**Responses to Questionnaire for Other Stakeholders regarding**

**Access to Remedy in relation to Business-related Human Rights Abuses**

EarthRights International submits the following responses to certain of the questions posed by the U.N. Working Group on the issue of human rights and transnational corporations and other business enterprises in its Questionnaire for Other Stakeholders regarding Access to Remedy in relation to Business-related Human Rights Abuses.

1. **What are the key elements of the right to an “effective” remedy under international human rights law that are relevant to Pillar III of the UNGPs?**

All elements of the right to an effective remedy, as recognized in international human rights treaties and guidelines, are relevant to Pillar III, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. In particular, remedies/reparations must be distinct from other measures such as development initiatives.[[1]](#footnote-1) Such initiatives cannot replace the need to provide remedies for human rights violations and business-related grievances.

1. **What needs to be done to ensure that remedies for business-related human rights abuses are responsive to the experiences and expectations of the rights-holders, especially of vulnerable groups such as children, women, people with disabilities, migrant workers, and indigenous peoples?**

Rights-holders must be at the center of the process to provide remedies.[[2]](#footnote-2) Remedies must be culturally appropriate and responsive to the needs of rights-holders; achieving this requires including them as co-designers of both the remedial process and the remedies provided.

Rights-holders are best placed to ensure that the process and remedy responds to their expectations, is accessible, and will be trusted by the community. Rights-holders must also co-design the types of remedies provided; but the remedy given in specific cases must be tailored to the needs and expectations of the rights-holder(s). Having rights-holders as co-designers in any remedy process will help mitigate against the power imbalance between them and the company.

Remedy programs must also recognize that rights-holders may not be unified and speak with a single voice, and respect traditional power structures while ensuring that all rights-holders have a voice and role in the process. The appropriate approach for reaching out to marginalized groups may vary between communities, and guidance may be drawn from best practices on obtaining free prior and informed consent.[[3]](#footnote-3)

Placing rights-holders at the center of any process to remedy violations to their human rights is a well-established principle in designing reparations programs,[[4]](#footnote-4) and is equally applicable to the Third Pillar.

1. **What should be the role of home as well as host states of business enterprises in providing access to effective remedy for victims of business-related human rights abuses?**

Both home and host states should provide access to effective remedy for victims of business-related human rights abuses; this includes treaty obligations for home states. [[5]](#footnote-5) Home states should follow the EU model, where Article 4 of the Brussels Regulation provides that corporations domiciled in a Member State can be sued in that state[[6]](#footnote-6); this bars consideration of *forum non conveniens.*[[7]](#footnote-7)Even where *forum non conveniens* remains a barrier, however, home state courts must retain cases where victims face barriers to justice in host states. For example, a U.S. court recently recognized that litigating in Colombia would place victims of human rights abuses at risk.[[8]](#footnote-8)

1. **What does “cooperate” in remediation of adverse human rights impacts “through legitimate processes” entail for business enterprise under Principle 22 of the UNGPs?**

As stated above in question 2, “cooperate” means to work with rights-holders, as co-designers. The process of identifying the adverse human rights impacts cannot be left solely to the determination of the business enterprise. Rights-holders must be able to determine what an adverse human rights impact is, and have an avenue to report these impacts and work with the company for remediation. The rights-holders are best placed to determine what adverse impacts (grievances) they are experiencing.

It is also important that any process designed to address adverse impacts address the range of grievances important to the rights-holders. When businesses only respond to certain grievances they fails to fulfill their obligations, and this selection can also cause divisions between rights-holders. Moreover, rights-holders may have more than one grievance, which they may view as interconnected. A process which does not respect the rights-holder’s perception of their grievances will not result in an effective remedy.

1. **What role should non-state-based societal organs such as intergovernmental organisations, international financial institutions, civil society organisations, trade unions, human rights defenders, lawyers’ associations and business associations play in facilitating access to effective remedy in cases related to business-related human rights abuses?**

Each of these organs has the ability to play a positive role in supporting access to remedy. For example, NGOs working with rights-holders can play a role in providing cultural context and facilitating information sharing with rights-holders. They can also bring expertise and provide training or facilitation where useful.[[9]](#footnote-9) But none of these organs can be treated as proxies for rights-holders, whose views must be part of the process.

Rights-holders may form their own organizations, and select their own representatives. In instances raising sensitive matters, such as sexual violence, organizations of rights-holders may play an important role in ensuring trust in the remedy process and broad participation. Such organizations should have a role in the design of the remedy process and in its implementation.

1. **How can the concept of reparations under international law be used to develop a remedy typology for business-related human rights abuses?**

Remedies under international law must provide full and adequate reparation.[[10]](#footnote-10) We focus here on compensation, and in particular in the context of remedies provided through a non-judicial grievance mechanism.

In its assessment of Barrick Gold’s remedy framework in Porgera, Papua New Guinea, Enodo Rights concluded that damage awards (pecuniary and non-pecuniary) under international law should be calibrated according to the GDP per capita where the victim lives.[[11]](#footnote-11) This method is not supported by the concept of reparations under international law, and is a dangerous approach to determining remedies for business-related abuses, contrary to the fundamental notions of dignity and respect for human rights. The Working Group should reject this approach.

In international law, restition includes “indemnification for patrimonial and non-patrimonial damages, including emotional harm.”[[12]](#footnote-12) Pecuniary (patrimonial) damages provide compensation for losses with precise monetary value (such as wages and medical expenses), while non-pecuniary (non-patrimonial) damages provide compensation for damages where “it is impossible to assign precise monetary value,” such as moral damages.[[13]](#footnote-13) Principles of equity guide the determination of the value of non-pecuniary damages.[[14]](#footnote-14) Emphasis is placed is on “what is just, fair and reasonable in all the circumstances of the case, [and] . . . give[s] recognition to the fact that moral damage occurred as a result of a breach of a fundamental human rights and reflect[s] in the broadest of terms the severity of the damage.”[[15]](#footnote-15) International tribunals appropriately recognize that evidence is not always required to establish and provide awards for moral damages.[[16]](#footnote-16)

The economic circumstances of the individual, or their country, are not considered in determining non-pecuniary damages. In fact, the Inter-American Court of Human Rights has specifically noted that it does not consider financial effects that are patrimonial in nature in analysis of non-pecuniary damage, which, in contrast, “include[s] both the suffering and distress caused to the direct victims and their next of kin, and the impairment of values that are highly significant to them, as well as other sufferings that cannot be assessed in financial terms.”[[17]](#footnote-17) Moreover, a review of damage awards shows little variation between victims in different states, any differential value does not align based on GDP per capita. More likely, differentiation is based on severity of the violation. Calibrating awards based on GDP per capita literally indicates that the suffering of people from poorer countries is worth less.

Principles used in international law to determine reparations, such as the division between pecuniary and non-pecuniary damages, the emphasis on the principles of equity, and the recognition that evidence need not be provided to establish moral damages are equally applicable to business-related human rights abuses. It is fundamentally inconsistent with the jurisprudence from international tribunals to incorporate a GDP per capita analysis into a determination of non-pecuniary damages. It is also inconsistent with the guiding principle of non-discrimination, and respect for human dignity.

The method of using GDP per capita as a measure for damage awards would not allow for compensation to align with the severity of the damage. In the case of Porgera, which involved sexual violence by the mine’s security guards, sexual violence carries significant stigma.[[18]](#footnote-18) Using international law principles would require a non-pecuniary damage award that accounts for this stigma, and the severe consequences which follow, which may include beatings and divorce.[[19]](#footnote-19) Moreover, even for pecuniary damage, looking at GDP per capita does not account for the fact that cost of living in specific communities; Porgera, for example, is a community with a high cost of living due to the presence of a gold mine. The UNGPs recognize a victim’s right to an effective remedy, and this cannot be accomplished based on a model that uses GDP per capita to calculate damage awards.

Remedies for transnational business-related human rights abuses provided in a non-judicial context are novel. In that respect, the appropriate method may require a combination of domestic and international law principles. On­e such example is punitive damages—damages awarded to punish the defendant.[[20]](#footnote-20) Deterrence is an important element of domestic tort law, and international law which incorporates this goal into the concept of compensation which is “about retribution, making the wrongdoer pay and deterring further wrongs.”[[21]](#footnote-21) Remedies for business related-human rights abuses must aim to deter the wrongful conduct, and doing so will require consideration of the corporation’s financial position.

1. **Additional Comments**

Operational grievance mechanisms must not privatize justice.[[22]](#footnote-22) They cannot replace a justice system. Participation in a grievance mechanism must not impede access to a judicial system, or other non-judicial mechanisms. Thus, waiving the right to a legal remedy is not an appropriate condition of access to, or acceptance of remedies through, a private grievance mechanism. The power imbalance between the rights-holders and the company is so great that waivers present an opportunity to take advantage of rights-holders. Instead, remedies granted through grievance mechanisms should be used as offsets against any future legal remedies that rights-holders might be entitled to.[[23]](#footnote-23)

1. *See* Guidance Note of the Secretary-General, http://www.ohchr.org/Documents/Issues/Women/WRGS/PeaceAndSecurity/ ReparationsForCRSV.pdf [“UN SG Guidance Note”], 9-10; Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (“SR report”) ¶ 59, UN Doc. A/68/345. [↑](#footnote-ref-1)
2. *See* Jonathan Kaufman & Katherine McDonnell, Community Driven Operational Grievance Mechanisms, 1 Bus. H.R. J. 1, 127, <https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/communitydriven-operational-grievance-mechanisms/582A2DEE5490BBC02DEC66B05F376B85>; EarthRights International, Community-Driven Operational Level Grievance Mechanisms (“ERI Report”) at 2, 10 (March 13, 2015), <https://www.earthrights.org/sites/default/files/documents/final_ogm_report_2015.pdf>; *Righting Wrongs? Barrick Gold’s Remedy Mechanism for Sexual Violence in Papua New Guinea* at 131-132 (2015),

   <http://static1.squarespace.com/static/562e6123e4b016122951595f/t/565a12cde4b0060cdb69c6c6/1448743629669/Righting+Wrongs.pdf>. [↑](#footnote-ref-2)
3. ERI Report at 10. [↑](#footnote-ref-3)
4. *See* Report of the independent expert to update the Set of Principles to combat impunity ¶ 59(e), U.N. Doc. E/CN.4/2005/102 (Feb. 18, 2005); CEDAW, General recommendation No. 30 ¶ 81(e), UN Doc. CEDAW/C/GC/30, (Oct. 18, 2013); UN SG Guidance Note 10-12; SR Report ¶ 59. [↑](#footnote-ref-4)
5. *See e.g.* Hum. Rts. Com., CCPR, *Concluding observations on the sixth periodic report of Canada* ¶ 6, CCPR/C/CAN/CO/6, (Aug. 13, 2015), <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fCAN%2fCO%2f6&Lang=en>; Committee on the Elimination of All Forms of Discrimination Against Women, *Concluding observations on the combined seventh and eighth periodic reports of Germany*CEDAW/C/DEU/CO/7-8, ¶16(c) (Mar. 9, 2017), <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fDEU%2fCO%2f7-8&Lang=en> [↑](#footnote-ref-5)
6. Council Regulation 1215/2012, art. 4, 2012 O.J. (L 351) 1, (EU).  [↑](#footnote-ref-6)
7. *See Okpabi v Royal Dutch Shell Plc,* [2017] EWHC 89 (TCC), 23-26 (Jan. 26, 2017). [↑](#footnote-ref-7)
8. *See* <https://www.earthrights.org/sites/default/files/documents/order_denying_defendants_joint_motion_to_dismiss_.pdf>;

   *see also Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 335-41 (S.D.N.Y. 2003); *Araya v. Nevsun Resources Ltd*., 2016 BCSC 1856; *Garcia v Tahoe Resources Inc.,* 2016 BCCA 320. [↑](#footnote-ref-8)
9. ERI Report at 10. [↑](#footnote-ref-9)
10. *Factory at Chorzów*, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, at 47. [↑](#footnote-ref-10)
11. Enodo Rights, *Pillar II on the Ground*, at 105-06 (2016), <http://barrick.q4cdn.com/808035602/files/porgera/Enodo-Rights-Porgera-Remedy-Framework-Independent-Assessment.pdf>; Enodo Rights, The Principle of Remedy: A Discussion with EarthRights International, <http://www.enodorights.com/assets/pdf/a-response-eri.pdf>. [↑](#footnote-ref-11)
12. *Velásquez Rodríguez Case*, Judgment ¶ 26 (Inter-Am. Ct. HR July 21, 1989). [↑](#footnote-ref-12)
13. *Miguel Castro-Castro Prison v. Peru,* Judgment ¶ 430 (Inter-Am. Ct. HR Nov. 25 2006); *Case of the "Street Children"*, Judgment ¶ 84 (Inter-Am Ct. HR May 26, 2001). [↑](#footnote-ref-13)
14. *Velásquez Rodríguez Case*, Judgment ¶ 27 (Inter-Am. Ct. HR July 21, 1989); *Miguel Castro-Castro Prison v. Peru*, Judgment ¶ 430 (Inter-Am. Ct. HR Nov. 25, 2006); *Cyprus v. Turkey*, No. 25781/94 ¶ 56 (Eur. Ct. H.R. May 12, 2014). [↑](#footnote-ref-14)
15. *Varnava v. Turkey*, No. 16064/90, ¶ 224 (Eur. Ct. HR Sept. 18, 2009). [↑](#footnote-ref-15)
16. *Loayza-Tamayo v. Peru*, Reparations and Costs, Judgment ¶ 138 (Nov. 27 1998); *Peck v United Kingdom,* No. 44647/98, ¶ 118 (Eur. Ct. HR Jan. 28, 2003). [↑](#footnote-ref-16)
17. *Case of the "Street Children"*, Judgment ¶ 84 (Inter-Am Ct. HR May 26, 2001). [↑](#footnote-ref-17)
18. *Righting Wrongs* at 75-76. [↑](#footnote-ref-18)
19. *Id.*  [↑](#footnote-ref-19)
20. Recent opinions suggest that punitive damages may be awarded in international tribunals without using that label, and should be considered in appropriate cases. *See Krupko v. Russia*, No. 26587/07, Concurring Opinion of Judge Pinto De Albuquerque ¶ 13 (Eur. Ct. HR June 26, 2014); *Cyprus v. Turkey*, No. 25781/94 ((Eur. Ct. H.R. May 12, 2014). [↑](#footnote-ref-20)
21. Dinah Shelton, *Remedies in International Human Rights Law* at 22 (3d ed. 2015). [↑](#footnote-ref-21)
22. ERI Report at 5. [↑](#footnote-ref-22)
23. EarthRights International, Letter to the United Nations High Commissioner for Human Rights (Oct. 1, 2013), <https://business-humanrights.org/en/doc-letter-to-un-ohchr-regarding-the-porgera-joint-venture-remedy-framework> [↑](#footnote-ref-23)