

## Practice Note

# The Approach to Implementation of the *Kilwa* Decision: Communication 393/10–IHRDA and Others v. DRC (2016)

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### Abstract

States are required to implement decisions adopted by human rights treaty bodies, the African Commission on Human and Peoples' Rights being one of them. Although the responsibility to implement lies with the state, treaty mechanisms play an important role in ensuring compliance with their decisions. The African Commission does not have an institutionalized mechanism tasked with implementation. It does however use other means such as promotion visits and the consideration of state reports to follow up on implementation of its decisions. This practice note recalls the approaches that the Institute for Human Rights and Development in Africa (IHRDA) and its partners have used and plan to use to follow up on implementation of the *Kilwa* decision. After a brief background on the case, this note assesses the content of the *Kilwa* decision, and outlines the road map for implementation. The note concludes with a look at the impact expected from the implementation of the *Kilwa* decision.

**Keywords:** African Commission on Human and Peoples'; Rights; civil society; Democratic Republic of Congo; implementation

### 1. Introduction

States are required to implement decisions adopted by human rights treaty bodies ([Human Rights Implementation Centre 2009](#)), the African Commission on Human and Peoples' Rights (ACHPR) being one of them. At the African level, some states have argued that the African Commission's findings are not binding, as they are not decisions but merely recommendations ([Viljoen 2012: 339](#)). However, these findings become binding once they are contained in the Commission's Activity Report and approved by the African Union (AU)

Assembly or Executive Council. Under Article 1 of the African Charter on Human and Peoples' Rights ('the Charter') there is an obligation to give effect to the African Charter rights. It is thus argued that, having accepted the competence of the African Commission to interpret the Charter and to decide individual communications, states parties to the African Charter are consequently legally bound to implement the Commission's findings.

Although the responsibility to implement lies with the state, treaty mechanisms play an important role in ensuring state compliance with their decisions. The African Commission does not have an institutionalized mechanism in place that is tasked with implementation. It does however use other means such as promotion visits and the consideration of state reports to follow up on implementation of its decisions. In the last two years, the Commission has shown more commitment to playing a more proactive role in implementing its recommendations particularly through collaboration with other stakeholders including civil society organizations (CSOs). This has included a greater focus on implementation during its sessions and through the holding of regional meetings such as in Dakar, Senegal and in Zanzibar in August 2017 and September 2018 respectively.

This practice note recalls the approaches that the Institute for Human Rights and Development in Africa (IHRDA) and its partners have used and plan to use to follow up on implementation of the African Commission's *Kilwa* decision. After a brief background on the case, the note assesses the content of the *Kilwa* decision, and outlines the road map for implementation. The note concludes with the impact expected from the implementation of the *Kilwa* decision.

## 2. Background

Communication 393/2010–IHRDA, RAID and ACIDH v. Democratic Republic of Congo concerns massive human rights violations, including numerous summary executions perpetrated in October 2004 by the Democratic Republic of Congo (DRC) armed forces in the city of Kilwa, in the south-east of the country. These violations were committed with the logistical support of Anvil Mining, a Canadian–Australian company. Anvil Mining operated a copper and silver mine near Kilwa and provided logistical support to the soldiers, including an airplane and vehicles to transport the soldiers and move arrested persons to places of detention or execution. The violations were committed during an armed conflict between the DRC armed forces and the Mouvement Révolutionnaire de Libération du Katanga (Amnesty International 2013; Global Witness 2006; UN OHCHR 2010).

After seeking redress before DRC courts to no avail, some victims sought assistance from IHRDA to litigate the case before the African Commission. The Communication on behalf of the victims was brought before the Commission in November 2010 by IHRDA, based in Banjul, Gambia; UK-based Rights and Accountability in Development (RAID); and Congo-based Action against Impunity and Human Rights (ACIDH).

In June 2016 the African Commission issued a landmark decision against the DRC finding the Congolese army responsible for the 2004 massacre of over 70 people in Kilwa and publicly rebuked Anvil Mining for its role in the violations. The African Commission's far-reaching decision set a new precedent. The Commission ordered the DRC government to pay a total of over four million US dollars in compensation to eight victims, the highest amount ever awarded in compensation by the Commission. It further instructed the DRC government to identify and compensate other victims and their families; to issue a formal apology to the people of Kilwa; to exhume and re-bury with dignity the bodies dumped in a

mass grave; to construct a memorial; and to rebuild the schools, hospital and other infrastructure destroyed during the attack. Further, the Commission ordered the DRC to launch a new criminal investigation and 'take all due measures to prosecute and punish agents of the state and Anvil Mining Company staff'. It said the government should establish a committee with representatives from the African Commission and representatives of victims to implement the decision.

The *Kilwa* decision was adopted on the eve of general elections and amid political tensions in the DRC. It was clear that the time was not appropriate to engage with the then DRC government on implementation. Moreover, the African Commission does not have an institutionalized implementation mechanism, which made it difficult to push for compliance with the recommendations.

In view of the above hurdles, IHRDA and its partners have been proactively engaging the DRC government and the African Commission on implementation of the *Kilwa* decision. The Kilwa victims and their representatives met in Lubumbashi, DRC, in October 2016, to reflect on the African Commission's recommendations and on the appropriate approach on implementation. It was hoped that the government would work with the local partner, ACIDH, who would enable interaction with the victims and identify others who were not named in the communication. Prior to examining the strategy agreed, it is important to explain the Commission's recommendations in more detail.

### 3. Overview of the African Commission's recommendations

The African Commission's decision contains several recommendations, some of which are clear whereas others are ambiguous. A separate explanation of each recommendation is needed to enable a better understanding of the decision and of the difficulties that the follow-up on implementation could pose, as well as the role applicants can play in the implementation process.

*Regarding individual monetary reparation*, the Commission recommended the payment of 200,000 US dollars to victim X; 200,000 US dollars to victim Y; 630,000 US dollars to Faray Mwayuma; 300,000 US dollars to Malangisha Pélagie Mpweto; 300 000 US dollars to victim LLL; 2,105,000 US dollars to victim CCC; 300,000 US dollars to victim AAA; and 325,000 US dollars to Kunda Kikumbi Dickay. This monetary compensation recommendation is self-explanatory, as victims had unanimously expressed their wish to prioritize implementation of individual monetary reparations so as to cater for their urgent needs.

*Concerning the prosecution of perpetrators*, the Commission recommended the DRC take diligent action to prosecute and punish state agents and Anvil Mining personnel involved in the violations. IHRDA consider that indicators of a clear commitment will include the request for extradition of Anvil Mining agents as well as the arrest of soldiers who were involved.

*The Commission also recommended a public apology to Kilwa victims.* The Commission did not indicate how the apology should be made. Since few people in Kilwa have access to newspapers, IHRDA take the view that the apology should be expressed by a member of the government on radio and television.

*The Commission further recommended an Inquiry to determine the fate of disappeared persons.* The Commission does not however specify the names of disappeared persons. The DRC government can therefore shield itself behind this with the view that it is not aware of any disappeared persons. In order to overcome this challenge, the applicant CSOs will provide government authorities with a list of all disappeared persons and establish the causal link between the Kilwa attack and the disappearances.

*Regarding reparation to victims who were not party to the case,* it is clear that over time, evidence disappears, wounds heal and witnesses die, amongst other factors. The applicants will identify victims who did not file a complaint with the Commission and will bring their names to the attention of the DRC government. For those whose suffering can still be proved, the applicants will establish the causal link between the events of Kilwa and the harm.

*Concerning the reburial of the bodies dumped in mass graves in Nselele,* the applicants are fully mindful that identifying a person whose death occurred in 2004 requires the completion of DNA testing. As this is an obligation of means, the DRC may invoke the absence of resources to afford such expertise, and it will be difficult to measure the will to implement. The applicant CSOs will therefore indicate the location of mass graves to the DRC government. IHRDA expects the government to cover the costs relating to DNA testing.

*The building of a memorial in Nselele* is an obligation of result, the implementation of which is easy to measure. As the 2019 DRC national budget does not foresee the construction of the memorial, the lack of implementation of this recommendation is obvious. The general budget for 2020 has no specific heading for the payment of reparations for people who have won cases against the state. The applicants will continue to engage with competent authorities to advocate for the provision of a budget for such a memorial.

*The Commission finally recommended the rebuilding of infrastructure destroyed during the Kilwa attack, including roads.* This recommendation raises several questions. Given the scope of the destruction, but bearing in mind the poor quality of the infrastructure prior to the attack, and the lack of available evidence to show this, it will be difficult to single out infrastructure that was destroyed during the attack. It will also be difficult to establish proof that victims were unable to flee for lack of practicable roads and hence why their rebuilding is needed as a recommendation flowing from the Kilwa massacre.

#### 4. Approach to implementation

The *Kilwa* case was filed in 2010 and the decision issued in 2016, 12 years after the occurrence of the violations in 2004 (it is not unusual for it to take many years for the African Commission to reach a decision). To date, the DRC government has totally ignored the Commission's decision and taken no steps to implement it. The Commission has also not taken any measure towards ensuring the implementation of the decision. Although there have been other decisions adopted by the Commission against the DRC, there has been no systematic assessment of the extent to which these have been implemented. It is difficult therefore to predict how the government will act on the recommendations in the *Kilwa* decision. In order to push for implementation in the *Kilwa* decision, in October 2016 the victims and their representatives met in Lubumbashi, DRC to draw a road map to guide efforts towards implementation. IHRDA had previously adopted guidelines on

implementation (drafted in collaboration with the Human Rights Implementation Centre in Bristol) and these were the basis of the road map. IHRDA and ACIDH organized the meeting with victims in the DRC to reflect on the Commission's decision and way forward.

The activities around the road map were driven by the desire to maximize the pressure on the DRC to implement the *Kilwa* decision. Thus, all national, regional and international actors likely to exert pressure on the DRC will be involved in the implementation of the road map.

The salient elements of the road map are the following:

#### 4.1 Wide dissemination of the decision at local and regional levels

The decision has been widely disseminated via press releases, websites and mailing lists, as well as during side events at the margins of the African Commission's ordinary sessions, meetings with civil society organizations at the local and regional levels, and through radio programmes in the DRC, and shared with the national human rights commission.

To help our efforts, we plan to develop a short professionally-made video in multiple languages that can be disseminated on social media and in more traditional outreach events. The video will detail the Kilwa events, the role of Anvil Mining, and the long search for justice. We also plan to summarize the decision in simple French (this is a pragmatic approach given that the DRC has hundreds of ethnic groups with different languages) and publish it in the form of booklets making it accessible to local communities.

#### 4.2 Capitalizing on the 15th anniversary of the massacre in October 2019

We planned to carry out the following activities on the anniversary of the massacre in October 2019:

- start a national and international petition urging for implementation of the decision which would also be delivered to authorities in a high-profile event;
- organize a special 15-year anniversary mass at the Cathedral in Lubumbashi and in Kilwa to remember the victims and push for justice;
- sensitize government actors at the local, provincial and national levels including provincial deputies, national deputies, senators and the governor about the decision and push for its implementation; and
- mobilize the Catholic Church (including the local Bishop of Kilwa-Kasenge, the diocese where the events occurred), an influential player in the DRC and who played an important role in national elections in recent months.

Unfortunately, due to lack of funding, these were unable to be delivered.

#### 4.3 Engaging and assisting the DRC government on implementation

We had planned a number of activities to engage with and assist the DRC government. These included organizing a meeting with representatives of the government and the Commissioner of the African Commission who is responsible for the DRC. Direct engagement with DRC authorities has been delayed as the country has been undergoing a period of political transition marked by tensions. As indicated above, we will provide government authorities with information regarding the names of the disappeared, the names of victims who have not filed a complaint with the African Commission, and information establishing the causal link between the events of Kilwa and the harm victims have suffered. Should our

assistance be needed, we will indicate to the DRC government where the mass graves are located.

#### 4.4 Using UN treaty bodies and other monitoring mechanisms

We have engaged the Commissioner of the African Commission who has responsibility for promotion in the DRC (who doubles as Chairperson of the Commission) as well as the new Commissioner from the DRC as a means of urging the DRC to create the implementation committee recommended by the Commission in the decision. We also plan to conduct a mission to the DRC to meet the relevant authorities with whom such discussions should be held, as well as to meet with diplomats and United Nations officials who could play an important role in pushing for implementation. We will additionally request the Commissioner with responsibility for promotion in the DRC to write to the state asking for information on the measures it is taking to implement the decision. We submitted an alternative report to the African Commission with a section on the *Kilwa* decision prior to the consideration of the DRC's periodic report in November 2017. The Commission's activity report containing concluding observations was adopted in January 2020. These observations are yet to be published.

The DRC has not submitted another report and could not submit it prior to the finalization of concluding observations for the previous report.

We are also exploring the possibility of using relevant UN mechanisms by submitting alternative reports, sharing information with special procedures or working groups, and submitting information to the Universal Periodic Review.

#### 4.5 Legal action outside the DRC to press for implementation of the decision

We plan to explore the use of international commercial litigation to pay the Kilwa victims and then sue the government of the DRC to recover the total sum that was recommended by the African Commission. In effect, we want to employ and build on the tactics employed by vulture funds in the mid-1990s who bought up debt from Third World countries that had defaulted on loans and then seized assets abroad to force payment. Similar legal tactics may be possible on behalf of victims of human rights violations who are owed money by the DRC government. If successful, this could dramatically alter the enforcement of Commission decisions. Our aim is to engage an international legal expert who could explore such legal avenues available for the victims.

### 5. Conclusion

The *Kilwa* decision was a landmark decision in terms of compensation and the broad scope of redress recommended by the African Commission for the Kilwa community. The DRC government has not yet implemented the *Kilwa* decision and the Commission has not pushed for compliance. The efforts deployed by victims and their representatives have not yet yielded tangible results. Most of the activities included in the road map have not been carried out due to budget constraints and the political context prevailing in the DRC.

Funding would enable the creation of an implementation committee for the *Kilwa* decision. Through pressure and continued engagement with government authorities, we expect increased momentum for a new criminal process against Anvil Mining employees and soldiers to ensure compliance with the *Kilwa* decision. We believe extending the legal strategy beyond the DRC will additionally increase pressure on the government to implement the

decision. The pressure and engagement with various actors will revive the sense of hope among victims of the Kilwa massacre as the momentum for compliance with the Commission's decision by the state increases.

Should the road map be successfully implemented, it will set a new African standard for wide-ranging redress against abuses by both governments and companies. Moreover, should a new legal strategy outside the DRC to force implementation on behalf of victims be successful, it will open up new avenues for enforcing the decisions of the African Commission on Human and Peoples' Rights and as a result, form a game-changing method which can be utilized by victims awarded compensation by the Commission.

## Funding

No funding was received for this piece, but it was commissioned by the Human Rights Law Implementation Project that was funded by the Economic and Social Research Council.

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