**Comments in support of the UN Working Group and Human Right’s UN General Assembly Report on Access to Remedy**

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The following brief notes address just some of the relevant issues.

**A. What is an effective remedy**

Broadly, an effective remedy is one that, to the extent possible, repairs harm caused by a human rights abuse, both in regard to the victim and in regard to the dependents of this victim be they younger (for example children) or older (for example parents) than the victim, as well as to the broader social community the victim is part of. This harm can be physical, social, cultural, economic, and psychological, for example loss of dignity and self-worth for rape victims.

An effective remedy takes time into consideration. Some harms will continue to have impacts for the rest of the victims’ lives. Some of these impacts may be worsened by aging. For example, it is not enough to give someone who has lost a limb through excess use if force by project security a prosthesis, when that limb will need to be maintained and adjusted, and likely replaced over the lifetime of the victim.

An effective remedy also takes prevention and deterrence into consideration. If the price a company pays to compensate for harm done is insignificant, or not material, given that company’s overall balance sheet, the compensation can become simply a cost of doing business as usual and not prevent or deter future harm.

The Effectiveness Criteria are necessary criteria for state and non-state based non-judicial mechanisms, but are not sufficient. More guidance is necessary regarding how implementation of these criteria can be ensured in both state and non-state based mechanisms.

With respect to OGMs, in particular, more needs to be done to ensure that the mechanisms are truly arms-length from the company that has perpetrated, or is perpetrating, the harm. It simply cannot be the case, for example, that the perpetrator of a harm has a high degree of say in which victims may access a remedy mechanism. This can occur, for example, by narrowly scoping a mechanism so as to exclude certain classes of victims as the Porgera Joint Venture (Porgera) OGM did – excluding men who had been physically assaulted by mine security and women who had been sexually assaulted by police guarding the mine under an MOU with the PNG state. Or by restraining access through making a mechanism only in force for a short duration, as was the case in the Porgera OGM (2012-2014), causing many women to miss a chance to participate in the mechanism. Nor should the perpetrator of a harm be allowed to, for example, determine the value of the remedy that will be awarded, as was the case in the Porgera OGM where an a priori top limit was set. This limit was subsequently, following successful protest by the female victims, raised in a unilateral and arbitrary decision by the company. The new limit was no more acceptable to the women, but this dissatisfaction has not been addressed to date.[[1]](#footnote-1)

Further, it is unclear why EC (h) for operational level mechanisms prioritizes “dialogue as the means to address and resolve grievances” when dialogue, particularly with the company that has caused the harm, may not be feasible, safe, or desirable in all circumstances.

Finally, an effective remedy is not one in which highly vulnerable people in the context of an OGM, where there is extreme power imbalance and often no other viable options for remedy,[[2]](#footnote-2) are offered remedy on a take it or leave it basis in which, if they take the remedy offered, they are required to sign a legal waiver. It is simply not acceptable to say that highly vulnerable people have agency and can choose to waive their rights in return for a non-equitable remedy, or remedy they strongly disagree with, just because their poverty or need leaves them no choice. This is re-victimizing these victims. It is clear that using limited remedy as a means to secure legal waivers in cases of direct or indirect criminal behaviour, such as killings or rapes by mine personnel, has further harmed the victims of corporate human rights abuses at the Porgera Joint Venture mine in Papua New Guinea and the North Mara Gold Mine in Tanzania. In both cases, victims, many of whom are illiterate and did not understand the implications of the documents they signed or put a finger print on, are now speaking out against the OGM process they endured, the limited remedy they received, and the fact that they are now excluded from taking legal action to seek more equitable remedy.[[3]](#footnote-3) There is no place these victims of OGMs can turn for effective redress for harmed caused by the OGM.

**B. How to realize an Effective Remedy**

Home states must play a much greater role in ensuring access to remedy for overseas victims of their multinationals. It is clear that many victims of corporate abuses cannot access either judicial or non-judicial remedy in their own countries and that there are few, if any, international mechanisms available for these victims. This leaves home states as an important venue for access to remedy for these victims. Home states can ensure greater access to their own courts for overseas victims. They can also create effective non-judicial mechanisms, such as the human rights Ombudsperson for the Extractive Sector being proposed by the Canadian Network on Corporate Accountability in Canada.[[4]](#footnote-4) And they can legislate a duty of care for parent companies in respect to the activities of their subsidiaries that could result in fines for companies that cause harm overseas or that could create a cause of action for civil legal proceedings by those who have been harmed.

1. See Coumans, Catherine. 2017. [Do no harm? Mining industry responses to the responsibility to respect human rights](http://www.tandfonline.com/doi/abs/10.1080/02255189.2017.1289080).[*Canadian Journal of Development Studies / Revue canadienne d'études du développement*](http://www.tandfonline.com/toc/rcjd20/0/0). Vol. 38, No. 1. March. <http://www.tandfonline.com/doi/full/10.1080/02255189.2017.1289080> [↑](#footnote-ref-1)
2. Practice regarding non-judicial mechanisms in the context of a legal system that offers a judicial alternative if the non-judicial effort breaks down should not be compared to, for example, an OGM employed in a context where victims have no viable alternative. [↑](#footnote-ref-2)
3. See for example: <http://miningwatch.ca/blog/2016/11/16/video-message-porgera-women-un-forum-business-and-human-rights#sthash.auxdr2Nj.dpbs> and <http://miningwatch.ca/news/2016/11/16/119-indigenous-women-demand-justice-barrick-gold-un-forum-geneva> [↑](#footnote-ref-3)
4. See <http://cnca-rcrce.ca/campaigns-justice/ombudsperson/> [↑](#footnote-ref-4)