



Remarks on Operational-Level Grievance Mechanisms Presented to the UN Working Group on Business and Human Rights Upon their Visit to Canada

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The Context – The UN Guiding Principles (UN GPs) advise that: “To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted” (point 29, p. 31). The UN GPs provide Effectiveness Criteria for these operational-level grievance mechanisms (OGM) (Point 31, p. 33).

The Problem – Research conducted over several years by MiningWatch Canada (MiningWatch) and others¹ at Canadian mining company Barrick Gold’s (Barrick) Porgera Joint Venture (PJV)² mine in Papua New Guinea (PNG) and North Mara Gold Mine Ltd. in Tanzania,³ has revealed serious negative impacts resulting from victims’ participation in Operational-level Grievance Mechanisms at these mines; impacts both on these indigenous victims’ human rights and on their ability to access equitable remedy. At both mines OGMs were employed to address criminal acts and serious harm, such as beatings, killings, rapes and gang rapes, caused by excess use of force by mine security.⁴

¹ At Barrick’s North Mara Gold Mine in Tanzania, MiningWatch conducted yearly field assessments with Rights and Accountability in Development (RAID) from 2014-2016. The focus of these human rights assessments was ongoing violence against local men and women as a result of excess use of force by private mine security and police guarding the mine (under provisions of a Memorandum of Understanding between the mine and the State of Tanzania), as well as the functioning of an OGM created to address the consequences of this violence. At Barrick’s Porgera Joint Venture mine in Papua New Guinea, MiningWatch carried out similarly focused field assessments between 2008-2013. The Human Rights Clinic (Columbia Law School) & International Human Rights Clinic (Harvard Law School), and the human rights clinic at New York University, also carried out regular field assessments in regard to human rights abuses related to excess use of force by mine security and police guarding the mine (under provisions of a Memorandum of Understanding between the mine and the State of Papua New Guinea), as well as in regard to the functioning of the OGM created to address the consequences of this violence.

² At the time that Barrick implemented a remedy program for victims of sexual assault by private mine security at the PJV mine (2012-2014), Barrick owned 95% of the PJV mine through its local subsidiary Barrick (Niugini) Ltd (BNL). In 2015, Barrick sold off half of its shares in BNL to the Zijin Mining Group, retaining 47.5% ownership.

³ The North Mara Gold Mine Ltd. is a subsidiary of Acacia Mining, which is 63.9% owned by Barrick Gold.

⁴ Both at the Porgera Joint Venture mine in PNG and at the North Mara Gold Mine Ltd. in Tanzania, security is provided by both private security and by police who guard these mines under a Memorandum of Understanding with the respective states. In both cases the police forces are paid and receive bonuses by the mining companies involved. In Porgera these police are housed at the mine, fed, and clothed by the mine.

Concerns regarding the OGMs at these two mines have been documented extensively by MiningWatch and others.⁵ The following summarizes just some of these concerns.

- The OGM for victims of violence at the North Mara mine was implemented only after legal action was initiated by a UK-based law firm⁶ on behalf of victims of excess use of force by mine security and by police guarding the mine under an MOU with the Tanzanian State. The OGM was used strategically to draw clients away from the UK law suit by offering victims some remedy in return for signing legal waivers.⁷ In our field research we found that most victims did not understand that they had signed away their legal rights. Once the UK-based suit was settled, with a greatly reduced number of clients, the mine's grievance office ceased to be responsive to many new victims or to previous claimants who needed ongoing care, for example for prostheses they had received, or who found that the verbal promises made to them by OGM staff were not reflected in the remedy they actually received.
- At the Porgera mine a short-term OGM was so narrowly framed that male victims of excess use of force by mine security were excluded, as were victims of rape and gang rape by police guarding the mine under an MOU with the Papua New Guinea State. The remedy program was only available for two years. All 119 victims of rape by private mine security who received some remedy through the program, in exchange for signing legal waivers, filed a complaint with the UN Working Group on Business and Human Rights in November 2016⁸ to protest aspects of the process they went through, for example the fact that they did not have independent legal counsel, as well as the inadequate remedy they received. Furthermore, many women who were eligible under the narrow frame of the remedy program did not participate in the program for a range of reasons, including being unaware of its existence. Many of these women have filed claims at the mine's grievance office dating back to 2015, but have not to date had any response.

Some Conclusions –

- Our research has revealed that OGMs can be, and have been, used strategically to thwart legal action undertaken on behalf of victims, as in North Mara, or to focus narrowly on only certain victims, who may, arguably, pose the highest potential legal risk, or risk to the company's reputation, as in the case of the Porgera mechanism.
- Our research has shown lack of compliance with the UN GPs effectiveness criteria for OGMs, both in how these OGMs were designed, and in how they are implemented. For example, lack of consultation with victims regarding mechanism design and lack of due process for highly vulnerable, often illiterate and poor victims of excess use of force by mine security is a serious concern at both the Porgera and North Mara mines.

⁵ See for example: MiningWatch Canada and RAID, 2014, *Privatized Remedy and Human Rights: Re-thinking Project-Level Grievance Mechanisms*. [Hereinafter, "Privatized Remedy 2014"]
http://miningwatch.ca/sites/default/files/privatized_remedy_and_human_rights-un_forum-2014-12-01.pdf; Human Rights Clinic (Columbia Law School) & International Human Rights Clinic (Harvard Law School). 2015. *Righting Wrongs? Barrick Gold's Remedy Mechanism for Sexual Violence in Papua New Guinea: Key Concerns and Lessons Learned* (November).
<http://hrp.law.harvard.edu/wp-content/uploads/2015/11/FINALBARRICK.pdf>

⁶ On July 30, 2013, a law suit against African Barrick Gold (now Acacia Mining) and North Mara Gold Mine Ltd. was launched by UK-based Leigh Day in the UK High Court on behalf of victims of excess use of force by mine security and police guarding the mine. For more on this see: *Privatized Remedy 2014*.

⁷ See "Leigh Day confirms that many of their clients stated they had been specifically targeted to forgo their legal claims and sign up to the Mine's grievance mechanism." *Privatized Remedy 2014* at 31.

⁸ See <http://miningwatch.ca/blog/2016/11/16/video-message-porgera-women-un-forum-business-and-human-rights#sthash.auxdr2Nj.dpbs> and <http://miningwatch.ca/news/2016/11/16/119-indigenous-women-demand-justice-barrick-gold-un-forum-geneva>

- We have also found that the remedy these victims received, in return for signing legal waivers many did not understand, is not what they or expected to receive based on verbal communications, or what they say they need, to address the serious and long-term harm done to them and their dependents as a result of the violence they endured.
- Furthermore, while violence by mine security is ongoing at both mines, new victims are either no longer being offered any recourse through an OGM (in Porgera), or they are now approached selectively by mine personnel and offered seemingly arbitrary cash payments in return for signing legal waivers (in North Mara).

Some Recommendations –

- Human Rights experts, governments and companies must acknowledge that OGMs can themselves cause harm and can be used strategically to further corporate aims, for example by creating barriers to access to justice.⁹ This recognition must be reflected in enhanced guidance that explicitly addresses these corporate abuses of OGMs.
- In particular, more attention needs to be paid to ensuring due process for victims participating in an OGM, for example by ensuring the OGM is independent of the company in question and through participation of independent legal and/or human rights experts of the victim's own choosing.
- If OGMs are used to address criminal acts and serious violations of human rights, such as those resulting from excess use of force by mine security and police guarding a mine, then these OGMs should not require, in return for remedy, legal waivers that bar participants from later suing the company in question over the issues addressed through the OGM.
- Finally, specifically in regard to victims of excess use of force by mine security and police guarding the Porgera Joint Venture mine, I refer to requests made by Evelyn Gaupe, one of the 119 women who participated in the mine's short-term OGM, and Joycelyn Mandi, one of 80 women whose claim was put in to the mine's grievance office in 2015, after the remedy program was closed, and who, to date, have not received a response. On a recent visit to Canada, Ms. Gaupe and Ms. Mandi called on Barrick Gold, the Canadian government and the human rights community to support their calls for Barrick to open a new dialogue with all victims of excess use of force by mine security and police at the PJV mine and to ensure direct participation in this dialogue of human rights experts and legal advisors of the victims' own choosing.¹⁰
- The Canadian government should reflect the findings and recommendations made here in any guidance it may produce on OGMs.
- The Canadian government should uphold its commitment to create an effective human rights ombudsperson for the extractive sector, as called for by the Canadian Network on Corporate Accountability, and victims such as Ms. Gaupe and Ms. Mandi.¹¹

⁹ See Coumans, Catherine. 2017. Do no harm? Mining industry responses to the responsibility to respect human rights. *Canadian Journal of Development Studies / Revue canadienne d'études du développement*. Vol. 38, No. 1. March. <http://www.tandfonline.com/doi/full/10.1080/02255189.2017.1289080>

¹⁰ See <http://miningwatch.ca/blog/2017/4/25/statements-and-questions-everlyn-gaupe-and-joycelyn-mandi-barrick-gold-s-2017-annual#sthash.Z6Dc1G3p.ifmb7lcf.dpbs>

¹¹ See <http://cnca-rcrce.ca/campaigns-justice/ombudsperson/> ; <http://miningwatch.ca/news/2017/5/9/indigenous-women-papua-new-guinea-appeal-government-canada-help-obtaining-remedy>