



MiningWatch Canada

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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

Dear Commissioner Pillay,

Re: Allegations regarding the Porgera Joint Venture remedy framework

Thank you for the detailed opinion piece¹ your office has provided in response to submissions you have received from MiningWatch Canada (MiningWatch) and others² regarding the non-judicial grievance mechanism (NJGM) set up by Barrick Gold (Barrick) at the Porgera Joint Venture (PJV) mine³ in Papua New Guinea (PNG).

We appreciate that your response reflects the importance of the issues we have raised in regard to this particular project-level NJGM, but we have substantive concerns with aspects of the opinion, which we discuss below.

MiningWatch strongly supports your office's recommendation that:

...efforts should be made to establish a process to identify an individual, group of individuals or organization, considered credible by Barrick, the claimants and other key stakeholders, to conduct an independent review of the Porgera remediation programme. If necessary, the review should identify possible areas for improvement in the implementation of the programme. The independent review should be focused on the perspectives of the victims of sexual abuse, and the implementation of the programme should be assessed against the effectiveness criteria for non-judicial remedy mechanisms as set out in Guiding Principle 31. An inclusive and transparent process for establishing and conducting such an independent

¹ *Allegations regarding the Porgera Joint Venture remedy framework*. July 2013. 13 pages. Prepared by Craig Mokhiber, Chief, Development and Social Issues Branch, Office of the High Commissioner for Human Rights. Received August 22, 2013. (*Allegations*)

² http://www.miningwatch.ca/sites/www.miningwatch.ca/files/letter_to_unhchr_on_porgera_2013-03-19.pdf ;
http://www.miningwatch.ca/sites/www.miningwatch.ca/files/letter_to_un_high_commissioner_april_2_2013.pdf ;
http://www.miningwatch.ca/sites/www.miningwatch.ca/files/ltr_to_unhchr_may_14_2013_re_porgera_sign-on.pdf

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

review could help address any residual concerns stakeholders may have about the implementation of the programme.⁴

MiningWatch believes a credible independent review is critical in this case and should be undertaken as soon as possible for reasons that include the following:

- The rape victims themselves were not consulted on the remedy framework; therefore, the process by which Barrick's remedy framework was developed is not in compliance with the effectiveness criteria of the Guiding Principles⁵ (GP 31h).
- The compensation being offered is not be rights-compatible (GP 31f) as it will not be "appropriate and proportional to the gravity of the violation and the circumstances of each case" as set out in the "Basic Principles and Guidelines on the Right to Remedy."⁶ Based on recently received information, it is our understanding that the remedy to be offered to the rape victims will not include the compensation they told MiningWatch and other human rights experts that they expect, including monetary compensation and full grown pigs. Nor will it reflect what rape victims might expect to receive in a civil suit.
- Implementation of the remedy framework is not in accordance with the effectiveness criteria of the Guiding Principles (GP 31a,b,c,e)⁷ as recently received information from Porgera indicates that women have lost trust in the process, both because the remedy offered is not what they expected and because the consultants (Cardno) hired by Barrick did not return to further the process on the date they had indicated they would return, leaving women who approached the office on that date without an explanation. Cardno has not been back in Porgera for some four months now, with no communications to rape victims regarding reasons for the delay, or clarity regarding when the process will continue.
- For these reasons, and others set out below, Barrick should not be requiring rape victims to sign a legal waiver in return for individual benefits packages.

MiningWatch will gladly participate in a process to seek credible independent reviewers and in any other capacity that may be considered constructive in this regard.

Imposing conditions on remedy through a non-judicial grievance mechanism

A key concern of MiningWatch remains the imposition of conditions on remedy for the rape victims – in this case the withholding of individual remedy unless the Porgera rape victims are willing to provide Barrick with immunity from future civil suits.

⁴ *Allegations...* p. 10.

⁵ UN Guiding Principles on Business and Human Rights (UN GPs) (A/HRC/17/31)

⁶ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005. See <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>

⁷ "31. In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be: (a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes; (b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access; (c) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation; (...) (e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake..."

The legal waiver Barrick requires states that "...the Claimant is bound not to take any further legal action against Barrick and PRFA in respect of the matters giving rise to the claim..."⁸ Barrick's only justifications for this condition are to avoid "double recovery from the company for the same injury" and that the waiver is "...in the interests of certainty and closure," as this is "important for the claimant and the company..."⁹

As we have pointed out to Barrick, double recovery can be avoided through simple provisions in the remedy agreement between the company and the claimant.¹⁰ Furthermore, and importantly, the waiver holds *no value whatsoever for the victims*. It is clearly not "victim-oriented" as set out in the "Basic Principles and Guidelines on the Right to Remedy."¹¹ It is not in the victim's best interest as it significantly increases the legal barriers they would face should they decide that they need to sue the company in the future with regard to these claims. By making the provision of remedy a transaction of value that unnecessarily benefits the company, Barrick is once again undermining the rights of the rape victims in Porgera and setting a dangerous precedent for project-level grievance mechanisms at other mines around the world.

Legal waivers particularly problematic in cases of project-level non-judicial grievance mechanisms

Our concern regarding legal waivers in cases of non-judicial grievance mechanisms is particularly focussed on the specific circumstances of *project-level non-judicial grievance mechanisms*.

As in the Porgera case, many project-level grievance mechanisms will play out in very remote locations, in countries with weak governance, with highly vulnerable populations under conditions of severe power-asymmetry and with little or no truly independent scrutiny. *As this case continues to demonstrate, under these circumstances companies will not necessarily follow the effectiveness criteria set out in the Guiding Principles, nor ensure rights-compatible outcomes.*

As this case also demonstrates, *oversight by civil society should not be relied upon to ensure that these project-level non-judicial grievance mechanisms produce rights-compatible outcomes*. In this case, Porgeran organizations Akali Tange Association (ATA) and the Porgera Landowners Association (PLOA) and a number of international organizations, including MiningWatch, have made every effort to ensure that the remedy process and the remedy received by the rape victims are rights-compatible. *These efforts have not been successful to date.*

In particular, efforts by civil society locally and internationally to ensure a rights-compatible remedy process in this case have included: direct communications with Barrick; direct communications with experts (both in PNG and internationally) who have advised Barrick on the remedy framework and

⁸ See <http://www.barrick.com/files/porgera/Framework-of-remediation-initiatives.pdf> page 21.

⁹ See <http://www.barrick.com/files/porgera/Summary-of-Recent-Changes-to-the-Porgera-Remediation-Framework.pdf>

¹⁰ MiningWatch Canada has provided Barrick with examples of provisions in other cases that avoid double recovery. In particular, victim's compensation's schemes in Australia generally provide for the payment of compensation to victims of serious crime, assessed by an independent tribunal and paid by the government. The payment of compensation does not affect the victim's right to bring legal proceedings (whether against the government or an individual): *Victims Support and Rehabilitation Act* 1996 (NSW) section 43(2). However, the compensation may be subject to a condition that the compensation be repaid from any subsequent award of damages in subsequent legal proceedings: s.34(1)(c) and the government has a right to receive the compensation for any subsequent award of damages: *Victims Support and Rehabilitation Act* 1996 (NSW) section 43(3). Similar provisions apply in Victoria: *Victims of Crimes Assistance Act* 1996 (Vic) section 51 and South Australia: *Victims of Crime Act* 2001 (SA) sections 17 and 28. See

http://www.miningwatch.ca/sites/www.miningwatch.ca/files/letter_to_unhchr_on_porgera_2013-03-19.pdf p.4-5; See

http://www.miningwatch.ca/sites/www.miningwatch.ca/files/letter_to_un_high_commissioner_april_2_2013.pdf p.6.

¹¹ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005. See <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

process; a field assessment in March of 2013, which included some thirty interviews with rape victims; participation by MiningWatch, ATA and PLOA in a mediated dialogue with Barrick as part of an OECD “specific instance”; taking the case up with the OHCHR, and media exposure in Canada, Papua New Guinea, and Australia.

Opinion from the OHCHR on legal waivers raises questions

In your opinion on this case you determined 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.¹²

While we welcome your opinion that the presumption should be against waivers, the phrase “as far as possible” creates ambiguity that is unhelpful.

Can you please specify in which cases, or under what criteria, a waiver might be considered acceptable?

Opinion from the OHCHR on stakeholder engagement in the Porgera case raises concern

In your opinion you state that:

It should be noted that this opinion is limited to responding to the letters and petitions received by the High Commissioner and focuses exclusively on the Porgera remediation framework.”¹³

In view of these limitations it is surprising that the OHCHR opinion reached the conclusion that the development of the Porgera remedy framework is not necessarily “in breach of GP 31.”¹⁴ This conclusion is based on a number of important erroneous assumptions.

First of all, it fails to recognize the fact that that the framework was not informed by input from the victims themselves – an important point that we raised in previous submissions to your office, and a fact that Barrick has not disputed thus far.

Secondly, your office notes, based on information provided by Barrick, that the local organizations ATA and PLOA “had an opportunity to review the framework” in 2012. Barrick had already started to implement the framework in Porgera by the time members of ATA and PLOA saw the framework in late November, 2012. Furthermore, ATA, PLOA, and MiningWatch obtained the framework from other sources, not from Barrick.

Finally, it must be reiterated in the clearest possible terms that ATA and PLOA were the organizations that first (in 2005), and consistently, raised alarm about alleged violence against local men and women by the security guards at PJV. MiningWatch is confident, based on communications with these organizations since 2006 and three field visits to Porgera between 2008 and 2013, that these organizations are trusted by many rape victims, as well as by male victims of alleged violence by PJV security guards, and their families. It is of considerable concern to us that the OHCHR references letters received from Barrick “[f]or its part, Barrick (...) refers to concerns about the good faith and integrity of the two specific organizations named by MWC”¹⁵ and Human Rights Watch “Barrick’s position on this point appears to be supported by the letter from Human Rights Watch of 5 April 2013”¹⁶ and “[at] the same time, doubts have been raised, including by Human Rights Watch, as to the legitimacy and role of these two

¹² *Allegations...* p. 8.

¹³ *Allegations...p.*

¹⁴ *Allegations...* p. 13.

¹⁵ *Allegations...* p. 12.

¹⁶ *Ibid.*

organizations.”¹⁷ MiningWatch urges the OHCHR to exercise greater caution in discussing the “legitimacy and role” of local organizations in complex circumstances without having conducted its own investigation or, apparently, having spoken to representatives of either of the organizations in question.

It is clear that Barrick was in breach of GP 31 in developing the framework and it is our contention that inclusion of the perspectives of victims, and of ATA and PLOA, might have prevented some of the flaws in the framework and breaches of human rights in its implementation.

Independent Investigation

To conclude, we reiterate our appreciation for the serious consideration given to the issues that MiningWatch and others have been raising concerning Barrick’s remedy program in Porgera, and we support the recommendation by the OHCHR for an independent investigation. We look forward to playing a constructive role in advancing this investigation at the earliest possible time.

Sincerely,



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

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, Trade and Development Canada

¹⁷ *Allegations...* p. 13.