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Dr. Navanethem Pillay
UN High Commissioner for Human Rights
Office of the United Nations High Commissioner for Human Rights (OHCHR)
Palais Wilson
52 rue des Pâquis
CH-1201 Geneva, Switzerland

Re: Response to Barrick Gold’s letter of March 22, 2013: Barrick should not require legal waivers of rape victims in return for remedy packages provided through a flawed and evolving non-judicial mechanism¹

Dear Commissioner Pillay,

I have read with interest Barrick Gold’s response of March 22, 2013 to my letter to you of March 19, 2013.² Aspects of Barrick’s letter bear noting, as they represent a response – albeit an unacknowledged response - to specific concerns I raised in my letter regarding the non-judicial remedy program Barrick has implemented for female victims of rape by security guards at the Porgera Joint Venture (PJV) mine in Papua New Guinea.³ Insofar as the information submitted by Barrick in its letter is now newly public this is a positive development. Other aspects of the letter are disappointing and require a response. To the extent that flaws in Barrick’s remedy program are related to lack of compliance with “effectiveness criteria” for project-level grievance mechanisms, as set out in the United Nations Guiding Principles on Business and Human Rights (UN GPs), I note this failure below.

¹ This letter responds to a letter by Barrick Gold of March 22, 2013, which in turn is a response to a letter from MiningWatch Canada dated March 19, 2013. MiningWatch’s letter was informed by a site visit to Porgera and interviews with victims of rape by security guards at the Porgera Joint Venture mine. I conducted interviews with rape victims between the dates of March 5-10, 2013. Nine of these interviews were in depth, of which two were with women who had already entered Barrick’s remedy process. I was also able to gather information on the experiences of other women in the remedy process who I did not interview in depth.

² These same concerns were also raised on March 11, 2013, while I was in Papua New Guinea, with an expert involved in Barrick’s remedy program.

³ Barrick is 95% owner of the PJV mine and the mine is operated by a Barrick subsidiary.

Ongoing Lack of Transparency

Barrick has now disclosed for the first time that 170 women have filed claims and that no claim has yet been finalized. Transparency is one of the “effectiveness criteria” set out in the UN Guiding Principles on Business and Human Rights (UN GPs) (A/HRC/17/31 p. 26), with which Barrick says its remedy program is in conformity. However the program is not transparent to the women who are using it, or to external stakeholders.

Internal Transparency - Based on interviews I conducted with victims of rape by PJV security guards who had entered the remedy program, lack of transparency was a major concern. For example the women did not know who the members of the complaints assessment team (CAT) were with whom they had spoken, including someone they identified as a lawyer. The women described being told they would receive particular things from the available remedy packages with no clear understanding of why they were being allocated those particular items as opposed to others. They had no clear conception of what would happen when the CAT team next came to town or what the overall time frames of the program were. Some said that they may receive some money, but that they had no idea how much or under what circumstances. The women did not know who the “independent expert” was, only that “someone” in Port Moresby was deciding their remedy.

External Transparency - Barrick’s letter of March 22 provides –for the first time publicly – some information about the remedy program being implemented in Porgera; information that MiningWatch Canada noted in our letter to you of March 19, 2013 was not publicly available. Barrick’s letter provides the names of the consulting company hired to administer the remedy program, as well as the names of the “independent expert” and the members of the “review committee” where appeals may be brought. However, the names of people staffing most other key functions associated with the remedy framework, such as the PRF Association that “independently oversees” the remedy program, the “complaints assessment team” that assesses claims, the “Expert Advisory Group,” and a lawyer the rape victims said spoke to them, remain shrouded. This lack of external transparency means that local and international stakeholders cannot meet with or talk to these individuals about the program to form an independent assessment of it.

Flawed Consultation and its impact on the remedy program

The victims themselves

The UN GPs⁴ specifically note that operational-level grievance mechanisms must consult “the stakeholder groups for whose use they are intended on their design and performance.” Barrick’s letter of March 22 lists groups and individuals it has consulted on the remedy program⁵, but does not mention the victims themselves. There is no evidence that the women who were victims of rape by PJV security guards were consulted on the remedy program. In interviews I conducted,

⁴ UN Guiding Principles on Business and Human Rights (UN GPs) (A/HRC/17/31) p. 26-27

⁵ It should be noted that we have no information on what these groups who were consulted by Barrick actually said the company should do with regard to the remedy framework, or to what extent any advice that was provided was followed.

those who were aware of the remedy program only became aware of it when it was already in place.

The ATA and the PLOA

The Akali Tange Association (ATA), a grass roots human rights group, and the Porgera Landowners Association (PLOA), which represents landowners in the mine lease area, were not consulted in the development of the remedy framework. In its letter of March 22, Barrick once again denigrates these two Porgera stakeholder groups who have done the most to ensure that the rapes of local women by PJV security guards⁶ became known internationally, and who ensured that after years of denial by Barrick, the company has had to acknowledge the rapes.

Leadership of the ATA and the PLOA travelled to Canada yearly between 2008-2011 to speak at Barrick's annual general meetings and meet with Canadian media, civil servants and Members of Parliament regarding the issues of violence by Barrick's security forces at the PJV mine. As is too often the case when local people speak up about human rights abuses related to corporate activity, ATA and PLOA have become a target of hostility by Barrick, which has repeatedly sought to delegitimize them without addressing the undeniably substantive and substantiated complaints they have raised with regards to the operations of the Porgera Joint Venture. Furthermore, all international organizations that have been able to speak out on the issue of violence against women by PJV security guards⁷ have relied heavily on support provided by ATA and PLOA to be able to gather the information needed to publicize the rapes internationally.

Additionally, from the interviews conducted and from a wide range of informal exchanges it is clear that very many people, including women, in the Porgera Valley consider PLOA and ATA to be their representative advocacy organizations.

It is unfortunate that Barrick's letter provides the fact that "local specialists" "counselled against the inclusion of ATA and PLOA" as one reason to have excluded ATA and PLOA from consultations on the remedy framework. These local specialists are not named. But it is remarkable that the two local organizations that Barrick says were consulted on the remedy framework, the Porgera District Women's Association and the Porgera Environmental Advisory Komiti – both financially supported by Barrick – were either unaware of the large number of alleged rapes by mine security guards or did not speak out about them.

In its letter of March 22, Barrick mentions the fact that ATA, PLOA and MiningWatch Canada filed a request for review regarding the issues at the Porgera mine with Canada's National

⁶ As well, ATA and PLOA have worked to publicize: rapes by mobile police units who are housed, fed and financially supported by PJV; house burnings by police in villages in the mine lease area; severe environmental contamination by the mine's riverine tailings disposal; the need for resettlement of the local populations, and other pressing issues.

⁷ I include here Human Rights Watch, so often mentioned favourably by Barrick.

Contact Point for the OECD Guidelines for Multinational Enterprises.⁸ The request for review includes the issue of violence, including sexual violence against women, by PJV's security guards. The request for review was tabled on March 1, 2011. The remedy framework was largely developed subsequent to the filing of this request for review. Nonetheless, none of the notifiers, ATA, PLOA, or MiningWatch Canada was consulted in the development of the framework.

Barrick's March 22 letter dismisses the significance of excluding key local and international stakeholders from its consultation as "one of process rather than outcome." The point that needs to be emphasised is that the serious flaws in the remedy process detailed in this letter, and in my previous letter of March 19, might have been avoided with broader consultation with the victims themselves – and with key stakeholders such as ATA and PLOA. Barrick has cherry-picked the stakeholders with whom it decided to consult. This is not a legitimate way to do stakeholder consultation and it has led to a seriously flawed process.

Flaws in the remedy process

In its letter of March 22, Barrick provides some information that is new and has not previously been made public. Barrick also repeatedly refers to "recent enhancements" and to a process that "will continue to evolve." While some of this new information appears to respond to concerns I raised in my letter of March 19, it also raises new concerns.

1) Translation – in my letter of March 19, I noted that my field visit had revealed that remedy program staff are using a language not commonly understood or spoken by local women. In response Barrick says that translation services are formally offered to every claimant who participates. And, furthermore, that a "recent enhancement" requires remedy program staff to "certify in writing that translation services in the language of the Claimant's choosing have been offered or provided." As Barrick's assertion that translation is being offered is not reflected in my field interviews,⁹ and given the "recent enhancement" Barrick mentions, the question arises about when translation services started to be offered and how many of the 170 women that Barrick mentions have entered the program received translation services. Furthermore, the fact that program staff will now themselves certify that adequate translation was offered does not mean that women have actually received adequate translation services. The women I talked to had only a vague concept of what had happened during their meetings with the assessment team, suggesting that there needs to be some quality control to ensure that the women are actually giving and receiving information in a way that is meaningful to them.

⁸ See: http://oecdwatch.org/cases/Case_210. The issues related to violence by Barrick's security guards are on the table and being discussed in that forum. As Barrick knows, the local notifiers (ATA and PLOA) continue to provide relevant and constructive feedback, subject to a confidentiality agreement.

⁹ In my meeting with an expert involved in Barrick's remedy program the expert acknowledged the fact that the program is being delivered in Tok Pisin rather than the languages of the rape victims and that this was a concern. The expert said it couldn't be helped because competent people who have knowledge of the local languages could not be found. The expert said that in cases where women did not understand Tok Pisin they could bring in a friend to help them. It should be noted that while I was in Porgera some five women were able to offer very competent translation services from local languages to English and back even about quite complex issues.

2) Remedy packages – the Remedy Framework document is quite clear on the types of remedy that will be offered.¹⁰ Aside from mental or physical health related services, the core remedy package offerings may best be characterized as development or income generation projects. These are the sorts of projects a company may offer community members in the normal course of operations as part of “community relations” or “corporate social responsibility.” And in fact, Barrick will be offering similar projects to the community as a whole through a separate community-based program.

Based on the information I collected about women who have entered the program, as well as the firsthand interviews I conducted, it appears that nearly identical income-generating projects are offered to most – if not all – of the women, regardless of the actual physical, social, and psychological impacts they have suffered. The interviews also indicated that the women did not feel they had much say in what they would receive and that the decision was being made in Port Moresby. Women indicated that the remedy did not address their specific needs as a result of the rape and that it was not in alignment with what they would be offered through a traditional dispute resolution procedure.¹¹ In all, these remedy packages do not accord with the injunction of the Guiding Principles that the outcomes of grievance mechanisms should be “rights-compatible” – i.e. in accord with internationally recognized human rights.

Barrick should not require legal waivers of rape victims in return for remedy packages provided through a flawed and evolving non-judicial mechanism

The women who have suffered rape by PJV’s security guards have suffered a gross violation of human rights, and a criminal offence. These women are poor, with very low levels of formal education. As a consequence of the rapes they have become further marginalized and very vulnerable. Barrick is trying to deal with these offences by offering remedy packages in the form of income generating projects that cannot be compared to an “out of court settlement,” such as may be reached following a formal and transparent judicial procedure.¹²

¹⁰ Compensation in the remedy packages may include: psychosocial/trauma counseling; health care; education and training; cooking utensils, clothing; micro-credit; assistance with school fees. For a complete list see Olgeti Meri Igat Raits: A Framework of remediation initiatives in response to violence against women in the Porgera Valley. Page 24. Available at http://www.miningwatch.ca/sites/www.miningwatch.ca/files/framework_of_remediation.pdf

¹¹ As my letter of March 19 indicated, one woman reported having told the Complaints Assessment Team she would appreciate receiving a particular remedy from those offered, only to be told later she would be receiving “chicklets” [young chickens] to raise instead. Women indicated a desire for forms of compensation that addressed the specific harms they had suffered as a result of the rape, such as loss of housing. Women reported that a culturally appropriate form of compensation for a transgression as serious as rape would be pigs and the equivalent value of these pigs in cash.

¹² New information provided by Barrick in its letter of March 22 is that a claimant may have representation “through her own legal representative, funded by the programme if necessary” but this information is not reflected in the remedy program framework document. See Olgeti Meri Igat Raits: A Framework of remediation initiatives in response to violence against women in the Porgera Valley. Available at http://www.miningwatch.ca/sites/www.miningwatch.ca/files/framework_of_remediation.pdf. Nor was this information reflected in interviews conducted with victims of rape who had entered the program. . Specifically, it is unclear whether the Remedial Framework team is actually offering to give claimants money to hire legal counsel independently, whether the amount on offer would actually be sufficient to retain counsel, and whether women would be given assistance in finding counsel if so desired.

Barrick's March 22 letter reveals that the company's project-level non-judicial remedy program is at best a work in progress, as Barrick's many references to "recent enhancements" and to the program's evolution clearly indicate. It offers none of the protections or safeguards of a formal judicial process, or even of an established and officially sanctioned non-judicial process.¹³ As pointed out above, the remedy process is not sufficiently transparent to allow independent outside review (not paid for by Barrick).¹⁴ The program also has no independent accountability mechanism.¹⁵

And yet, as soon as this month, Barrick may be requesting legal waivers from women who accept a remedy package through this flawed process. In order to receive remedy packages, women must enter into an agreement in which "the claimant agrees that she will not pursue or participate in any legal action against PJV, PRFA [Porgera Remediation Framework Association Inc.] or Barrick in or outside of PNG. PRFA and Barrick will be able to rely on the agreement as a bar to any legal proceedings which may be brought by the claimant in breach of the agreement."¹⁶

In its letter of March 22, Barrick simply says that "it is appropriate that claims against Barrick, PJV and PRFA should be released in order to bring finality to the process." While it is undoubtedly of great value for the company to be able to secure a bar to future legal procedures, this is of no value to the women. A remedy program is supposed to provide remedy for harm that has been done, not to function as a transaction of value for the company.

Best Practice and the Guiding Principles

In its letter of March 22, 2013, Barrick dismisses examples provided by MiningWatch Canada of non-judicial remedy programs that explicitly do not require claimants to give up their rights to future legal action; in particular the Hokie Spirit Memorial Fund at Virginia Tech and victim's compensation's schemes in Australia that provide for the payment of compensation to victims of serious crime, assessed by an independent tribunal and paid by the government. While we did not argue in our letter of March 19, 2013 that these examples were entirely analogous to the specific remedy scheme Barrick has designed, we do argue that these schemes provide important and relevant principles. Both cases recognize that the awards provided may not reflect the level of compensation to which victims may be entitled under common law. This is also the case in

¹³ Such a system in exists in Papua New Guinea in the form of traditional, or village courts.

¹⁴ Barrick has recently hired the organization Business for Social Responsibility (BSR) to conduct an "independent review" of the remedy program for the company. BSR's President and CEO, Aron Cramer, is on Barrick's CSR Advisory Board. BSR also regularly carries out contracts for Barrick. This is not an independent review.

¹⁵ Independence of implementation of the program is also questionable in spite of Barrick's assertions that the implementation of the program is independent. In footnote 16 of Barrick's letter of March 22, Barrick incorrectly publicizes information based on a communication between MiningWatch Canada and Cardno, the "independent" consulting firm tasked with implementing the program. Rather than engaging with its critics, Barrick continues to unilaterally engage so-called "independent" experts who are paid by Barrick (Cardno, BSR), operate according to Barrick's terms of reference, and report confidentially to Barrick. This is not a good faith attempt to deal with the independence and engagement problems.

¹⁶ Olgeti Meri Igat Raits: A Framework of remediation initiatives in response to violence against women in the Porgera Valley. Page 27. Available at http://www.miningwatch.ca/sites/www.miningwatch.ca/files/framework_of_remediation.pdf

regard to the remedy packages Barrick is offering rape victims in Porgera based on the information in the remedy framework document and interviews conducted by MiningWatch Canada.¹⁷

With regard to the Guiding Principles (GPs), we have argued above that Barrick's remedy program does not conform with the "effectiveness criteria" of the GPs. We furthermore stand by our letter of March 19 in which we note that the GPs envisage a "mix" and a system of remedies (see GP 6, 25), the most fundamental being judicial remedies for the most serious human rights violations, including those that amount to torts or serious crimes (see GP 22, 25, 26). Nowhere do the GPs state or envisage or imply that project level mechanisms will in all cases fully satisfy victims' access to remedy (see GP 29, 30). The Guiding Principles explicitly call on companies to treat the risk of gross human rights violations (e.g. rape) "as a legal compliance issue" (GP 23c). And the GPs state that company "operational-level" grievance mechanisms "should not be used...to preclude access to judicial or other non-judicial grievance mechanisms" (GP 29 Commentary).¹⁸

Appeal for Justice

Failure by Barrick Gold to act – in spite of public warnings dating back to at least 2008 that PJV's security guards were raping local women – allowed the abuses to go on longer than was necessary. Barrick should provide remedy to the women who are coming forward at this time in Porgera, but we strongly appeal to you, the UN High Commissioner for Human Rights, to join us in asking Barrick to open the remedy process up to a truly public, transparent, inclusive¹⁹ and independent review aimed at resolving the issues raised here. And we ask that you support our request that Barrick remove the requirement that women sign away their rights to pursue future legal action if they accept a remedy package for the harm they have endured.

Sincerely,



Catherine Coumans, Ph.D.
Asia Pacific Program Coordinator, MiningWatch Canada

¹⁷ Barrick's letter of March 22 describes another "recent enhancement" to the company's remedy program in Porgera notable that "it will bear in mind the range of awards that have been rendered in the Papua New Guinea civil justice system for rape and sexual assault." It is unclear exactly what this means. Again, this recent enhancement is not reflected in the remedy framework document and is not reflected in the interviews MiningWatch Canada conducted with women who had entered the remedy program and who were offered income generating projects. This new enhancement again underscores the "work in progress" nature of the program and reason to drop the requirement that the 170 women who have already entered the program, and others who may follow, waive rights to future legal action.

¹⁸ Barrick's letter of March 22 notes that John Ruggie has said that "Barrick's approach as stated is consistent with the Commentary to Principle 29." Experts familiar with Barrick's remedy program have offered MiningWatch Canada a differing opinion to that apparently secured by Barrick from John Ruggie.

¹⁹ Including Barrick's long term critics PLOA and ATA in substantive investigative roles, not as subjects of interview requests by hired consultants.

Electronic copy furnished to:

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

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

OECD-Watch

Amnesty International

Human Rights Watch

Department of Foreign Affairs Canada

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Natural Resources Canada

Department of International Trade Canada