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Rights and Accountability in Development

Brad Gordon
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24 February 2014

RE: African Barrick Gold’s non-judicial “remedy programs”¹ at North Mara, Tanzania.

Mr. Gordon,

We are writing this letter to request transparency regarding “remedy programs” that African Barrick Gold Plc (ABG), a UK-registered company, 74 percent owned by Barrick Gold Corporation (Barrick), has established for alleged victims of “harm”² and women who have been the victims of alleged “sexual assault” by “police and site security personnel at the North Mara mine”³ in Tanzania. A letter requesting the same information was sent on 21 February to Jamie C. Sokalsky, the President and Chief Executive Officer of Barrick Gold Corporation.

Based on information that has recently come to light regarding these “remedy programs” we believe they are not rights-compatible given, among others, the conditional nature of the benefits offered to claimants, the legal waivers they are required to sign that form a barrier to access to judicial redress for the signatories, as well as for others, and lack of transparency about the programs.

The information we are requesting through this letter does not involve providing any identifying details about the alleged victims.

Background

There has been a pattern of lethal force by mine security and police at the North Mara mine over many years.⁴ Such incidents are continuing to occur, including this year,⁵ raising serious concerns about whether ABG has any, or any effective, measures to prevent human rights abuses.

Legal action - UK-based law firm Leigh Day commenced proceedings against ABG and its 100% subsidiary, North Mara Gold Mine Limited (NMGML) on 28 March 2013 in the High Court of England and Wales on behalf of Tanzanian villagers who claim that the companies are “liable for deaths and injuries allegedly caused

¹ We place quotation marks around the term “remedy programs” as this term is used by Barrick and African Barrick Gold to describe the programs we discuss in this letter but we question the validity of this term given the issues and questions we raise here.

² http://www.miningwatch.ca/sites/www.miningwatch.ca/files/abg_grievance_agreement.pdf

³ http://www.africanbarrickgold.com/~media/Files/A/African-Barrick-Gold/Attachments/press-releases/2013/abg-update-north-mara-sexual-assault-allegations_20122013.pdf

⁴ <http://www.theglobeandmail.com/report-on-business/rob-magazine/barricks-tanzanian-project-tests-ethical-mining-policies/article559188/?page=all>

⁵ See regarding a shooting on 18 January resulting in one death.

<http://www.google.com/hostednews/afp/article/ALeqM5jyFUvawBza67Fj6JVRvsajQXSIUQ?docId=3badc899-2cf1-4f72-9c2b-42ddd6b30e93>

by the use of excessive force by mine security and police.”⁶ The claimants “include the relatives of six men who were killed at the mine-site and one man who has been left paraplegic. The claimants are suing the companies in the hope of receiving just compensation.”⁷

Non-judicial “remedy” program - In the course of legal proceedings in the case filed by Leigh Day, a previously confidential legal “waiver” was forced to light. The waiver relates to a non-judicial project-level grievance mechanism initiated by ABG.⁸ The waiver is labeled “Strictly Confidential.”⁹ It is dated December 16, 2012 and refers to “alleged harm suffered by the Complainant,” a man, as a result of an “incident” which occurred “on the NMGML property.” In return for a “Condolence Disbursement” the Complainant had to agree “that he will not instigate, encourage or in any way assist other complainants, demands or claims by any other person against NMGML, ABG or their affiliates” [emphasis added]. The Complainant was also required to sign a “covenant not to sue,” waiving “all and any rights” to be a party to “any proceedings” anywhere in the world against any of the aforementioned business entities.

Leigh Day has raised concern regarding these legal waivers noting that it “believes that the mine has made offers to people without adequate legal representation in return for those individuals signing away their rights” to legal redress.¹⁰

On December 20, 2013, following a media release on this issue by MiningWatch Canada on December 17¹¹ and an article in the Globe and Mail on December 19,¹² ABG issued a statement,¹³ addressing for the first time since 2011,¹⁴ the issue of “sexual assaults by police and site security personnel at the North Mara mine.” ABG noted in its statement that 14 women were also receiving “remedy” packages.

Simultaneous “remedy programs” at Porgera in Papua New Guinea and North Mara in Tanzania

Since 2006, MiningWatch Canada (MiningWatch) , together with our Papua New Guinea partners,¹⁵ Rights and Accountability in Democracy, and others¹⁶ have raised concerns about alleged violence against men and women by security guards at Barrick’s¹⁷ Porgera Joint Venture (Porgera) mine.¹⁸ At the end of 2012, we engaged Barrick on the “remedy program” for rape victims that the company had started to implement in Porgera. In January 2013, we made public our concerns about this program.¹⁹ Since then we have continued to monitor the implementation of the Porgera remediation program, including through field visits and interviews with rape victims. In March 2013, MiningWatch wrote the first of a series of letters to the UN High Commissioner for Human Rights detailing our concerns with the Porgera program.²⁰

⁶ <http://www.leighday.co.uk/International-and-group-claims/Tanzania> (accessed February 13, 2014)

⁷ Ibid.

⁸ http://www.miningwatch.ca/sites/www.miningwatch.ca/files/abg_grievance_agreement.pdf

⁹ As the waiver was forced to light through the Leigh Day law suit it is no longer considered confidential.

¹⁰ <http://www.leighday.co.uk/International-and-group-claims/Tanzania> (accessed February 13, 2014)

¹¹ <http://www.miningwatch.ca/news/african-barrick-s-confidential-compensation-agreements-questioned-troubled-tanzania-mine>

¹² <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/african-barrick-to-compensate-assault-victims/article16063262/>

¹³ http://www.africanbarrickgold.com/~media/Files/A/African-Barrick-Gold/Attachments/press-releases/2013/abg-update-north-mara-sexual-assault-allegations_20122013.pdf

¹⁴ <http://www.barrick.com/investors/news/news-details/2011/North-Mara-Mine-Tanzania/default.aspx>

¹⁵ Akali Tange Association and Porgera Landowners Association

¹⁶ EarthRights International; International Human Rights Clinic of the Harvard Law School and the Center for Human Rights and Global Justice of New York University School of Law.

¹⁷ Barrick is 95% owner of the PJV mine and the mine is operated by a Barrick subsidiary.

¹⁸ These efforts culminated in an OECD complaint of 2011 at <http://www.miningwatch.ca/article/miningwatch-and-papua-new-guinea-partners-file-complaint-porgera-mine>

¹⁹ <http://www.miningwatch.ca/news/rape-victims-must-sign-away-rights-get-remedy-barrick>

²⁰ http://www.miningwatch.ca/feature_block_CSR_in_Canada

In light of the above, Barrick has provided some details about its “remedy program” in Porgera.²¹ In response to public criticism, Barrick made some adjustments to the program and to the terms of the legal waiver.²² These however have not fully addressed our concerns.

Secrecy – Until the disclosure in the London court case, the “remedy program” in North Mara, which concerns an unspecified number of victims of “harm” and 14 female rape victims,²³ was shrouded in secrecy. The North Mara program was apparently implemented at about the same time as the program in Porgera. Barrick claims that the North Mara program “is consistent with the UN Guiding Principles on Business and Human Rights ‘Protect, Respect and Remedy’ Framework,”²⁴ but lack of transparency is not compatible with the effectiveness criteria set out in the UN Guiding Principles. A terse statement issued by ABG on December 20, 2013 states that **“it should not be anticipated that additional details about the program will be forthcoming from ABG or the mine.”**²⁵ ABG justifies this lack of transparency by arguing the need to “physically protect” the women concerned. However, ABG should be able to provide answers to the questions posed in this letter as they do not require specific information about the rape victims.

“Remedy” program not rights-compatible - Based on the content of the legal waiver that has surfaced, the North Mara “remedy” program does not appear to be compatible with international human rights standards. Among others, the waiver appears to constrain the Complainant not only from legal action against the companies in question but also from:

- pursuing legal action against North Mara employees or contractors who may have harmed the Complainant, including security guards, in their individual capacity;
- pursuing claims to the date of the waiver that may be unrelated to the “incident” reported by the Complainant;
- assisting in criminal action that may be brought by a state;
- assisting other complainants, demands or claims by other persons against NMGML, ABG or their affiliates.

The questions set out in the Annex to this letter concern: i) details regarding the “remedy program” for victims of “harm”; ii) details regarding the legal waivers victims of “harm” have been required to sign in return for benefits; iii) details regarding the “remedy program” for female rape victims.

Yours sincerely,



Catherine Coumans, Co-Manager, MiningWatch Canada



Patricia Feeney, Executive Director, Rights and Accountability in Development

²¹ <http://www.barrick.com/operations/australia-pacific/porgera/default.aspx>

²² For example, Barrick had to change the waiver to allow for the fact that rape victims may be required to participate in criminal proceedings that may be brought by the Papua New Guinea state.

²³ http://www.africanbarrickgold.com/~media/Files/A/African-Barrick-Gold/Attachments/press-releases/2013/abg-update-north-mara-sexual-assault-allegations_20122013.pdf

²⁴ Statement from Barrick received through a media contact (personal communication with Catherine Coumans December 2013).

²⁵ http://www.africanbarrickgold.com/~media/Files/A/African-Barrick-Gold/Attachments/press-releases/2013/abg-update-north-mara-sexual-assault-allegations_20122013.pdf

Annex

Questions regarding the “remedy” process for victims of “harm”

- When precisely was the “remedy program” for victims of “harm” implemented at North Mara?
- Was the program created to deal only with a specific number of known victims, or was the program open to anyone who had suffered similar harms over a particular period of time?
- How were victims, or potential victims, and/or their families informed about the availability of the remedy program?
- Was the program open to both men and women?
- How many men and how many women participated in the program?
- Is there a “remedy framework” for the North Mara “remedy” program for victims of “harm,” as has been adopted in Porgera for female rape victims, and, if so, why has this not been made public?
- What is the nature of the “harm” suffered by Complainants who are receiving “Condolence Disbursements”?
- Is the program open only to Complainants who have suffered “harm” at the mine, or also to family members of Complainants who may have died as a result of this harm?
- To date how many Complainants have been offered a package/disbursement and how many accepted and signed the “Strictly Confidential Agreement and Full and Final Release” (the Agreement)²⁶ with North Mara Gold Mine Limited?
- Were any of these Complainants clients of independent legal council (not provided by NMGML, Barrick or ABG) regarding the same complaints over which they were required to sign the “Final Release” Agreement?
- If so, were the Complainants who signed the “Final Release” Agreement with NMGML represented by this independent legal council (not provided by Barrick, ABG or NMGML) during the “remedy” process and in signing the “Final Release” Agreement?

Questions regarding the “Strictly Confidential Agreement and Full and Final Release” signed by victims of “harm”

- 2.2, 2.3, 2.4, 2.5 - The “Condolence Disbursement,” totalling 8,780,000 TZS [approximately 5,400 USD] consists of two years employment in a company in the town of Nyamongo near the mine site, as well as remuneration for “participating in NMGML's campaign to create awareness in the local community of the hazards of trespassing on the mine site.” The terms of employment will be provided by the local employer and failure by the Complainant to adhere to these terms “will result in the automatic termination of benefits to which the Complainant is otherwise entitled under the terms of this Agreement and Release.” In return for attending monthly Awareness Meetings “upon invitation by a representative of NMGML, the Complainant shall be paid an attendance fee by NMGML.” Failure to attend an Awareness Meeting will result in loss of payment. Finally, the Complainant can also “forfeit” benefits related to the “Agreement and Release” if the “Complainant is found to have trespassed on the NMGML mine site.” This waiver not only conditions “remedy” on legal immunity for Barrick, ABG and NMGML but contains further conditions, some of which are not defined here, such as terms of employment that may result in loss of benefits for the Complainant. *How was the determination of payment of “the sum of Tanzanian Shillings Eight Million Seven Hundred and Eighty Thousand (8,780,000 TZS)” by NMGML on behalf of the Complainant arrived at? How will non-compliance of the Complainant with the conditions of this waiver be determined? What provisions exist for the Complainant to defend himself against allegations of non-compliance?*
- 3.1 - The waiver extends to “any other claim, complaint, legal or administrative action which could have made [sic] by the Complainant against NMGML, ABG or their affiliates to the date of this agreement in relation to the North Mara Mine or its employees.” *Why does this waiver cover potential claims that may be unrelated to the “incident” reported by the Complainant on November 19, 2012, which is the subject of the remedy and the waiver?*

²⁶ http://www.miningwatch.ca/sites/www.miningwatch.ca/files/abg_grievance_agreement.pdf

- 3.1 – The waiver extends to “NMGML, ABG or their affiliates to the date of this agreement in relation to the North Mara Mine or its employees.” *Does this waiver purport to preclude legal action by the Complainant against an employee of the North Mara Mine in their individual capacity?*
- 3.2 – “The Agreement and Release given by the Complainant in Clause 3.1 shall also extend to the current or former directors, officers and employees of NMGML and of its direct and indirect shareholders and affiliates (including, without limitation, ABG and Barrick) and to any contractors working at the North Mara mine at the time of the incident or anytime thereafter.” *Does this waiver purport to preclude legal action by the Complainant against a security guard or police working directly or indirectly for the North Mara mine who may have harmed the Complainant?*
- 4.1 – “The Complainant further agrees that he will not instigate, encourage or in any way assist other complainants, demands or claims by any other person against NMGML, ABG or their affiliates.” *This requirement that the Complainant not support claims by others who may have been harmed by Barrick, ABG, or NMGML places barriers in the way of others who may seek access to judicial or non-judicial remedy and hinders human rights outcomes. This requirement further could be interpreted to preclude victims from acting as witnesses in criminal proceedings taken by the State of Tanzania, or other States against Barrick, ABG or NMGML. Why is this requirement being made?*
- 5.2 – “The Complainant further represents, warrants and acknowledges that he has received, or had ample opportunity to receive, independent legal advice concerning this Agreement and Release and the execution of this Agreement and Release.” *Did the Complainant in this instance benefit from independent legal representation – not paid for by Barrick, ABG or NMGML? Did any of the Complainants enrolled in this “remedy” program receive such independent legal representation – not paid for by Barrick, ABG or NMGML?*
- 6.1 – “The Parties shall keep the terms of this Agreement and Release strictly confidential...” *Why is strict confidentiality being required?*
- 10.2 – “The Courts of Tanzania shall have exclusive jurisdiction to settle any dispute which may arise out of or in connection with this Agreement and Release.” *As this release has been required of the Complainant in the context of a non-judicial grievance procedure, why does it refer to courts to settle any disagreements that may arise out of it? Why would those not be settled through non-judicial means? Why does this waiver limit jurisdiction for any disagreements that may arise from this Agreement and Release to Courts of Tanzania as opposed to courts in the home countries of ABG or Barrick?*

Questions regarding the “remedy” process for female rape victims

- When precisely was the “remedy program” regarding female rape victims implemented at North Mara?
- Was the program created to deal only with a specific number of known victims of sexual abuse, or was the program open to any women who had suffered similar harms over a particular period of time?
- How were victims or potential victims informed about the availability of the remedy program?
- Is there a “remedy framework” for the North Mara “remedy” program for female rape victims, as there is for the Porgera program and, if so, why has this not been made public?
- How many women were offered a package/disbursement from the program and how many ultimately accepted and signed the agreement?
- Have all female rape victims who accepted some form of remedy through the program signed legal waiver agreements, such as those signed by victims of “harm”? What confidentiality conditions apply to that waiver?²⁷
- Why hasn’t Barrick made the terms of the legal waiver public?
- Did any of the female rape victims have independent (not paid by Barrick, ABG or NMGML) legal representation during the process and in signing legal waiver agreements?

²⁷ In response to a media contact Barrick stated: “To be clear, there is no requirement for secrecy, women are free to discuss their grievances and their remedy packages.”

Copy furnished:

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 MP, Secretary of State for Foreign and Commonwealth Affairs

Rt Hon Vince Cable MP, 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

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