



## **Review of Barrick Gold/Acacia Mining’s Draft “Community Grievance Process - Standard Operating Procedure” for the North Mara Gold Mine in Tanzania**

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### **Context**

In January 2018, Acacia Mining<sup>1</sup> released an undated draft Standard Operating Procedure for a new Community Grievance Process<sup>2</sup> for the North Mara Gold Mine in Tarime, Tanzania.

This review of Acacia/Barrick’s new draft Grievance Process is informed by field assessments carried out yearly at the North Mara mine by MiningWatch Canada in 2014, 2015, 2016 and 2017.<sup>3</sup> In the course of these field assessments MiningWatch interviewed more than a hundred male and female victims, family members, and witnesses of alleged excess use of force by mine security and by police who guard the mine under an MOU between the mine and the Tanzania state. The field assessments both document the ongoing violence against local villagers, and assess the legitimacy and effectiveness of the mine’s non-judicial grievance mechanism meant to address these alleged human rights abuses.

Following each field visit MiningWatch summarized, and made public, key findings with respect to both the ongoing violence and the functioning of the mine’s grievance mechanism. We found the grievance mechanism to lack legitimacy and to be ineffective in addressing the violence and the alleged rights

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<sup>1</sup> Canadian Barrick Gold Corp. holds a 63.9% equity interest in U.K.-based Acacia Mining plc. North Mara Gold Mine Ltd. is wholly owned by Acacia Mining plc.

<sup>2</sup> See Acacia. Jan. 2018. *Community Grievance Process: Standard Operating Procedure*. <http://www.acciamining.com/sustainability/grievance-process/english.aspx>

<sup>3</sup> In 2014-2016 MiningWatch carried out human rights field assessments together with UK-based Rights and Accountability in Development (RAID). MiningWatch carried out a further assessment in 2017.

violations and harm suffered by victims of the mine's security forces.<sup>4</sup> We also found it to have been used strategically by the mine to evade legal action on behalf of victims.<sup>5</sup>

MiningWatch has continuously shared its findings and recommendations in regard to the North Mara mine's flawed grievance mechanism with Acacia/Barrick, both in writing and in meetings. However, MiningWatch indicated to Acacia that we would not participate in a confidential and non-transparent process to revise the mechanism. MiningWatch was not involved in the development of the draft Community Grievance Process released in January 2018<sup>6</sup> and reviewed here.

## **Review: Draft *Community Grievance Process - Standard Operating Procedure***

This brief covers:

- **Possible Improvements** over the previous mechanism
- **Ongoing Concerns**
- **Outstanding Questions** that need to be answered

### ➤ **Possible Improvements:**

- **Article 1, item 3.** – states that the new Grievance Process is not designed to “*substitute for or impede access to judicial or other remedy processes.*”

This would constitute an improvement over the previous process that was explicitly used to undermine legal action on behalf of victims.<sup>7</sup>

- **Article 54, item 2.** – states that: “*Grievants and persons affected shall not be required to waive their rights to bring a claim against the Mine in another forum in order to participate in or resolve Grievances through the Grievance Process.*”

This would constitute an improvement over the mine's previous grievance process that required binding agreements in return for compensation, in which victims waived their legal right to seek

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<sup>4</sup> For more information and findings from field assessments see: *Anger Boils Over at North Mara Mine – Barrick/Acacia Leave Human Rights Abuses Unaddressed Field Assessment Brief*. MiningWatch Canada. July 2017. [https://miningwatch.ca/sites/default/files/2017\\_field\\_report\\_final\\_-\\_anger\\_boils\\_over\\_at\\_north\\_mara\\_mine.pdf](https://miningwatch.ca/sites/default/files/2017_field_report_final_-_anger_boils_over_at_north_mara_mine.pdf); *In Need of Repair: Acacia Mining's Grievance Mechanism at North Mara Gold Mine, Tanzania*. Mining Watch Canada and RAID, May 2016. [https://miningwatch.ca/sites/default/files/memorandum\\_to\\_acacia\\_revised.pdf](https://miningwatch.ca/sites/default/files/memorandum_to_acacia_revised.pdf); Mining Watch Canada and RAID, *Violence Ongoing at Barrick Mine in Tanzania: MiningWatch Canada and RAID (UK) Complete Human Rights Assessment*, (Aug. 5, 2014), <https://miningwatch.ca/news/2014/8/5/violence-ongoing-barrick-mine-tanzania-miningwatch-canada-and-raid-uk-complete-human>; Mining Watch Canada and RAID, *Broken Bones and Broken Promises: Barrick Gold Fails to Address Ongoing Violence at Tanzania Mine*, (Nov. 17, 2015). <http://miningwatch.ca/news/2015/11/17/broken-bones-and-broken-promises-barrick-gold-fails-address-ongoing-violence>; Mining Watch Canada and RAID, *Tanzanian Government Investigation Receives Hundreds of Reports of Violence and Deaths at North Mara Gold Mine*, (Sept. 22, 2016), <http://miningwatch.ca/news/2016/9/22/tanzanian-government-investigation-receiveshundreds-reports-violence-and-deaths>; Mining Watch Canada and RAID, *Background Brief: Adding Insult to Injury at the North Mara Gold Mine, Tanzania*. September 2016. [https://miningwatch.ca/sites/default/files/adding\\_insult\\_to\\_injury\\_north\\_mara\\_0.pdf](https://miningwatch.ca/sites/default/files/adding_insult_to_injury_north_mara_0.pdf)

<sup>5</sup> *Anger Boils Over at North Mara Mine*, *op. cit.*

<sup>6</sup> Acacia does not provide transparency on which organizations or individuals were involved in drafting the new Community Grievance Process, but does acknowledge feedback on the previous version: “International civil society organisations have also commented.” <http://www.acaciamining.com/sustainability/grievance-process/english.aspx>

<sup>7</sup> *Anger Boils Over at North Mara Mine*, *op. cit.*

remedy in court for the harms covered by the agreement. MiningWatch has protested legal waiver requirements in the context of company implemented operational-level grievance mechanisms, both at Barrick/Acacia's North Mara mine, and in regard to Barrick's Porgera Remedy Framework Agreement mechanism that was in place at the Porgera Joint Venture mine in Papua New Guinea (2012-2015) and also required legal waivers.<sup>8</sup>

**NOTE** – Based on MiningWatch's interviews with victims of alleged excess use of force by mine security and/or police at the North Mara mine, some of these victims, or family members of deceased victims, have been offered what may be described as "humanitarian relief" in return for signing a document that explicitly states that the mine is not responsible for the harm that the victims allege.<sup>9</sup> In some of these cases the victims have refused to sign these documents, and have forgone potential relief, because they strongly believed the mine to be responsible for the harm they endured. In the new draft Grievance Process, **Articles 62 and 63** discuss **Humanitarian Relief**. There is no mention here of the need for victims to sign a document relieving the mine of responsibility for the harm they endured in return for humanitarian relief. *Acacia/Barrick needs to be explicit that victims will not be required to sign documents stating that the Mine is not responsible for the harm victims have endured, whether they receive remedy through the Grievance Process or are granted Humanitarian Relief. Such documents are not appropriate as they may impede future legal action victims may wish to take.*

- **Article 17, item 1.** – provides a broad definition of who can lodge a grievance; this is positive.
- **Article 17, item 2.** – defines the issues that a grievance may address broadly; this is positive.
- **Article 17, item 4.** – includes consideration of potential future rights violations and harms by allowing "Remedy Requests" for issues that "are going to have an adverse Impact" or "to prevent an adverse impact"; this is positive.
- **Article 47, item 1b.** – appears to indicate that impacts of a rights violation and harm on the victim's dependents may be considered in determining remedy; if so, this is positive.

## ➤ Ongoing Concerns:

Overall concerns with the draft Grievance Process discussed below are:

1. Lack of Independence: the Grievance Process is not independent of the Mine/Acacia/Barrick
2. Lack of Due Process: the Grievance Process does not address the power imbalance inherent in the relationship between the Mine and mainly indigent and illiterate claimants
3. Lack of Assurance of Rights-Compatible Remedy
4. Lack of Transparency
5. Lack of compliance with the UN Guiding Principles effectiveness criteria

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<sup>8</sup> See for example: *Letter to UN Commissioner for Human Rights re: Barrick Gold's "grievance" procedure for victims of rape by security guards at the Porgera Joint Venture mine in Papua New Guinea*. MiningWatch Canada. 23 March 2013.

<https://miningwatch.ca/blog/2013/3/23/letter-un-commissioner-human-rights-re-barrick-golds-grievance-procedure-victims-rape>

<sup>9</sup> MiningWatch has interviewed a number of individuals who said they had been asked to sign a document that explicitly relieved the mine of any responsibility for the harm they had endured in return for what can be described as humanitarian relief. One victim asked for a copy of the document to consider it more carefully at home, but was refused a copy.

## 1. Lack of Independence

The Grievance Process, as set out in the Standard Operating Procedure (SOP), is complex involving numerous stages and types of personnel at each stage. Notably, key positions and decisions makers are appointed by the Mine, work for the Mine, and/or explicitly represent the interests of the Mine, and report to the Mine.

- Investigation Team - The Community Impacts and Remedies Investigation Team (Investigation Team or IT) “takes the lead”<sup>10</sup> when a complaint comes in. In addition to leading in the grievance process: “[t]he Investigations Team shall represent the Mine through the Grievance Process, including through both the Dialogue & Engagement and the Independent Review stages” [emphasis added].<sup>11</sup> The IT investigates the “facts alleged” in the complaint that has been brought including: “receiving and analysing information provided by Grievants” (which may include their statements, their witnesses statements, supporting documentation); data provided by the Mine; commissioning studies; “instructing any necessary experts or consultants”; taking witness statements from Mine employees, contractors and others (with the exception, unless requested, from Grievants or their witnesses).<sup>12</sup> The IT also gathers police reports or reports from any other authorities with relevant information. The IT generates a report with “findings of fact” and conclusions, if possible, on whether “there may have been a breach of ... legal or other standards”, and whether there has been an “adverse impact as a result of any such breach.”<sup>13</sup>

At some point, the SOP is unclear when this would happen, information regarding “each party’s observations, evidence and reports” is meant to be exchanged. It is also unclear if this exchange will include *all* evidence gathered by the Mine, including, for example, CCTV footage. There is no independent body to ensure that all information gathered by the Mine is in fact provided to the Grievant.

In the case there is a determination that “there was an impact or risk of an impact,”<sup>14</sup> it is again the IT, which represents the Mine, that “takes the lead” in the “[i]dentification of remedies.”<sup>15</sup>

*To summarize, the Investigation Team represents the Mine through the Grievance Process but it also: “takes the lead” on incoming complaints; investigates the complaints; and, if the Investigation Team agrees that there is an impact, or a risk thereof, it leads in identifying remedies (p. 5).*

- Grievance Committee and Advisory Board – The “Grievance Committee,” is made up of three members, to which complaints are referred when there is disagreement between the Mine and the Grievants in regard to whether there was an “impact,” and/or whether the remedy offered is “impact-appropriate and proportionate.”<sup>16</sup>

The SOP describes this Grievance Committee as “independent,”<sup>17</sup> but two of the three members of the Grievance Committee are effectively chosen by the Mine. One is chosen from a roster of candidates compiled by the Mine and another, the Chairperson of the Grievance Committee, is chosen from a

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<sup>10</sup> Acacia. Jan. 2018. *Community Grievance Process: Standard Operating Procedure*. p. 5.

<http://www.acaciainining.com/sustainability/grievance-process/english.aspx>

<sup>11</sup> *Ibid.* p. 7

<sup>12</sup> *Ibid.* p. 7-8

<sup>13</sup> *Ibid.* p. 17

<sup>14</sup> *Ibid.* p. 5

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

roster of candidates compiled by an Advisory Board.<sup>18</sup> The five member Advisory Board is itself “appointed by the Mine”<sup>19</sup> and includes “Acacia’s Head of Legal & Compliance.”<sup>20</sup>

The third member of the Grievance Committee is chosen from a “Community Roster.” This roster is compiled by the “Community Consultation Body (“CCB”)”<sup>21</sup> The CCB and the Community Roster are the only entities that appear to have some independence from the Mine. However, the member of the Grievance Committee chosen from the Community Roster is in a minority position as the other two members are effectively chosen by the Mine.<sup>22</sup> Furthermore, the actual choice of *all* members for the Grievance Committee, drawn from each of the three rosters, is made by the Grievance Team Leader, who is employed by the Mine, as described below.

The Advisory Board also compiles an “Experts Roster” which “may be consulted by Grievants or the Grievance Committee at the Mine’s expense in respect of specific Grievances or subject.”<sup>23</sup> It is unclear if the Mine would cover the costs of experts chosen by Grievants who are *not* on this Experts Roster.

- Community Grievance Team and Grievance Team Leader – The Community Grievance Team and Grievance Team Leader are both appointed by and work for the Mine. The Community Grievance Team is to “act as the key interface with Grievants” and “administer and coordinate all aspects of the Grievance Process.”<sup>24</sup>

The Grievance Team Leader oversees the functioning of the Community Grievance Team and the overall implementation of the SOP. The Grievance Team Leader plays a key advisory role to the Mine with respect to grievances and will “advise the Mine on how they should be investigated.”<sup>25</sup>

Additionally, as noted above, the Grievance Team Leader will “appoint members of the Grievance Committee from the rosters of approved candidates compiled by each of the Mine, the CCB and the Advisory Board.”<sup>26</sup> This Grievance Committee is key as it arbitrates disputes between the Mine and Grievants regarding whether there was an impact and whether remedy offered by the mine is rights-compatible.

The Grievance Team Leader executes a number of other core functions, among others: “draft or oversee the drafting of Grievance Resolution Reports; (...) monitor the appropriateness, proportionality, rights-compatibility and consistency of outcomes of the Grievance Process; (...) present written reports to the CCB and the Advisory Board every year on Grievance Process activities, outcomes and statistics (including the number, type, status, time taken to resolve and

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<sup>18</sup> *Ibid.* p. 7.

<sup>19</sup> *Ibid.* p. 9.

<sup>20</sup> The members of the Advisory Board “serve a first term of two years and may be reappointed for additional two year terms.” (*Ibid.* p. 9). It is therefore conceivable that Acacia’s Head of Legal & Compliance would always be on the Advisory Board. The Advisory Board makes decisions by “majority vote” (*Ibid.* p. 9) so in a split decision Acacia’s Head of Legal & Compliance could have a determining vote.

<sup>21</sup> *Ibid.* p. 9.

<sup>22</sup> The SOP does not clarify how decisions are made in the Grievance Committee. If decisions are made by the majority, then the two members effectively chosen by the Mine could prevail over the member chosen from the Community Roster. If the Chairperson can override decisions by the other two members then, again, a member effectively chosen by the mine would prevail in decision making.

<sup>23</sup> Acacia. Jan. 2018. *Community Grievance Process: Standard Operating Procedure*. p. 10.

<http://www.aciamining.com/sustainability/grievance-process/english.aspx>

<sup>24</sup> Acacia. Jan. 2018. *Community Grievance Process: Standard Operating Procedure*. p. 6.

<http://www.aciamining.com/sustainability/grievance-process/english.aspx>

<sup>25</sup> *Ibid.* p. 7.

<sup>26</sup> *Ibid.* p. 7.

outcomes of Grievances), on the trends and patterns of community impacts, on community consultations regarding the Grievance Process and on recommended changes to the Grievance Process.”<sup>27</sup>

*To Conclude: The detailed description above of the key committees, personnel, and decisions makers, which are appointed by the Mine, work for the Mine, and/or explicitly represent the interests of the Mine, and report to the Mine, demonstrates a significant lack of independence of this grievance mechanism from the Mine. Furthermore, the procedure creates a potential conflict of interest for the Mine’s Investigation Team. Presumably in recognition of the fact that the Grievant does not have its own Investigation Team the process notes that the Mine’s Investigation Team could also be called upon to help victims obtain evidence or witness statements on their behalf.<sup>28</sup> The Mine’s Investigation Team cannot represent both parties at the same time. The process is set up such that they owe their duty to the Mine, and the victims should have access to their own investigators.*

## 2. Lack of Due Process

Control over the grievance mechanism’s process is exerted by the Mine, both through key operational and investigative bodies and decision makers, as detailed above, and through the process of the mechanism that does not address power imbalances between the Mine and claimants who, as we know from our field work, are most commonly indigent and illiterate. The mechanism does not provide for fair process or “equality of arms.”

- Who may file a grievance - The Grievance Process appears to exclude from consideration *a priori* all claimants who may have sought and received remedy through the mine’s previous, flawed, iteration of the Community Grievance Process:<sup>29</sup> “[t]he Grievance Process shall not consider a Grievance if its subject matter: (...) duplicates a Grievance already examined and settled by the Grievance Process....”<sup>30</sup> It also excludes Grievances that are “pending before another remedy process”<sup>31</sup> whether this is “judicial or non-judicial, inside or outside of Tanzania against the Mine and/or any of its parents or affiliates.”<sup>32</sup>

*Given the serious shortcomings in the previous iteration of the Community Grievance Process, as documented by MiningWatch over four years between 2014-2017,<sup>33</sup> victims of mine-related rights violations and harm who had their cases considered, and may have received some remedy, under the previous grievance process, should be eligible for reconsideration under a yet-to-be-created equitable process without having to argue circumstances for re-consideration.<sup>34</sup> Furthermore, as the 2018 draft Grievance Process is already processing claimants,<sup>35</sup> these claimants should also be eligible for reconsideration under a yet-to-be-created equitable grievance mechanism. Finally, best practice in non-judicial grievance mechanisms is not to exclude cases based on parallel procedures.<sup>36</sup>*

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<sup>27</sup> *Ibid.* p. 7.

<sup>28</sup> *Ibid.* p. 13 and p. 16 (articles 21 (4), 31 (3)).

<sup>29</sup> Acacia’s web site refers to the Community Grievance Process, by the same name, set up in 2012.

<http://www.acciamining.com/sustainability/grievance-process/english.aspx>

<sup>30</sup> Acacia. Jan. 2018. *Community Grievance Process: Standard Operating Procedure*. p. 15.

<http://www.acciamining.com/sustainability/grievance-process/english.aspx>

<sup>31</sup> *Ibid.* p. 16.

<sup>32</sup> *Ibid.* p. 15.

<sup>33</sup> See footnote 4 above.

<sup>34</sup> Acacia. Jan. 2018. *Community Grievance Process: Standard Operating Procedure*. p. 16.

<http://www.acciamining.com/sustainability/grievance-process/english.aspx>

<sup>35</sup> *Ibid.* p. 11.

<sup>36</sup> See for example: *Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points*

- Burden of Proof - To file a claim, Grievants are expected to provide the Mine's Community Grievance Team and Grievance Team Leader, the following items. These include: "an account of the facts and background to the Grievance, specifying the place, date and approximate time of the alleged events resulting in impact(s); identification of all of the entities and/or individuals the Grievant considers caused, by act or omission, the alleged impact(s), and information as to why the Grievant considers the Mine responsible; if applicable, identification of the interest(s) or right(s) affected by the subject matter of the Grievance; supporting evidence, including copies of any medical records and witness statements; ... steps taken (if any) to complain about the subject matter of the Grievance through another process (for example, the Police, other Government agencies, the Courts), and status of such processes including name of any public authority which is considering the subject matter of the Grievance; steps taken (if any) to obtain remedies from other parties apart from the Mine and/or information and explanation about the inability to do so."<sup>37</sup>

*It must be reiterated here that more than a hundred victims of alleged rights abuses, family members and witnesses, which MiningWatch has interviewed over the past four years, are, with very few exceptions, indigent and illiterate. The Mine will offer Grievants "vouchers for four hours of legal advice and assistance, redeemable upon submission of tax invoices from qualified legal representatives of their own choosing."<sup>38</sup> Most of these Grievants will need specialized, preferably legal, support throughout the entire process. Furthermore they will need disbursements to pay for independent investigators or experts.*

- Biased investigation – Once a grievance is filed, and accepted by the Mine's Community Grievance Team, the Mine's Investigation Team, which "shall represent the Mine through the Grievance Process"<sup>39</sup> and will "represent the Mine's view of the events,"<sup>40</sup> investigates the grievance. The Investigation Team will "issue an Investigation Report on the Grievance, which shall include: a. findings of fact; b. any potentially applicable legal or social responsibility standards, commitments or codes of conduct; c. conclusions, if possible, regarding whether, based on the findings of fact, there may have been a breach of those legal or other standards, commitments or codes of conduct; and d. whether there has been or could be an adverse impact as a result of any such breach."<sup>41</sup>

The Grievance Team is mandated to "facilitate the exchange of each party's observations, evidence and reports." Presumably the information provided by the Grievant will be made available to the Investigation Team to facilitate its investigation. It is unclear if, and when, the Grievant will receive *all* evidence gathered by the Mine, including, for example, CCTV footage.

There is no independent body to ensure that all information gathered by the Mine, or sought by the Grievant, will in fact be made available to the Grievant. There is no indication, for example, that the Grievant's lawyer can subpoena documents or compel witnesses.

*It is clear that the Grievance Process envisions a biased and one-sided investigatory process that is entirely in the hands of the Investigations Team, a team that explicitly represents the Mine's interests. The procedure should guarantee Grievants, or more likely their legal support, the right to carry out interrogatories and obtain undertakings or request documents/evidence, such as security footage,*

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from 2000 to 2015. P. 24. <https://mneguidelines.oecd.org/oecd-report-15-years-national-contact-points.pdf>

<sup>37</sup> Acacia. Jan. 2018. *Community Grievance Process: Standard Operating Procedure*. p. 14.

<http://www.acaciainining.com/sustainability/grievance-process/english.aspx>

<sup>38</sup> *Ibid.* 13.

<sup>39</sup> *Ibid.* 7.

<sup>40</sup> *Ibid.* 17.

<sup>41</sup> *Ibid.*

*field reports from security, environmental and social impact monitoring, etc. Furthermore, as noted above there should be a provision for disbursements so that the Grievant can pay for independent investigators or experts.*

- Dialogue to determine impact – Following the Mine’s investigation and determination of “findings of fact” regarding the Grievance, the Grievance Process envisions a facilitated and confidential “Dialogue and Engagement” between the parties about “whether there was an impact or risk of an impact”<sup>42</sup> or not. The Mine’s Grievance Team will facilitate this session aimed at arriving at a “mutual understanding as to whether there have been or would be adverse impacts in a manner involving the Mine.”<sup>43</sup> Perhaps in recognition of the biased nature of this critical “dialogue” the Grievance Process notes that the Grievant may “be represented at or accompanied by a lawyer or other advisor to the Meeting.”<sup>44</sup>

*The Grievant is at a distinct disadvantage in this biased and confidential dialogue process, even if the Grievant has a lawyer present, as the Mine’s Investigation Team, has already come up with a report on “findings of fact,” from the Mine’s point of view, and the session is facilitated by the Mine’s Grievance Team. Furthermore, if no agreement on “impact” is reached at this stage the issue either is “archived” or is sent to the Grievance Committee for final arbitration in another confidential process. As noted under 1. above, the three person Grievance Committee is also not independent of the Mine.*

- No undertaking to suspend applicable limitation periods – The Standard Operating Procedure under Article 1, item 3 states that the Grievance Process is not designed to “substitute for or impede access to judicial or other remedy processes.”

*However, there is no undertaking from the Mine that it will agree that the applicable limitation period is suspended while a victim participates in the grievance mechanism. By participating in this mechanism, victims could lose time and miss filing a claim on time against the company. If they do not respect the limitations period for bringing their claim, they could be precluded from doing so.*

- No undertaking to preserve evidence – The parties have no duty to preserve all relevant evidence and keep one another informed of the facts that are relevant to a fair debate. They should have such a duty and should also have a duty not withhold facts from the other party that are relevant to the dispute.
- No rules on the admissibility of evidence – It is standard in private arbitration, for the parties to either choose a set of rules of evidence and procedure or pick and choose the ones that they want to apply.

***To Conclude:*** *In order to ensure independence and due process, the Grievance Procedure should ensure that:*

- *the role of decision makers is to impartially resolve disputes between the parties;*
- *decision makers are independent from the mine;*
- *the mine has no oversight over decision makers;*
- *decision makers cannot be removed by the mine (security of tenure). Only a neutral party can remove a decision maker if he/she breaches his/her ethical duties;*

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<sup>42</sup> *Ibid.* 5.

<sup>43</sup> *Ibid.* 18.

<sup>44</sup> *Ibid.*

- *decision makers will receive adequate remuneration (to eliminate or reduce the possibility of corruption);*
- *the Mine cannot withhold or remove the remuneration;*

*The validity of the Grievance Procedure and dispute resolution process depends upon guaranteeing these principles.*

### **3. Lack of Assurance of Rights-Compatible Remedy**

The Standard Operating Procedure is very much focussed on detailed procedural and evidentiary requirements on the part of the Grievant and the Mine, which seem divorced from the realities of the people this mechanism is meant to serve and their capacity to participate in it. This concern extends to the issue of remedy, which does not seem to be in touch with the life-altering impacts of many of the harms that victims of excess use of force and their families endure.

- Definition of remedy – The Standard Operating Procedure defines remedy as “a measure or collection of measures to prevent an adverse impact or to restore, as far as possible, the situation which existed before an adverse impact occurred” and says it aims “to provide Remedies that are proportionate, individually tailored, culturally appropriate and compatible with the nature and gravity of any adverse impact.”<sup>45</sup> It also says the Mine will not “seek to alleviate underlying or pre-existing conditions, enrich a recipient or be punitive on the Mine.”<sup>46</sup>
- Remedy Request and Mine’s position on remedy - If there is a determination “that the Mine should consider a remedy in respect of adverse impacts suffered or threatened by the activities of the Mine” then there will be a process to determine an “appropriate, proportionate and/or rights-compatible remedy.”<sup>47</sup> The Grievant is required to file a Remedies Request form including: “a detailed statement from the persons affected where possible regarding the consequences of the adverse impacts; detailed statements from any dependents of the person(s) impact, if relevant; copies of any documents showing loss of income or other economic harm, medical reports or other reports (if relevant); and other supporting information or evidence.” The Mine’s Investigations Team issues a Remedies Report that sets out “what remedy the Mine proposes.”<sup>48</sup>

*As noted above the degree of paperwork and evidentiary documentation required from Grievants, again, in this stage in order to make their case regarding the needed remedy is likely to be completely overwhelming and out of reach for most indigent and illiterate Grievants.*

- Dialogue to determine remedy – Similar to the process to determine if there was a rights violation and harm done, an “impact,” the process to determine remedy is through another confidential “Dialogue and Engagement” process between the Grievant and the Mine, facilitated by the Mine’s Grievance Team.

*The same concerns regarding due process pertain here as noted under “Dialogue to determine impact” on page 8 above. The process as set out by the Mine will require far more than 4 hours of a lawyer’s time to see the Grievant through the entire process.*

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<sup>45</sup> *Ibid.* p. 12

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.* p. 21

<sup>48</sup> *Ibid.* p. 22

- Restrictions on Remedy – The Standard Operating Procedure determine that “[r]emedies shall be provided in kind or through the direct payment of fees to service providers, institutions or medical facilities whenever possible.”

*The envisioned means of provision of remedy is paternalistic. Furthermore, it has been MiningWatch’s experience that payments made by the mine directly to suppliers, particularly of building materials, but also to medical facilities, have led to misappropriation of funds by those receiving the funds to the detriment of the Grievants. This will require greater care on the part of the Mine than has been the case thus far.*

**To Conclude** – *The definition of remedy set out above, particularly in regard to “restore, as far as possible, the situation which existed before an adverse impact occurred” and in regard to seeking “detailed statements from any dependents of the person(s) impact” might lead to the conclusion that the wider and longer-term consequences of an “impact” will be considered in providing remedy. But this is not ensured in the Standard Operating Procedure.*

*Most of the victims of excess use of force by mine security and by police guarding the mine that were interviewed by MiningWatch were of an age at which the economic benefits of their labour supported not just themselves but also a spouse, young children, and potentially their younger siblings and elderly parents. In many of these cases, the injuries sustained make manual labour, the most common form of work in these communities, impossible. Remedy in such a case would have to entail, among others: potentially long-term medical care; life-long care for medical devices, such as prostheses; replacing the economic value of the injured or deceased victim, potentially for the lifetime of the person, and for many years in the case of dependents. This is not likely to be possible through “in kind” provisions of remedy or “payments to suppliers.”*

*The Standard Operating Procedure does not provide sufficient assurance that the Mine will provide remedy for victims and their dependents, and families of deceased victims, who will need support over many years and/or for the rest of their lives as a result of the harm they endured.*

#### **4. Lack of Transparency**

Lack of transparency is evident on many levels.

- Barrick/Acacia has come out with this draft Community Grievance Procedure without any transparency around who was consulted or contracted to design this new mechanism.
- There is a lack of transparency around who populates the various positions, rosters and committees set out in this document. This is particularly relevant as in our interviews with those victims of alleged excess use of force, by mine security and police guarding the mine, who had engaged with the previous grievance mechanism, we heard near universal complaints about the bullying behaviour of a retired judge engaged by the mine. If this judge were to be engaged in, for example, the Grievance Committee, this would further call into question the impartiality of this committee.
- Aspects of the Grievance Procedure are cloaked in confidentiality that may be harmful to the interests of Grievants, particularly regarding provisions set out under Article 64. It needs to be made clear here that documents and evidence and testimony belonging to the Grievant or pertaining to the Grievant, such as medical records, will not be made confidential by being brought into the grievance process no matter by which party.

## 5. Lack of compliance with the UN Guiding Principles effectiveness criteria

The UN Guiding Principles for Business and Human Rights (Principle 31) set out “effectiveness criteria” for non-judicial grievance mechanisms. The criteria are: legitimacy, accessibility, predictability, equitability, transparency, rights-compatibility, dialogue and engagement, continuous learning.<sup>49</sup> The concerns detailed above indicate a lack of compliance with these criteria.

Legitimacy rests in part on fair process. We have discussed the lack of independence of the Grievance Process from the Mine and the lack of consideration for the existing extreme power imbalance between the Mine and Grievants. The mechanism lacks necessary and sufficient means to address this power imbalance and to better provide fair or due process for poor and illiterate Grievants. Ultimately, the Mine and the various staff and committees it has put in place have too much control over determinations of whether there was an “impact” and whether remedy will be provided and what that remedy should be.

With regard to accessibility, we have indicated that the overly legalistic nature of the process that relies heavily on written documentation will make this an impossible process for many Grievants to sustain without significant expert support and far more than the four hours of legal support offered by the Mine. Additionally, not only the costs of expert support will need to be covered, but also the costs incurred by Grievants participating in this process as many are extremely challenged economically and cannot even afford transportation costs, let alone significant time away from daily efforts to secure food.

Predictability may be a concern as the Mine reserves the right to change the Standard Operating Procedures as it sees fit. Furthermore, at least some Grievants who have gone through the previous deeply flawed Grievance Process, started in 2012, appear to be excluded from participation in this new process which presumably offers some improvements over the previous process.

With regard to equitability, we have made the case here that the new Grievance Process is not equitable as it is not unbiased and independent from the Mine. Nor is it available on an equal footing to indigent and illiterate Grievants. It does not ensure, as envisioned by the effectiveness criteria, that Grievants have “reasonable access to sources of information, advice and expertise” as they only have a lawyer for four hours and there is no evidence in the Standard Operating Procedures that this lawyer can undertake an investigation by compelling documents or testimonies. There is also no provision for disbursements to pay for independent investigators or experts.

With regard to transparency, we have detailed on page 11 a number of ways in which this Grievance Process is not transparent. For example, at a most basic level, there is no transparency regarding who actually populates the various committees, rosters, and key decision making positions.

With regard to rights-compatibility we have demonstrated serious concern that the Standard Operating Procedure does not provide enough clarity and assurance of rights-compatibility with regard to remedy. There is no assurance that outcomes and remedies will accord with internationally recognized human rights norms in regard to remedy, and that the very serious harms endured by many victims of excess use of force by mine security and/or police guarding the mine, their dependents, and the families of victims who have lost their lives, will receive the kind of long term and sustainable reparations to offset their losses that are required.

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<sup>49</sup> See [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf) p. 33-35

## ➤ Outstanding Questions

The questions posed below represent some issues that require further clarification.

- **Article 62: 1** - states that “[t]he Grievance Team Leader may on his or her own initiative or upon request of a Grievant or another recommend that the Mine grant Humanitarian Relief with respect to a serious and urgent medical situation which appears to be linked to an injury incurred on the Mine Site.” In case the Mine will provide either humanitarian relief or remedy, will Grievants be required to sign a document that explicitly states that the Mine is not responsible for the impact in relation to which the remedy or humanitarian relief is provided? MiningWatch was made aware of such documents during our fieldwork in 2017 and found villagers very reluctant to sign them. Such documents could conceivably also be used by the Mine to defend against legal action, in contradiction to **Article 1, item 3.**, which states that the new Grievance Process is not designed to “*substitute for or impede access to judicial or other remedy processes.*”
- **Article 17: 4.** – includes consideration of potential future rights violations and harms by allowing “Remedy Requests” for issues that “are going to have an adverse Impact” or “to prevent an adverse impact.” In 2017 MiningWatch learned that at least four people had drowned in a mined out pit that was full of water and where the Mine had removed a wall barrier.<sup>50</sup> The Mine had removed these four bodies and was clearly aware of the danger, but had not taken action to once again limit access to the pit. In such a case would the Mine wait for a Grievant to file a complaint before taking action?
- **Article 6: 6.** – states that “[w]hen investigating Grievances that raise security-related human rights concerns in particular, the Investigations Team shall follow the Handbook for Security & Human Rights Investigations as updated by the Mine from time to time.” Is this Handbook available for the public and if so where can it be found?
- **Article 1:4.** – states that “[t]he Mine may not be able to fully investigate or provide comprehensive remedies on its own where the State or third parties are involved in the alleged harm. The Mine may need to refer credible allegations of criminal conduct to the appropriate Tanzanian authorities, and refer matters involving third parties to such third parties in order to help Grievants obtain effective redress.” Does this mean that the Mine’s Community Grievance Process is not intended for the very serious cases (beatings, shootings, rape) of excess use of force by mine security and by police guarding the mine under an MOU with the Tanzanian state that MiningWatch has been documenting over the past four years?

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<sup>50</sup> See: *Anger Boils Over at North Mara Mine*, *op. cit.*