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11 March 2014

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*VIA EMAIL*

Dear Ms. Coumans and Ms. Feeney:

**Re: African Barrick Gold's non-judicial remedy programs at North Mara, Tanzania**

We write in response to your letters to the chief executive officers of Barrick Gold Corporation ("Barrick") and African Barrick Gold plc ("ABG"), dated 21 and 24 February 2014 respectively, concerning the North Mara Gold Mine Limited ("NMGML"). ABG has consulted with NMGML and this letter represents a response from both companies. In your letter, you request "transparency" with respect to remedies that NMGML has provided, in connection with alleged incidents of the use of excessive force and sexual violence by police and site security personnel against individuals intruding on the mine site. You also suggest that certain aspects of those remedies may not be "rights compatible."

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Incorporated under Companies Act 2006 and registered in England and Wales with registered number 7123187  
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NMGML strives to operate to high standards, despite a highly challenging operating environment. It has made and continues to make a concerted effort to ensure that it provides a Grievance Mechanism that is responsive to the concerns of surrounding communities and complies with the effectiveness criteria set out in the UN Guiding Principles on Business and Human Rights ("UNGPs").<sup>1</sup> Those efforts appear to be paying off, as community awareness of the mechanism is high, use of the mechanism is increasing and the mine is being lauded for its work, inasmuch as a national newspaper has reported on the strides the mine and its Grievance Mechanism are making in improving community relations.<sup>2</sup>

We believe that there is already transparency with respect to NMGML's Grievance Mechanism, as well as with respect to the response by NMGML and ABG to the sexual assault allegations made in 2011. As we explain below, information about the Grievance Mechanism is widely available to local communities in North Mara, the mechanism's intended users, and in Tanzania more broadly through culturally and linguistically appropriate means. Information about NMGML's Grievance Mechanism is also available in ABG's Annual Report,<sup>3</sup> while specific information about how to access the mechanism is available on ABG's website for potential users who have access to the internet and for interested stakeholders.<sup>4</sup> ABG has also issued a press release on the independent investigation that was conducted into the allegations of sexual assault at North Mara.<sup>5</sup>

Nevertheless, in keeping with our commitment to transparency and in response to the specific questions you pose, in this letter we provide further information about NMGML's Grievance Mechanism, including about its outcomes with respect to the sexual assault allegations and other human rights grievances. We also respond to your suggestion that one specific Grievance Resolution Agreement that you have obtained is not rights-compatible, including your expansive reading of the legal waiver contained in that agreement and your apparent view that the need for transparency should trump the need for confidentiality in such an agreement.

#### A. *The Grievance Mechanism at the North Mara Mine*

NMGML works with the seven villages near the mine, as well as local government authorities and a range of development partners, to tackle the ongoing social and economic issues that make North Mara one of the most challenging places in the world to operate a mine. North Mara is a very remote, underdeveloped part of Tanzania in close proximity to a porous Kenyan border. In-migration from across the border and from other areas strains the limited local economic resources, law enforcement capacity

<sup>1</sup> United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, HR/PUB/11/04 (2011).

<sup>2</sup> Mwandishi Wetu, "Migodi ya ABG yaboresha malusiano na jamii nchini" ("ABG makes strides in improving community relations"), *Majira*, 19 Oct. 2012 ("ABG is making strides in improving community relations at its mines in Tanzania thanks to robust grievance procedures that allow community members to seek information or register complaints against any aspect of its mining operations in the country") (Attachment 1).

<sup>3</sup> See <http://www.africanbarrickgold.com/~media/Files/A/African-Barrick-Gold/Attachments/pdf/reports-and-presentations/abg-ar-final-2012.pdf>

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

<sup>5</sup> See [http://www.africanbarrickgold.com/~media/Files/A/African-Barrick-Gold/Attachments/press-releases/2013/abg-update-north-mara-sexual-assault-allegations\\_20122013.pdf](http://www.africanbarrickgold.com/~media/Files/A/African-Barrick-Gold/Attachments/press-releases/2013/abg-update-north-mara-sexual-assault-allegations_20122013.pdf); see also <http://www.barrick.com/investors/news/news-details/2011/North-Mara-Mine-Tanzania/default.aspx>.

and social services. Crime, including organized crime, and violence, including sexual violence, are endemic. Civil unrest and poverty are particular problems in the area.

NMGML strives to ensure that its operations create opportunities and do not cause or contribute to negative impacts on neighbouring communities.<sup>9</sup> However, NMGML recognizes that where individuals believe they have been negatively affected by the mine's operations they should be able to seek a remedy and has accordingly provided for a non-judicial Grievance Mechanism since 2009. Given the mine's remote location and the population's limited access to judicial remedies, the mine's Grievance Mechanism plays an important role in enabling members of the communities surrounding the mine to have their grievances heard and addressed where appropriate. The Grievance Mechanism also provides an important source of continuous learning for the mine to prevent future grievances, to understand concerns of the community, and to improve the mechanism itself. Accordingly, NMGML has periodically revised aspects of the mechanism to ensure that it meets the effectiveness criteria set forth in UNGP 31 and comports with other international standards.

#### 1. A Legitimate and Accessible Process

In particular, NMGML has worked to ensure that the Grievance Mechanism is considered to be legitimate by the communities surrounding the mine. To that end, NMGML has consulted Kivulini, a Tanzanian NGO that focuses on women's human rights, Search for Common Ground, a respected international NGO with a local office, and Avanzar, a specialist human rights consultancy that conducts human rights impact assessments, in relation to the functioning of the mechanism and/or remediation packages. Through its Community Relations Department, NMGML has consulted with village leadership on how the Grievance Mechanism might be improved. It also receives feedback from those who use the mechanism, both directly and through Retired Justice Mackanja of the Tanzanian High Court, who meets with all complainants who have resolved human rights-related grievances with the mine (as discussed in further detail below). NMGML has also undertaken several reviews of the Grievance Mechanism on its own with the support of ABG and in response to Barrick's experience of operating a remedy framework in Papua New Guinea, and has revised aspects of its operation accordingly (as also discussed in further detail below).

NMGML has also endeavoured to make the Grievance Mechanism as accessible as possible to those who might wish to use it. The Grievance Mechanism is advertised with posters in surrounding communities (see Attachment 2), and at community meetings, where leaflets are also handed out (see Attachment 3). Anyone may register a grievance about harms he, she or a family member has suffered and attributes, directly or indirectly, to the operation of the mine. Complainants may register a grievance in person at the mine's Grievance Office with a Grievance Officer or with any of the mine's Village Liaison Officers, or by mail, telephone or email to the mine. To help ensure that the Grievance Mechanism is accessible, responsive and protective of women in particular, NMGML employs trained female Grievance Officers and Village Liaison Officers and treats the grievance process with confidentiality. The Grievance Office

<sup>9</sup> Since 2011, NMGML has been working with Search for Common Ground, which delivers human rights and conflict resolution programmes, and ABG has been reporting annually on the outcome of that work. See <http://www.africanbarrickgold.com/-/media/Files/A/African-Barrick-Gold/Attachments/pdf/reports-and-presentations/abg-annual-2012.pdf>

is located outside the mine premises to improve access, and transportation assistance to and from the office is available. In some cases, when significant incidents have occurred at the mine, such as the 2011 allegations involving sexual assault, Search for Common Ground has sought out individuals that may have been affected to ensure that they are aware of the Grievance Mechanism.

## 2. Based on Free and Informed Consent

At the same time, NMGML takes steps to assure potential complainants who have grievances that involve allegations of human rights violations that a decision to use the Grievance Mechanism does not preclude access to other non-judicial or judicial mechanisms. Grievance Officers expressly advise complainants that they may withdraw from the grievance process at any point before a grievance resolution agreement is implemented and pursue their claims against the mine elsewhere. They also advise that complainants contact the police if they believe that an incident involved criminal activity.

For grievances that involve allegations of a human rights violation, Grievance Officers also encourage individuals to seek third-party assistance (including from legal advisers, friends, family or other support persons) in deciding whether to use the Grievance Mechanism, during negotiations with the mine and with respect to the outcome of the grievance resolution process. Recent enhancements to the mechanism include offering a voucher that can be redeemed with the mine by an independent lawyer of a complainant's own choosing. The Grievance Officer also raises with complainants the possibility of involving civil society organizations in the grievance process in appropriate cases. NMGML has observed that many complainants choose not to have third party assistance, often expressing reservations about lawyers in particular and fear about others appropriating their remedies, while other complainants prefer to have family members accompany them to meetings with Grievance Officers.

NMGML has, since November 2012, insisted that every complainant who has negotiated a resolution of a human rights grievance with the mine meet with retired Justice Mackanja of the Tanzanian High Court to discuss the terms of that resolution before it is finalised in an agreement, as described below. While complainants are encouraged to bring counsel or other advisers to the meeting, the express purpose of this meeting is to help verify that complainants enter into agreements with the mine based on free and informed consent with full knowledge of their rights. At a minimum, Justice Mackanja explains the proposed provisions of the agreement to a complainant, the rights that may be gained or given up by accepting them, and the alternatives to entering into the agreement. He will sit with a complainant for as long and as many times as he or she wishes, and will not permit an agreement to be finalized until he is fully satisfied that the complainant accepts it knowingly, intelligently and voluntarily, in the same manner as he did when he was on the bench in analogous circumstances.

## 3. Resolving a Grievance Non-Judicially

The Grievance Mechanism resolves grievances through a process of engagement and dialogue.<sup>7</sup> Remedy programs for human rights grievances are tailored to each individual and may include, for example, construction materials, various types of rehabilitation, training and education, involvement in alternative livelihood programs, livelihood assistance or financial assistance. Several types of available remedies --

<sup>7</sup> Only the credibility of the complainant, and not the legal liability of the mine, is considered during the process.

employment sponsorship in the local community and the provision of microbusiness capital, in particular – are designed to address some of the economic issues that prompt individuals to undertake the very substantial physical and sometimes life-threatening risks of intruding on the mine site to steal ore.<sup>8</sup> Women who allege they have been victims of sexual assault by police or site security personnel have received individualized remedy packages designed with input from employees of Search for Common Ground.<sup>9</sup> The level of any financial compensation provided in a remedy package is benchmarked against civil damage awards from Tanzanian courts, as identified by outside counsel, were complainants to have had a sustainable cause of action against NMGML.

If a complainant and the mine are able to negotiate a resolution of a human rights grievance, their agreement may be memorialized in a Grievance Resolution Agreement. The purpose of the Grievance Resolution Agreement is to create a final resolution that is binding and enforceable by both parties.<sup>10</sup> It thereby reflects an underlying purpose of the Grievance Mechanism itself, which is to provide a remedy and a means to achieve finality of a claim without the burden, inconvenience and expense of litigation, and the need for the complainant to prove his or her claim. This purpose is reflected in the key terms of the Grievance Resolution Agreement, which provide for negotiated remedies without any admission of liability by the mine on the one hand and, as in a typical settlement agreement, a promise by the complainant not to pursue a civil legal claim against the mine with respect to the grievance that has been

<sup>8</sup> If the complainants do not wish to accept an employment offer, they of course need not do so, and many remedy packages have been negotiated without sponsored employment. But for those who have accepted it, sponsored employment offers an opportunity to obtain skills and an alternative livelihood to repeated intrusions on the mine site, with a salary benchmarked against other employment positions in the area (including in the mine), and taking into account the local cost of living and World Bank cost of living figures. When sponsored employment is accepted, claimants are expected to meet the terms of employment offered as a condition of receiving a salary – e.g., at a minimum, they are expected to actually appear for work. In addition, remedy packages with sponsored employment have to date always included other remedies as well.

<sup>9</sup> See [http://www.africanbarrickgold.com/~media/Files/A/African-Barrick-Gold/Attachments/press-releases/2013/abg-update-north-mara-sexual-assault-allegations\\_20122013.pdf](http://www.africanbarrickgold.com/~media/Files/A/African-Barrick-Gold/Attachments/press-releases/2013/abg-update-north-mara-sexual-assault-allegations_20122013.pdf). There is no separate remedy framework for women as such or a restriction on the time frame in which incidents must occur in order to be the subject of grievances. No allegations of sexual assault against the mine or police who may be on the mine site have been made since the year 2011, when the independent investigation was undertaken. However, if any such allegations arose in the future, the Grievance Mechanism would consider handling them in a similar fashion. Of note, NMGML's Grievance Office also employs a women's human rights specialist who assists in supporting women who have remediation packages.

<sup>10</sup> We note that you question the inclusion of a choice of courts provision, which provides that disputes arising out of the agreement should be resolved in Tanzania, in an agreement reached through a non-judicial process of engagement and consensus. In practice, disputes arising out of the agreement are typically resolved consensually, and a provision recently was added to the example agreement stating that agreements should in the first instance be resolved consensually. However, where the parties cannot agree, it is important that disputes can be adjudicated by the claimant and the mine to ensure that the agreements are respected. Indeed, the Commentary to UNGP 31(ii) provides that, while "these [operational-level grievance] mechanisms should focus on reaching agreed solutions through dialogue . . . [w]here adjudication is needed, this should be provided by a legitimate, independent third-party mechanism." You also question the choice of the Tanzanian courts, rather than the courts, for example, in England, for the adjudication of disputes. We believe that choice is appropriate for agreements between Tanzanian claimants and a Tanzanian company (NMGML), that are governed by Tanzanian law, and relate to incidents arising in Tanzania (including sometimes the Tanzanian police). ABG, incidentally, is not a party to any Grievance Resolution Agreement. In addition, when it has appeared that disputes cannot be resolved consensually, the mine has offered to resolve the matters through alternative dispute resolution and pay the reasonable legal expenses of claimants in that process, though ultimately all disputes to date have eventually resolved consensually.

resolved on the other hand. Complainants are provided with both the English version and Swahili version of any proposed settlement agreement.<sup>11</sup>

To date, several hundred individuals have resolved their grievances with NMGML, mostly to do with land claims.<sup>12</sup> To date, 46 individuals (24 men and 22 women), have been offered and have accepted remedy packages in response to grievances that might be considered human rights-related because they involved allegations regarding the use of force by mine security or police against intruders.<sup>13</sup> While all of those individuals have entered into Grievance Resolution Agreements through the process described above, one individual has chosen not to implement the agreement.<sup>14</sup>

In addition to resolving past grievances, NMGML has taken many steps, as reported on ABG's website, to prevent human-rights related incidents from occurring in the future.<sup>15</sup> For example, Search for Common Ground has provided training on the Voluntary Principles on Security and Human Rights ("VP") to Tanzanian police, developed initiatives to help address violence against women and women's economic empowerment in the Tarime District, and held training sessions with community leaders on conflict resolution techniques and the hazards of mine intrusions. These ongoing efforts with respect to the VPs and human rights more broadly are evaluated for effectiveness during annual human rights assessments conducted at the mine by the specialist consulting firm Avazar.<sup>16</sup>

#### *B. Specific Criticisms Regarding Grievance Resolution Agreements*

In your letter, you suggest that agreements reached by NMGML and certain complainants – including women who allege that they have been victims of sexual violence by police or mine security -- are not "rights-compatible." First, you contend that the agreements involve individuals "signing away their rights" to legal redress "without adequate legal representation" and therefore do "not appear to be compatible with international standards." Second, you maintain that these agreements have been "shrouded in secrecy" and are therefore inconsistent with the effectiveness criteria set forth in the UNGPs.

You base your criticisms regarding the right to redress and transparency on a single case of a Grievance Resolution Agreement with a man, dated 16 December 2012 and captioned "Agreement and Full and

<sup>11</sup> Rather than taking their Grievance Resolution Agreements home with them, a number of women have asked NMGML's remediation coordinator to keep their agreements safe for them, because they feared that family or community members would learn of their remediation benefits and try to appropriate them.

<sup>12</sup> ABG has provided public reports on the numbers of grievances filed through the mechanisms. See <http://www.africanbarrickgold.com/-/media/Files/A/African-Barrick-Gold/Attachments/pdf/reports-and-presentations/abg-ar-final-2012.pdf>.

<sup>13</sup> Although NMGML offers its condolences or expresses regret for any harm that has occurred in Grievance Resolution Agreements, it does not admit the truth of the complainants' allegations or accept any legal liability in these agreements.

<sup>14</sup> This individual is currently claiming against ABG and NMGML in the litigation before the High Court of England and Wales mentioned below and is the party to the 2012 Agreement mentioned below.

<sup>15</sup> See <http://www.africanbarrickgold.com/-/media/Files/A/African-Barrick-Gold/Attachments/press-releases/2011/North-Mara-update-Sept-30.pdf>.

<sup>16</sup> We note that no grievances have been filed alleging that incidents of sexual assault have occurred in the years since 2011, when an independent investigation of such claims was undertaken and a number of initiatives were launched to combat violence against women by police and in the communities surrounding the mine.

Final Release," which was disclosed in an ongoing legal proceeding in the High Court of England and Wales (the "2012 Agreement").<sup>17</sup> In what follows, we go into some detail to put that agreement into its proper historical context, explain why your allegations based on it are unfounded with respect to NMGML's policies and practices, and demonstrate that NMGML is engaged in a good faith effort to ensure that its Grievance Mechanism and its outcomes are fully consistent with the effectiveness criteria in the UNGPs.<sup>18</sup>

## 1. Criticism of Legal Waivers

Your principal complaint about NMGML's Grievance Resolution Agreements concerns the promise not to sue, which complainants make in return for remedies – which you describe as making "offers to people without adequate legal representation in return for those individuals signing away their rights to legal redress."<sup>19</sup> In particular, you point to the 2012 Agreement and suggest that it "does not appear to be compatible with international human rights standards" because it seems to constrain the complainant not only from legal action against the companies in question but also from pursuing legal action against certain individuals or in relation to matters other than those addressed in the grievance, or assisting in criminal actions or civil actions brought by other persons. We have three responses to your concerns.

### a) Legal Waivers Per Se

First, we note that, while you object to the *scope* of the legal waiver contained in the 2012 Agreement, you do not object to the inclusion of a legal waiver *per se*. That issue seems to have been settled in August 2013 by the United Nations Office of the High Commissioner for Human Rights ("OHCHR"), which issued an opinion concerning the waiver provision in the example grievance resolution agreement used by Barrick's Porgera mine in Papua New Guinea with respect to certain human rights-related grievances. In that opinion, the OHCHR confirmed that, "as there is no prohibition *per se* on legal waivers in current international standards and practice, situations may arise where business enterprises wish to ensure that, for reasons of predictability and finality, a legal waiver be required from complainants at the end of a remediation process."<sup>20</sup>

Indeed, it is for reasons of predictability and finality that NMGML asks complainants who advance human rights grievances to acknowledge that their grievance has been resolved in exchange for remedies, and to commit not to pursue a civil legal claim in respect of the same grievance against the mine. As noted above, NMGML only does so after encouraging the complainant to seek third-party assistance,

<sup>17</sup> The signatory to the 2012 Agreement has chosen to participate in the English High Court litigation rather than implement and receive benefits under the agreement.

<sup>18</sup> In doing so, neither ABG nor NMGML intends to expressly or impliedly waive any confidence or privilege.

<sup>19</sup> For this proposition you rely on a quote from plaintiffs' counsel in the English High Court litigation described above. In that context, you might be interested to know that plaintiffs' counsel also has taken the position that its clients have signed conditional fee arrangements governed by English law which require them to pay counsel's fees in full (including any success fee) even if they withdraw from the English High Court litigation to pursue non-judicial remedies. It seems to us that the effect of such a situation, if true, would threaten to render meaningless the plaintiffs' right to terminate litigation counsel and to pursue non-judicial redress – which is what you, erroneously, suggest may be occurring with NMGML with regard to judicial remedies. We also do not know whether the plaintiffs had adequate independent legal counsel or had the agreements explained to them in a language that they could understand before they entered into these agreements.

<sup>20</sup> See <http://business-humanrights.org/media/ohchr-porgera-join-venture-letter-aug-2013.pdf>

offering assistance to obtain legal advice from a lawyer of the complainant's own choosing, and ensuring that a retired justice of the Tanzanian High Court has explained the agreement in full to the complainant. Such an approach is intended to ensure that Grievance Resolution Agreements are consistent with the effectiveness criteria set forth in the UNGPs. It also is consistent with one of the key purposes of the Grievance Mechanism, which is to satisfy a claim, where appropriate and desired by the complainant, without the need for court proceedings.

#### b) Scope of Legal Waivers

Second, we believe that the expansive reading you appear to give the legal waiver contained in the 2012 Agreement is exaggerated and reflects neither NMGML's intention nor the way it has been interpreted in practice by NMGML or other complainants whose Grievance Resolution Agreements contain the same language. Moreover, the example agreement on which the 2012 Agreement was based (which was drafted by a major law firm and reviewed by a second firm with a business and human rights practice) has not been utilized as the basis for a Grievance Resolution Agreement for nearly a year.<sup>21</sup> This reflects the fact that NMGML has engaged (and will continue to engage) in a rigorous effort to improve its Grievance Mechanism and its outcomes, including its Grievance Resolution Agreements, consistent with the effectiveness criteria in the UNGPs.

For example, during the first quarter of 2013, Barrick engaged in extensive consultations with international experts in the field of business and human rights and other legal experts about the appropriate scope of the legal waiver in the context of the Porgera remedy framework in Papua New Guinea. Those consultations led to the waiver language used as part of that framework, which was finalized in April and May 2013. The lessons learned by Barrick were then relayed to ABG and NMGML and in May 2013, NMGML modified its example waiver language again to clarify that the waiver was not intended to extend to criminal matters and was not intended to preclude a complainant from giving evidence as a witness in any proceedings (whether civil or criminal) commenced by any other individual with respect to his or her own claims.<sup>22</sup>

Then, in August 2013, OHCHR issued the opinion mentioned above concerning the waiver provision in the example agreement used by Barrick's Porgera mine. While OHCHR confirmed that legal waivers are *per se* permissible, it also observed that their scope should be narrowly tailored, as in the case of Barrick's revised example waiver provision. In light of that opinion, NMGML reviewed its example waiver provision yet again to ensure that it was narrowly tailored.<sup>23</sup> Another round of changes was made

<sup>21</sup> None of the women whose claims of sexual assault were investigated in 2011 signed the 2012 Agreement.

<sup>22</sup> These changes were included in the agreements with complainants whose claims involved allegations of sexual assault. In addition, the waiver in the 2012 example agreement was not intended to be broadly construed. Nor has it been interpreted in the manner that concerns you, despite NMGML's belief that there may be settled complainants who are serving as witnesses in other matters. The intent was to prevent complainants from working with others to bring claims that were already settled under the Grievance Mechanism, and to address identified concerns about settled complainants seeking to exploit others. However, the language was changed to make clear that complainants are not intentionally precluded from assisting others in their own claims or participating in criminal proceedings.

<sup>23</sup> The prior language was not intended to apply to additional claims, but to extend the waiver to claims related to the same incident but which were not made in the grievance that was ultimately filed. That also is how it has been construed in practice, as claims have been resolved that relate to incidents occurring before those addressed in agreements containing this language. However, the language in the agreement has been clarified in that regard.



to NMGML's example waiver provision in the fourth quarter of 2013, and in early 2014 to streamline and simplify it, and to make clear that it could not preclude claims against individuals (such as employees) or contractors. The waiver provision currently in use is attached to this letter. (See Attachment 4)

Finally, while we believe the revised language addresses the concerns outlined in your letter, NMGML is sensitive to the possibility that a complainant who signed an agreement similar to the 2012 Agreement might still believe himself to be subject to a waiver provision that does not reflect NMGML's intentions or its practice. Therefore, NMGML has provided a written document in Swahili to all of the complainants who signed such agreements informing them that the legal waiver was intended to be narrow and was not intended to prohibit them from: (a) initiating or participating in any criminal action; (b) giving evidence as a witness in any proceedings or investigations commenced by any other individual; (c) seeking money damages against any individuals or third parties (including any security personnel, government officers or officials, or third party contractors);<sup>24</sup> or (d) making a claim against NMGML or any other entity or individual for complaints that are not related to the incident that was the subject of the Agreement. (See Attachment 5).

In its written communication to these complainants, NMGML also confirmed its willingness to provide complainants with a voucher redeemable at the mine by an independent lawyer of their own choosing to provide them with advice and/or representation in connection with the grievance process. And it suggested that the complainants meet with Retired Justice Mackanja, so that he may explain the contents of the document.

#### c) Legal Representation

Third, we object to your suggestion that the legal waivers contained in NMGML's non-judicial Grievance Resolution Agreements are not rights-compatible on the grounds that complainants allegedly did not have adequate legal representation when they entered into those agreements. As described above, NMGML has gone to considerable lengths to ensure that all complainants enter into Grievance Resolution Agreements with the mine based on free and informed consent and with full knowledge of their rights. For example, as described in detail above, complainants who have grievances that involve allegations of human rights violations: (a) are expressly informed that a decision to use the Grievance Mechanism does not preclude access to other non-judicial or judicial mechanisms; (b) are specifically encouraged to seek third-party assistance (including from legal advisers, friends, family or other support persons); (c) are offered a voucher that can be redeemed with the mine by an independent lawyer of a complainant's own choosing; and (d) meet with retired Justice Mackanja of the Tanzanian High Court to discuss the terms of any proposed Grievance Resolution Agreement before it is signed. Moreover, many complainants expressly choose to resolve their grievances directly with the mine because they prefer not to engage with lawyers. NMGML accepts and respects this preference.

<sup>24</sup> Although the prior language was intended only to release NMGML, ABG and Barrick of any civil liability for the actions of employees and contractors, it was clarified due to concerns, like those you raise, about the appropriateness of constraining complainants from pursuing legal action against individuals or contractors in their individual capacity where they are directly involved in causing an injury, which was not the intention.

## 2. Criticism of Confidentiality Provisions

You also suggest that by not making public the existence of certain Grievance Resolution Agreements that include confidentiality provisions, NMGML is showing a “lack of transparency” that is not compatible with the effectiveness criteria set out in the UNGPs. In particular, you complain that the only grievance resolution agreement that you have seen from NMGML’s Grievance Mechanism, the 2012 Agreement, was obtained from a court proceeding. And you maintain that the lack of publicity surrounding the existence of a remediation program for women whose grievances relate to allegations of sexual assaults cannot be justified by concern for the women’s physical safety. Two sets of observations are pertinent with respect to these criticisms.

### a) Transparency

First, it appears that your criticisms about a lack of “transparency” may be based on a misreading of that term as it is used in the UNGPs to describe one of the effectiveness criteria for operational-level grievance mechanisms. According to UNGP 31(c), “transparency” means “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.” In other words, transparency in the context of a grievance mechanism means providing information to complainants about how their complaints are being handled, providing information to affected stakeholders, and in certain circumstances to other stakeholders, about how well the mechanism is working.<sup>25</sup>

We do not believe that transparency in that context means providing information about specific grievances to the public at large, as you seem to suggest. Indeed, the report of the pilot projects on grievance mechanisms conducted for the UN Special Representative on Business and Human Rights warned that it can be “inappropriate to provide transparency about the specific detail of some outcomes; for instance, where doing so can lead to the identification of complainants who wish to remain anonymous, or when revealing levels of financial compensation would compromise individuals and legitimate processes.”<sup>26</sup>

In our view, this is precisely such an instance. As ABG explained in its 20 December 2013 press release, the women who have received remedies from NMGML based on sexual assault allegations at the North Mara mine have asked that that fact not be publicized because they fear for their own safety from members of the community seeking to appropriate their remediation benefits.<sup>27</sup> Thus, while we in this letter provide answers to your questions with respect to those women in an effort to shed light on how NMGML’s Grievance Mechanism is working, we reiterate that it should not be anticipated that additional details about the remedies they have received will be forthcoming.

<sup>25</sup> Rees, Caroline, *Piloting Principles for Effective Company-Stakeholder Grievance Mechanisms: A Report of Lessons Learned*, CSR Initiative, Harvard Kennedy School, Cambridge, 2011, available at [http://www.hks.harvard.edu/m-rcbg/CSRI/publications/report\\_46\\_GM\\_pilots.pdf](http://www.hks.harvard.edu/m-rcbg/CSRI/publications/report_46_GM_pilots.pdf), p. 22.

<sup>26</sup> *Id.* at 22.

<sup>27</sup> See [http://www.africanbarrickgold.com/-/media/Files/A/African-Barrick-Gold/Attachments/press-releases/2013/abg-update-north-mara-sexual-assault-allegations\\_20122013.pdf](http://www.africanbarrickgold.com/-/media/Files/A/African-Barrick-Gold/Attachments/press-releases/2013/abg-update-north-mara-sexual-assault-allegations_20122013.pdf).

## b) Confidentiality

Second, your concerns regarding the confidential nature of the 2012 Agreement appear misplaced. At the time it entered into that agreement and others like it, NMGML assumed that confidentiality was needed to ensure that the Grievance Mechanism could provide a safe space for engagement, to protect the privacy of users, and to prevent reprisals. It was also advised that local views and preferences, as well as the needs of vulnerable populations, militated in favour of confidentiality.<sup>38</sup>

Experience has born that out. NMGML's Village Liaison Officers, Search for Common Ground and some of the women subjected to sexual violence who received remedies have expressed concerns about the safety of the women. Indeed, community members and leaders have made comments to NMGML Village Liaison Officers to the effect that those who trespass on the mine do not deserve remedies, which raises concerns about the communities' treatment of all complainants, including men, who receive remedies for harm suffered at the mine. Thus, in all likelihood, confidentiality will remain the consensually agreed norm for Grievance Resolution Agreements relating to North Mara.

Nevertheless, NMGML has considered whether its suggested confidentiality provision might be unnecessarily strict, given that the purpose of confidentiality is to protect complainants from their families or communities. Accordingly, NMGML revised the confidentiality provision to clarify that the clause is optional and, where the parties choose to include it, it should only bind NMGML. (See Attachment 4)

NMGML has also addressed the confidentiality provision in the document it has provided to all complainants who signed the example 2012 Agreement. In particular, NMGML has clarified that the confidentiality provision in those agreements was intended to protect the complainant's interests. It also has indicated that, while NMGML will continue to honour the confidentiality provision, it will not object if complainants choose to share their Grievance Resolution Agreements with anyone despite having agreed to the confidentiality provision. (See Attachment 5).

## C. Concluding Observations

NMGML acknowledges its responsibility to work to eliminate and remediate any negative human rights impacts attributed to the operation of its mine. It also is committed to ensuring that the operational-level Grievance Mechanism at the mine, as well as any agreements associated with it, satisfies the effectiveness criteria for operational-level grievance mechanisms set forth in UNGP 31. To that end, NMGML has made a number of changes to its example Grievance Resolution Agreements and provided clarifications to already-executed agreements in response to legitimate issues and the expectations of stakeholders. NMGML also expects that the Grievance Mechanism will continue to evolve as additional lessons are learned.

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<sup>38</sup> The terms of the legal waivers used in NMGML's Grievance Resolution Agreements have not been made public until now because no one has ever asked to see them and because they form part of agreements that contain confidentiality provisions intended to protect the complainants.

Accordingly and in the interest of transparency, we have sought to provide a detailed response to your letter. At the same time, NMGML hopes that unfounded criticisms will not deter companies from pursuing non-judicial grievance mechanisms, particularly in areas where there may be limited access to judicial remedies, and that individuals are not dissuaded from utilizing those mechanisms. For our part, we will continue working to provide non-judicial alternatives to individuals who claim they have been affected by our mines' operations in accordance with the UNGPs, and seeking constructive engagement with external stakeholders around improving those alternatives.

Yours sincerely,



Déo Mwanyika

**Vice President Corporate Affairs**

cc. Dr. Navanethem Pillay, UN High Commissioner for Human Rights  
Mr. James Anaya, Special Rapporteur on the rights of Indigenous Peoples  
Mr. Pablo De Greiff, Special Rapporteur on the promotion of truth, justice, reparation guarantees of non-recurrence  
Ms. Rashida Manjoo, Special Rapporteur on violence against women, its causes and consequences  
Ms. Rita Izsak, Independent Expert on minority issues  
Working Group on the issue of discrimination against women in law and in practice  
Working Group on the issue of human rights and transnational corporations and other business enterprises  
Hon John Baird, Department of Foreign Affairs, Trade and Development Canada  
Hon Ed Fast, Department of Foreign Affairs, Trade and Development Canada  
Hon Christian Paradis, Department of Foreign Affairs, Trade and Development Canada  
Rt Hon William Hague, Foreign Secretary, UK  
Rt Hon Vince Cable, Secretary of State at the Department of Business, Innovation and Skills, UK  
Lee Waldorf, Human Rights Advisor, UN Women  
ESCR-Net - Corporate Accountability Working Group  
Canadian Network on Corporate Accountability  
European Coalition for Corporate Justice  
Corporate Responsibility Coalition  
International Corporate Accountability Roundtable  
Amnesty International  
OECD-Watch