



Ten years on: still no justice for Kilwa victims

For many years, RAID has been pursuing a legal case to achieve justice for victims of serious human rights abuses in Kilwa, in Katanga Province, DRC.

In October 2004 the Congolese military crushed a small uprising in the town, involving six or seven ringleaders with a small band of associates. Immediately after the town was recaptured, the military went on the rampage, looting shops and houses, and detaining, torturing and killing civilians. The majority of the population fled, and some died in the attempt. In the subsequent day or two, tens of people were tortured and killed; others died from their injuries in the following months.

Support for the military action was provided by the Canadian/Australian mining company Anvil Mining Limited, which ran a mine at Dikulushi, some 50km away. According to the local military commander, Anvil's assistance was instrumental in making the operation possible.¹

In an interview for Australian television the year after the massacre,² Bill Turner, then CEO of Anvil, explained that following a request for assistance from the military, Anvil flew between 80 and 100 troops into the area from the provincial capital, supplied vehicles to move soldiers into Kilwa, and flew detainees out of the area after the operation. Eyewitnesses report that Anvil vehicles, driven by Anvil personnel, were also used for removing looted goods and taking people to be executed at nearby Nsensele. Of this last claim, Turner said, "I have no knowledge of it and as far as I'm concerned it never happened."

In February 2012 Anvil was taken over by Chinese state-owned Minmetal Resources/MMG Limited, whose headquarters is in Melbourne.

The flawed criminal trial

After two years of intense pressure led by RAID and the Congolese NGO *Action contre l'impunité pour les droits humains* (ACIDH – Action Against Impunity for Human Rights), a Congolese military prosecutor recommended in October 2006 that nine military personnel and three former Anvil Mining employees be tried for alleged war crimes or complicity in war crimes. Anvil Mining itself escaped prosecution. Within days, the prosecutor, Colonel Eddie Nzabi Mbombo, was summoned urgently to Kinshasa by the President's office – a move that the UN deplored as political interference in the trial. In March 2007, just before the trial, Nzabi was removed from the case and replaced by a close associate of Congolese President Kabila who had also been advisor to an ex-board member of Anvil Mining.

By this time Anvil was claiming that it had had no choice in supporting the offensive because its vehicles had been requisitioned. The company made no reference to a requisition in its press releases at the time nor in the television interview some months later, and produced no documentary evidence of a requisition at the trial.

In June 2007 all the defendants were acquitted in relation to the Kilwa incident. Louise Arbour, UN High Commissioner for Human Rights, expressed concern at the verdicts, given 'the presence at the trial of substantial eye-witness testimony and material evidence pointing to the commission of serious and deliberate human rights violations'. Nevertheless, in December 2007 a higher military court refused to hear an appeal against the acquittals. The survivors were not even notified that an appeal hearing was taking place.

Pursuing justice in Australia and Canada

The Australian Federal Police (AFP) launched an investigation into the incident in 2005. In August 2007 the AFP informed the victims' lawyers that 'following extensive and lengthy investigation', it had concluded that there was insufficient evidence to pursue the matter. The investigation was pitifully inadequate, according to documents seen by RAID. For example:

- the case was moved from one AFP investigator to another and referred from AFP Canberra to AFP Perth and back again. During the two-year inquiry, the case was reassigned six times
- there is no record of the AFP having sent representatives to observe the military trial in the DRC. When



Australian Broadcasting Corp.

"As far as I'm concerned it never happened." Kilwa residents point out the site of the mass grave at Nsensele.

¹ United Nations Organization Mission in the DRC, 'Report on the conclusions of the Special Investigation concerning allegations of summary execution and other human rights violations perpetrated by the Armed Forces of the Democratic Republic of Congo (FARDC) in Kilwa (Katanga Province) on 15 October 2004', ¶ 37.

² *Four Corners* taped interview with Bill Turner, transcript, May 2005. An edited version was broadcast by ABC on 5 June 2005.

the trial opened in December 2006, the AFP did not know that it was taking place and was 'not aware of... any Anvil Mining employee having been charged with any offences'³

- the AFP interviewed Anvil staff in South Africa but, so far as RAID is aware, they made no attempt to arrange to interview Congolese witnesses and survivors at the same time
- The AFP recommended that its investigation be closed for lack of evidence on 26 October 2006 – before the Congolese trial had even started.⁴

In 2008 a group of the victims initiated pre-action proceedings for discovery of documents in the Supreme Court of Western Australia, with a view to evaluating whether they had a civil claim worth pursuing. Anvil contested the application, partly on the grounds that 'no litigation has been commenced and... the applicants apparently have not made a decision to commence any litigation'.⁵ In the event, the application was ended abruptly when the claimants' lawyers were prevented by the Congolese authorities from travelling to meet the claimants, and the claimants' Congolese lawyers received anonymous death threats.

Accordingly, RAID invited five other international NGOs⁶ to work with it in bringing together a coalition of Kilwa victims – the Canadian Association Against Impunity or CAAI – to file a class action in Quebec, where Anvil had its Canadian office. In April 2011 the Superior Court in Quebec accepted jurisdiction, finding that the victims would not receive justice either in the DRC or in Australia.

Anvil appealed, arguing that the plaintiffs had already been involved in unsuccessful legal proceedings in Australia and were 'forum-shopping'. Recall that this is precisely the opposite of what Anvil had argued in Australia, namely that no legal proceedings had been commenced there. In January 2012 the Quebec Court of Appeal found in Anvil's favour, ruling that Quebec's courts did not have jurisdiction to hear the case.

In March 2012 CAAI applied to the Supreme Court of Canada for leave to appeal. In October 2012 the Supreme Court dismissed CAAI's application, marking the end of any judicial relief in Canada.

It is worth noting that the Canadian judicial process hinged entirely on the technical issue of jurisdiction.

³ Ingrid Kuster, National Coordinator, Special Operations, AFP Canberra, letter to Richard Meeran, Special Legal Counsel, Slater & Gordon, 8 December 2006.

⁴ Penny Spies, Federal Agent, 'Recommendation for finalisation of Operation Valonia [the codename for the investigation]', 24 October 2006, released by the AFP under the Freedom of Information Act, pp. 574–8.

⁵ Clayton Utz (lawyers) on behalf of Anvil Mining, in the Supreme Court of Western Australia at Perth, 'Respondents' outline of submissions in support of an application for security for costs of application', 19 February 2008.

⁶ ACIDH, ASADHO, Global Witness, CCIJ & L'Entraide missionnaire.

The courts did not consider the facts of the case, and their decisions therefore do not represent an acquittal of Anvil Mining.

The African Commission: hope for the victims

In collaboration with RAID and ACIDH, the Institute for Human Rights and Development in Africa prepared a Communication on Kilwa for submission to the African Commission on Human and People's Rights. In its 15th Extraordinary Session in March 2014, the Commission ruled the Communication admissible, finding that domestic remedies had been exhausted. The Commission's ruling confirms RAID's contention that the Kilwa victims have no realistic prospect of recourse in the Congolese courts.



Family and friends of the Kilwa victims at Lubumbashi Cathedral for a service of commemoration nine years after the massacre.

Chantal Peyer/Bread for all

Some of those who were tortured or shot have died of their injuries since the original trial. Pierre Kunda Musopelo, a local policeman tortured during and after the military operation, never recovered his health and died in November 2009. Augustin Kyambala Mwilambe, a fisherman, survived the mass execution at Nsensele but his right arm and shoulder were shattered by a bullet so that he could no longer work. He died destitute in April 2013.

RAID remains absolutely committed to supporting the remaining survivors in their quest for justice, and a new legal team is considering all possible options with a view to pursuing the case in an alternative jurisdiction.

Recommendations

- The Governments of Australia, Canada and South Africa should re-open (or in the case of RSA open) criminal investigations into the Kilwa massacre in order to review the evidence against the parent corporate entity, its former directors and former employees.
- Barriers to an effective remedy for the Kilwa victims should be removed, to enable them to obtain reparation for the harms they have suffered.

Kilwa: the victims

This information, the most detailed available, has been carefully compiled by RAID from eye-witness testimonies, information from relatives and statements to the prosecutor. Unless otherwise stated, the deaths occurred between 15 and 20 October 2004.

No comprehensive list of the Kilwa victims has ever been officially produced. Many of them were originally referred to only by their nicknames, and the military court did not trouble to identify them formally even in the indictment and verdict. In its judgment the court cast doubt on the existence of a number of them, claiming that they were 'fictitious names that the prosecution had plucked out of thin air'. No autopsies were ever conducted but some of the victims were known to the local Red Cross officials who buried them.

It has not been possible to identify all of the 81 bodies that the Red Cross had listed and given to the prosecutor. The Red Cross list included five soldiers

who died when a vehicle one of them was driving crashed en route to Nsensele. No other deaths of soldiers were reported at the time.

It is likely that visitors or commercial travellers passing though Kilwa at the time of the incident were among the dead, but as they were not known locally they have not been identified. A few of the rebels are also likely to be among the dead. At least two of their number, Alain Kazadi and his deputy André Bwalya, were transferred to Lubumbashi in the custody of the 6th Military Region. Kazadi had sustained a serious but not life-threatening injury. The military claimed that he died from his injuries soon after his transfer. Bwalya was convicted for his part in 'the occupation' of Kilwa and sentenced to 20 years' imprisonment.

Families were prevented by the army from burying their loved ones and observing funeral rites according to local custom. There is no memorial to commemorate the Kilwa victims.

	Name	Alleged circumstances of death
1	BIYUKA Gauthier (m)	Charcoal-maker. Married with two children. Shot dead by soldiers.
2	KABIMBI KIPOLO "Mukoroboro" (m)	Had learning difficulties. Took refuge in Mme Kaponto's house with others. Killed at Nsensele.
3	KABWEBWE KITANIKA* Stanislas "Mutunakakwe" (m)	Aged 74. Customary judge. Killed on the military commander's orders at Nsensele.
4	KAMONA Marie* (f)	Aged 30, pregnant. Drowned Lake Moero fleeing the fighting.
5	KAPIA KAYOMBO Joseph* (m)	Aged 26, fisherman. Arrested fleeing Kilwa. Allegedly tortured at Hotel Kabyata and executed at Nsensele.
6	KAZADI Alain	Appears to have been extra-judicially executed after his arrest.
7	KIMANDA* (m)	Had learning difficulties. Mother reported him missing.
8	KISALA NGONGO David* (m)	Aged 19, fisherman. Arrested on his return from village of Mukupa. Tortured at Hotel Kabyata. Executed at Nsensele.
9	KISIMBA Jérôme (m)	Aged 62. Tortured at Hotel Kabyata and executed at Nsensele.
10	KUNDA MONGA Dorcas (f)	Aged 22. Raped when pregnant. Died of complications a few months later at the end of 2004.
11	KUNDA MUSOPELO Pierre (m)	Chief of Police, allegedly tortured. In prison for 6 months. Poor health and died November 2009.
12	KYAMBALA MWILAMBE Augustin (m)	Fisherman. Injured in the shooting and unable to earn a living. Never treated for his injuries and died April 2013.
13	KYUNGU BANZA Marie* (f)	Disappeared with her son-in-law NKULU MWAMBA (no. 31).
14	LWEMBE KAPYA (m)	Killed on 16 October according to his mother.
15	MBOYA MUTABI* (f)	Wife of MUNONGO (no. 24). Disappeared in same circumstances.
16	MITANDA Georges (m)	His wife believed him to have been killed.
17	MITONGA Charles* (m)	Aged about 15. Shot at Nsensele.
18	MUGALU Jean-Pierre (m)	Schoolboy. Shot dead by soldiers near Kilwa hospital.
19	MUJINGA KIMONGO (f)*	Shot with husband while fleeing by boat across lake.
20	MUKALAY, MBUYU* (m)	Believed to have been killed at Nsensele.
21	MUKIMBA Andre* (m)	Shot dead by soldiers near Kilwa hospital.

	Name	Alleged circumstances of death
22	MULIMBI Narcisse* (m)	Aged about 40. Wife reported that he had disappeared.
23	MUNGEDI KASONGO "Musashina"* (m)	Aged 48. Butcher, married with 3 children. Shot at Nsensele trying to flee Kilwa.
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24	MUNONGO* (m)	Husband of MBOYA MUTABI (no. 15). They stayed in Kilwa to guard their house. Both disappeared believed killed.
25	MUTUNGWA KATONDO* (m)	Aged 20. His father, helping to bury the dead, discovered son's body.
26	MWANDWE Severa* (m)	Had learning difficulties. Shot in head and stomach near hospital.
27	MWAPE KASONGO* (m)	Had learning difficulties. Shot in Kilwa.
28	MWILAMBWE Boston* (m)	His family believed that he had been killed.
29	MWILAMBWE SANDUKU "Ndekandeka"* (m)	Aged about 57. Married with 7 children. Shot in the back by soldiers in his back garden.
30	NKUBA KIPENGE* (m)	Aged 13. Deaf and with learning difficulties. Disappeared after the attack.
31	NKULU MWAMBA* (m)	Disappeared with mother-in-law KYUNGU BANZA Marie (no. 13).
32	NKULU WA NKULU* (m)	Beaten by soldiers. Killed at Nsensele.
33	NYEMBO LEMBE* (m)	Aged 40. Had learning difficulties.
34	SENGA NDJIBU (m)	Tortured at Kabyata and killed at Nsensele.
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35	SHIMPUNDU Pilati* (m)	Shot dead at Mme Kaponto's house in Kilwa by soldiers.
36	Sophie KABANGU* (f)	Aged 82. Shot dead in her home close to Hotel Kabyata.
37	Tabu MWAMBA (m)	Aged 21. Held in Hotel Kabyata and shot at Nsensele.
38	ULIMWENGU Lukumani "Paki"* (m)	Aged 25. Killed by soldiers trying to protect family home.
39	ULIMWENGU Nombele "Willy"* (m)	Aged 19. Killed by soldiers trying to protect family home.

*In the original indictment Anvil employees were charged with complicity in the deaths of the 21 men and five women whose names have been marked with an asterisk *.*

Kibeka family

Urbain Kibeka was employed by Anvil as a stonemason at Dikulushi. His family and two friends tried to escape Kilwa by boat on the afternoon of 15 October 2004. He

did not board the boat, and left his family believing they would be safe. Ten people drowned when soldiers firing rockets caused their boat to capsize. Urbain lost four children (no. 40–43) and four grandchildren (no. 44–47).

40	KYUNGU Damien (m)	Aged 38.
41	KALUMBE Françoise (f)	Aged 32. Nurse at Kilwa hospital.
42	KALEMBE Albertine (f)	Aged 22.
43	KIBEKA MUSONDA Urbain (m)	Aged 14, schoolboy.
44	MWIKA Fabiola (f)	Aged 9, schoolgirl.
45	MUSONDA Juré	Aged 2.
46	MUSONDA Jenovic	Aged 10 months, baby of Françoise KALUMBE (no. 39)
47	KABILA NTUNDU Donatien	Aged 2 months.
48	Mme MITWELE (f)	(no details available)
49	Mme CHOLA (f)	(no details available)
50	Baby of Mme Chola	(no details available)