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Court decision in Kilwa Massacre case denies right to remedy for victims of corporate human rights abuses

Amnesty International is deeply disappointed to learn about the recent decision made by the Canadian Quebec Court of Appeal to refuse jurisdiction to hear a class action brought on behalf of Congolese citizens against the Canadian company, Anvil Mining Limited ("Anvil Mining"), for serious human rights abuses committed in Kilwa in 2004, otherwise known as "the Kilwa Massacre."

On 25 January 2012, the Quebec Court of Appeal reversed the decision of the Superior Court judge Honorable Benoît Emery determining that sufficient links to Quebec existed for establishing Quebec's jurisdiction and thus allowing the case to proceed so that the substance of the allegations could be heard.[1]

In his decision, Judge Emery stated:

(translation) "In fact, at this stage of the proceedings, everything indicates that if the Tribunal dismissed the action on the basis of article 3135 C.C.Q. [*which allows the court to decline jurisdiction if another forum is more appropriate*], there would exist no other possibility for the victims to be heard by civil justice."

The lower court decision had raised the hopes of the survivors of the Kilwa Massacre that their story would be heard and justice might finally be done. However, the decision by the Quebec Court of Appeal crushed these hopes and represents a major set-back in their struggle to obtain justice and adequate reparation. The application for the class action in Quebec by the Canadian Association against Impunity (CAAI) alleges that Anvil Mining contributed to serious human rights abuses committed by the Congolese military, including the massacre of more than 70 people in the Democratic Republic of Congo (DRC) in 2004, and seeks compensation from the company.

CAAI alleges that in October 2004 Anvil Mining provided trucks, drivers, and other logistical support to the Congolese military to help them counter an attempt by a small group of rebels to take over the town of Kilwa, a key port for Anvil Mining's operations. In the course of this operation, serious human rights violations were perpetrated against the civilian population by the military. Anvil Mining's vehicles allegedly transported Congolese soldiers, as well as civilians who were taken outside the town and executed by the military. The group also alleges that Anvil Mining allowed soldiers to use planes leased by the company to reach Kilwa from Lubumbashi, the capital of Katanga province.[2]

"Anvil Mining's material support enabled the Congolese army to reach the remote town of Kilwa at top speed - where they then carried out widespread abuses against the civilian population," said Tricia Feeney, President of CAAI. Anvil Mining has denied any allegations of wrongdoing and asserts that its logistical support was requisitioned by the authorities.

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[1] Superior Court Justice Emery issued the decision on 28 April 2011.
[2] http://www.globalwitness.org/library/congolese-victims-file-class-action-against-canadian-mining-company

In its decision, the Court of Appeal found that the requirements of the *Quebec Civil Code* (Art. 3148(2)) had not been met with respect to jurisdiction. The Court accepted Anvil Mining's arguments that the dispute was not related to the company's activities in Quebec, citing that Anvil Mining was not established in Quebec at the time of the Kilwa Massacre and that its activities in Quebec were not linked to the management of the mine in the DRC. The Court of Appeal also found that CAAI had not proven the impossibility for the survivors to access justice in another jurisdiction. These assertions contradict the findings by the first judge that Anvil Mining's principal, if not sole activity, was the management of the Congo mine, that the role of its Quebec based director was necessarily linked to the exploitation of the mine in the DRC, and that no other viable forum for the survivors of the Kilwa Massacre to seek justice existed.

Earlier attempts by survivors at seeking justice in the DRC and in Australia had met considerable hurdles and ultimately failed. For the Court of Appeal to suggest that the survivors should pursue a remedy in either of these jurisdictions is out of touch with the reality that they face. After expending huge amounts of effort, time and resources to start a legal action in Canada, impoverished villagers cannot be realistically expected to start new proceedings afresh.

The Canadian action follows a controversial military trial in the DRC. In 2006, a Congolese military prosecutor indicted nine Congolese soldiers for war crimes, and three expatriate former employees of Anvil for complicity in war crimes. Following numerous irregularities, in June 2007 the military tribunal acquitted all the defendants.

A public statement was subsequently made by Louise Arbour, the United Nations High Commissioner for Human Rights at that time stating that:

"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".

In February 2008 the survivors were denied the right to appeal in the DRC.

In its class action CAAI described the limited action undertaken in Australia and the hurdles that the survivors encountered there, including the ability to find lawyers willing and able to take a case forward.

According to the 2010 United Nations Mapping Report, the Kilwa case demonstrates the difficulty in proving the legal responsibility of private companies in the perpetration of serious human rights abuses and violations of international humanitarian law.[3]

While multinational corporations are able to benefit from lucrative operations carried out overseas, they can escape legal liability by exploiting the many barriers to justice facing victims of human rights violations in which they are implicated. Corporate defendants in cases of alleged human rights abuses routinely raise jurisdictional objections to have claims against them dismissed by their home state courts. Corporate defendants often push for cases to be sent back to the host state on the knowledge that a claim there is unlikely (or less likely) to succeed.

The laws and the way in which they are interpreted by courts in home states are often limited and have not evolved to ensure that companies comply with international human rights standards

[3] UN Office of the High Commissioner for Human Rights, "Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003", August 2010.

wherever they operate. A narrow interpretation of legal principles by courts when establishing jurisdiction represents a significant hurdle that victims of corporate human rights abuses face when attempting to seek legal justice in home states. It also ignores the obligation of home states to ensure that victims of corporate human rights abuses have access to effective remedies. This flies in the face of global concerns relating to access to justice and remedy for human rights abuses and underscores deficiencies in current international standards relating to business and human rights. A greater focus on the hurdles faced by victims of serious human rights abuses is necessary.

Courts have a vital role to play in bridging the existing accountability gaps. When home state courts close their doors to foreign victims of corporate human rights abuses they may end all realistic avenues for them to seek reparation. In cases of alleged human rights abuses, decisions on jurisdiction must be informed first and foremost by human rights considerations; in particular the extent to which claimants stand a realistic chance of accessing justice and obtaining adequate reparation in other forums. If these elements have no place in the balancing exercise that a judge conducts to assess jurisdiction, it is no surprise that alternative forums, found to be adequate, blatantly fail to provide victims of corporate human rights abuses with access to justice and reparation in practice.

The cases of the Bhopal toxic gas leak in India and the Omai Gold Mine dam rupture in Guyana are clear examples where defendants were able to evade justice on the basis of claiming a lack of jurisdiction of their home state courts. In the Omai case, the Quebec court decided that, although it clearly had jurisdiction over the case, jurisdiction ought nevertheless to be declined on the basis that the Canadian courts were not the best venue to hear the matter.[4] The court accepted the defendant's argument that Guyana was the more appropriate forum to hear the case, despite testimonies that a refusal by Canadian courts to accept jurisdiction would result in denial of justice for the plaintiffs. In Guyana, claimants faced serious hurdles and deficiencies and ultimately claims there were dismissed.

In the Bhopal claim, the US courts felt that the "balance of interests" test pointed towards India, where the evidence and witnesses were located, as the more appropriate forum.[5] A claim was indeed subsequently filed in India but it fell far short of providing victims timely, fair and adequate reparation. Although the Indian Government had originally claimed US$ 3.3 billion in damages, it ended up settling with UCC for the much smaller amount of US$ 470 million, a sum considered to be utterly insufficient.

The failure to recognise these hurdles and to account for these will continue to allow the accountability gaps for corporate human rights abuses to prevail. Companies should not be able to use their multi-jurisdictional presence and complex legal structures to evade justice. Courts must send a clear message to corporations that they cannot enjoy impunity if they take part in, or benefit from, serious human rights violations. Concerns relating to ensuring justice for victims and survivors must be made paramount.

Amnesty International understands that the Congolese massacre survivors will pursue justice at the Supreme Court of Canada. Given our interest in enhanced access to remedy for corporate human rights abuses, Amnesty International will continue to monitor this case closely. We trust the survivors of the Kilwa Massacre will find justice.

[4] *Recherches Internationales Quebec, petitioner, and Cambior inc., respondent, and Home Insurance and Golder associés ltée, co-respondents.* [1998] Q.J. No. 2554, No. 500-06-000034-971, Quebec Superior Court (Class Action), District of Montreal.
[5] In Re Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195, 196 (2d Circ.), cert. denied, 484 U.S. 811, 108 S.Ct. 199 (1987).