



Q&A

The Kilwa Massacre and the Landmark Decision of the African Commission on Human and Peoples Rights

The African Commission on Human and Peoples' Rights has issued a landmark decision that found the government of the Democratic Republic of Congo responsible for the 2004 massacre of over 70 people in Kilwa, in the southeast of the country. Amongst other collective reparations, it granted landmark compensation of US \$4.36 million to the victims and their families, the highest amount ever recommended by the Commission.

An Australian-Canadian mining company, Anvil Mining, which operated a copper and silver mine at Dikulushi, 50 kilometers from Kilwa, was publicly rebuked by the Commission for its role in the violations. The Commission urged the Congolese government to launch a new criminal investigation and "take all diligent measures to prosecute and punish agents of the state and Anvil Mining Company staff."

The complaint on behalf of 8 victims was brought to the African Commission in November 2010 by UK-based Rights and Accountability in Development (RAID), Congo-based Action Against Impunity and Human Rights (ACIDH) and the Institute for Human Rights and Development in Africa (IHRDA), based in Banjul, Gambia.

Questions (Answers can be found below)

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1. What happened in Kilwa?

Kilwa is a remote fishing town with an estimated population of 48,000 in what used to be called Katanga province¹ in south-eastern Congo. It is nestled on the shores of Lake Mweru near the border with Zambia, some 320 kilometers from Lubumbashi, the region's main city. A copper and silver mine is located at Dikilushi, some 50 km away.

In the early hours of 14 October 2004, a motley crew of about six or seven naive and lightly armed rebels tried to take control of Kilwa. Led by a 20-year old fisherman from a nearby town, they claimed to belong to an unknown rebel movement supporting the cessation of Katanga, and managed to recruit some 100 local young people to their cause. According to a United Nations (UN) investigation, the Congolese army response was heavy handed and brutal. Before entering Kilwa, the soldiers bombarded the town, destroying homes. The rebels provided little or no resistance as their leaders fled into the bush. Civilians tried to flee, including women and children, some of whom were shelled by the soldiers as they desperately tried to flee across the lake in small fishing boats or who drowned when their boats overturned. [Witness accounts](#) starkly illustrate the horror of what occurred.

In the town, the soldiers went on a rampage, conducting house-to-house searches for rebels, looting shops and homes, and arbitrarily detaining, torturing and killing civilians who they accused of siding with their enemies. Over two days, at least 73 civilians were killed, including an estimated 28 people who were arbitrarily arrested and then summarily executed. Others were brutally tortured, some dying from their injuries in the weeks and months that followed.

A week after the events, a team of investigators from the UN peacekeeping mission based in Congo, known then as MONUC, interviewed victims and witnesses to the events and pieced together what happened. The UN accused the Congolese army of war crimes and said those responsible, including the commander officer, Colonel Ademar Ilunga, should be brought to justice.

The UN report can be found here: <http://www.raid-uk.org/sites/default/files/monuc-final-report.pdf> as well as a [timeline](#) of key events.

2. Is what happened in Kilwa linked to the war in DRC

Yes, it was certainly part of a larger picture of chaos and conflict. Congo had two consecutive wars. The first from 1997 to 1998 which resulted in the overthrow of dictator, Mobutu Sese Seko, and saw Laurent Désiré Kabila come to power (the father of the current president). The second war was from 1998 to 2003. The exploitation of Congo's vast mineral wealth was an important feature in the wars. Although the second war officially ended when a peace accord was signed and a transitional government installed, fighting continued in parts of the country, especially in the east. There were also considerable problems with trying to integrate former rebel groups into one new unified army.

¹Now called Haut-Katanga.

In Katanga province, a new problem emerged following the end of the war. Soldiers who had remained loyal to the government were largely abandoned, with salaries left unpaid and little or no logistical support. The soldiers turned to looting and extorting local civilians, frequently combined with brutal human rights abuses.

3. Who are Anvil Mining?

Anvil Mining² was a small Australian mining company led by Bill Turner, its CEO, with its head office in Perth, Australia. The company won the license to mine the copper and silver at Dikulushi in 1998, during Congo's war, by passing the usual negotiations with the state-owned mining company Gecamines. A close advisor to Congolese president Joseph Kabila sat on the board of Anvil and held shares in the company.

Anvil began mining operations in 2002. The Dikulushi mine was Anvil's "flagship project" and its primary asset. Anvil transported the ore from Dikulushi mine to a purpose-built port at Kilwa. From there, the ore was transported by barge across Lake Mweru to Zambia and onwards by road to processing plants in South Africa and Namibia. The port in Kilwa was the only transport link to export the ore.

In 2004, when the Kilwa massacre occurred, Anvil Mining's shares were traded on both the Australian and Toronto stock exchanges. Anvil also had an office in Canada. In June 2004, Anvil reported its net operating profit was over US \$10 million.

In 2010, the Dikulushi mine was sold to [Mawson West](#), a small Australian mining company. In January 2015, Mawson West stopped industrial production at Dikulushi, stating the mine was no longer economically viable.

4. What role did Anvil Mining play in the massacre?

Anvil Mining provided substantial logistical support to the military action by the Congolese army in Kilwa. According to witnesses interviewed by UN investigators, including a local military commander, Anvil's assistance was instrumental to the military operation. An airplane chartered by Anvil Mining was used to transport an estimated 150 troops from Pweto to Kilwa on October 14 and 15. The Congolese army used the company's vehicles, driven by Anvil employees, to transport soldiers. According to UN investigators, the vehicles also transported looted goods, corpses and people arbitrarily detained by the soldiers. UN investigators also [found](#) that Anvil provided fuel, food and may have paid money to a number of the soldiers.

5. What does Anvil Mining say happened?

Anvil Mining says that the logistical support it provided to the soldiers was requisitioned by the army. The company's CEO, Bill Turner, acknowledged that the company helped the soldiers to get to Kilwa. During an [interview](#) with an Australian TV broadcaster in June 2005, he said, "We helped the military to get to Kilwa and then we were gone. Whatever they did there, that's an internal issue." Initially the

²Originally listed as Anvil Mining Management NL. In 2004, following a company reorganization, it became a wholly-owned subsidiary of Anvil Mining Limited, which was incorporated in Canada and had an office in Montreal, Quebec.

company made no reference to a requisition order, but five days after the television documentary was broadcast, Anvil Mining produced a letter from the Governor of Katanga, dated 11 June 2005 (eight months after the Kilwa massacre), which said a requisition request had been issued. Anvil [denies](#) it or its employees committed any wrongdoing.

6. Did the Congolese government arrest any of the soldiers or Anvil employees?

In 2006, after two years of intense pressure led by RAID and Congolese human rights group ACIDH, a Congolese military prosecutor recommended nine soldiers and three serving and former Anvil employees stand trial for war crimes or complicity in war crimes. Within days, the prosecutor was urgently summoned to Congo's capital, Kinshasa, by staff in President Kabila's office – a move the UN criticized as political interference in a trial.

In March 2007, just before the trial was due to start, the prosecutor was removed from the case and replaced by a close associate of President Kabila, who had also been an advisor to a former Anvil board member. A few months later, all the defendants were [acquitted](#). The UN High Commissioner for Human Rights [expressed concern](#) at the verdict.

In December 2007, a higher military court refused to hear the appeal against the acquittals. In violation of the law, the survivors were not notified the appeal hearing was taking place.

Further information about the trial can be found [here](#) as well as a [chronology](#) of key events.

7. Have there been other attempts to seek criminal justice?

Yes. Survivors and their families [continued to pursue justice](#) in Canada and Australia, where Anvil Mining had offices.

In 2005, following an Australian Broadcasting Corporation [documentary](#), and under pressure from RAID, the Australian Federal Minister of Justice instructed the federal police to open an investigation into Anvil's role in the Kilwa massacre. The inquiry was marred by personnel changes: in the space of two years the case was assigned to six different officers. In mid-2006 the Australian police interviewed Anvil employees in South Africa, but made no attempt to interview Congolese witnesses. In October 2006, just before the start of the Congolese trial, the police recommended the investigation be closed because of insufficient evidence. Following the verdict in Congolese Military Court in June 2007, the Australian police ended its investigation. It brought no charges.

In March 2007, RAID and Global Witness requested the Canadian Minister of Justice to open an investigation into the Canadian entity of Anvil Mining. The War Crimes Unit of the Royal Canadian Mounted Police (RCMP) began to investigate though its efforts were slow and appeared to languish after a number of years. In August 2016 and again in March 2017 RAID wrote to the Canadian Minister of Justice requesting clarification on the progress of the RCMP investigation, whether it continued or if it

had been halted. The Department of Justice responded that it could not comment on any specific case or investigation, whether it existed or not. It left the survivors none the wiser if any action would be taken.

8. Were there attempts to seek justice through the civil courts?

Yes. In March 2010, RAID invited five other NGOs to work with it to bring together a coalition of Kilwa victims (The Canadian Association Against Impunity). The coalition filed a [class action suit](#) in Quebec, Canada, where Anvil had its Canadian office in an effort to obtain justice and compensation for the victims. In 2011, the Superior Court in Quebec accepted jurisdiction, [finding](#) that the victims would not receive justice either in Congo or in Australia and that the case could proceed.

Anvil appealed against the decision. The Quebec Court of Appeal found in Anvil's favour, [ruling](#) that that Quebec courts did not have jurisdiction to hear the case. An appeal to the Supreme Court by the victims was unsuccessful. The Canadian judicial process did not allow the courts to consider the facts of the case, rather it hinged entirely on technical issues of jurisdiction, which the victims lost.

In 2008 the victims sought to take civil action against Anvil Mining in Australia. This was halted after Congolese lawyers and NGOs supporting them received death threats and Congolese authorities refused to allow lawyers to fly from Lubumbashi to Kilwa to meet with the claimants.

9. Why did the victims decide to launch a complaint with the African Commission on Human and Peoples Rights?

Following the [failure to obtain justice](#) in Congo, Canada or Australia, the victims and the human rights groups supporting them, decided to try to seek justice through the African Commission on Human and Peoples' Rights.

The [African Commission](#) was established in 1986 and is located in Banjul, The Gambia. It interprets the African Charter on Human and Peoples Rights, an international human rights instrument to promote and protect human rights and basic freedoms on the African continent. The Commission can hear individual complaints from any of the 53-member states of the African Union (all except South Sudan), if all domestic remedies have first been exhausted or if it can be proven that domestic remedies are not available or have been tried and failed. In the Kilwa case, it was possible to prove all attempts to seek justice in Congo had been tried and [failed](#).

In 2010 RAID and ACIDH joined forces with the Institute for Human Rights and Development in Africa (IHRDA) to submit a complaint to the African Commission on behalf of eight Kilwa victims. A number of the other families who had lost loved ones feared there might be repercussions from Congolese government officials if they continued to pursue legal action and declined to be associated with the action. Some of the individual claimants requested confidentiality.

10. How did African Commission reach its decision?

The Commission took 7 years to reach its decision and inform the parties. As is required by the procedure, the Commission provided opportunities for the Congolese government to reply as to the merits of the case at the admission stage and again when it considered the complaint, but the Congolese government failed to engage with the process. The Commission did not conduct oral hearings, although it can do so if it wishes. In this case, the Commission based its decision on the written submissions of the applicants.

11. What did the African Commission decide?

In a landmark 43-page decision, the Commission found the Congolese government was responsible for 9 violations of the [African Charter](#) relating to arbitrary arrest, extrajudicial executions, torture, disappearances, and forced displacement of the population. It also found the articles relating to the independence of the judiciary, the right to housing and development had been violated.³

The Commission said the Congolese government should do the following:

- a) Take all diligent steps to prosecute and punish agents of the state and staff of Anvil Mining involved in the violations
- b) Pay damages to the victims. The decision lists out the amount of damages each of the 8 victims should receive. This totals US \$4.36 million. The Commission also said the government should provide compensation to other Kilwa victims not represented by the complaint.
- c) Make a full apology to the people of Kilwa.
- d) Exhume the bodies buried in mass graves at Nsensele, at the outskirts of Kilwa, and give them a dignified burial.
- e) Construct a memorial to honour the victims who died and disappeared.
- f) Rehabilitate the socio-economic infrastructure destroyed during the attack, such as the school, the hospital and the dilapidated roads.
- g) Provide psycho-social support, such as trauma counselling, to the victims and others in Kilwa to help them overcome the trauma of the events.

12. What was ground-breaking about the award for compensation?

The decision represents notable progress, and sets new precedent, on many points of law regarding the African Charter.

Most notably, its decision on compensation was the highest amount ever recommended by the Commission. The Commission does not usually specify the sum of compensation to be paid, but rather recommends that the State provide "adequate compensation." In the Kilwa case, the Congolese government has been asked to pay over US \$4.36 million, with specific amounts of compensation awarded to individual complainants.

The Commission further instructs the Congolese government to promptly investigate what happened to the disappeared and compensate their families, as well as to

³The articles of the charter that it found had been violated included Articles 1, 4, 5, 6, 7(1) (a), 7 (1) (c), 14, 22 and 26.

identify any other victims who were not party to the complaint but who also lost loved ones or were otherwise affected. This implies the Congolese government should pay considerably more in compensation.

13. What else was groundbreaking about the decision?

The decision was all-encompassing in that it not only awarded compensation and called for new investigations, but also said the government should issue an apology, rebury the victims in mass grave with dignity, construct a memorial to the victims, provide trauma counselling and rebuild the school, hospital and roads. These collective reparations, which will benefit the Kilwa community as a whole, are innovative and, if implemented, will go a long way in helping the people of Kilwa overcome the traumatic events. Justice that recognizes the wrongs done and supports both the individual and the affected community is considered by experts to be more restorative. Through this decision, the Commission is showing that it too is moving in the direction of innovative and comprehensive justice.

14. What did the African Commission say about the role of Anvil Mining?

The Commission publicly rebuked Anvil Mining by stressing that extractive industry companies are also legally required to carry out their activities with due regard to the rights of the host communities. At paragraph 101 of its decision, the Commission said, “At a minimum, they [extractive industry companies] should avoid engaging in actions that violate the rights of communities in their zones of operation. This includes not participating in, or supporting, violations of human and peoples’ rights.”

The Commission made its position on Anvil Mining clear in its first recommendation where it calls on the Congolese government to prosecute and punish not only the soldiers involved in the Kilwa massacre, but also staff of Anvil Mining involved in the violations.

15. What happens next?

The Congolese government must, within 180 days, inform the Commission what steps it has taken to implement the recommendations. This sets the deadline at December 17, 2017.

In another innovation, the African Commission urges for the establishment of a monitoring committee to supervise the implementation of its decision. It says this monitoring committee should include representatives of the victims, and their families, and a member of the African Commission.

16. Can this decision be enforced?

In short, no. The African Charter does not contain any provision for enforcement of the Commission’s findings and recommendations, which are not formally binding. The Commission can refer cases to the African Court of Human and Peoples’ Rights, if a state is a member, but Congo is not.

However, pressure can, and should, be put on the Congolese government to fully implement the decision by other African governments who are members of the Commission. The Commission’s strength is that it reports to the Assembly of Heads

of State and Government of the African Union, meaning it has access to Africa's political leaders. This helps it to push at the highest level for the implementation of its decisions. International donors, who provide support to Congo, many of who also help to fund the African Commission and the African Union, should also urge for full implementation of the decision. It is pointless to fund these bodies and international instruments if the decisions they produce are not acted upon.

This year, Congo successfully put forward one of its nationals, Remy Ngoy, to become a Commissioner on the African Commission. This too is likely to increase the pressure on the Congolese government to implement the decision. It would be contradictory for the Congolese government to promote one of its nationals to the post of Commissioner and not implement the decisions that come from the Commission.

Correction: An earlier version of this document erroneously reported the compensation amount as \$2.5 million. The correct figure is \$4.36 million