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Re: Human rights concerns regarding assessment of the Porgera remedy mechanism for sexual assault

Dear Peter Sinclair, Christopher Albin-Lackey, Dahlia Saibil, and Lelia Mooney,

We are writing to share some initial concerns regarding the current design, methodology, and mandate of the Barrick Gold-funded assessment of its Porgera, Papua New Guinea sexual assault remedy mechanism.

We acknowledge that it was a positive step for Barrick Gold to recognize the corporate responsibility to remedy harms associated with business operations. Like Barrick Gold, we also agree that it is vital to review and to learn from the novel remedy mechanism that it set up in Porgera to provide remedies to victims of sexual assault.

However, we have serious concerns about the current assessment process. It is critical that the review is carried out with the full confidence of relevant stakeholders, and according to transparent, rigorous processes. Given the severity of the concerns we describe below, and the

importance of the final assessment, we believe that the review should be suspended until the issues raised in this letter have been addressed.

According to documents provided to us, the review is intended to constitute an ‘independent’ and ‘authoritative final assessment’ of the Porgera remedy mechanism.¹ The Porgera remedy mechanism is a company-created procedure through which women who were sexually assaulted by Barrick Gold personnel may claim a remedy on condition of waiving their right to pursue judicial remedies in any country. Approximately 120 women, many of whom were brutally raped and beaten, and sometimes gang-raped, have now received a remedy through this process. The remedies generally included a ‘business grant’ of 15,000 kina (approximately \$5,527.00 USD) as well as business training, and some health services, counseling, school fees, and a ‘financial supplement’ of up to 5,000 kina (approximately \$1,842.00 USD) for each claimant.²

We write as experts in human rights fact-finding and monitoring, and as human rights lawyers and professors with extensive experience investigating, reporting, and teaching human rights issues.³ In particular, since 2006, we have investigated sexual and other assaults by Barrick Gold personnel in Porgera, testified in Canadian Parliament about these assaults in 2009 and 2010, and have investigated Porgera community perspectives about remedies for assaults since 2011. This year, we will publish the results of a three-year study into the Barrick Gold remedy mechanism.

Below, we set out concerns regarding the Barrick Gold-funded review as it has been presented to us since April 20, 2015. We describe concerns relating to the assessment’s independence; its methodologies, including confidentiality and informed consent for participants; the mandate and scope of the assessment; and transparency. In our view, the concerns are so significant that, after careful consideration, we unfortunately feel compelled to request that the review be suspended until the concerns are addressed.

1. Independence of the review

Barrick Gold and Enodo Rights (the consultants hired by Barrick Gold to carry out the review) state that the proposed assessment of the Porgera remedy mechanism will be ‘independent.’⁴

¹ Enodo Rights, ‘Porgera Assessment Terms of Reference,’ (April 23, 2015), page 1.

² Copies of some of the remedy agreements were published online: EarthRights International, ‘Survivors of Rape by Barrick Gold Security Guards Offered “Business Grants” and “Training” in Exchange for Waiving Legal Rights,’ (November 21, 2014), at <http://www.earthrights.org/media/survivors-rape-barrick-gold-security-guards-offered-business-grants-and-training-exchange>.

³ Together, we have investigated human rights issues in over 16 countries, including Afghanistan, Albania, Bolivia, Brazil, Cambodia, the Central African Republic, Colombia, the Democratic Republic of the Congo, Ecuador, Kenya, Malaysia, Myanmar, Pakistan, South Africa, Thailand, and the United States. Knuckey has been an advisor to the UN Special Rapporteur on extrajudicial executions since 2007, and currently serves as Chair of the Special Rapporteur’s Legal Investigations Working Group. She frequently lectures on human rights fact-finding, is the co-editor of *The Transformation of Human Rights Fact-Finding* (2015, OUP), and has organized numerous workshops and trainings on human rights investigations. Giannini has conducted human rights investigations for more than two decades, including founding two human rights organizations that focus on documentation and research methodologies. He has advised leading human rights organizations on fact-finding techniques and developed and taught numerous classes and sessions on human rights investigations.

⁴ Enodo Rights, ‘Porgera Assessment Terms of Reference,’ (April 23, 2015), page 1; Email from Enodo Rights (Yousuf Aftab) to Sarah Knuckey (April 20, 2015); Email from Barrick Gold (Senior Vice President for Corporate

However, we have serious questions about the actual and perceived independence of the current assessment, given that Barrick Gold is funding it, has chosen who will carry it out and who will be on its ‘external committee’ of review, and is – to the exclusion of numerous other stakeholders – involved in defining the investigation’s scope and methods.

To ensure confidence in the review’s methods and findings, significantly more needs to be done to secure and demonstrate the independence of the review. A review that is in fact independent and *perceived to be* independent by relevant stakeholders and the international community is particularly important in this case, given the prominent international debate that has surrounded abuses at the Porgera minesite and Barrick Gold’s remedy mechanism. It is also important because the remedy mechanism is unusual in its offering of remedies for serious human rights abuses and its claims to uphold the UN Guiding Principles of Business and Human Rights, and thus can serve as a valuable learning tool for businesses similarly seeking to directly provide remedies for adverse impacts associated with their operations.

In 2013, the UN Office of the High Commissioner for Human Rights (OHCHR) wrote:

‘[E]fforts 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 *An inclusive and transparent process for establishing and conducting* such an independent review could help address any residual concerns stakeholders may have about the implementation of the programme.’⁵ (emphasis added)

The OHCHR makes clear that – especially in light of the history of international disagreement about this particular remedy mechanism – for the review to be *seen to be* independent, the manner of establishing the review should be inclusive of the various stakeholders. Those carrying out the review, and those on its external committee, should be selected through a multi-stakeholder process, and not chosen only by the subject of the review, Barrick Gold. This has not taken place, and there do not appear to be plans to create a process through which stakeholders can consent to or co-define the review’s mandate or members.

In addition, the review’s working methods need to be designed (and published) to show how the study will be undertaken independently of Barrick Gold in practice. (We discuss this further below, under ‘Transparency.’)

If these steps are not taken, we do not consider that the mechanism can fairly be characterized as independent.

Affairs, Peter Sinclair) to Sarah Knuckey (April 23, 2015); Email from Enodo Rights (Yousuf Aftab) to Tyler Giannini (April 20, 2015); Email from Barrick Gold (Senior Vice President for Corporate Affairs, Peter Sinclair to Tyler Giannini (April 23, 2015).

⁵ Office of the High Commissioner for Human Rights (United Nations), ‘Re: Allegations regarding the Porgera Joint Venture remedy framework,’ (July 2013) at <http://www.ohchr.org/Documents/Issues/Business/LetterPorgera.pdf>, page 10.

2. Investigation methodologies

Information provided to us raises concerns about the research and investigation methods being employed in the assessment, and about whether the methodological design of the study can fulfill the intended study aims.

Porgera is a particularly challenging location in which to conduct research, sexual assault is an extraordinarily difficult and sensitive interviewing issue, compensation has a deep and complex role in Porgeran culture, and the dynamics between Barrick Gold and the community (and within the community) are complicated and frequently contentious. It is far from clear that the review as currently set-up will bring to bear the necessary time and resources, experience, expertise, or rights-based approach to adequately evaluate the remedy framework and its effects in Porgera.

The review's Terms of Reference as well as our interactions with the assessing agency to date have undermined our confidence in the review's methodology. We highlight here two examples:

First, when we were contacted by the assessor to be interviewed about the remedy mechanism, no informed consent or confidentiality guidelines or expectations were shared with us, even following our specific requests about methodology, and despite these issues being foundational to human rights and human subjects research.⁶ In fact, the contents of one of our emails to the assessor were shared – without consent or notification – with Barrick Gold. The lack of attention to informed consent and confidentiality deviates significantly from best practice in the international human rights field. It undermines our confidence in the assessment, and is so elementary to human rights methodology that we believe the actions to date justify putting the assessment on hold. It raises serious concerns about how similar issues will be dealt with in Porgera – where interviews will be conducted with vulnerable populations, sexual assault survivors, and individuals who may not be literate or who are likely to not have had exposure to appropriate research methodologies. It also brings into question whether the assessor will be able to gain the trust and confidence of interviewees so that they feel safe to share very personal information, information that may be against their own interests, or information that may have negative ramifications.⁷

Second, the timeline for the study provides one to two weeks for 'planning and contextual research' and five days for an 'in-country assessment.'⁸ These timeframes are far too short for a review intended to be an authoritative study of the implementation of a novel mechanism, in the context of an under-studied legal framework, and intending to take into account a wide range of viewpoints. In addition, it is difficult to arrange and carry out interviews with community

⁶ See e.g., Siracusa Guidelines for International, Regional and National Fact-Finding Bodies (2013), guidelines 10.5-10.6; Guidelines on International Human Rights Fact-Finding Visits and Reports (The Lund-London Guidelines), Principles 39, 42; OHCHR, Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice (2015), page 34.

⁷ For example, we have found in numerous interviews with individuals working or hoping to work for, or otherwise monetarily benefiting from the mine, that they can be very reluctant to share negative views about the company for fear that it might be reported back to the company. In interviewing women who went through the remedy mechanism, we have also found that some fear speaking openly about their experiences for fear that they may lose out on remedies or be required to return their remedies.

⁸ Enodo Rights, 'Porgera Assessment Terms of Reference,' (April 23, 2015), page 3.

members in Porgera – many Porgerans travel in and out of Porgera, they work long hours to provide for their families, and some live in areas to which it can take an hour or more to hike on steep terrain. From our experience, it will normally only be possible to meaningfully interview (through interpretation) five to ten people per day. Given the large number of claimants and sexual assault victims, and the diversity of stakeholders in the area, the short time period in Porgera would severely limit the ability of any assessor to conduct an ‘authoritative final assessment.’

Insufficient information has been made available that would permit assessment of the myriad of other methodological considerations (see further below under ‘Transparency’). However, the approaches thus far to fact-finding planning and consent raise concerns about how other issues will be dealt with, such as interviewee selection, witness security management, mitigation of re-traumatization, approaches to inter-village and clan dynamics, or the type of questioning procedures to be employed.

3. Scope of the review mandate

Barrick Gold and Enodo Rights have stated in the Terms of Reference that the scope of the review is to examine two broad issues:

The degree to which the Remedy Framework has been implemented as designed, including specifically the experience of claimants who have participated in the Framework and how remedies have impacted the lives of recipients to date.

How the Remedy Framework’s design and implementation align with relevant provisions of the Guiding Principles, specifically alignment with the Effectiveness Criteria in Guiding Principle 31 and with Guiding Principle 29, as well as other relevant norms of international law.⁹

Because the information provided to us is very general, it is difficult to know the extent to which (or how) key issues will be covered by the review. But based on our correspondence to date, we highlight here several questions and concerns about the scope of the mandate.

First, it is unclear if the review will examine ongoing questions about the scope of the remedy mechanism itself, such as the fact that it only addresses sexual violence, and does not seek to remedy other violence allegedly committed by Barrick personnel, including killings and beatings of men and women. The limited scope of the remedy mechanism has been a significant concern for many Porgerans.

Second, it is unclear if the mandate will include an assessment of whether the Porgera remedy mechanism – a mechanism to directly remedy serious, widespread violence – was the kind of ‘operational-level grievance mechanism’ (OGM) contemplated by the Guiding Principles, and thus the extent to which Guiding Principles 29 and 31 are the appropriate legal framework for assessing the remedy mechanism. OGMs as conceived in the Guiding Principles are primarily preventative, early warning complaint mechanisms, designed to address issues before they

⁹ Terms of Reference, section 2.

escalate and to provide dialogue-based approaches to resolve complaints. The Porgera remedy mechanism is not such an OGM, but is instead a retrospective process offering largely fixed remedies for many grave human rights abuses in a process closer to adjudication than dialogue. With it now clear that more than 100 women suffered sexual violence, the review's mandate should include assessment of whether Guiding Principles 29 and 31 are indeed the appropriate standards to be evaluating against at all, particularly given the gravity of the harm and its widespread nature. While the scope of the review on its face allows for consideration of norms beyond the Guiding Principles, insufficient information has been provided to clarify how the 'other relevant norms of international law' are being defined or how they might be applied.¹⁰ The Guiding Principles make clear that for assessment and operational purposes, corporations should look to international law, and Principle 12 notes that the International Bill of Rights contains relevant standards. Given that the scope of the review names only Principles 29 and 31, it is unclear if or how the assessor will use foundational human rights norms in the assessment. It is also not clear if the review will assess whether the mechanism was designed to provide, and effectively provided, appropriate remedies proportionate to the harms. In addition, there are questions as to whether international criminal law prohibitions (such as crimes against humanity) for which individuals and corporations can be held responsible for widespread or systematic attacks, will be considered.

Third, it is unclear whether or how the review intends to assess underlying power dynamics between the company, the community, and sexual assault victims, and whether the remedy mechanism's design and implementation sufficiently overcome power differentials between the company and those raped by company employees. These considerations may not necessarily arise under a Guiding Principles assessment, but we have found them to be critical concerns in this case.

Fourth, in response to questions about whether the scope would include an examination of governance issues, the assessor reported: 'We will not be assessing governance issues with respect to the Papua New Guinea public authorities.'¹¹ This response indicates a limited approach to the scope of the review. The Guiding Principles make clear that the context of operations is an important factor, including concerns about weak governance zones.¹² Indeed, the Terms of Reference also indicate that learning about the context is important. The fact that the assessor believes that assessing governance issues in PNG is not part of the review may mean that the review will miss the importance of evaluating the interaction and interplay between the Barrick Gold remedy mechanism and other available remedies for the claimants, and of assessing whether the review is likely to have negative or positive short and long-term impacts on the

¹⁰ Email from Enodo Rights (Yousuf Aftab) to Tyler Giannini (May 13, 2015) ('In terms of scope, the reference to "other relevant standards" is intended to capture the fact that the Guiding Principles do not exist in a vacuum. In order to understand the effectiveness criteria under Principle 31 we will consider, for instance, the UN Basic Principles and Guidelines on the Right to Remedy and Reparation and relevant General Comments of the UN Human Rights Committee. While these norms and guidance may not apply directly to businesses, they will provide helpful referents to interpret the Guiding Principles.').

¹¹ Email from Enodo Rights (Yousuf Aftab) to Tyler Giannini (May 13, 2015). The question to the assessor intended to ask whether the assessment would examine the governance of the remedy mechanism, and upon clarification, the assessor indicated that it would. Despite the clarification, the original response that the broader context of governance in PNG would not be part of the assessment raised concerns about the methodology.

¹² See, e.g., UN Guiding Principles, Principles 17(b), 18, 23.

development of rule of law in Porgera.

Fifth, there is no information as to whether the review will assess financial information or the allocation of resources expended through or surrounding the remedy mechanism. As industry and civil society are considering the value of remedy mechanisms such as these, part of the assessment should examine the overall allocation of resources, the percentage of the allocated resources received by those harmed, and the amount and percentage given to design, implementation, and promotion of the mechanism, including public relations and outreach efforts in Porgera and internationally.

4. Transparency about review methods and processes

Transparency is a critical part of any research methodology, as well as of any assessment process. It helps establish credibility for the process and provides stakeholders with necessary information to make informed decisions about participation. We highlight several concerns with transparency here:

First, in response to specific questions about methodology for the review and the requested interviews with us, we were provided with only very general information and were told in email correspondence, ‘We will explain our methodology in depth in the public report.’¹³ A cursory explanation of the approach was provided, containing few details and omitting any discussion about consent and confidentiality or mention of the other important considerations raised above.¹⁴ While there may in fact be a detailed methodology that exists, the impression that we have is that one either does not exist, is under development, or that the assessor is unwilling to share it with us. Any of these scenarios is problematic. If a methodology exists, it should be shared. If one does not exist or is under development, the assessor should be transparent about the status of the methodology.

Second, in addition to the questions about the transparency of the methodology, there are questions about the transparency of the review structure overall including who designed the effort, who defined the scope, the selection process for the assessing agency and external committee, and the financial payments of the review (including to the assessing agency and/or external committee). It is also unclear whether the external committee can change or only comment on the assessor’s findings, or publish dissenting views, or what role the external committee has, if any, in designing the review’s methodology from the outset.

Conclusion

An independent, comprehensive, credible, and objective review is needed to provide survivors, Porgerans, Barrick Gold, and the international community with information and analysis about the novel and potentially precedential Porgera remedy mechanism. Presently, our view is that there is too great a risk that this complicated review may be mishandled and that significant issues may be missed in the review as now designed. Our considered view is that the review should be suspended until the problems are addressed.

¹³ Email from Enodo Rights (Yousuf Aftab) to Tyler Giannini (May 13, 2015).

¹⁴ Email from Enodo Rights (Yousuf Aftab) to Tyler Giannini (May 13, 2015).

In particular, the following should be resolved before the review proceeds:

- To ensure that the review’s processes and findings are broadly accepted as independent, legitimate, and credible, key relevant stakeholders should be involved in the creation, design, and selection of the assessment structure, mandate, investigation team, external committee, and processes;
- The detailed investigation and research methodology needs to be available to stakeholders and participants, at a minimum, and if one does not exist, it should be immediately developed before proceeding further; and
- At present, moving forward may do more harm than good for key stakeholders, including sexual assault survivors if, for example, confidentiality, consent, and efforts to mitigate re-traumatization are not handled with care. Clear, strict, and rights-based protocols for establishing confidentiality and informed consent must be put in place.

While our concerns are significant, they can be overcome.

Following an inclusive design process, a team of experts considered by stakeholders to be experienced, fair, and appropriate reviewers can then implement an independent review that draws out lessons learned from the Porgera remedy mechanism, and helps to advance human rights.

We are available to discuss these issues in further detail, and are available to assist in any efforts to move forward a legitimate and credible assessment. We can be contacted at giannini@law.harvard.edu and sarah.knuckey@law.columbia.edu.

Regards,



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