. Our position

I would at this stage, wish to state that the action taken by the Government to have the Barotseland Agreement 1964 abrogated through various legislative processes as cited above, can not be legally sustainable because:-

- i) the Parliament of the Republic of Zambia had no jurisdiction or power to enact any law whose effect was either to breach or abrogate the Agreement because the Barotseland Agreement 1964 forms part of the obligations inherited by the President of the Republic of Zambia by virtue of and under the succession provision of Section 21) of the Zambia Independence Order 1964 which stated as follows:

20 (1) "All rights, liabilities and obligations of

- a) Her Majesty in respect of Northern Rhodesia
- b) The Govenor of Northern Rhodesia or the Holder of any Office under the Crown in respect of the Government of Northern Rhodesia on behalf of that Government; shall, from the commencement of this order be rights liabilities and obligations of the President

on behalf of the Government of Zambia and subject to the provisions of any law, shall be enforceable by or against the President accordingly.

- ii) Parliament could not have, validly, abrogated the Agreement without repealing section 20 of the Zambia Independence Order. It is important to appreciate that while the Zambia Independence Act 1964 and the Zambia Independence Order 1964 were both repealed by section 3 of the Constitution of Zambia Act No 27 of 1973, the provisions of Section 20 of the Zambia Independence Order 1964 was spared the hammer of the Parliamentary draughtsman and was, indeed, confirmed by Article 11(2) of the Constitution of Zambia Act 27 of 1973 as read with Article 11(2) of the Constitution of Zambia Cap. 1 of 1991 which provide as follows:

11(2) " The transfer and vesting of all rights, liabilities and obligations to or in the President, on behalf of the Government of Zambia by virtue of section 20 of the Zambia Independence Order 1964, for avoidance of any doubt, is hereby confirmed"

- iii) further, Article 12 of the same Constitution of Zambia Act No 27 of 1973 as read with Article 12 of the Constitution of Zambia Cap.1 of 1991 confirmed the obligations of the President and provides as follows:-

12." All rights, liabilities and obligations of the President or any public officer on behalf of the Government of the Republic of Zambia before the commencement of this Act shall, on and after the commencement of this Act, be rights , liabilities and obligations of the President or such public officer, as the case may be, on

behalf of the government of
Zambia."

- iv) furthermore, article 14 (1) of the constitution of Zambia Act 27 of 1973 as read with article 14(1) of the constitution of Zambia Cap.1 of 1991 upheld the obligations of the President under the transitional provisions as follows;

14(1) " All rights and obligations under conventions, treaties or agreements which were exercisable by or binding upon the government of Zambia immediately before the commencement of this Act shall continue to be so exercisable and binding."

- v) it is a basic principle of law that a party to a contract cannot legislate against its obligations under the contract. Accordingly, the Government of Zambia has contravened this principle by ignoring section 8 of the Barotseland Agreement 1964 which states as follows:

x Implementation 8: "The Government of the Republic of Zambia shall take such 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"

- vi) the Government of Zambia had been contemptuous of the Barotseland Agreement 1964 by enacting the Western Province (Lands and Miscellaneous provisions) Act No. 47 of 1970 because the Prime Minister of Northern Rhodesia had not signed the Agreement with the Litunga as a representative of a province but he (the Litunga) was acting with the authority of a representative of a territory which had equal protective status as Northern Rhodesia.

Appreciating the fact that the Barotseland Agreement 1964 was the only symbiotic instrument that brought Barotseland together with Northern Rhodesia to form a unitary State called Zambia, and noting, with dismay that the Government of the Republic of Zambia has, illegally and arbitrarily abrogated this noble Agreement, the Litunga of Barotseland the Council, the Chiefs and the People of Barotseland acted in a more orderly, civilised and legal manner by requesting and advocating for negotiations in order to secure full restoration of the Agreement. This was done with the realisation that should the Agreement fail to work, then, whatever it had set out to achieve, namely a Unitary State of Zambia, shall also have collapsed, rendering a situation whereby the two territories or protectorates that formed Zambia revert to their previous status as they existed before the signing of the Barotseland Agreement 1964.

The Government of the Republic of Zambia, half heartedly, accepted the overtures to negotiate. In all, six (6) meetings were held between the Government of Zambia and the Bafotse Royal Establishment from 1990 to 1994 culminating into a declaration by Government that the Agreement was statute "Stale" by reason of passage of time.

A rhetorical question can be asked at this stage. Is it true that an agreement can be rendered invalid on account of passage of time? The answer is NO because agreements have no time scale or time limit. A good example is the Waitangi Agreement which was signed on the 12th May, 1840 between the Government of the United Kingdom and the Maori Chiefs of New Zealand. Like the Barotseland Agreement 1964, the Waitangi Agreement was, similarly, not honoured to the letter. This led the Maoris to fight for the restoration of their Agreement. Luckily and especially that they were dealing with civilised people, Her Majesty the Queen of England personally, went to Wellington and apologised publicly and restored the Agreement in November of 1995. If the Waitangi Agreement that had been put in the cold for 155 years can be restored, then surely the Barotseland Agreement 1964 that has been on hold for only 30 years can not be said to be "stale". Copy of the letter from the Government in which this matter is being repudiated is herewith enclosed.

In a further effort to justify its abrogatory actions the Government has put up a spirited argument that the referendum of 1969, in which the people of Zambia voted in the affirmative to the question posed, took away people's property rights and gave Government authority to annul the

Agreement. This claim is defective and without merit for the following reasons;

- i) the issue that was at stake was not Barotseland or the Barotseland Agreement 1964. The question which was the subject of the referendum was,

“Do you support the provisions of the Constitution (Amendment) (No3) Act of 1969?”.

The Act, which Parliament passed following the referendum only provided for the amendment of section (72) of the Constitution by the deletion of sub-section(3).

- ii) the people of Barotseland rejected even this proposed amendment by voting “NO” in the referendum. The results of the vote count in the Barotseland constituencies are reflected in the schedule which forms part of the appendix to this petition.

The Committee may, rightly, wish to ask a pertinent question as to why the Litunga and the people of Barotseland have not taken a litigatory action in order to seek a court redress over the matter. While this question, if ever asked, is quite reasonable, I would like to answer it as follows:

- i) The independence of the judiciary in the Third World, especially on the African continent and worse still in Zambia, is in a “still born” state and therefore, it would be a miracle to find a court determining a case in favour of a litigant against the government especially on a matter of this nature. Besides the role of the High Court as provided for in Section 9 of the Agreement is limited to interpretation only, and hence it would be pointless to take the matter to court as the Agreement is not in force.
- ii) In the event that the Litunga and the people of Barotseland lost the case, they would not have the opportunity to appeal to an impartial tribunal like the International Court of Justice since Barotseland has no locus standi before that impartial court.

- iii) Even if Barotseland had the locus standi to appear before an impartial tribunal and that she got judgement which was favourable, chances are that the judgement would not be enforceable. A good example was the decision of the International Court of Justice in a case which was determined in favour of the people of South West Africa against the Government of the Republic of South Africa. The Court's judgement was ignored by the Government of South Africa.

In highlighting these facts, I, on behalf of the Litunga of Barotseland, the Council, the Chiefs and the People of Barotseland refuse to accept any insinuation or accusation from any quarter that the people of Barotseland are contemplating a treasonable act of secession. This is because without the Barotseland Agreement 1964, Zambia as was constituted at independence would have been liquidated, and therefore there would be nothing for Barotseland to secede from.

4. Our appeal to the Conflict Resolutions Committee

Finally, I would like to make a passionate appeal to the Committee to intercede in this matter in order to avert human catastrophe such as those we are witnessing in many troubled spots throughout the world.

I make this honest appeal bearing in mind that the patience of the people of Barotseland is wearing thin and that they are not prepared to be held in bondage as if they were a conquered people and yet, they entered the union of Zambia voluntarily. Under the present circumstances an uncontrollable situation could erupt since the people of Barotseland have equal locus standi in the matter of the Barotseland Agreement 1964 as is provided in the preamble:

"This Agreement is made this eighteenth day of May 1964 between **KENNETH DAVID KAUNDA**, Prime Minister of Northern Rhodesia on behalf of the Government of Northern Rhodesia of the one part and **SIR MWANAWINA LEWANIKA THE THIRD, KBE**, Litunga of Barotseland acting on behalf of himself, his heirs and successors, his Council and the chiefs and people of Barotseland of the other part and signed by the Right Honourable **DUNCAN SANDYS, MP**, Her Majesty's Principal Secretary

of State for Commonwealth Relations and for the Colonies, to signify the approval of Her Majesty's Government in the United Kingdom of the arrangements entered into between the parties to this Agreement and recorded therein."

In making this appeal, I, fully, recognise the capacity of the committee to resolve conflicts. The role of the Commonwealth in the issues of struggle in Rhodesia prior to the attainment of independence by Zimbabwe is a good testimony of its commitment in matters of this nature.

I further take cognisance of the constructive role of the Commonwealth through the efforts and work of the Eminent Persons Group in Apartheid South Africa which helped, together with other international groups, to bring about the current fluid political climate in that country. It is because of this realisation that I plead for the intervention of the Commonwealth in the matter of the Barotseland Agreement so that it is resolved without the necessity of blood shed, which the people have endeavoured to avoid in spite of continuous provocation by the Government of Zambia for refusing to address this serious problem.

For a full settlement of this matter, the Commonwealth may, with other international efforts, have to conduct a referendum in Barotseland to determine whether the people are still interested in this "marriage of convenience" within the family of Zambia, or want to go their own way which is the general feeling in Barotseland.

5. Conclusion.

It is my sincere hope and prayer that the Committee will accord this appeal a deserved hearing and help avert yet another catastrophe on our troubled continent of Africa.

Yours Faithfully,


Maxwell M Mututwa

NGAMBELA of BAROTSELAND

cc: Mr. F.J.T. Chiluba - President of the Republic of Zambia