

CANADA

(Class Action)

PROVINCE OF QUEBEC

**SUPERIOR COURT**

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DISTRICT OF MONTREAL

No.: 500-06-

**ASSOCIATION CANADIENNE CONTRE L'IMPUNITÉ**, legal personality constituted by virtue of part III of the Companies Law, being located at 750, Côte de la Place d'Armes, suite 90 in the city of Montreal, province of Quebec

Petitioner

vs.

**ANVIL MINING LIMITED**, legal personality, having an office at 1, Place Ville-Marie, office 2001, in the city of Montreal, province of Quebec

Respondent

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**REQUEST FOR THE AUTHORIZATION TO FILE A CLASS ACTION AND TO BE DESIGNATED REPRESENTATIVE**

(Art. 1002 and following C.p.c.)

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**TO ONE OF THE HONOURABLE JUDGES OF THE SUPERIOR OF THE DISTRICT OF MONTREAL, THE PETIONER RESPECTFULLY SUBMITS THE FOLLOWING:**

**INTRODUCTION**

The armed forces of the Democratic Republic of Congo committed terrible atrocities against the citizens of the small Congolese town of Kilwa during the repression of a minor local uprising in 2004. Summary executions, mass graves, rapes, pillage, torture, destruction of houses; for the victims, these words

became a reality, a reality that arrived in the white trucks of the defendant, Anvil Mining, a Canadian company that runs a copper mine in the region.

With the protection of its commercial interests at heart and acting with total contempt for the fundamental rights of the victims, Anvil Mining was complicit in the crimes committed against the citizens of Kilwa.

The present claim seeks to obtain justice for the victims of these crimes.

**1. The Petitioner wishes to exercise a class action on behalf of the natural persons comprised in the following group:**

- 1.1 All the persons who lost a member of their family, who were victims of physical abuse, of the pillage of their goods or who were obliged to flee the town of Kilwa in October 2004 following illegal acts committed by the Armed Forces of the Democratic Republic of Congo;

**2. The facts that give rise to the claim that the Petitioner wishes to bring are the following:**

THE PARTIES

- 2.1 Anvil Mining Limited ("**Anvil**") is a Canadian mining company established according to the Business Corporations Act of North West Territories on 8 January 2004 as it appears from its profile on SEDAR, exhibit **R-1**;
- 2.2 Its original name was Dikulushi Resources Limited. This name was changed on 12 March 2004 as appears in a prospectus published by Anvil on 15 April 2009, exhibit **R-2**;
- 2.3 Its main premises in Canada are situated in Montreal at 1 Place Ville-Marie, bureau 2001, as appears on its entry in the Company Registry, exhibit **R-3**;
- 2.4 Anvil is the product of the reorganization in 2004 of the Australian company Anvil Mining Management NL. This reorganization was partly caused by the wish to have access to the Canadian capital markets, as Anvil states in its annual report of 2004, a copy of which is produced as exhibit **R-4**:

In order to adequately support anticipated future growth and development opportunities, a corporate reorganization was completed in June 2004, which involved a redomiciling of the company to Canada, followed by new listings of the new Canadian holding company, Anvil Mining Limited, on the Toronto (TSX),

Australian (ASX) and Berlin Stock Exchanges. The reorganization included an initial public offering in Canada, which raised C\$7 million. **The redomiciling to Canada is seen as an important step for the future development of the Company**, which now has access to a much larger mining capital market and one in which a greater proportion of equity funds raised, is destined for African projects.

[Our emphasis]

- 2.5 Since June 2004, Anvil has been listed on the Toronto Stock Exchange (hereafter “**TSX**”). Anvil is also listed secondarily on the Australian and Berlin Stock Exchanges, as appears in its annual report of 2004, exhibit **R-4**:

During June 2004, the Company completed the corporate reorganization and redomiciling to Canada as well as an initial public offering enabling it list [sic] on the Toronto Stock Exchange and obtain secondary listings on both the Australian and Berlin Stock Exchanges as Anvil Mining Limited (AVM)

- 2.6 In 2004, Anvil’s principal asset was a direct equity interest in a copper and silver mine in located in Dikulushi (hereafter the “**Dikulushi Mine**”), in the Democratic Republic of Congo (hereafter “**DRC**”). Anvil stated the following in its prospectus prior to joining the TSX, dated 14 May 2004, exhibit **R-5**:

The AVM Group is an international base and precious metals mining and exploration group. Its principal assets comprise (i) a 90% direct equity interest in the Dikulushi copper/silver mine [...]

- 2.7 In its communications addressed to Canadian and Quebecois investors, Anvil states that it is the owner and operator of the Dikulushi Mine. For example, in a press release of 18 October 2004, Anvil notified the public of the following:

Anvil Mining Limited is an unhedged copper and silver producer whose shares are listed for trading on the Toronto Stock Exchange and the Australian Stock Exchange under the symbol AVM. **It owns and operates the Dikulushi copper-silver mine in the Katanga Province of the DRC**, which it brought into production in October 2002.

[Our emphasis]

As it appears on a copy of the press release, produced as exhibit **R-6**;

- 2.8 In 2004, Anvil owned the Dikulushi Mine through a number of subsidiary companies. Anvil held 100% of the shares in Anvil Mining Management NL (Australia), which held 100% of the shares in Anvil Mining Holdings Limited (UK), which in turn held 90% of the shares in Anvil Mining SARL (Congo) (hereafter “**Anvil Congo**”), the owner of the Dikulushi Mine. All of this appears in the prospectus dated 14 May 2004, exhibit R-5;

#### CANADIAN ASSOCIATION AGAINST IMPUNITY

- 2.9 The Canadian Association Against Impunity (hereafter “**ACCI**”) is a company incorporated according to Part III of the Companies Law of Quebec (L.R.Q. c. C-38, art. 218);
- 2.10 ACCI was set up following a joint initiative of the five following non-governmental organizations with the primary objective of undertaking the present class action: Action Against Impunity for Human Rights (hereafter “**ACIDH**”), the African Association for the Defence of Human Rights (hereafter “**ASADHO**”), the Canadian Centre for International Justice (hereafter “**CCIJ**”), Global Witness and Rights and Accountability in Development (hereafter “**RAID**”);
- 2.11 The mission of ACCI is described as follows in its letters patent:

To assist the victims of wrongs committed by companies or persons in countries where the judicial system does not allow for reasonable access to justice.

To represent, in the context of class action, the interests of the victims of the incidents in Kilwa in the Democratic Republic of Congo in 2004.<sup>1</sup>

All as it appears in the letters patent, exhibit **R-7**;

- 2.12 The activities and missions of the five founding organizations are described as follows:

#### ACIDH

- 2.13 ACIDH, a Congolese non-governmental organization based in Lubumbashi, was founded in January 2004 in order to fight against impunity and to promote human rights in DRC, particularly in the province of Katanga;

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<sup>1</sup>Original text in English?

- 2.14 ACIDH strives particularly to document and expose abuses in the country's judicial system;
- 2.15 Its executive director, Mr Emanuel Umpala Nkumba, sits on ACCI's governing council;

#### ASADHO

- 2.16 ASADHO is an apolitical organization that promotes and defends human rights and was founded on 10 January 1991 in Kinshasa by a group of lawyers, doctors and journalists, with the name of the Zairean Association for the Defence of Human Rights, or AZADHO.
- 2.17 Following the change of the country's name from Zaire to DRC in 1997, AZADHO changed into the African Association for the Defence of Human Rights, ASADHO;
- 2.18 In 1998, following the governmental measure to outlaw ASADHO throughout the DRC, it operated secretly for a period of two years and five months;
- 2.19 ASADHO's mandate is to promote and protect human rights;
- 2.20 ASADHO's national vice president, Mr Georges Kapiamba, sits on ACCI's governing council;

#### CCIJ

- 2.21 CCIJ is a Canadian not-for-profit organization that seeks to help victims of genocide, torture or war crimes to obtain justice;
- 2.22 CCIJ has investigated several cases involving crimes against humanity and has intervened at several levels of jurisdiction, including the Supreme Courts of Canada and of the United States, to support the rights of the victims;
- 2.23 Matt Eisenbrandt, coordinator of legal cases for the CCIJ, is a member of ACCI's governing council;

## GLOBAL WITNESS

- 2.24 Global Witness is a British non-governmental organisation based in London, established in 1993. It also has offices in Washington and numbers approximately forty permanent employees;
- 2.25 Its objective is to fight against corruption and armed conflicts linked to the exploitation of natural resources. It has instigated several international campaigns that have made it possible to put an end to certain illicit trades, notably the trade of diamonds to finance the war in Angola, which led to the creation of the Kimberley Process Certification Scheme;
- 2.26 Global Witness has produced several reports on the exploitation of natural resources in DRC and has participated in the investigations surrounding the Kilwa massacre;
- 2.27 Seema Joshi, legal advisor and member of the ending-impunity team at Global Witness, is a member of ACCI's governing council;

## RAID

- 2.28 RAID is a British non-governmental organization based in Oxford, United Kingdom. Founded in 1997, it aims to ensure the good governance of companies that conduct their activities in developing countries. It promotes fair investment and ensures that companies are held accountable;
- 2.29 RAID has investigated and produced several reports concerning the Kilwa massacre and the involvement of Anvil;
- 2.30 Patricia Feeney, founder and director of RAID, sits on ACCI's governing council;
- 2.31 ACCI can therefore depend on a support network both at the local and international levels to help the designated member, the members of the group and the witnesses throughout the proceedings. In particular, the experience of the members of the governing body and their respective networks makes it possible to ensure the sound and effective logistical management of a case whose context entails an international dimension, as applies in this particular case;

## THE DESIGNATED MEMBER

- 2.32 Adèle Mwayuma was born on 16 February 1957;
- 2.33 Mrs. Mwayuma lost two of her sons, Ulimwengu Lukumani and Ulimwengu Nombele, who were murdered by the armed forces of the DRC (hereafter "**FARDC**"). She also lost all her family goods, which were looted during the events at Kilwa in October 2004;

## THE SITUATION IN DRC

- 2.34 The DRC is the third largest African country and the most populous country in the French-speaking world, with a population of more than 68 million;
- 2.35 The country shares its borders with Angola and the Republic of Congo to the West, the Central African Republic and Sudan to the North, Uganda, Rwanda, Burundi and Tanzania to the East and Zambia and Angola to the South;
- 2.36 Its population includes several hundred ethnic groups but its official language is French;
- 2.37 Katanga is a large province in south-east DRC that shares a border with Angola to the South and Zambia to the East. Katanga is particularly rich in copper;
- 2.38 Between 1997 and 2005, DRC was devastated by a series of internal and international conflicts leading to more than 3.5 million deaths. This conflicts particularly affected Katanga.
- 2.39 In August 2010 the UN High Commissioner for Human Rights released a detailed report covering the most serious violations of human rights and international humanitarian law committed in DRC between 1993 and 2003 (hereafter the "**Mapping Report**"). A copy of this report is presented as exhibit **R-8**;
- 2.40 The Mapping Report establishes that a very large number of human rights violations were committed in DRC and that they remain hardly investigated and largely unpunished;

## THE DIKLUSHI MINE

- 2.41 The Dikulushi Mine is located in the province of Katanga, roughly 50 kilometres from Kilwa. Kilwa is situated on the edge of the Lake Mweru but is geographically remote from the capital of Katanga, Lubumbashi, which is nearly 350 kilometres to the south. It is very difficult to reach Kilwa by road;
- 2.42 The Dikulushi Mine was the first mine operated by Anvil, which explored the mine in 1997 and developed it in 2002, as stated in the following extract from their annual report of 2005, exhibit **R-9**:

Anvil's first mining and processing operation, Dikulushi was initially explored by the Company in 1997, and was developed in 2002.

- 2.43 Anvil envisaged that the Dikulushi Mine would make a fortune for the company, as it appears from the following extract from their annual report of 2003, exhibit R-10:

Dikulushi will be a company maker for Anvil. It is a very high-grade resource, the mining and processing of which is technically relatively simply. It is the kind of resource that will produce a profit regardless of future adverse fluctuations in metal prices. Few mining projects fall into this category.

[Our emphasis]

- 2.44 Since the beginning of the exploitation of the Dikulushi mine, the ore has passed through the port facilities that Anvil had built in Kilwa. Anvil trucks loaded with ore boarded ships [barges] there to cross Lake Mweru for neighbouring Zambia with its road infrastructure, which is better developed than that in the DRC. The ore was then transported by road to foundries located in South Africa and Namibia;
- 2.45 If the ore could not go through Kilwa, the Dikulushi mine would be paralysed. There existed no other means of getting it out, no other passable roads, no railway.
- 2.46 The Dikulushi mine was Anvil's only productive asset in October 2004. If Anvil were to lose access to the port of Kilwa, its viability would be undermined.
- 2.47 Moreover, in 2004 Anvil was seeking private capital to finance a major acquisition. Anvil announced on 30 November 2004 that they had raised \$20,000,000 through a non-public offering, as appears in a press release dated 30 November 2004, exhibit **R-11**;

- 2.48 Any prolonged interruption to the Dikulushi Mine's production would seriously undermine such a non-public offering.

#### THE EVENTS IN KILWA IN OCTOBER 2004

- 2.49 On the night of 14 October 2004, a small group of approximately six or seven unorganized and poorly equipped individuals arrived in the small town of Kilwa;
- 2.50 Claiming to be part of a hitherto unknown organization, the Revolutionary Movement for the Liberation of Katanga (hereafter the "**MRLK**"), the group was led by a young fisherman, aged 20 and named Alain Kazadi Mukalay (hereafter "**Kazadi**");
- 2.51 Kazadi and his group met very little resistance from the few members of the army present in Kilwa and from the police, and succeeding in taking control of the town without bloodshed.
- 2.52 On the morning of 14 October, Kazadi held a public meeting in Kilwa's marketplace, during which he proclaimed Katanga's independence. He asked the inhabitants of Kilwa to join them and assured them that news of Katanga's liberation would shortly be heard on the international airwaves;
- 2.53 Kazadi then went to Anvil's petrol station in Kilwa where he demanded to be put in contact with the "whites" at Anvil's Dikulushi Mine. He assured the Anvil employees that he had not come to disturb Anvil's activities, but his group did appropriate petrol and other goods belonging to Anvil.
- 2.54 Less than a week after the events, the UN Mission in the DRC (hereafter "**MONUC**") despatched a team of investigators to Kilwa. MONUC then produced a detailed report of the events, a copy of which is included as exhibit **R-12**;
- 2.55 The MONUC investigation was delayed by one day on the order of the Congolese military authorities, who profited from this delay by sending the Sixth Military Regional Deputy Commander, General Sylvain Tchokwe, to Kilwa. MONUC reports that, once in place, "the team discovered that potential key witnesses had been warned by the military not to cooperate with

MONUC”, as appears in paragraph 7 of the report, exhibit R-12. In spite of these difficulties, MONUC conducted its investigation.

2.56 The report (R-12) describes the arrival of Kazadi and his group on 14 October 2004 as follows:

10. On the 14 October, at around 2 a.m., a group of 6 or 7 persons, led by Alain Kazadi Makalayi, a fisherman from Pweto, aged 20, who claimed to be the General-in-Chief of the Revolutionary Movement for the Liberation of Katanga (MRLK), attacked and briefly occupied Kilwa. [...]

11. Despite their limited weaponry, the MRLK met little or no resistance from the army – approximately 10 to 20 men – and from the local police present in Kilwa. No armed confrontations were reported.

12. Kazadi and his deputy, Mpundu Bwalya, went to the office of MSF (*Médecins sans frontières*) to look for their radio. They wanted to use the radio to announce the independence of Katanga to the whole world. They were very disappointed to learn that the radio could not connect them directly with RFI (*Radio France Internationale*) or the BBC. Kazadi then supposedly asked Bwalya to tell the inhabitants that he had put money aside in South Africa to buy tractors and fishing nets for the inhabitants. At the same time, Kazadi, along with some armed individuals, went to the petrol depot belonging to Anvil Mining in Kilwa.

13. Along the road, Kazadi stopped at the market and held a public meeting, during which he declared Katanga’s independence. He emphasised that that President Kabila and Katumba Mwanke – one of the president’s advisers – would no longer “pocket the money from the mines”. He added that they need not be afraid, as other towns in the province were about to fall on that same day, and that the FARDC brigade in Pweto, as well as many high-ranking officials, supported his initiative. He asked the inhabitants of Kilwa to join him and take up arms. He concluded by assuring them that news of Katanga’s liberation would shortly be heard on the international airwaves.

14. At the petrol depot belonging to Anvil Mining, Kazadi demanded that the employees help him get in contact with the “whites” from the company at Dikulushi, located some 30km to the north of Kilwa. The rebels

insisted, all the while, that they had not come to disturb the company's activities. Confronted with the Anvil employee's refusal to negotiate, they became more aggressive. They demanded access to the petrol and apparently obtained it. In the morning, the rebels supposedly distributed arms to their sympathisers – estimated to be at least 100 in number – who were mostly young townspeople with little or no experience bearing arms. [...] The new recruits, over-excited by being given weapons, are said to have fired into the air. Kazadi is said to have intervened, ordering them to stop after complaints from the town's inhabitants.

15. At the end of the morning, Kazadi's sympathisers received the order to go to their homes for lunch and reconvene in the afternoon. It was at that moment that 90% of Kilwa's 48,000 inhabitants decided to flee. Some supposedly went by boat to the island of Nshimba; others are said to have hid themselves in the bush. In the absence of radio confirmation of the promise of the province's liberation, the inhabitants quickly understood that this movement, without strong leadership, could very quickly be swept away by the national army. The rebels did not oppose their departure.

The above appears in the MONUC report, exhibit R-12;

- 2.57 The executive director of the Dikulishi Mine in 2004 was Pierre Mercier (hereafter "**Mercier**"), a Canadian citizen originally from Thetford Mines. The position that he occupied appears in the minutes of the meeting of Anvil Congo's board of directors, dated 15 June 2004, exhibit **R-13**;
- 2.58 Mercier was responsible for Anvil's operations in the DRC in October 2004;
- 2.59 In an examination on 13 October 2006 led by Colonel Eddy Nzabi, superior military prosecutor at the Katanga Military Court, Mercier declared that on the 15 October 2004, he was managing director of Anvil and that he was in Kinshasa. He maintains that he was informed by telephone by an Anvil security agent that Kilwa had fallen into rebel hands, as appears in the minutes of his questioning, exhibit **R-14**;
- 2.60 Mercier declared the following:

In light of what this town represents for Anvil Mining, I alternated between calling the head of the ANR (National Intelligence Agency) in Kinshasa and the Comt 6 Rgn Mil (6<sup>th</sup> Regional Military Commander) to ask them for any information regarding the situation. The first, that is, the head of the ANR, responded that he knew nothing about it, while the second, who was well informed, advised me to evacuate our employees. That is when I called DIKULUSHI to ask them to describe the security situation on the ground. After having spoken again by telephone to the Regional Commander, it was jointly decided to evacuate our 75 employees (Congolese and expatriots)

[Unofficial translation. Our emphasis]

All as it appears in exhibit R-14;

- 2.61 On 15 October 2004 Mercier was therefore in contact with the 6<sup>th</sup> Regional Military Commander; contact initiated by Mercier, who was concerned that Kilwa should be retaken as quickly as possible “in the light of what this town represents for Anvil Mining”;
- 2.62 For Anvil, these events represented a potential threat to the very survival of the company;
- 2.63 The same day, Anvil asked the Australian Stock Exchange (ASX) to suspend trading of Anvil shares until the company released a statement; all as it appears in a copy of the Market Release dated 15 October 2004, exhibit **R-15**;
- 2.64 Anvil then released a statement to the press which it thought to be reassuring. In this statement, Anvil told the public that the insurrectional movement had no designs on the Dikulushi Mine, that Anvil expected the situation to return to normal within 72 hours and that the Government of DRC had notified Anvil that it would act quickly to re-establish the situation; as appears in Anvil’s press release dated the 15 October 2004, exhibit **R-16**:

PERTH, Western Australia, Oct. 15 /CNW/ - Anvil Mining Limited

(TSX, ASX: AVM) advises that yesterday, some local conflict appeared in the village of Kilwa located 54 kilometres south of the Dikulushi Mine. The conflict has not moved towards the Dikulushi Mine. Anvil security personnel have talked with the leader of the rebel group, who has advised that his group has no intention of taking over the Dikulushi Mine.

However, as a precautionary measure, and in accordance with Anvil's standard operating procedures, the Company yesterday stopped operations at the Dikulushi Mine and moved 25 non-essential staff from the mine site to Lubumbashi, the capital of the province, located 320 kilometres to the southwest of the mine. A further 50 will be moved to Lubumbashi today. Prior to taking this precautionary action, the total workforce at Dikulushi numbered 480 staff.

The Company has maintained security staff including the Group Security Manager and the Mining Manager on site in order to monitor the situation and coordinate the return of Company staff to site.

The group in Kilwa is reported to comprise somewhere between 50-100 people, the leader of which is not dressed in uniform and wears sandals. In discussions Company security had with the leader in Kilwa yesterday, it was clearly stated that the rebel group had no issues with Anvil, Anvil expatriate personnel, nor the Dikulushi Mine. The rebel group appears to be a small band of disaffected individuals seeking representation.

The Company expects the situation to be resolved within the next 72 hours. The DRC Government has advised Anvil they are moving quickly to return the situation to normal.

[Our emphasis]

- 2.65 Yet on 15 October 2004, it was physically impossible for the FARDC to resolve the problem within 72 hours, as the nearest military personnel to Kilwa were in Pweto, over 175 kilometres away, and these personnel had no way of transporting themselves to Kilwa. If the soldiers of the 62<sup>nd</sup> Infantry Brigade, commanded by Colonel Ilunga Adémar (hereafter "**Adémar**") had had to make the journey on foot, it would have taken several days' marching simply to arrive in Kilwa;
- 2.66 Adémar and his troops did not have to march. Anvil, which had a direct, immediate and vital stake in Kilwa's being retaken as quickly as possible, provided the necessary transportation to the FARDC. It was Anvil trucks, driven by Anvil-employed drivers and led by Peter Van Niekerk, Anvil's chief of security, that went to Pweto and that allowed Adémar and his men to get to Kilwa;
- 2.67 This was how, on the 15 October, Adémar and his men arrived in Kilwa;

- 2.68 The inhabitants of Kilwa already knew of Adémar in 2004. They nicknamed him “kote kubaya”, a phrase meaning “double-edged knife” in Swahili, and used to describe a person who does to all around him, without discrimination.
- 2.69 Those in charge of Anvil also knew of Adémar and his reputation, which should have prompted them to wield a great deal of caution.
- 2.70 The MONUC report (exhibit R-12) describes the Adémar’s arrival into Kilwa as follows:

16. In the afternoon of the 15 October the 62nd brigade from Pweto under the command of Colonel Ademars [sic] began an attack on the town. According to MONUC the operation had been authorized by the Kinshasa authorities who had overturned the instructions of the Commander of the 6th military region (ex-MLC).

17. Before entering the town, the FARDC bombarded Kilwa, destroying at least 5 or 6 houses. Then they were in an armed engagement with Kazadi’s group mainly in the area around the market and along the road to the airport. The confrontation lasted for one or two hours. The FARDC did not sustain any casualties. Afterwards the FARDC carried out house to house searches which lasted until the afternoon of 16 October. During this operation the FARDC carried out summary executions and other human rights violations (see below).

- 2.71 Thus FARDC recaptured the town on 15 October without suffering a single loss of life.
- 2.72 Thereafter, FARDC troops conducted themselves like conquerors from another era, killing indiscriminately and pillaging without restraint, with uninterrupted logistical aid from Anvil.
- 2.73 MONUC noted numerous cases of summary execution:

24. According to local sources more than 100 civilians were killed or were summarily executed during the FARDC counter-offensive on 15 October 2004. The military authorities at Kilwa and the Governor of Katanga stated that 24 – 30 members of a militia had been killed and that the local civilian authorities had no knowledge about the number of dead. Kilwa hospital sources, who had coordinated the burial of the bodies, denied to MONUC that they had information on this subject.

It is worth noting that before meeting the MONUC team, these sources had been called to a meeting with Colonel Ademars. According to information from independent sources 73 people had been found dead, 28 of whom had been summarily executed.

11 people drowned on the lake trying to flee from Kilwa.

34 bodies were allegedly found and buried by the inhabitants of Kilwa. Among them there were victims of summary executions, insurgents killed in armed confrontations with the FARDC, and civilians killed by stray bullets.

At least 28 people, suspected of supporting the insurgents, are believed to have been summarily executed.

The MONUC team received information according to which the military allegedly buried an undetermined number of bodies, principally the victims of summary executions.

- 2.74 ASADHO/Katanga produced an investigative report on the Kilwa events in January 2005, in which it gave an account of more than 90 cases of summary executions carried out by FARDC soldiers from the 62<sup>nd</sup> brigade. This appears in a copy of the report, entitled "Report on the Human Rights violations committed in Kilwa in October 2004", exhibit **R-17**;
- 2.75 Furthermore, MONUC reports illegal imprisonment and large-scale pillage as well as incidents where FARDC soldiers extorted money from the victims in exchange for their freedom or security;
- 2.76 According to MONUC, the Kilwa events precipitated a massive displacement of civilians, consisting of 90% of the local population. When MONUC's team of investigators were operating in the village, from 22 to 24 October, almost half the fleeing population had not yet returned to Kilwa, as appears in paragraph 8 of exhibit R-12;
- 2.77 Anvil does not deny having provided logistical support to Adémar, as appears in the MONUC report:

36. According to statements made to MONUC by eyewitness, the Armed Forces of the Democratic Republic of Congo (FARDC) used vehicles of the

mining company Anvil Mining during their operation in Kilwa. These vehicles appear to have been used to transport pillaged goods as well as corpses – which may have included victims of summary execution – to the area of Nsensele; there, MONUC located two shallow graves and one individual grave. Anvil Mining has confirmed to MONUC that the FARDC did use the company's vehicles but Anvil has denied that the vehicles were used to transport corpses or pillaged goods. Anvil Mining has also acknowledged that planes chartered by the company to evacuate its personnel to Lubumbashi were used on 14 and 15 October to transport approximately 150 soldiers in the area of operation. These planes were also used to transport to Lubumbashi some of the suspects arrested by the army following its counter-offensive in Kilwa. [...]

37. In October 2004, the Commander of the 6th military region in Lubumbashi informed MONUC that the intervention of the FARDC to bring safety back to Kilwa was made possible thanks to the logistical assistance given by Anvil Mining. [...]

Footnote: The information of MONUC according to which an international security officer of Anvil was also in the vehicles used by the army was denied by Anvil.

- 2.78 Neither does Anvil deny that its drivers drove some of the vehicles used by the FARDC, or that it provided the FARDC soldiers with rations and even paid them, as appears in the MONUC report, exhibit R-12:

MONUC was able to confirm that three drivers of the company Anvil Mining drove the vehicles used by the FARDC<sup>4</sup>. MONUC was also able to confirm that food was provided to the armed forces in order to – according to Anvil – prevent the pillage of goods of civilians. Anvil also appears to have acknowledged to have contributed to the payment of a certain number of soldiers.

- 2.79 Neither does Anvil deny that Adémar and his men committed serious, large-scale crimes after taking control of Kilwa, as appears in a press statement dated 21 June 2005, exhibit **R-18**, in which Anvil states that “it [the Kilwa massacre] was a terrible event”;
- 2.80 Anvil claims, however, firstly that they had no choice but to provide the support which they gave, as that support would have been requisitioned by the DRC Government; and secondly,

that they were not aware of the crimes at the time they were committed;

- 2.81 And yet, it is obvious that, on the contrary, Anvil provided logistical support on its own initiative, and in its own interests. It is equally obvious that Anvil was perfectly aware of the crimes committed by the FARDC and that it kept silent about the crimes until they became public on the international stage;

#### ANVIL AND THE DRC AUTHORITIES

- 2.82 Anvil had a privileged relationship with many people close to power in DRC, and it used its contacts to secure rapid FARDC intervention to counter Kazadi's small-scale insurrection;
- 2.83 Among these contacts was Augustin Katumba Mwanke (hereafter "**Katumba Mwanke**"), a former governor of Katanga and one of the principal advisors to the president of DRC, Joseph Kabila;
- 2.84 In 2004, Katumba Mwanke sat on Anvil Congo's board of directors, the Anvil subsidiary which held the mining rights to the Dikulushi Mine, as appears in the minutes from Anvil Congo's board meeting on the 15 June 2004, exhibit R-13;
- 2.85 When Bill Turner, the president of Anvil (hereafter "**Turner**") was questioned on this matter by Sally Neighbour, for an episode of the investigative current affairs programme *Four Corners*, on the Australian television channel ABC (Australian Broadcasting Corporation), Turner initially denied that Anvil had any political contacts, later admitting the presence of Katumba Mwanke on the board, as appears in the transcript of the programme, exhibit **R-19**;
- 2.86 According to the MONUC report, exhibit R-12, Katumba Mwanke figures on a list of people identified by a UN working group as having participated in a massive misappropriation of mining resources in DRC:
- Mr. Mwanke is included in the list of persons against whom the Expert Group on the illegal exploitation of natural resources and other types of richness in the Democratic Republic of Congo recommends a prohibition of travel and financial restrictions, in its report of October 2002.
- 2.87 The Minister for Mines in 2003-2004, Eugène Diomi Ndongala, declared on *Four Corners* that Katumba Mwanke was

Anvil Mining's "protector", as appears in the transcript of the programme, exhibit R-19;

- 2.88 After the massacres, Katumba Mwanke, accompanied by the Governor of Katanga, Urbain Kisula Ngoy, and the 6<sup>th</sup> Regional Military Commander, visited the locality of Kilwa in person to encourage the population to return;
- 2.89 MONUC reported what followed:
19. The situation returned to normal. Katumba Mwanke, an advisor to the President of the Republic, Governor Kisula Ngoy, the 6<sup>th</sup> Regional Military Commander and other officials visited the island of Nshimba and strongly encouraged the displaced population to return to Kilwa. The displaced population began to return to Kilwa the day after that meeting.
- 2.90 Anvil was the principal beneficiary of these efforts, as many of its workers and their families had fled.
- 2.91 In reality, the DRC got no benefit from Anvil's exploitation of the Dikulushi Mine, as appears in the analysis of the mining contract concluded between Anvil (Anvil Mining N.L.) and DRC in November 2007, exhibit **R-20**;
- 2.92 The DRC had no reason, therefore, to despatch its troops hurriedly to put down a minor rebellion which had claimed no victims, except in Anvil's interests;
- 2.93 The officials who went to Kilwa to encourage the displaced population to return likewise had no reason to do so, except in Anvil's interests;

#### ANVIL PROVIDED LOGISTICAL SUPPORT VOLUNTARILY AND IN ITS OWN INTERESTS

- 2.94 When questioned by Colonel Nzabi in October 2006 (exhibit R-14), Mercier stated the following:
- Also, I contacted José DEMOURA to ask him if the DUBIYE landing strip could be used for the evacuation.
- After feasibility studies by the aforementioned (DEMOURA) and the assurance given by the 6<sup>th</sup> Regional Military Commander on the good state of

the strip, José DEMOURA replied to me, saying that we could use a Hawker Siddley 748 (HS), which could not take off with more than 25 people maximum.

After a quick calculation, we estimated that three flights would be sufficient to evacuate everyone.

In the meantime, the governor of the province called me to make a request which was more like an order, to provide the FARDC with the logistical means to retake Kilwa.

Having asked him to provide me with a written request, he responded that the document would follow.

[Our emphasis]

- 2.95 Thus, in October 2006, two years after the events, Mercier stated that he received a request “which was more like an order”, and that he asked that this request be confirmed in writing;
- 2.96 Further on, Mercier states that the logistical support that Anvil had provided had been requisitioned by the authorities:

Q5. You were nonetheless aware that these vehicles with drivers had been at the disposal of the 62<sup>nd</sup> Brigade Infantry commanded by colonel ILUNGA Ademard [sic]?

R5. I have no idea, but I only know that there were vehicles that had been requisitioned. Whether that was with or without drivers, I don't know anything about it.

[Our emphasis]

- 2.97. Mercier reportedly finished by saying:

“Finally, I insist that the vehicles at the FARDC's disposal had been requisitioned by the Governor.”

[Our emphasis]

- 2.98 Governor Ngoy, who had gone to encourage the inhabitants of Kilwa to return to their homes in October 2004, confirmed in a letter dated 11 June 2005 that he had given “*firm instructions*” to Pierre Mercier “*to provide the personnel of the 6<sup>th</sup> Military Region with the logistical means to transport troops from Lubumbashi and Pweto towards Kilwa , but also for use within the village*”, as appears in a copy of a letter dated 11 June 2005, exhibit **R-21**;

- 2.99. It is, however, evident that the letter from the Governor, sent more than seven months after the events, constitutes an obliging attempt to justify Anvil's behaviour after the events.
- 2.100 Indeed, the Governor sent the letter (R-21) to Anvil five days after the *Four Corners* broadcast on 6 June 2005;
- 2.101 Yet when Turner was questioned by Sally Neighbour on this question, he never mentioned that Anvil had been subject to a requisition or that Anvil had had no choice but to provide support. Instead, he referred to a request for support ("*they requested assistance*") and said that:

A. They requested assistance from Anvil for transportation. We provided that transportation so they could get their soldiers down to Kilwa.

Q So what did you provide?

A We provided some vehicles, I'm not sure how many. We provided vehicles for soldiers to get down there, which is...

Q To bring them to Kilwa?

A To bring them to Kilwa.

Q How many vehicles?

A I got, I got no idea.

Q Two, five, 10?

A No idea.

Q You must have a bit of an idea, whether it was one or a dozen?

A What difference does it make how many vehicles, there were a group of soldiers and whatever number of vehicles that were necessary to move these guys, I guess we sent up there and they moved them down.

[Our emphasis]

The above appears in a copy of the transcript of the programme "*The Kilwa Incident*", exhibit R-19;

- 2.102. Thus, several months after the events, Turner did not know how many Anvil vehicles had been used, even stating that the number of vehicles was not important and that Anvil had provided what was necessary;
- 2.103 Such a declaration, and the ignorance of such an important fact as the number of vehicles is incompatible with the existence of a requisition which, if it had existed, should have specified the exact equipment – what kind and what number – in order to be valid and binding;
- 2.104 A valid requisition should, even more importantly, have mentioned specifically whether or not drivers were included;
- 2.105 If Anvil had acted in a reasonably cautious manner with the aim of avoiding being complicit in the crimes which were committed with its aid, it would have insisted that a properly laid-out requisition request be submitted before supplying any kind of logistical aid to FARDC;
- 2.106 If Anvil had acted in a reasonably cautious manner with the aim of avoiding being complicit in the crimes which were committed with its aid, it would above all have insisted on obtaining assurances as to the manner in which the requisitioned equipment and personnel were to be used;
- 2.107 Anvil did nothing of the sort, and its failure to do so constitutes a fault which directly caused the injury suffered by the members of the group;
- 2.108 In fact, the declarations made by Turner, and the circumstances, point to a collective endeavour, initiated by Anvil, to ensure the rapid resumption of activity at the Dikulushi Mine, rather than a coercive situation. Anvil was, after all, the principal beneficiary of the promptness of the government's reaction;
- 2.109 Turner also stated in his interview for *Four Corners* that there had been much communication between Anvil members and the military authorities before Anvil sent its trucks to Pweto:

There would have been quite a lot of communication going on as to what the situation was, the military wanting to find out from us what we knew of it and we were wanting to find out from them what sort of risk this posed for the mining operation and the people, particularly the people at the mining operation.

As appears in exhibit R-19;

- 2.110 In one part of the interview with Sally Neighbour that was not broadcast, Turner explains Anvil's position thus:

Can you imagine us sitting there expecting the protection of the Government. We've got all those vehicles there and these soldiers just making their 200 Kilometre trip down to Kilwa...could we just sit there and let those guys walk past the mine. I don't think so.

This extract is cited in the MONUC report, exhibit R-12;

- 2.111 Thus, Turner does not refer to any requisition or any other form of coercion. On the contrary, he explains that it would not be "correct" to let the soldiers march when Anvil, which was the principal beneficiary of their intervention, had vehicles available;
- 2.112 The day after the *Four Corners* programme was broadcast, Anvil tried to limit the damage by releasing a statement to the press in which it declared that it had had no choice but to comply with the request, made by the military of the legitimate government of DRC, which is already very different from what Turner had stated in his interview on *Four Corners*:

[...]

As a result of the rebel activity in October 2004, Anvil evacuated its non-essential personnel from the Dikulushi mine. The DRC military requested access to Anvil's air services and vehicles, to facilitate troop movements in response to the rebel activity. Anvil had no option but to agree to the request, made by the military of the lawful Government of DRC, as any other company would have done in similar circumstances.

Anvil had no knowledge of what was planned for the military operation, and was not involved in the military operation in any way. Anvil's sole concern was to safely evacuate non-essential personnel. The idea that Anvil somehow influenced the military action, or should be seen as complicit in the military action, is nonsense.

[Our emphasis]

The above appears in a copy of the press statement dated 7 June 2005, exhibit **R-22**;

- 2.113 On 21 June 2005, Anvil released another press statement in which it reiterated that it had had *absolutely* no choice but to provide the FARDC with the transportation they requested. Additionally, Anvil refers for the first time to a so-called prior incident, where vehicles were supposedly commandeered under threat of violence, to bolster the case that Anvil acted under duress:

Following the taking of the town of Kilwa by rebels on October 14, 2004, the Military of the DRC Government had commandeered Anvil vehicles, drivers and chartered aircraft to assist the Military in suppressing the rebel insurgency. Given Anvil's previous experience with rebel activity in the Kilwa area, during which Anvil's vehicles were, after initial resistance, commandeered at gunpoint, Anvil had absolutely no choice but to provide the transport required by the DRC Military and had no reason to suspect that this would involve anything other than the lawful enforcement of the laws of the DRC. Anvil had no knowledge of what was planned for the Military operations and was not involved in the Military operations in any way.

[Our emphasis]

As appears in a copy of the press statement, exhibit R-18;

- 2.114 Yet this new version diverges even more than that of 7 June 2005 from the account that Turner had given to *Four Corners*;
- 2.115 Let us remember that the situation in Kilwa on 14 October 2004 was calm, that there had been no bloodshed and that, aside from the interruption to Anvil's activities, the situation in itself presented no urgency, nor posed any imminent danger;
- 2.116 But on 15 October, Anvil had already publicly announced that it expected that the situation would be resolved within 72 hours and that the DRC Government had advised Anvil that it was acting quickly to return the situation to normal;
- 2.117 It is therefore obvious that in providing logistical support, Anvil acted in its own interests and not under any form of duress;
- 2.118 This is even more apparent in view of the Anvil's guilty and complicit silence following the events;

## COMPLICIT SILENCE

- 2.119 On 21 June 2005, while recognising that the events of October 2004 were terrible, Anvil claimed in a press statement that it had not been made aware of the seriousness of the events until much later:

Although at the time, Anvil had no knowledge of the occurrence of human rights abuses, we are now learning, it was a terrible event. The climate of fear and retribution that exists in this strife-torn part of the world means that it takes a considerable amount of time for any party to obtain all information that relates to such events as occurred at Kilwa.

[Our emphasis]

As appears in the press statement, exhibit R-18;

- 2.120 And yet, Anvil knew exactly what occurred at Kilwa as it was happening;
- 2.121 Indeed, when the troubles started, the “expats” working at the Dikulushi Mine were evacuated, with the exception of the security staff, Peter Van Niekerk (hereafter “**Van Niekerk**”) and Cedric Kirsten, and Les “Dog” Melrose. Melrose said the following when he was interviewed by *Four Corners*:

The expats on site were evacuated. There was only myself and two head of security managers that were left on site. Ah the people were evacuated six hours drive to a place called Dubie with an airstrip and we actually flew them to Lubumbashi for their own safety.

As appears in the transcript of the programme, exhibit R-19;

- 2.122 Mercier himself arrived in Kilwa on 16 October, as he swears in his declaration, exhibit R-14;
- 2.123 The Anvil-employed drivers who drove Anvil’s all-terrain vehicles on 15 and 16 October 2004 made daily reports of their activities to the Anvil’s security staff in Kilwa;
- 2.124 It is therefore obvious that the executive director and the security staff at Anvil, who were in place during the events, could not have been unaware that serious crimes had

been committed and continued to be committed with the logistical support of Anvil;

- 2.125 It is equally obvious that this information was, or should have been, communicated to Anvil;
- 2.126 In its press statement dated 21 June 2005 (exhibit R-18) Anvil states that they needed a long time to obtain all the information regarding the kind of situation that had developed at Kilwa;
- 2.127 This statement is manifestly false. The Anvil employees directly witnessed many of the crimes committed by the FARDC and they made daily reports to the Anvil security personnel who were in place;
- 2.128 Implausibly, Mercier declared in his questioning that he had no knowledge of what had happened with the vehicles:

Not being on site, I do not know what happened regarding the vehicles. Peter can provide you with more information.

As appears in exhibit R-14;

- 2.129 It is totally unbelievable that Van Niekerk, Les Melrose and Cedric Kirsten did not report to Mercier when he arrived in Kilwa on 16 October, given that tragic and dramatic events, which had a direct impact on Anvil's vital interests, were concerned.
- 2.130 This scenario is all the more incredible, as Anvil had announced to the public on 15 October 2004 that the company had kept the head of security and the mine manager on site to monitor the situation:

The Company has maintained security staff including the Group Security Manager and the Mining Manager on site in order to monitor the situation and coordinate the return of Company staff to site.

As appears in the press statement, exhibit R-16;

- 2.131 To claim that the senior employees present on site to monitor the situation in Kilwa did not see the roads strewn with bodies, the systematic pillage and other atrocities,

or that they did not hear about them beggars belief.

2.132 And yet, eye-witnesses saw Van Niekerk intervene directly with the FARDC on 16 October 2004 after one of Anvil's vehicles was involved in an accident which cost the lives of several soldiers;

2.133 This intervention was not intended to restrain the FARDC, but rather to protect Anvil's equipment, as Van Niekerk insisted to the FARDC that Anvil vehicles would only be driven by Anvil drivers from then on;

2.134 It is therefore obvious that Mercier was lying when he claimed not to have any knowledge of what happened with the vehicles;

2.135 In the same manner, Turner clearly lied when he declared to *Four Corners* that he was not aware that vehicles belonging to his company had been used to transport detainees to the place where they were to be executed:

Q Eye witnesses have told us that Anvil vehicles were used to transport people who were arrested to the places where they were executed.

A I have no knowledge of that.

Q You have no knowledge of that?

A No knowledge.

Q You just put up your hands and say I have no knowledge?

A I have no knowledge of that.

Q Well there are numerous eyewitness accounts of this happening?

A I have no knowledge of that.

Q Do you deny it happened?

A I have no knowledge of it and as far as I'm concerned it never happened.

[Our emphasis]

2.136 If Anvil had acted in a reasonably cautious manner, it would have immediately ceased all form of collaboration with the FARDC by withdrawing all form of logistical support. Furthermore, it would have listed all crimes committed and would have denounced them;

2.137 Instead, Anvil hushed up what it should have denounced, thereby becoming complicit in the crimes committed;

2.138 Indeed, on 18 October 2004, when it knew that serious human rights violations had been committed in Kilwa, Anvil

released a press statement in which it announced that on 16 October the situation had returned to “normal”:

PERTH, Western Australia, Oct. 18 /CNW/ - Anvil Mining Limited (TSX, ASX: AVM) advises that the situation in the village of Kilwa, Democratic Republic of Congo (DRC), located 54 kilometres south of the Company's Dikulushi Mine was returned to normal on Saturday October 16, 2004. Furthermore, the conflict reported in the Company's News Release of October 15, 2004 did not move beyond Kilwa. Anvil began remobilizing personnel back to the mine yesterday (October 17) via the airstrip at Kilwa and anticipates that operations will resume by tomorrow (October 19).

[Our emphasis]

As appears in a copy of the press statement, exhibit R-6;

- 2.139 In the same statement, far from distancing itself from the FARDC report, Anvil announces that it is in consultation with the authorities to secure greater protection from the government in the future:

The Company is in consultation with the Government of the DRC to provide additional security for the mine so that, should such incidents occur again, the Company would be able to continue operations. Anvil Mining Limited is an unhedged copper and silver producer whose shares are listed for trading on the Toronto Stock Exchange and the Australian Stock Exchange under the symbol AVM. It owns and operates the Dikulushi copper-silver mine in the Katanga Province of the DRC, which it brought into production in October 2002. [...]

[Our emphasis]

- 2.140 On 21 October 2004, Anvil repeats in another press statement that the situation in Kilwa has returned to normal, without the slightest mention of the crimes which have been committed there:

The Company also wishes to advise that following its News Release of October 18, 2004, concerning the normalization of the situation in Kilwa, a village located 54 kilometres south of the mine, operations at the Dikulushi Mine have now returned to normal. The recently installed ball mill and flotation plant resumed operations early on October 19 and mining operations resumed the previous day. Loading of the concentrate trucks also resumed on October 19, and export of concentrates via the Company's barge across Lake Moero to Zambia resumed on October 20.

[Our emphasis]

As appear sin a copy of the press statement dated 21 October 2004, exhibit **R-23**;

- 2.141 In its quarterly report to investors for the October-December quarter, 2004, Anvil goes even further and congratulates the government and the FARDC for the swiftness of their intervention in supporting the prompt resumption of operations:

**Kilwa Event**

During October 2004, production was suspended for a period of five days owing to the precautionary evacuation of staff to Lubumbashi, following an incursion of a small number of rebels into the Kilwa area. The evacuation and corresponding return to work was carried out efficiently and without incident. The government and military response on both provincial and national levels was rapid and supportive of the prompt resumption of operations. Security consultants have been engaged to review current security risk mitigation measures, to ensure that the likelihood of similar business interruptions occurring in the future is minimised.

[Our emphasis]

As appears in the copy of the quarterly report dated 28 January 2005, exhibit **R-24**;

- 2.142 When the MONUC investigators asked Anvil to explain the contradiction between its report to its investors, dated 28 January 2005 (exhibit R-24), and the facts of the Kilwa incident, Anvil provided the following explanation, as appears in the MONUC report, exhibit R-12:

Anvil Mining has explained the apparent contradiction between their report of December 2004 and the events in Kilwa – including the presumed requisition of its vehicles and of its employees- by saying, in its letter of 20 June 2005 to MONUC that the report was “a dry response to compulsory reporting requirements of the financial markets”. It was produced prior to them having an appreciation of the seriousness of these events and in no way reflects the deep sadness they feel following the deaths that occurred.

- 2.143 However, this response is not to be believed at all. Instead, it is the report dated 28 January 2005 (exhibit R-24) which describes the truth: Anvil wanted to retake Kilwa as quick as possible in order to re-establish normal operations. The future of the company was at stake and Anvil requested the government's assistance;
- 2.144 The government helped Anvil, and this latter appreciated the assistance which allowed it to save the company. The fact that this assistance was accompanied by a series of serious crimes does not seem to have disturbed Anvil at the time and it would undoubtedly have kept silent forever if the story had not become public;
- 2.145 Such behaviour is a shocking example of what is possible when a multinational company operates in a country where the rule of law is non-existent or so weak that the multinational believes it can act with impunity;

#### ANVIL EXERCISED DIRECT CONTROL OVER THE OPERATIONS AT THE DIKULUSHI MINE

- 2.146 Throughout the period of time which is relevant to the present case, Anvil exercised direct control over the operations at the Dikulushi Mine and declared so officially to its shareholders;
- 2.147 Throughout the period of time which is relevant to the present case, the only Anvil activities are those described in its declaration in the Quebec Business Registry, exhibit R-3:

#### THE ACQUISITION, EXPLORATION, DEVELOPMENT AND MINING OF MINERAL PROPERTIES

- 2.148 Throughout the period of time which is relevant to the present case, Anvil's finances were consolidated, as notably appears in the consolidated financial statements for the year terminating 31 December 2005, exhibit **R-25**;
- 2.149 In an amendment dated 27 May 2004 to its prospectus dated 15 April (exhibit R-2), Anvil informed its shareholders that the mining operations were exercised under Anvil's supervision:

The Dikulushi Mine is currently an open pit mining operation, which is contemplated to continue until mid-2008 and after which it is expected to become an underground mining operation. The current mining operations are carried out under the supervision of the Corporation;

[Our emphasis]

As appears in a copy of amendment no. 1 dated 27 May, exhibit **R-26**;

- 2.150 In an amendment to the Prospectus dated 27 May, exhibit R-6, “The Corporation” is defined as being Anvil;
- 2.151 It was Turner himself who signed the mining contract with the DRC, as appears in exhibit R-20;
- 2.152 Anvil’s control over the operations at the Dikulushi Mine and over the events of October 2004 is made obvious by the constant intervention of Turner, who was, throughout the period of time relevant to the present case, not only the president of Anvil, but also the president of Anvil Congo;
- 2.153 Thus the Anvil employees in the DRC would receive their instructions directly from Turner, as in the case of Mercier, or indirectly from Turner with Mercier acting as intermediary;
- 2.154 The faults described in the present suit were therefore committed with the knowledge of, and under the direction of Anvil;

THE LAW THAT APPLIES IN THE PRESENT CASE IS CONGOLESE LAW

- 2.155 By virtue of article 3126 C.c.Q. the obligation to provide restitution for the harm caused to the members of the group is governed by the law of the DRC, where the acts that caused the harm were committed;

ANVIL’S BEHAVIOUR VIOLATES SEVERAL STANDARDS OF CONDUCT APPLICABLE IN THIS PARTICULAR CASE

- 2.156 The DRC is a country with civil law. The principal clauses of its private law have their origin in the *Code Napoléon* of 1804, by means of Belgian civil law;
- 2.157 The articles pertaining to civil responsibility read as follows:

***Decree of 30 July 1888 – Conventional Obligations***

**CHAPTER II OFFENCES AND MINOR OFFENCES**

Art. 258. – Any act which causes harm to another obliges the author of the harm to repair the damage caused.

Art. 259. – Everyone is responsible for the harm they have caused, not only through their own actions, but by negligence or imprudence.

Art. 260. – A person is responsible not only for the harm caused through his/her own actions, but for the harm caused by those for whom the person must answer, or the things for which the person is responsible;

The father, and the mother after the death of the father, is responsible for all harm caused by the children that live with them.

Masters and employers are responsible for any harm caused by their servants and officials in the course of the work they have been employed to do.

Teachers and craftsmen are responsible for the harm caused by their pupils and apprentices during the time in which they are under their supervision.

The responsibilities mentioned above are effective unless the father and mother, teachers and craftsmen can prove that they could not have prevented the actions which have led to this responsibility being invoked.

As appears in a copy of the relevant extracts from the Decree of 30 July 1888, exhibit **R-27**;

- 2.158 The code of conduct applicable here is similar, indeed identical, to the code decreed by Quebec civil law;
- 2.159 It is evident and incontestable that Anvil's behaviour as described in the present case is at fault in the eyes of Congolese civil law;
- 2.160 It is equally evident and incontestable that Anvil's misdemeanours contributed to the harm suffered by the members of the group;
- 2.161 In fact, it is clear that the members of the group would not have suffered the harm that they did had it not been for Anvil's misdemeanours;
- 2.162 Furthermore, the DRC constitution makes all properly-approved international treaties or agreements applicable in the domestic law of the DRC:

Article 215:

All properly approved international treaties and agreements have, from the moment they are published, an authority superior to any laws, subject to the application by the other party of each treaty or agreement.

A copy of the constitution of the DRC is provided as exhibit **R-28**;

- 2.163 The DRC ratified the Rome Statute of the International Criminal Court in 2002 (hereafter the "**Rome Statute**"). The Rome statute is provided as exhibit **R-29**;
- 2.164 The Rome statute specifies in article 7 what constitutes a crime against humanity:

ARTICLE 7  
CRIMES AGAINST HUMANITY

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

- (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- [...]

2.165 It is evident that the atrocities committed by the FARDC against the population of Kilwa with the assistance and knowledge of Anvil constitute crimes against humanity, and that in making itself complicit in these crimes, Anvil assumes responsibility under Congolese law;

2.166 The Rome statute specifies in article 7 what constitutes a war crime. Article 8 reads, in part, as follows:

Article 8  
WAR CRIMES

[...]

2. For the purpose of this Statute, "war crimes" means:

[...]

- (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

[...]

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

[...]

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

[...]

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

- 2.167 It is evident that the atrocities committed by the FARDC against the population of Kilwa with Anvil's assistance constitute war crimes, and that in making itself complicit with these crimes, Anvil assumes responsibility under Congolese law;
- 2.168 Additionally, Anvil violated the Voluntary Principles on Security and Human Rights which were developed in 2000 following a collaboration between the United States, the United Kingdom, companies in the extractive industry and energy companies, and certain NGOs (hereafter the "**Voluntary Principles**"), as appears in a copy of the Voluntary Principles, exhibit **R-30**;
- 2.169 The Voluntary Principles were the result of an effort by stakeholders in the extractive industry to describe the codes of acceptable conduct in precise situations;
- 2.170 The Voluntary Principles are particularly relevant in this case, as, in September 2004, just before the events in Kilwa, Anvil declared to the Multilateral Investment Guarantee Agency (hereafter "**MIGA**"), an agency of the World Bank, that there was nothing in its operation of the Dikulushi Mine that contravened the Voluntary Principles:

MIGA asked Anvil to provide a representation as to whether Anvil considered itself to be compliant with the Voluntary Principles. In its response, Anvil confirmed that there were no statements in the Voluntary Principles "that are at odds with Anvil's modus operandi." It indicated that it would be pleased to be listed as a supporter of the principles, subject to the consent of the Anvil Board. Anvil also indicated that it was unfamiliar with certain documents referred to in the Voluntary Principles but would not expect the principles embodied in these referenced documents to be at odds with Anvil's approach. MIGA accepted the representation but did not include any specific provisions concerning the Voluntary Principles within the Conditions of Contract.

[Our emphasis]

As appears in the report produced by the Compliance Advisor Ombudsman in November 2005, exhibit **R-31**;

- 2.171 The Voluntary Principles specifically have in mind cases where there is a transfer of equipment between a company and an organ of state. The code of conduct in such a case reads as follows:

*Equipment transfers.* Where Companies provide equipment (including lethal and non-lethal equipment)

to public or private security, they should consider the risk of such transfers, any relevant export licensing requirement, and the feasibility of measures to mitigate foreseeable negative consequences, including adequate controls to prevent misappropriation or diversion of equipment which may lead to human rights abuses. In making risk assessments, companies should consider any relevant past incidents involving previous equipment transfers.

- 2.172 And yet Anvil did not evaluate the risks, however obvious, of providing logistical support to a military force known for its brutality;
- 2.173 Anvil did nothing to mitigate the negative consequences that were, however, very foreseeable;
- 2.174 Anvil did nothing to prevent its equipment from being used to commit crimes, behaviour which is all the more at fault as Anvil maintained control over the equipment through its security agents and drivers;
- 2.175 When a company learns of human rights violations, the Voluntary Principles set out the following codes of conduct:

Companies should record and report any credible allegations of human rights abuses by public security in their areas of operation to appropriate host government authorities. Where appropriate, Companies should urge investigation and that action be taken to prevent any recurrence.

Companies should actively monitor the status of investigations and press for their proper resolution.

Companies should, to the extent reasonable, monitor the use of equipment provided by the Company and to investigate properly situations in which such equipment is used in an inappropriate manner.

Every effort should be made to ensure that information used as the basis for allegations of human rights abuses is credible and based on reliable evidence. The security and safety of sources should be protected. Additional or more accurate information that may alter previous allegation

should be made available as appropriate to concerned parties.

- 2.176 Anvil did not record and report the serious violations of the rights of the victims, claiming falsely not to have any knowledge of them;
- 2.177 Anvil perhaps conducted an internal investigation into the events at Kilwa, but it refused to make it known to MONUC, as appears in the MONUC report, exhibit R-12;
- 2.178 Anvil can with greater difficulty claim that these codes of conduct did not apply to it, as the company subsequently contributed financially to the publication of a document outlining the implementation of the Voluntary Principles, as appears in the following extract from the document entitled “Voluntary Principles on Security and Human Rights – An Implementation Toolkit for Major Project Sites”, exhibit **R-32**:

A security consultant who has directed the collaboration between MIGA and Anvil Mining is the principal author of this report, with contributions from MIGA and Anvil.;

- 2.179 In view of the above, it is obvious that by its complicity in the serious crimes committed by the FARDC, Anvil committed several misdemeanours which directly caused the harm suffered by these members and which invoke, by this very fact, Anvil’s responsibility;

#### THE RIGHTS OF THE MEMBERS OF THE GROUP ARE NOT TIME-BARRED

- 2.180 Article 3131 C.c.Q. anticipates that the statute of limitations is governed by the law applicable to the merits of the dispute; that is, Congolese law;
- 2.181 Article 647 of the Congolese Civil Code decrees that the statute of limitations applicable in this case is thirty years:

**Art. 647.** – All lawsuits, real as well as personal, are limited by a period of thirty years, without the party that invokes this statute of limitations being obliged to relate it to another title or of being challenged on the basis of bad faith

- 2.182 Consequently, the rights of the members have not expired;

THE QUEBEC SUPERIOR COURT IS ABLE TO HEAR THE PRESENT SUIT

2.183 Article 3148 of the C.c.Q. confers jurisdiction to Quebec courts to take charge of a dispute in the following cases:

3148. In personal actions of a patrimonial nature, a Québec authority has jurisdiction where:

[...]

2. The defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec;

[...]

2.184 In this case, Anvil has a base in Quebec and the dispute relates to its activity in Quebec;

2.185 Anvil has a base in Montreal, which is its principal base in Canada, as appears in the statement of information to the Business Registry, exhibit R-3;

2.186 Since its incorporation and during the period of time relevant to the present case, Anvil's only activity was the exploitation of mineral resources in the DRC;

2.187 This activity was financed in large part by public offerings in Canada. Anvil affirms that it raised over 400 million dollars in the Canadian capital markets up to 2009, as appears in the following extract from an Anvil document entitled *The DRC: Working in an Emerging Democracy*, exhibit **R-33**:

From 2005 to 2009, Congo projects raised over \$3 billion on Canadian and UK Stock Exchanges. Anvil alone has raised more than \$400 million during this period. The trend is likely to accelerate as more companies establish successful operations

2.188 As mentioned, one of the principal motives that Anvil cited to explain the relocation of its corporation headquarters to Canada in 2004 and its entry into the TSX was the importance of having access to the Canadian capital markets;

2.189 Anvil's base in Montreal is notably responsible for the management of the Dikulushi Mine, as appears in the annual report of 2005, exhibit R-9:

General, administrative and marketing costs which relate to the corporate activity of the Perth and Toronto/ Montreal corporate offices was \$4,3 millions. The increase in costs [...] was due to the higher number of corporate personnel of 15 employed to support the expanded management, corporate governance, financial control and administrative support infrastructure required to manage, administer and account for the expanding business in the DRC (Dikulushi mine).

- 2.190 In fact, Anvil's vice president of corporate affairs, Robert La Vallière, is based in Montreal, as appears notably in a press statement released by the Montreal office on 27 January 2010, exhibit **R-34**;
- 2.191 Mr La Vallière was previously vice president of investor relations;
- 2.192 Furthermore, in Anvil's annual reports of 2005, exhibit R-9, and 2008, exhibit **R-35**, we can read that "*The Group's Australia and Canada segment carry all corporate activity costs*";
- 2.193 In its "Code of Business Conduct", dated September 2007, Anvil affirms that it is bound by the laws of the countries in which it is based—that is, Australia and Canada—and the countries in which it operates:

Anvil's operations are subject to a detailed legislative framework. This framework includes the laws of the countries in which it is based, including Australia and Canada, the local laws of the countries in which it operates, as well as international standards of corporate social and environmental responsibility.

As appears in a copy of the Code of Business Conduct, exhibit **R-36**;

- 2.194 Anvil Mining therefore conducts from Quebec the activities of managing and financing its mines in the DRC;
- 2.195 For example, the statement announcing the private capital obtained by Anvil in November 2004 (exhibit R-11) came from Anvil's Canadian office, then located in Toronto but now in Montreal;
- 2.196 Similarly, when Anvil obtained assurance from MIGA pertaining to its exploitation of the Dikulushi Mine in May 2005,

it was Anvil's Canadian office which announced the fact, as appears in an Anvil press statement dated 4 May 2005, exhibit **R-37**;

- 2.197 MIGA identified "*Anvil Mining Limited of Canada*" as being the beneficiary of this assurance, as appears in an extract from MIGA's website, exhibit **R-38**;
- 2.198 It is evident that seeking finance is vital to the activities at the Dikulushi Mine;
- 2.199 It is equally evident that the fact that Anvil was seeking finances in Autumn 2004 pushed Anvil into acting hastily to re-establish normal operations at the Dikulushi Mine;

#### QUEBEC IS THE MOST APPROPRIATE FORUM FOR HEARING THE PRESENT CLASS ACTION

- 2.200 The Superior Court is the most appropriate forum for deciding the present dispute;
- 2.201 It is obvious that neither of the two alternative forums which could be envisaged, either Australia or the DRC, is more appropriate than Quebec;
- 2.202 One the one hand, the DRC offers no possibility of granting justice to the victims;
- 2.203 Aside from the fact that the justice system provides no guarantees of a fair and equitable trial, a trial was held before the Katanga Military Court, in the course of which some of the victims of the group instituted a civil action;
- 2.204 And yet, in a decision which constitutes a flagrant denial of justice, as will be discussed further, the Katanga Military Court declared the civil actions to be unfounded and rejected them, as appears in a copy of the decision, exhibit **R-39**. It would therefore be a complete illusion to claim that the DRC could be a more appropriate forum than Quebec for these victims, because they have no available recourse in the DRC;
- 2.205 As for Australia, 61 members of the group were briefly represented by the Australian law firm Slater & Gordon, which petitioned the Superior Court of Western Australia to obtain disclosure of proof prior to a lawsuit against Anvil's Australian entity Anvil Mining SL, as well as Anvil itself;

- 2.206 After the respondent had questioned the validity of the lawyers' instructions, the DRC government interfered with efforts to confirm these instructions by refusing to allow the victims to travel from Kilwa to Lubumbashi;
- 2.207 Following this, the victims' Congolese lawyers were subjected to death threats and the law firm Slater & Gordon stepped down from the proceedings;
- 2.208 Despite efforts by RAID and The Human Rights Law Resource Center in Melbourne, the victims were unable to find other lawyers who were prepared to take on the case;
- 2.209 And yet it is essential that the victims be able to rely on prosecutors who are ready to act and able to face the very important demands of a class action such as this.
- 2.210 Thus there is no possibility for the group of pursuing a class action in Australia.
- 2.211 Furthermore, several other factors are in Quebec's favour as a forum;
- 2.212 As mentioned, the official language of the DRC is French. For this reason, several witnesses speak French and several relevant documents are written in French;
- 2.213 The law which applies in this case is civil law;
- 2.214 Holding a trial in Quebec will allow the victims to have access to Anvil's internal documents;
- 2.215 A trial held in Quebec will capable of being heard in Quebec;
- 2.216 Mercier, the executive director of the Dikulushi Mine in 2004, is a Québécois from Thetford Mines;
- 2.217 Anvil raises the majority of its finances in Canada, from its offices in Montreal. Indeed, only 5% of Anvil shares are held by Australians, while 50% are held by North Americans, as appears in a document entitled "Shareholder information" dated 13 August 2010, exhibit **R-40**;
- 2.218 Given that the finances used to fund the exploitation of the Dikulushi Mine come in large part from Canada, and given that the profits generated by this exploitation come in large part to Canada, it is

only right that a suit with the aim of forcing Anvil to answer for the real costs of this exploitation be held in Canada;

- 2.219 Given that a multinational company operates in territories where the justice system does not guarantee reasonable access to justice for the victims, it is only right that the justice system of the country where the multinational is incorporated and where it raises its finances provide such access to the victims;
- 2.220 The petitioner respectfully submits that if the suit is not heard in Quebec it will not realistically be heard elsewhere. The Superior Court is without doubt the only and last chance for the victims to have access to justice;

THE MILITARY TRIAL WHICH TOOK PLACE IN THE DRC CONSTITUTES A DENIAL OF JUSTICE THE LEGITIMACY OF WHICH SHOULD NOT BE RECOGNIZED IN QUEBEC

- 2.221 Anvil Congo and three Anvil employees—Mercier, Peter Van Niekerk and Cedric Kirsten—were indicted and committed for trial, along with Adémar and several of his subordinates, for having knowingly “helped or assisted in the actions which had been prepared or facilitated or those which had been perpetrated, [by] those who committed war crimes [...]”, as appears in the referral decision dated 12 October 2006, exhibit **R-41**;
- 2.222 This promising charge, in the context of a fight against impunity, was the result of intense international pressure;
- 2.223 Unfortunately, the trial soon became a parody of justice, leading to the acquittal of all the parties accused of taking part in the events at Kilwa;
- 2.224 Numerous violations of the rules of natural justice led to this result. These violations are recorded in part in the document entitled “The Kilwa Trial: A Denial of Justice” prepared by Global Witness, ACIDH, RAID and ASADHO/Katanga, exhibit **R-42**;
- 2.225 For example, the military prosecutor, who signed the indictment and who had conducted the interviews with the accused and several witnesses, was recalled to Kinshasa for a month and was put under

intense pressure from the office of President Kabila to drop the proceedings, as notably appears in a report by MONUC's Human Rights division dated 8 February 2007, exhibit **R-43**;

- 2.226 Before the beginning of the trial, a lawyer acting as a consultant with *Avocats Sans Frontieres* [a non-governmental organisation], and who had until that point assisted the victims' lawyers, joined the team of lawyers working for Anvil;
- 2.227 In February 2007, during the trial, Colonel Nzabi, the military prosecutor who had led the case with courage and determination from the start, had conducted the investigation and examination [of witnesses] and had resisted intense political pressure, was transferred to another jurisdiction and replaced by an official with little knowledge of the case;
- 2.228 In May 2007, the tribunal moved to Kilwa to hold circuit court hearings, but the victims' lawyers were not able to go there;
- 2.229 Moreover, the sitting judge refused to call several witnesses that the victims' lawyer had requested to summons, including the former provincial governor, Kisula Ngoy, a key witness on the subject of the so-called requisitioning of Anvil equipment and personnel, as notably appears in a letter dated 16 December 2006 from Maitre Georges Kapiamba, exhibit **R-44**;
- 2.230 It is clear that the FARDC suffered no losses in recapturing Kilwa. Conversely, dozens of witnesses came forward to say that they lost members of their families, civilian non-combatants, but this did not prevent the military tribunal from concluding that the victims were killed in combat;
- 2.231 The High Commissioner of Human Rights made the following comments on the Military Court's verdict:

"I am concerned at the court's conclusions that the events in Kilwa were the accidental results of fighting, despite the presence at the trial of substantial eye-witness testimony and material evidence pointing to the commission of serious and deliberate human rights violations".

As appears in a copy of a press statement dated 24 July 2007, exhibit **R-45**;

- 2.232 The High Commissioner had additionally condemned the decision to judge civilians by means of a military tribunal, as also appears in exhibit R-45;
- 2.233 The cessation of proceedings on 28 June 2007 was the object of an appeal which was accompanied by a large number of violations of the rules of natural justice, as notably appears in the document “*L’appel de Kilwa – un simulacre de justice*” dated 5 May 2008, exhibit **R-46**;
- 2.234 The Mapping Report cites the Kilwa Trial to illustrate the dysfunctional nature of military justice in the DRC:

47. It is undeniable that some Judges of the Congolese military justice system, inspired by the DRC’s ratification of the Rome Statute of the ICC in 2002 and supported by the international community, rendered a small number of courageous decisions in relation to crimes under international law. Although they braved physical and psychological barriers as well as apparent political pressure to do so, all the cases studied nonetheless illustrate the significant operational limitations of the military justice system. Botched and dubious investigations, poorly drafted or inadequately substantiated court documents, irrational decisions, violations of due process and various instances of interference by the civilian and military authorities in the judicial process, are apparent defects that characterised some of these cases, particularly those pertaining to Ankoro, Kahwa Mandro, Kilwa and Katamisi.

[Unofficial translation; Notes omitted; Our emphasis]

- 2.235 The Mapping report also mentions Anvil’s involvement and the difficulty of demonstrating the responsibility of a private company:

778. The Kilwa case demonstrated the difficulty in proving the legal responsibility of private companies in the perpetration of human rights abuses and violations of international humanitarian law, even when they are supplying arms or logistical support to armed groups. This case also showed that political interference and a lack of impartiality are all the more striking when economic interests are at stake. In this incident in 2004, at least 73 people were killed apparently by the Congolese army (FARDC) in Kilwa, a town in Katanga that had fallen into the hands of a rebel group. An Australian-Canadian mining company was accused of supplying the army with logistics and transport during its military operation. In 2007, in the first case of its kind,

nine Congolese soldiers and three expatriate employees of the mining company were charged with war crimes and complicity in war crimes, respectively, in connection with these events. The case could have set an important precedent in terms of corporate accountability. Instead, all the defendants were acquitted of the charges relating to the events in Kilwa, in a trial by a military court that failed to meet international standards of fairness.

[Unofficial translation; Notes omitted]

- 2.236 The Mapping Report concludes that the Kilwa military trial illustrates lack of impartiality and independence on the part of the military justice system in the DRC:

869. The judicial decisions made during the Kilwa case are an illustration of the lack of impartiality and independence within the military justice system. The Court has clearly demonstrated its bias in favour of the accused, exonerating Colonel Adémar of most of the murder charges made by the military prosecutor, either against him personally or against him as the commander of the perpetrators of these murders. No reference was made in the judgement to international law as it pertains to war crimes. Throughout this case, political interference, a lack of co-operation on the part of the military authorities and many irregularities were observed.

[Unofficial translation; Notes omitted]

- 2.237 This did not prevent Anvil from publicly celebrating the verdict, as appears in an Anvil press statement dated 28 June 2007, exhibit **R-47**;
- 2.238 In light of the above, it is evident that the cessation of the Katanga Military Court proceedings on 28 June 2007, exhibit R-39, should not be recognized in Quebec and should not constitute any obstacle to the proceeding of the present class action;

### **3. The Petitioner is in a position to assure adequate representation for the members**

- 3.1 The Petitioner does not seek financial gain, and its founding members are themselves organizations devoted to the defence of human rights;

- 3.2 Its administrators and the organizations which it represents have vast experiences defending the rights of victims of crimes against humanity;
- 3.3 ACIDH, ASADHO, Global Witness and RAID have supported and continue to support on the ground the members of the group and the witnesses in the DRC and have the means of communicating with them;
- 3.4 These organizations have additionally assisted the ACCI lawyers by collecting information in the DRC;
- 3.5 ACCI is in a position to respond to the logistical challenges of a case with international scope;
- 3.6 ACCI is additionally represented by lawyers who have a great deal of experience with class actions;

**4. The composition of the group makes it difficult or impractical to apply articles 59 and 67 of the Code of Civil Procedure in that:**

- 4.1 The faults of the Respondent have caused harm to thousands of people;
- 4.2 It is impossible for the Petitioner to contact all the members and harder still to obtain instructions from all the members

**5. The questions of fact and identical, similar or related points of law linking the each member to the Respondent and which the Petitioner seeks to have decided by this class action, are:**

- 5.1 Did the FARDC violate the rights of the members of the group during their intervention in Kilwa and its surroundings in October 2004?
- 5.2 If yes, did the Respondent commit a fault in making itself complicit in these violations or assisting them?
- 5.3 If yes, did these faults cause harm to the members of the group?
- 5.4 If yes, what reparations are appropriate in the circumstances?

**6. The questions relating to the facts and points of law which are particular to each member are as follows:**

- 6.1 Other than the collective harm to the members of the group, if applicable, did the members suffer additional harm?
- 6.2 What is the nature and extent of this additional harm?

**7. It is appropriate to authorize the hearing of a class action for the members of the group as:**

- 7.1 Proceeding with a class action is the only way by which all the members of the group, victims of faults attributed to the Respondent, will have access to justice;

**8. The nature of the appeal which the Petitioner seeks to exercise on behalf of the members of the group:**

- 8.1 A claim for damages;

**9. The results that the Petitioner seeks are the following:**

**TO WELCOME** the class action by the Petitioner on behalf of the following group:

All the people who lost a member of their family, who were victims of abuse, of the pillage of their goods, or who had to flee the town of Kilwa in October 2004 following the illegal acts committed by the Armed Forces of the Democratic Republic of Congo;

**TO SENTENCE** the Respondent to pay the members of the group the total reparations sought;

**TO ORDER** the collection of reparations due to the members of the group, inasmuch as the evidence allows the court to establish the sum total of the reparations due;

**TO ORDER**, if applicable, all reparations judged appropriate in the circumstances;

**TO ORDER**, if applicable, the liquidation of the members' claims or the distribution of compensation to each member from the total sum recovered, or, **ALTERNATIVELY**:

**TO ORDER** that the members' claims be treated as individual claims;

**TO SUMMON** the parties in order to determine measures likely to simplify the passage of judgement and to decide on the questions still waiting to be determined, along with the documents and affidavits needed to support the claims;

**TO ORDER** the publication of appropriate opinions;

**TO NAME** any and all persons possessing the relevant qualifications to administrate claims and distribution of compensation;

**THE ABOVE**, with expenses, includes the costs for expert witnesses, the costs of opinions and the costs related to the administration of claims and the distribution of compensation;

**10. The Petitioner proposes that a class action be heard by the Superior Court of the district of Montreal;**

**ON THESE GROUNDS, IF IT PLEASE THE COURT:**

**TO WELCOME** the Petitioner's request;

**TO AUTHORIZE** the class action hereafter;

- Claim for damages;

**TO GRANT** the Petitioner the status of representative for the purpose of exercising the aforementioned class action on behalf of the group of persons described hereafter:

All the people who lost a member of their family, who were victims of abuse, of the pillage of their goods, or who had to flee the town of Kilwa in October 2004 following the illegal acts committed by the Armed Forces of the Democratic Republic of Congo;

**TO IDENTIFY** the following as the principal questions relating to facts and points of law, to be considered collectively:

Did the FARDC violate the rights of the members of the group during their intervention in Kilwa and its surroundings in October 2004?

If yes, did the Respondent commit a fault in making itself complicit in these violations or assisting them?

If yes, did these faults cause harm to the members of the group?

If yes, what reparations are appropriate in the circumstances?

**TO IDENTIFY** the following as the relief being sought, here re-stated:

**TO ACCEPT** the class action by the Petitioner on behalf of the following group:

All the people who lost a member of their family, who were victims of abuse, of the pillage of their goods, or who had to flee the town of Kilwa in October 2004 following the illegal acts committed by the Armed Forces of the Democratic Republic of Congo;

**TO ORDER** the Respondent to pay the members of the group the total reparations sought;

**TO ORDER** the collection of reparations due to the members of the group, inasmuch as the evidence allows the court to establish the sum total of the reparations due;

**TO ORDER**, if applicable, all reparations judged appropriate in the circumstances;

**TO ORDER**, if applicable, the liquidation of the members' claims or the distribution of compensation to each member from the total sum recovered, or, **ALTERNATIVELY**:

**TO ORDER** that the members' claims be treated as individual claims;

**TO SUMMON** the parties in order to determine measures likely to simplify the enforcement of the decision and to decide on the questions still waiting to be determined, such as documents and affidavits needed to support the claims;

**TO ORDER** the publication of appropriate legal opinions;

**TO NAME** any and all persons possessing the relevant qualifications to administer claims and distribute compensation;

**THE ABOVE**, with expenses, includes the costs of expert witnesses, the costs of legal opinions and the costs related to the administration of claims and the distribution of compensation;

**TO DECLARE** that, unless excluded, the members of the group will be bound by any judgment to take part in the class action in the manner set out by the law;

**TO SET** the date of exclusion of members to sixty days after the date of the notice to members, at the end of which period the members of the group who had not availed themselves of the means of exclusion will be bound by any judgement that may arise.

**TO ORDER** the publication of a notice to the members of the group according to the terms to be determined by the court;

**TO REFER** the case to the Chief Justice to determine which district the class action should be heard and to designate a judge to hear the application.

**THE ABOVE** with expenses including the costs of legal opinion.

MONTREAL, 8 November 2010

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**TRUDEL & JOHNSTON**

Lawyers for the Petitioner