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Rights and Accountability in Development

April 22, 2014

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Dear Mr. Sokalsky and Mr. Mwanyika,

RE: African Barrick Gold's non-judicial grievance mechanisms at North Mara, Tanzania

We are writing in response to a letter and attachments we received from African Barrick Gold (ABG) dated 11 March 2014,¹ concerning the project-level non-judicial grievance mechanisms (grievance mechanisms) at the North Mara Gold Mine Limited (NMGML).

We appreciate that ABG has reconsidered its earlier position² and has now provided some additional information. But we note that most of our questions remain unanswered, including regarding the types of allegations of harm that have been received, the grievance process itself, and the nature of the compensation provided. Additionally, ABG has again set unnecessary limits around the provision of relevant information³ and has apparently mis-understood the transparency criteria set out in the UN Guiding Principles on Business and Human Rights (UN GP) 31(e).

¹ ABG's letter is in response to a letter from MiningWatch Canada and Rights and Accountability in Development (RAID) of February 21, 2014.

http://www.miningwatch.ca/sites/www.miningwatch.ca/files/letter_to_barrick REGARDING_north_mara_2014-02-21.pdf

² On December 20, 2013, ABG put out a brief statement noting that "it should not be anticipated that additional details about the program will be forthcoming from ABG or the mine."

http://www.africanbarrickgold.com/~/media/Files/A/African-Barrick-Gold/Attachments/press-releases/2013/abg-update-north-mara-sexual-assault-allegations_20122013.pdf

³ "...we reiterate that it should not be anticipated that additional details about the remedies they [victims] have received will be forthcoming." <http://www.africanbarrickgold.com/~/media/Files/A/African-Barrick-Gold/Attachments/pdf/abg-response-to-MWC-RAID-march-2014.pdf>

African Barrick Gold notes a number of “recent enhancements” made to the mechanism, for example changes made to the waiver, *after* complainants signed the original waivers. While it is useful to have this information, it raises additional questions, which we detail below.

Finally, we note that ABG misunderstands and misrepresents our opposition to the use of legal waivers in project-level non-judicial grievance mechanisms. Among other concerns, the lack of transparency regarding the grievance mechanisms, as well as ongoing changes made to the ad hoc mechanisms during and after processing complainants, both in the case of victims of rape by security guards and police at Barrick’s Porgera Joint Venture mine in Papua New Guinea, and in the case of the grievance mechanisms for victims of rape and other forms of violence at the North Mara mine, reinforce our opposition to the use of waivers in project-level non-judicial grievance mechanisms. We provide additional reasons below.

Ongoing Lack of Transparency

We note with interest that following our letter of February 21, 2014, ABG has added some information regarding the grievance mechanisms to its web site,⁴ in particular regarding how outreach to the local community is conducted. This is the first new information about the grievance mechanisms since 2011.⁵ But ABG and Barrick have not made public a comprehensive “remedy framework” such as exists for the Porgera Joint Venture mine.⁶ Nor has ABG provided answers to many of the detailed questions we posed in our last letter. We have attached an amended list of questions in the Annex below.

In particular, detailed information regarding the compensation that victims of rape and of other forms of violence may have received, after signing a legal waiver, remains shrouded in secrecy. While ABG notes in its letter that the “level of any financial compensation provided in a remedy package is benchmarked against civil damage awards from Tanzanian courts,” related and relevant information is missing. For example, it is unclear whether all compensation packages include a financial component and what the basis is for including financial compensation. Without knowing the nature of the harm that is being addressed, or the type and level of compensation that is being provided, it is completely impossible to independently verify the veracity of ABG’s assurances. In fact, ABG’s letter of March 11, 2014, states: “**we reiterate that it should not be anticipated that additional details about the remedies they [victims] have received will be forthcoming.**”

ABG, in part, justifies this lack of transparency by expressing concern for the safety of the victims. While we, of course, share a concern for the safety of victims, answers to the questions we pose about the mechanism itself, and regarding the compensation victims of harm may receive, do not compromise the safety of the victims.

⁴ <http://www.africanbarrickgold.com/~/media/Files/A/African-Barrick-Gold/Attachments/pdf/ABG%20Grievance%20Mechanism/ABG%20Grievance%20Mechanism.pdf>

⁵ In December 2013, ABG issued a one page statement, following a press release from MiningWatch Canada and a related article in the Globe and Mail both appearing earlier in December. But this statement mainly noted that “it should not be anticipated that additional details about the program will be forthcoming from ABG or the mine.” forthcoming http://www.africanbarrickgold.com/~/media/Files/A/African-Barrick-Gold/Attachments/press-releases/2013/abg-update-north-mara-sexual-assault-allegations_20122013.pdf In its letter of 11 March, 2014 ABG noted that information on its “Grievance Mechanism is also available in ABG’s Annual Report.” But in both the 2012 (p. 45) and 2013 (p.36) Annual Reports the very brief mention of the Grievance Mechanism was in regard to land grievances, not human rights grievances.

⁶ Barrick did not initially publicize or provide a copy of its “remedy framework” for the Porgera Joint venture mine to MiningWatch Canada. It was only after MiningWatch received a copy of the Porgera “remedy framework” from a third party, critiqued it in detail and published it to the MiningWatch Canada web site, that Barrick, months later, published an updated version to its own web site. The newer version responded to some of MiningWatch’s critiques. However, the program was already being implemented when MiningWatch received the original remedy framework.

ABG further justifies lack of transparency through a narrow reading of the transparency requirement in UN GP 31 (e):

transparency in the context of a grievance mechanism means providing information to complainants about how their complaints are being handled, providing information to affected stakeholders, and in certain circumstances to other stakeholders, about how well the mechanism is working. We do not believe that transparency in that context means providing information about specific grievances to the public at large, as you seem to suggest.⁷

In communications about project-level non-judicial grievance mechanisms with John Ruggie, he noted “Our preference was to broaden access to remedy, in line with fully rights-compatible process requirements. And we counted on civil society to help ensure that those requirements are met in practice.”⁸

Leaving aside for now the question of whether independent “civil society” has the resources and access necessary to fulfill this “ensuring” role, it is clear that independent civil society, whether in Papua New Guinea, Tanzania or internationally, cannot assess the rights-compatibility of project-level non-judicial grievance mechanisms without a greater degree of transparency from companies that create project-level mechanisms.

Barrick and ABG are not providing the necessary transparency.

Use of Legal Waivers

We note with interest that ABG says it has changed provisions in the secret waiver (dated December 2012) that was forced to light in December 2013.⁹ ABG notes that “rounds” of changes were progressively made before and after May 2013 and as recently as “early 2014.” ABG also indicates that changes were made *after* complainants had signed the December 2012 waiver we disclosed in December. ***How many versions of the same waiver exist? How many complainants signed the 2012 waiver that ABG says was subsequently changed? How many complainants signed later versions of the waiver and when?***

One of the changes that ABG says it has made to the waiver, since our letter of February 21, 2014, regards secrecy. ABG now says that complainants are no longer constrained by a confidentiality clause from making the waiver public, but ABG will not provide copies of the waivers. Nonetheless, ABG has provided “excerpts” of the most recent changes made to the waiver. While the excerpts indicate that the waiver still requires that the complainant waives rights to take civil action against Barrick/ABG and related corporations, it has, apparently, in other ways been made narrower in scope. However, the waiver still requires the complainant to waive rights to participation “on behalf [sic] third parties to any civil proceedings in any jurisdiction.” ***Why is Barrick/ABG insisting on this restriction?***

ABG provided us with a new document, apparently created after our letter of February 21, 2014, to be signed by complainants who had already signed previous versions of the waiver. This document says that “there may be some confusion regarding some of the language used in Grievance Resolution Agreements that were signed by individual claimants and the North Mara Gold Mine Limited (NMGML) between

⁷ <http://www.africanbarrickgold.com/corporate-responsibility/community-relations.aspx>

⁸ Personal e-mail communication from John Ruggie received by Catherine Coumans on August 23, 2013.

⁹ For a copy of the waiver see:

http://www.miningwatch.ca/sites/www.miningwatch.ca/files/abg_grievance_agreement.pdf As the waiver was forced to light through a law suit by Leigh Day it is no longer considered confidential.

November 2012 and May 2013” and summarizes the changes made to waivers in use during that period.¹⁰ ***How many complainants have now signed the new document that sets out the changes made to the waiver?***

It must be noted here that as early as November 2012, MiningWatch Canada raised concerns with Barrick regarding the waiver used in the case of victims of rape by security guards and police at Barrick’s Porgera Joint Venture mine in Papua New Guinea. On April 16, 2013, Barrick said in a statement that the Porgera waiver that MiningWatch Canada was addressing had been changed and that the new waiver “contains much narrower terms.”¹¹ The new waiver excluded the requirement that complainants waive their rights to participate in a criminal case that might be brought against Barrick by a state. Nonetheless, in North Mara between November 2012 and May 2013, under a shroud of secrecy, complainants were asked to sign a waiver that not only prevented them from participating in criminal action that may be brought against Barrick/ABG, but contained other unacceptable and far-reaching provisions that we detailed in our previous letter.¹² ***Why was the waiver used in North Mara not made narrower in scope until sometime after May 2013, and after complainants had already signed an unacceptably broad waiver?***

In its letter of 11 March 2014, ABG notes that “[n]one of the women whose claims of sexual assault were investigated in 2011 signed the 2012 Agreement.” ***Did these women sign a legal waiver in order to receive a remedy package? If so, did the Agreement (waiver) these women signed constrain them to confidentiality regarding the waiver and the issues contained therein? How broadly did the legal waiver signed by these women constrain them in participating in future civil or criminal legal action on their own behalf or on the behalf of others?***

Also in its letter, ABG notes that “recent enhancements” to the mechanism include giving the complainants “vouchers” “that can be redeemed with the mine by an independent lawyer of a complainant’s own choosing.” ***When was the ‘recent enhancement’ of providing vouchers implemented? What other “recent enhancements” were implemented and when? How many of the 46 complainants mentioned in ABG’s March 11 letter were given vouchers for independent legal advice? How many complainants who signed the legal waiver between November 2012 and May 2013 had such vouchers before they signed the legal waiver? What is the monetary value of the voucher? How many of these vouchers have been used to date? How many complainants have had independent legal advice before signing legal waivers (separate from retired Justice Makanja)?***

In its letter of 11 March, ABG insists that the non-judicial mechanism it has put in place in North Mara is credible because retired Justice Mackanja of the Tanzanian High Court, hired consultants Search for Common Ground, and others, are advising on and overseeing the program. And yet, it does not seem that these agents questioned the use of waivers, the unacceptably broad scope of the waivers, the lack of transparency of the program, or any of the other issues we have been raising. Or, if they have questioned these things, their concerns have not been addressed in a timely way as, for example, complainants were subjected to and signed waivers that were unacceptably broad.

¹⁰ The summarized changes could create further confusion as they say that the complainant is not constrained from “giving evidence as a witness in any proceedings or investigations commenced by any other individual” while the excepts of the new waiver provided by ABG do indeed provide such constraints .

¹¹ See <http://www.barrick.com/files/porgera/Barrick-corrects-further-false-claims-concerning-Remediation-Program-at-Porgera.pdf> Note that in this statement Barrick erroneously states that MiningWatch had argued that complainants had to waive rights upon filing a grievance. In fact, MiningWatch never made this assertion.

¹² See http://www.miningwatch.ca/sites/www.miningwatch.ca/files/letter_to_barrick REGARDING_north_mara_2014-02-21.pdf

Finally, we must clarify, that you are mistaken to say that we “do not object to the inclusion of a legal waiver *per se*.”

We do in fact object to the use of legal waivers in project-level non-judicial grievance mechanisms. The Porgera and North Mara cases provide very good illustrations of some of the reasons we object to their use. These include:

- Both the Porgera and North Mara mechanisms have demonstrated that these ad hoc company mechanisms, set up in remote locations, in conditions of extreme power imbalance, with insufficient transparency and insufficient critical and independent scrutiny have been characterised by processes, remedies and conditions that are at best unpredictable and at worst not rights compatible. It is critical to ensure that victims of human rights abuses do not feel obliged to relinquish a right to seek civil judicial redress against the company under such circumstances.
- Both Barrick and ABG make a point of arguing that legal waivers are necessary and of value to both the company and the complainants to achieve “predictability and finality.” While predictability and finality are undoubtedly of great value to the corporations in these cases, this is not necessarily true for victims of violence in Porgera and North Mara, for whom greater value obtains in receiving remedy and maintaining the option to take civil action against the company for the harm that may be insufficiently covered by the remedy. While Barrick has argued that without a waiver a claimant might receive remedy from the company twice for the same harm, we have pointed out proven ways to avoid this occurrence without the use of a legal waiver.
- Both Barrick and ABG refer extensively to the consultants they have employed or engaged to ensure rights compatibility of the Porgera and North Mara mechanisms, retired justices, international consulting companies such as Search for Common Ground, etc. But the fact remains that these, often paid, experts either did not notice that the waivers complainants were being asked to sign were flawed, or, if they did, they were not able to persuade the company to make the necessary changes. Hired consultants, who may be operating under confidentiality clauses themselves, are insufficient guarantee that complainants’ rights will be protected.
- Both Barrick and ABG maintain that the remedy they provided in Porgera and North Mara was comparable to what these victims of rape and violence by security guards and police would have received in court. This argument is made in order to justify waivers. It is impossible to assess this claim as much related to the actual remedies is not transparent. As noted above, ABG responded to our requests for more detailed information on the remedies provided to claimants in the North Mara case by stating “we reiterate that it should not be anticipated that additional details about the remedies they [victims] have received will be forthcoming.”
- Legal waivers obtained through a non-judicial mechanism unnecessarily create barriers to judicial remedy for claimants who may decide to take legal action against a company for the harm covered by the waiver.
- The UN Guiding Principles clarify that corporations should provide remedy for harm they have caused. The UN GPs do not condition that responsibility on victims of human rights abuses giving up their right to judicial redress against the company in question. Remedy is a human right. It should not be viewed as a transaction of value in which a company will only provide remedy if it receives something of value to it – in this case legal immunity - in return.
- The opinion from the Office of the High Commissioner for Human Rights notes that “the presumption should be that as far as possible, no waiver should be imposed on any claims settled through a non-judicial grievance mechanism.”¹³

¹³ http://www.miningwatch.ca/sites/www.miningwatch.ca/files/22_08_lw_rh_porgera_opinion.pdf

We look forward to your response.

Yours sincerely,



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Co-Manager,
MiningWatch Canada



Patricia Feeney,
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Copy furnished:

Brad Gordon, CEO, African Barrick Gold Group

Dr. Navanethem Pillay, UN High Commissioner of Human Rights

Mr. James Anaya, Special Rapporteur on the rights of Indigenous Peoples

Mr. Pablo De Greiff, Special Rapporteur on the promotion of truth, justice, reparation & guarantees of non-recurrence

Ms. Rashida Manjoo, Special Rapporteur on violence against women, its causes and consequences

Ms. Rita Izsak, Independent Expert on minority issues

Working Group on the issue of discrimination against women in law and in practice

Working Group on the issue of human rights and transnational corporations and other business enterprises

Hon John Baird, Department of Foreign Affairs, Trade and Development Canada

Hon Ed Fast, Department of Foreign Affairs, Trade and Development Canada

Hon Christian Paradis, Department of Foreign Affairs, Trade and Development Canada

Rt Hon William Hague, Foreign Secretary, UK

Rt Hon Vince Cable, Secretary of State at the Department of Business, Innovation and Skills, UK

Lee Waldorf, Human Rights Advisor, UN Women

ESCR-Net – Corporate Accountability Working Group

Canadian Network on Corporate Accountability

European Coalition for Corporate Justice

Corporate Responsibility Coalition

International Corporate Accountability Roundtable

Amnesty International

OECD-Watch

Annex

Questions regarding the “remedy” process for victims of “harm”

- When precisely was the “remedy program” for victims of “harm” implemented at North Mara?
- Was the program created to deal only with a specific number of known victims, or has the program remained open to anyone who may suffer similar harms on an ongoing basis?
- Is there a “remedy framework” for the North Mara “remedy program” for victims of “harm,” as has been adopted in Porgera for female rape victims, and, if so, why has this not been made public?
- What is the nature of the “harm” suffered by Complainants who are receiving remedy packages?
- Is the program open only to Complainants who have suffered “harm” at the mine, or also to family members of Complainants who may have died as a result of this harm?
- ABG’s letter of 11 March 2014 notes that 24 men and 22 women “have been offered and have accepted remedy packages” in regard to “use of force by mine security or police against intruders.” In ABG’s statement of December 20, 2013, ABG noted that 14 women were “receiving remediation packages as part of a two year program.” Can ABG please clarify how many women have, or are, receiving remedy packages? Of these, how many were victims of rape and how many were victims of “harm” other than sexual assault.

Questions regarding the “remedy” process for female rape victims

- When precisely was the “remedy program” regarding female rape victims implemented at North Mara?
- Was the program created to deal only with a specific number of known victims of sexual abuse? In its letter of 11 March 2014, ABG indicates that “no grievances have been filed alleging that incidents of sexual assault have occurred in the years since 2011” but is the “remedy program” still open to any women who may wish to file such grievances?
- Is there a “remedy framework” for the North Mara “remedy” program for female rape victims, as there is for the Porgera program and, if so, why has this not been made public?
- How many women were offered a package/disbursement from the program and how many ultimately accepted and signed the agreement?
- Have all female rape victims who accepted some form of remedy through the program signed legal waiver agreements, such as those signed by victims of “harm”? What confidentiality conditions apply to that waiver?¹⁴
- Did any of the female rape victims have independent (not paid by Barrick, ABG or NMGML) legal representation during the process and in signing legal waiver agreements?
- What is the nature of the compensation received by female rape victims?

Questions regarding the “Agreement and Full and Final Release” signed by victims of “harm”¹⁵

- As in its letter of March 11, 2014, ABG has not indicated any changes made subsequent to the December 2012 waiver that has surfaced in regard to remedy that is provided and the provisions that condition that remedy, the following questions remain. Regarding sections 2.2, 2.3, 2.4, 2.5 - the “Condolence Disbursement,” totalling 8,780,000 TZS [approximately 5,400 USD] consists of two years employment in a company in the town of Nyamongo near the mine site, as well as remuneration for “participating in NMGML’s campaign to create awareness in the local

¹⁴ In response to a media contact Barrick stated: “To be clear, there is no requirement for secrecy, women are free to discuss their grievances and their remedy packages.”

¹⁵ http://www.miningwatch.ca/sites/www.miningwatch.ca/files/abg_grievance_agreement.pdf

community of the hazards of trespassing on the mine site.” The terms of employment will be provided by the local employer and failure by the Complainant to adhere to these terms “will result in the automatic termination of benefits to which the Complainant is otherwise entitled under the terms of this Agreement and Release.” In return for attending monthly Awareness Meetings “upon invitation by a representative of NMGML, the Complainant shall be paid an attendance fee by NMGML.” Failure to attend an Awareness Meeting will result in loss of payment. Finally, the Complainant can also “forfeit” benefits related to the “Agreement and Release” if the “Complainant is found to have trespassed on the NMGML mine site.” This waiver not only conditions “remedy” on legal immunity for Barrick, ABG and NMGML but contains further conditions, some of which are not defined here, such as terms of employment that may result in loss of benefits for the Complainant. *How is the determination of payment of “the sum of Tanzanian Shillings Eight Million Seven Hundred and Eighty Thousand (8,780,000 TZS)” by NMGML arrived at? How is non-compliance of a Complainant with the conditions of a legal waiver be determined? What provisions exist for a Complainant to defend him/herself against allegations of non-compliance?*