

# RIGHTING WRONGS?

## BARRICK GOLD'S REMEDY MECHANISM FOR SEXUAL VIOLENCE IN PAPUA NEW GUINEA

Key Concerns and Lessons Learned



By  
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Barrick Gold's Remedy Mechanism for Sexual Violence in Papua New Guinea:  
Key Concerns and Lessons Learned**

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## About the Authors

**The Human Rights Clinic at Columbia Law School & The International Human Rights Clinic at Harvard Law School** each work to advance human rights around the world. The clinics carry out human rights investigations, legal and policy analysis, litigation, report-writing, and international advocacy. The clinics bring together innovative education, social justice, and scholarly research, and students are trained to be strategic human rights lawyers.

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This report evaluates the effectiveness of a company-created remedy mechanism designed by Barrick Gold, the majority-owner of the mine from 2006-2015, to provide remedies to survivors of alleged sexual assaults by PJV employees.

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I went there to look for gold. I went myself, with my first born child. I went there and I was busy washing the gold . . . . Three security guards caught me . . . . When they held me, I told them, 'Don't hit me or fight me. Just take me to the cell.' . . . One hit me hard, I fell to the ground. Two [other] security guards were near. One came and raped me. Then another came and raped me. Then the third came. They said, 'We won't take you to the cell.' They left me there . . . . After the rape, I felt numb and pain, I couldn't walk well. I walked slowly back to my village.

*- A woman from Porgera, Papua New Guinea*

## Summary

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Brutal accounts of sexual and other assaults have been rife among the indigenous communities living near the Porgera Joint Venture (PJV) gold mine in Papua New Guinea (PNG). Security guards hired to patrol the mine's perimeter and to secure mine property have physically abused many local residents and landowners, and targeted women for vicious sexual assaults, including gang rapes. The assaults, which spanned many years in a context of pervasive impunity, have caused long-term and continuing harm to survivors and Porgeran communities.

This report analyzes the design and implementation of a company-created mechanism established to remedy sexual violence around the mine. The report provides key lessons for corporations, civil society, survivors and affected communities, and the international community about the benefits, challenges, and limitations of company-created remedy mechanisms as a means of redressing serious human rights violations. The report is grounded in the experiences of assault survivors and the findings are based on a three-year investigation, including many interviews conducted in Porgera before and during the implementation of the remedy mechanism.

The PJV, which started in 1989 and was majority-owned and operated from 2006-2015 by Canadian mining company Barrick Gold Corporation, was slow to respond to abuse allegations. Local and international actors who called attention to these serious human rights violations have spent the greater part of the last decade seeking investigations, acknowledgement, and appropriate preventative measures and remedies.

The fact that such assaults occurred is no longer in dispute, however. Starting in 2010, Barrick began to take long sought-after action. The company commissioned its own internal investigation, recognized publicly the serious problem of sexual violence at the mine site, introduced new systems to monitor mine personnel, and enhanced human rights trainings for security guards.

In 2012, Barrick launched a company-created remedy mechanism to offer reparations to women sexually assaulted by its security guards and other company employees. During the two years of operation of Barrick's "*Olgeta Meri Igat Raits (All Women Have Rights)*" remedy mechanism, approximately 120 sexual assault victims signed remedy package agreements, in exchange for waiving their right to sue Barrick. Separately, eleven women who refused to accept the packages and who secured legal representation by a U.S.-based human rights non-governmental organization were offered confidential settlement packages believed to be about ten times the amount of the remedy mechanism packages. In July 2015, Barrick offered each of the 120 women an additional payment, but taken together, the initial packages and additional payment remain significantly less than the international settlement.

Barrick's remedy mechanism was one of the first such mechanisms to be implemented for serious human rights abuses after the adoption of the UN Guiding Principles on Business and Human Rights (UN Guiding Principles) in 2011. For this reason, it is a particularly important attempt to advance remedies in the business and human rights field, and can serve as a valuable learning tool for understanding approaches to remedies for corporate harms and for designing future remedy

mechanisms.

This report finds that although the remedy mechanism had a number of positive features, it contained serious design and implementation flaws.

Barrick's remedy mechanism provided Porgeran women with a remedy that many otherwise would have been unlikely to receive. Significant barriers to remedy and justice in Porgera result from PNG's weak judicial system, limited local governance, the involvement of local police themselves in a range of abuses, the remote location of the mine, and myriad structural disadvantages (including poverty and illiteracy) faced by local communities and individual rights-holders. Many women in Porgera, especially those who have experienced sexual violence, face particular challenges in speaking out about their attacks and seeking legal redress, due to numerous complex factors, including lack of education, difficulties in accessing police and legal assistance, the social stigma of sexual assault, and the potential for threats or violence from husbands and other family members.

In contrast to the overall context of impunity in PNG, the Barrick remedy mechanism offered a formal path for sexual assault survivors to articulate their accounts of abuse and injustice, seek compensation from the company, and obtain a degree of acknowledgement of the grave harms done to them.

Barrick's remedy mechanism contains a number of specific positive features that other companies should look to as guidance. For example, the company:

- Publicly committed to the right to remedy and to the UN Guiding Principles;
- Consulted with both domestic and international human rights and other experts during the design of the mechanism;
- Was willing, together with the third-party implementer, to receive feedback from external stakeholders during the mechanism's implementation, and to make some modifications to implementation;
- Made serious effort to take into account both the PNG and sexual assault contexts—including by demonstrating sensitivity to claimants' privacy and mental and physical health interests, and to concerns about potential retribution by men against the female claimants;
- Provided business skills training to women who received remedy packages, which was viewed positively by numerous claimants;
- Recognized the need for independence in decisions about claim eligibility and legitimacy, and designed aspects of the remedy mechanism to be implemented by a third party;
- Designed the mechanism to include the provision of legal advice to the rights-holders; and
- Took positive steps towards promoting transparency by publishing the procedures governing the remedy mechanism and by providing occasional public updates about the process.

Ultimately, however, and despite these positive steps, Barrick's remedy mechanism falls short, and a close analysis reveals numerous serious deficiencies in its design and implementation. Thus, Barrick's remedy mechanism is not a model that other corporations should replicate wholesale.



An effective and rights-promoting remedy mechanism should strive to address inherent structural power imbalances. Multinational corporations can often wield enormous power over states, local communities, and individuals affected by their operations. If unaddressed, these power imbalances are likely to be replicated in any purported effort to remedy a rights violation, creating the risk that companies offer “take it or leave it” remedy packages that rights-holders feel are inadequate but which they have little ability to influence and feel unable to refuse. To mitigate the risk that such power differences undermine individuals’ rights, strict safeguards must be put in place to address and recalibrate the balance of bargaining power between corporations and rights-holders. Fundamentally, the Barrick remedy mechanism did not adequately overcome the acute power inequalities in Porgera, and this had a substantial effect on its effectiveness.

Relatedly, a remedy mechanism should center rights-holders and communities at each step in the process. This is critical to ensure that a mechanism serves rights-holders’ needs, that rights-holders view the remedy mechanism as legitimate, and that rights-holders experience increased agency through the process. The Barrick remedy mechanism was designed to remedy serious human rights violations, but it too often treated the survivors as “victims” and passive recipients rather than fully engaging them in all stages of the design and implementation of the mechanism. As with the failure to address the power imbalance, not centering the rights-holders undermined the mechanism’s legitimacy and effectiveness in numerous ways.

## **Findings and Lessons Learned**

The foundational concerns regarding power inequality and a lack of rights-holder centrality manifested themselves in a number of specific deficiencies in the remedy mechanism’s design and implementation. As detailed in this report, the following elements of the Barrick remedy mechanism inhibited its effectiveness and the advancement of human rights for affected communities in Porgera. The findings also provide important lessons for future remedy mechanisms.

### **Barrick did not promptly investigate and remedy human rights abuses.**

Barrick failed to provide a prompt remedy, and many women suffered for years, waiting to have their sexual assaults investigated, acknowledged, and addressed. The failure to react promptly likely resulted in continued assaults against women, and was largely due to the company’s grossly inadequate responses over a number of years to numerous allegations of human rights abuse.

*Lessons learned: Prompt responses to allegations of human rights violations are critical to the right to remedy; businesses must immediately investigate alleged abuses. Whether allegations are relatively minor or more serious, the investigation should be prompt to establish a practice of zero tolerance for human rights violations. Businesses should have robust policies in place to ensure that this happens.*

### **Consultation and engagement with survivors and other key stakeholders was inadequate.**

Barrick’s failure to adequately consult with survivors during the design of the mechanism was a major omission. Barrick chose to create the remedy mechanism itself, and brought in the views of

some other actors through a process of consultation. This consultation included valuable discussions with international and national actors, but there was inadequate engagement with survivors and other stakeholders that compromised the mechanism’s legitimacy and effectiveness. The failure to include rights-holders in design had negative consequences throughout the remainder of the process.

*Lessons learned: The floor of rights-holder engagement is consultation and requires early, proactive, and comprehensive engagement with all stakeholders, particularly rights-holders. Typical consultation models can maintain the unequal power relationship between rights-holders and companies. The interests of rights-holders are best served when they co-create a remedy mechanism with companies, or when rights-holders and companies jointly appoint an independent mechanism.*

**The remedy mechanism was limited in scope without proper explanation or justification.**

The scope of the remedy mechanism was narrow: it only applied to sexual assault, despite longstanding allegations of non-sexual assaults by mine staff. The exclusion of other alleged harms was unjustified. It undermined perceptions of legitimacy and fairness, and sidelined many other individuals with alleged harms.

*Lessons learned: The scope of harms remedied by a mechanism can impact its perceived legitimacy. Any “specialized” efforts must have a legitimate basis, be explained from the outset, and not lead to the arbitrary sidelining of others who allegedly experienced harms.*

**The remedy mechanism was not sufficiently accessible or safe for survivors.**

The decision by the remedy mechanism implementers to use a “word of mouth” instead of broad public awareness campaign to disseminate information—although based on legitimate concerns about privacy and safety—meant that accurate information about the remedy mechanism did not reach as many potential claimants as it should have, and insufficient steps were taken to overcome this problem. Accessibility was also undermined by having a single and public remedy mechanism location and a limited time frame for making complaints. In addition, inadequate steps were taken to ensure that risks for women were effectively mitigated at all phases.

*Lessons learned: Decisions to limit public awareness about a mechanism carry the serious risk that survivors will be poorly informed. Involvement and empowerment of the rights-holders during design and throughout the process is essential to provide insights into what necessary measures ought to be taken to make a mechanism accessible and safe. Multiple points of entry will often be important to maximize opportunities for access and maintaining privacy; extended time periods for making complaints is also important. Rather than managing security by limiting awareness, an alternative approach that may better balance security with awareness could pair broad public outreach with strong security measures during all subsequent stages of the remedy process, including when designing points of entry, communicating with women through the process, and through to remedy disbursement.*

**Full and effective reparations have not been provided, and many survivors consider the remedies unfair and insulting.**

Many rights-holders perceive the remedy packages to be inadequate and as failing to reflect the severity of the harms suffered. There are serious concerns about whether the packages are

proportionate to the alleged harms as required by human rights law. There are also serious concerns about whether they are inequitable or arbitrary, given that eleven women represented by U.S. attorneys reportedly received far greater remedies. The manner of remedy disbursement also was not adequately tailored to meet individual needs or to meet security concerns of the claimants. Barrick has acknowledged but not accepted responsibility for the abuses or engaged in sufficient public reporting of the facts around mine abuses. Although Barrick's internal investigations led to firing some staff and referrals to PNG police, the government has not convicted anyone.

*Lesson learned: Rights-holders and communities themselves are key to designing adequate, effective, and appropriate remedies. At the time of mechanism design, survivor participation is key. Remedies must be proportional to the harm, equitable, and not arbitrary. Remedy mechanisms must affirmatively seek to minimize structural inequalities and power imbalances to recalibrate negotiating power between rights-holders and companies. This will likely have a significant effect in seeing that remedies meet international standards, and that the choice to accept a remedy package is made freely. Reparation measures should be long-term, and should include careful attention to the requirements of satisfaction under international law, including full disclosure and acceptance of responsibility. Company remedy mechanisms cannot provide judicial sanction, and thus are only part of the right to a full and effective remedy for individuals who experience harms.*

**Barrick improperly required individuals to waive their legal right to sue, and many women did not have adequate independent legal representation.**

In order to receive a remedy, claimants were required to waive their legal rights to sue Barrick in any jurisdiction in the world. In a context of gross structural inequality between the company and the rights-holders, the waiver raised particular concerns, especially as many claimants did not have or did not know about alternative legal avenues and thus felt compelled to accept the waiver in exchange for the remedy package. The legal advisor provided—who was paid by and housed in the mechanism office—was not sufficiently independent or adequately equipped to overcome the power imbalance, and the majority of claimants experienced the mechanism without sufficient legal representation. The legal waiver was therefore not appropriate in this case, and should be rescinded by Barrick.

*Lessons learned: There should be a strong presumption against waivers, particularly in circumstances of gross human rights violations, extreme structural inequality, and where rights-holders have limited choices but to accept offers from companies. Businesses should bear the burden of ensuring and showing that rights-holders come to the table on more equal footing, and that the mechanism meets strict human rights standards. Claimants must have access to legal advisors who are able to robustly represent the full range of claimants' interests.*

**Barrick's process was not as transparent and predictable as it could have been, and it could not achieve full independence.**

Claimants and others too often experienced confusion regarding the process and outcomes of the remedy mechanism, and some practice differed from written procedures. Continuous learning and transparency practices could have been improved. Although certain aspects of the mechanism's implementation were appropriately independent of Barrick, the company's interventions to make changes during implementation, and its role in the mechanism's funding and design, mean that the mechanism was not independent in a number of respects.

*Lessons learned: Companies should ensure that claimants have a clear understanding of remedy procedures and*

*outcomes, and transparency to outsiders enables effective external monitoring and facilitates trust. Businesses should ensure formal and informal processes for incorporating feedback. Remedy mechanisms created by companies themselves are unlikely to ever be fully independent of the company. Independence involves a number of dimensions, including design, selection of implementers, implementation decision-making, and funding. Joint design or creation with rights-holders would improve the practice and perception of independence.*

## **Moving Forward: Applying Lessons from Porgera to Future Human Rights Remedy Mechanisms**

The Barrick mechanism is novel, but as transnational corporations seek to fulfill their responsibilities to provide remedies for human rights abuses while operating in countries with weak governance zones and judicial systems, similar mechanisms are likely to be implemented elsewhere. In theory, non-judicial remedy mechanisms, if designed and implemented well, have the potential to provide access to remedies where they may otherwise be unavailable, and to open a dialogue between the corporation and the community. Because transnational corporations often have structural power advantages relative to individual claimants and impacted communities, remedy mechanisms created by companies carry the risk of being concerned with limiting companies' legal liability and advancing their human rights reputations, without adequately providing survivors of human rights abuses with effective, fair, and proportionate remedies.

Indeed, experiences in Porgera raise fundamental questions about whether *company-created* remedy mechanisms are the best model to address power imbalances and promote the right to remedy for cases of very serious human rights abuses, and whether they can even be capable of doing so. As envisioned by the UN Guiding Principles, "operational level grievance mechanisms" are ongoing complaints mechanisms with broad eligibility, and exist primarily to serve early warning and harm prevention functions for low-level complaints. Companies should be extremely cautious when attempting to use such models to directly remedy serious human rights abuses and potentially grave criminal matters, such as allegations of torture, rape, and unlawful killings, particularly when they may be recurrent and perpetrated over a long period of time. There are also inherent limitations of any company-created and non-judicial process: full remedy for those harmed requires judicial sanctions, including criminal investigations of companies and senior management where appropriate.

Without attention to very strict human rights safeguards, such mechanisms can in fact risk undermining the right to remedy. Strict standards in the design of a corporate remedy mechanism for serious human rights abuses will help to ensure that the vulnerability of survivors of human rights abuses, often compounded by intersecting factors of marginalization and power asymmetry, is not further exploited by a mechanism. Expert and robust independent legal representation for individuals is one important way to help address the marginalization concerns and increase negotiating power for the survivors.

At a minimum, a remedy mechanism must seek to overcome acute power imbalances and to center rights-holders and communities at each step in the process. A rebalance of power needs to be a critical measure of success when analyzing a remedy mechanism, and should be a key goal of a mechanism's design, implementation, and monitoring. Fundamentally, addressing structural power imbalances can only be achieved by ensuring that rights-holders and impacted communities play a

central role in the development and implementation of the remedy mechanism. Rights-holders have knowledge and experience to bring to the table, including, for example, about what remedies they consider appropriate and how to disburse them in a way to meet their security and privacy needs. As the Porgera experience shows, rights-holders can be mistrustful of a process that was imposed on them by a powerful foreign entity in spite of the latter's best intentions, particularly if survivors viewed the imposer to be connected to the harms they suffered. Many concerns and deficiencies that later arose with respect to the remedy mechanism could have been alleviated through deep engagement with rights-holders and the community as early as possible.

Ideally, instead of being company-created, a remedy mechanism should be a joint effort between the company and the affected community, in which they both have sufficient power to contribute to and influence the process. Alternatively, the company and rights-holders could jointly appoint others to establish an independent mechanism. Joint design or appointment is necessary to develop more trusted and legitimate mechanisms, to help ensure free and informed choice, and to create better context-specific remedies and procedures that reflect the needs of abused individuals and the broader needs of the community as a whole. Such a mechanism would recognize the agency of local actors, create space for reconciliation, and better promote human rights.

# Recommendations

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## Recommendations for Barrick Gold

- **Offer an additional remedy to the 119 women who have already received a remedy through the Barrick remedy mechanism.** The additional amount should bring the total amount in line with the remedy received by the 11 women who received a settlement outside the remedy mechanism. Each of the 119 women should be consulted as to how she would like to receive her additional remedy, whether in cash, the form of direct purchasing for her of goods or services (such as education, funds to start a business), or some other form. Barrick should take significant additional steps to protect security and privacy when offering and disbursing further remedies. These steps should include: one-on-one individual counseling and security assessments for each woman, comprehensive relocation assistance for women at risk if appropriate, and ongoing one-on-one monitoring.
- **Fund individualized, case-by-case security advice and assessment** for all women who accessed the remedy mechanism, and **fund protection measures** to any women in need.
- **Void all legal waivers** signed by rights-holders through the remedy mechanism, and ensure that all complainants are informed of the voiding and its implications.
- **Address allegations not remedied by the mechanism.** Barrick should initiate an open dialogue with rights-holders as well as local, national, and international stakeholders and experts about how to effectively remedy alleged security guard abuses not remedied through the existing Barrick remedy mechanism process. Concrete steps should be taken to create a permanent remedy mechanism developed jointly by the company and rights-holders and the community. Such a mechanism should replace any other process for handling complaints from the community. It should be designed for alleged sexual assault survivors who did not submit complaints to the existing remedy mechanism, as well as individuals who allege other security guard abuses, such as physical assaults and killings.
- **Offer community-level direct public apologies** at the village level. Senior management from Barrick Gold and the PJV, following consultations with rights-holders and village and clan leaders, should personally visit each village in Porgera, and offer a public apology and explanation for past security guard abuses.
- **Make public further information** regarding the Barrick remedy mechanism, including:
  - The type and nature of harms suffered by individuals awarded remedies, and about the conduct and nature of the accused;
  - The specific reasons any claims were refused by the remedy mechanism;
  - The number of individuals who have been: (a) dismissed from Barrick employment or disciplined because of any direct involvement in alleged sexual assaults, and for non-sexual assaults; (b) dismissed from Barrick employment or disciplined because of any role in not preventing or not adequately responding to allegations of abuse; (c) referred to the PNG police for criminal investigation and prosecution because of alleged sexual or other abuse; (d) subject to criminal investigation, prosecution, and conviction for any involvement in abuse; and (e) the factual basis for dismissal, discipline, or referral to the police;

- A timeline of changes to the remedy mechanism and to remedy packages and why those changes were made;
  - The values and content of each and every remedy package, and the basis for any variation between the packages. Such information should be made available while also maintaining the anonymity of those receiving the package;
  - The Barrick-commissioned assessment of the mechanism carried out by Business for Social Responsibility (BSR); and
  - Financial information regarding the remedy mechanism, including: (a) total amounts provided for remedy packages to date; (b) any amounts reserved for future remedies; (c) costs to design and implement the mechanism; (d) costs associated with disseminating information about the mechanism to survivors; (e) costs associated with disseminating information about the mechanism in national and international forums, and in the media; and (f) and costs associated with assessing or reviewing the mechanism.
- **Report on the progress and outcomes of steps taken to prevent violence** in and around the mine site. Reported outcome data should include the rate of complaints about abuses over time, changes in security guard behavior, and data on the processes and impacts of Barrick-funded sexual assault prevention programs.

## Recommendations for the Government of Papua New Guinea

- **Investigate and, where appropriate, prosecute** individuals who committed abuses in and around the PJV mine. Investigations should consider whether senior management and the company itself bear legal responsibility for violations. There should be publicly available reporting on the investigations, arrests, and any prosecutions for violations committed on or around mine property by PJV employees and/or police or other state security sector personnel.
- **Conduct an assessment** of the implications of corporate-created remedy mechanisms for human rights as well as the PNG justice system, and **consider the adoption of government guidelines** or regulations that may be required for such mechanisms. Any guidelines should strive to ensure that any mechanism centers the rights-holders and addresses power inequalities between the parties involved.

## Recommendations for Corporations Considering Creating Remedy Mechanisms for Serious Human Rights Violations

Where corporations seek to remedy serious human rights violations associated with their business activities, any mechanism or remedy should comply with the highest standards of human rights. This should include, but not be limited to, the specific requirements of the UN Guiding Principles on Business and Human Rights as well as the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law. In particular, for remedy mechanisms designed to address serious human rights violations, corporations should:

- **Ensure rights-holders are centered throughout the design and implementation of such mechanisms.** At a minimum, early, meaningful, and continuing consultation with affected communities, particularly survivors, is necessary when considering whether and how to create a remedy mechanism. Consultation should continue through implementation. To increase the legitimacy and effectiveness of a mechanism, corporations should co-design with rights-holders and key stakeholders, or agree to design and implementation by a third party that is jointly appointed with relevant stakeholders.
- **Ensure that a mechanism does not exacerbate existing power differences** between parties, and strive to **recalibrate bargaining power** to help achieve better outcomes.
- **Ensure prompt investigations and remedies.** Providing prompt investigation and remedy will assist those harmed as well as help prevent additional violations from occurring.
- **Ensure there is adequate consultation** during design and implementation so that there is extensive input and advice from rights-holders themselves, local communities, diverse subject matter experts, human rights experts, civil society organizations, and those with relevant experience in the location of the project.
- **Ensure that a mechanism does not unnecessarily exclude human rights violations.** A mechanism's scope should not be unnecessarily narrow. Mechanisms that handle the range of violations are less likely to divide communities and more likely to allow them to heal as a whole. If a specialized mechanism is established, the reasons for it should be explained from the outset, and the mechanism should not arbitrarily exclude individuals who have experienced harms.
- **Ensure accessibility, security, and privacy** by taking proactive steps to inform rights-holders about the mechanism. Survivors should have as much knowledge of the mechanism as they need to make informed decisions to initially participate, continue with any process, and to receive any packages. Where accessing a mechanism may raise security or privacy concerns for a rights-holder, special steps should be taken, including: creating multiple points of entry; the potential for individually-tailored and secure complaints; undertaking individualized privacy and security assessments and monitoring; and creating survivor protection programs where necessary.
- **Provide remedy packages that are proportional to the harms.** Remedies should include long-term empowerment of the community as well as address the needs of individual survivors in accordance with international standards and individual and community expectations.
- **Establish a strong presumption against the inclusion of a legal waiver,** particularly in cases of grave human rights abuses and/or where power inequalities between the parties are present that undermine the bargaining power of rights-holders during negotiations. The desire of a company for finality should not alone be sufficient to overcome the presumption.
- **Ensure competent independent legal representation** is provided for claimants, and that it is able to provide legal advice on multiple jurisdictions, where necessary. Legal advisors should not be housed in the mechanism and should robustly advocate for the range of claimants' interests.
- **Ensure principles of rule of law apply to the** mechanism, including that:
  - The mechanism operates as **independently** as possible from the company, including by separating key decision-making structures from the company. Independence considerations should include who designs the mechanism, selection of key decision-makers and implementers, and funding;



- The mechanism should be **transparent and predictable**, and should clearly and regularly communicate results and procedures to individuals and communities in an accessible manner. Any changes in procedures or design or implementation should also be published and communicated, along with reasons for the changes.
- The mechanism should include **monitoring** and both informal and formal processes to **receive feedback**. At a minimum, processes should include an independent third-party assessment that is external from the company. Internal assessments or internal third-party assessments that supplement external reviews and provide the company with additional information and feedback should also be encouraged.

### **Recommendations for the International Business and Human Rights Community**

- **Facilitate greater discussion about using company-created remedy mechanisms** to address serious human rights abuses, and consider researching and publishing additional human rights-based guidance for this unique category of non-judicial grievance mechanism.
- **Assess the implementation of company-created remedy mechanisms** around the world, particularly through on-the-ground study of design and implementation and impacts. Assessments limited to mechanism design are insufficient. Particular focus should be given to the experience of rights-holders and users of the mechanism as well as assessing how power inequalities between the parties affect outcomes.
- **Explore and develop models of co-creation** of remedy mechanisms between companies and communities, or alternatively, processes where companies and rights-holders can jointly appoint others to design and implement such a mechanism.

## Methodology

This report provides a human rights analysis of a company-created remedy mechanism set up by Barrick Gold to remedy serious human rights violations committed by PJV mine security and other company personnel in PNG.

The findings in this report are based on research carried out by human rights clinics at Harvard Law School, Columbia Law School, and New York University School of Law. Although the clinics have been involved in investigations of rights violations at the mine since 2006, the findings here draw on a close study from 2011-2015 of assault survivors' views about remedies and about the Barrick remedy mechanism's design and implementation.

This report assesses the Barrick remedy mechanism in light of international human rights, including as expressed in the 2011 UN Guiding Principles on Business and Human Rights, as well as in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law. *See* Part II: The International Human Rights Framework. Indeed, Barrick has stated that the company is “firmly committed to upholding human rights and protecting human dignity;” committed to aligning its practices with the Universal Declaration of Human Rights; that the guiding principles used to develop its remedy framework derived from the UN Guiding Principles and the UN Basic Principles on the right to remedy; and that its remedy mechanism design aligns with the UN Guiding Principles.<sup>1</sup>

The study of the remedy mechanism draws on investigations undertaken in PNG; direct engagement with Barrick and the organization hired by Barrick to implement the remedy mechanism; legal analysis of the right to remedy and the UN Guiding Principles; and review of a broad range of publicly available information.

As part of the 2011-2015 investigations in PNG, the clinics conducted more than 130 interviews regarding mine-related human rights issues and the remedy mechanism.<sup>2</sup> The clinics prepared semi-structured interview guides prior to investigations, and adopted cognitive interviewing techniques in the course of the investigations. Interviews about the remedy mechanism sought to elicit views about its design and implementation. Where it was not otherwise volunteered in any interview, positive information about the mechanism was specifically sought.

Interviews were conducted with the assistance of interpreters in various languages, including Ipili, Engan, Pidgin (Tok Pisin), or English, depending on the preferences of the interviewee. Information provided in interviews was cross-referenced with other interviews and with documents, such as medical reports or signed remedy agreements, where available.

The clinics placed rights-holder interests, security, and autonomy at the center of interviewing procedures, and adopted measures to mitigate the risk of re-traumatization, and threats to survivor

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<sup>1</sup> *See, e.g.*, BARRICK GOLD CORP., A FRAMEWORK OF REMEDIATION INITIATIVES IN RESPONSE TO VIOLENCE AGAINST WOMEN IN THE PORGERA VALLEY 2, 10 (2013), <http://s1.q4cdn.com/808035602/files/porgera/Framework-of-remediation-initiatives.pdf>; BARRICK GOLD CORP., THE PORGERA JOINT VENTURE REMEDY FRAMEWORK 1 (Dec. 1, 2014), <http://s1.q4cdn.com/808035602/files/porgera/Porgera-Joint-Venture-Remedy-Framework-Dec1-2014.pdf>.

<sup>2</sup> Before 2011, the clinics conducted over 250 interviews in Porgera, focusing on abuse allegations, rather than the mechanism.

security and privacy.<sup>3</sup> For example, in the later years of the study, women who had accessed the remedy mechanism were asked about their views of the mechanism, but not about the details of the assault they had suffered. The clinics treated informed consent with particular importance, requiring and obtaining consent from rights-holders for interviews and for the use of any information in this report, and adopting specific protocols to account for literacy and education levels. To ensure fully informed consent, protocols required the discussion of note-taking and storage procedures, the uses of information, and potential risks to individuals of sharing information. Names and identifying information of interviewees have been withheld at the request of the interviewees, respectful of their legitimate concerns for security and privacy, or when the clinics determined that revealing an individual's identity might place them at risk.

Each investigative trip for the study of the remedy mechanism was designed to respond to unique circumstances and specific phases of work, including the remedy mechanism's development and implementation. When Barrick publicly acknowledged in early 2011 that sexual assaults had occurred,<sup>4</sup> the clinics focused their investigation on understanding the remedial response that local communities wanted and expected from Barrick. After Barrick announced the creation of the remedy mechanism in 2012,<sup>5</sup> the clinics began investigating rights-holder views about the remedy mechanism, its procedures, and outcomes. Investigations conducted by the clinics from 2013-2015 focused on monitoring the implementation of the mechanism.

In the final investigation in PNG, conducted in July 2015, the clinics conducted interviews and held focus groups to discuss with women their goals going forward, as well as the preliminary findings and recommendations of this report.

The report will be presented to communities and rights-holders in Porgera in January 2016.

Over the course of nine years of visiting Porgera, the clinics have sought out and spoken with men and women who reported both sexual and non-sexual violence. For this study, the clinics spoke with those who had and had not accessed the remedy mechanism, and those who both accepted and rejected the remedy package offered. The clinics specifically sought out women that the organization implementing the remedy mechanism recommended to be interviewed, as well as women who were supported by the Akali Tange Association (ATA), and women who were unrepresented by any external organization. The clinics also spoke with family members of survivors as well as of those who have been allegedly killed at or near the minesite. In addition, the clinics spoke to a range of local organizations, landowners and other Porgera community members, police and prosecutors, PJV security personnel, health providers, government officials, academic experts, UN officials, and representatives of international human rights organizations, including EarthRights International (ERI) and MiningWatch Canada.

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3 See, e.g., RAOUL WALLENBERG INST. OF HUM. RTS. AND HUMANITARIAN LAW, GUIDELINES ON INTERNATIONAL HUMAN RIGHTS FACT-FINDING VISITS AND REPORTS (2009); UN Office of the High Comm'r for Hum. Rts., Training Manual on Human Rights Monitoring, U.N. Doc. HR/P/PT/7 (2001); UN Office of the High Comm'r for Hum. Rts., Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law—Guidance and Practice, U.N. Doc. HR/PUB/14/7 (2015).

4 BARRICK GOLD CORP., ADDRESSING VIOLENCE AGAINST WOMEN AT PORGERA (Oct. 27, 2011), <http://www.barrick.com/files/porgera/Progress-on-Human-Rights-at-Porgera.pdf>.

5 BARRICK GOLD CORP., UPDATE ON ADDRESSING VIOLENCE AGAINST WOMEN IN THE PORGERA VALLEY (PAPUA NEW GUINEA) (Oct. 23, 2012), <http://www.barrick.com/files/porgera/Update-on-Addressing-Violence-Against-Women-in-the-Porgera-Valley.pdf>.

The report relies on information obtained through direct in-person meetings, as well as telephone, email, or letter correspondence with individuals associated with Barrick and Cardno, the organization hired to implement the grievance mechanism. With Barrick, the clinics have communicated with various individuals, including staff in Porgera; Barrick's General Counsel; Regional General Counsel, Barrick (Australia Pacific) Limited; Senior Vice President for Corporate Affairs; Corporate Social Responsibility Director; and the Porgera Remediation Project Corporate Specialist. With Cardno, the clinics corresponded with and met individuals at the managerial and staff levels.

Finally, this report also relies on public information. This information includes documentation of the history of the PJV mine, public reports on mine-related abuses, public material released by Barrick about the abuses and the remedy mechanism and other steps taken by Barrick in response to the abuses, public correspondence with and from the UN Office of the High Commissioner for Human Rights, and relevant policy and academic writing.



*Top: View of the mine site from a village in Porgera. (Photo Credit: Sarah Knuckey)*

*Bottom: Waste dump area of the gold mine, including the “red water” tailings waste, where Porgerans often go to collect rocks and pan for gold. (Photo Credit: Emily Allen)*



*Top: Panning for gold in Porgera. (Photo Credit: Emily Allen)*

*Bottom: View from a village in Porgera, across mine waste dump area. (Photo Credit: Emily Allen)*



*Top: A woman in Porgera. (Photo Credit: Emily Allen)*

*Bottom: The “red water” tailings waste, where Porgerans often go to pan for gold. (Photo Credit: Emily Allen)*

# Introduction

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This report assesses the Barrick remedy mechanism in light of international human rights principles. It contains three parts:

**Part I: Background** provides information about the history of the PJV gold mine and the general conditions for communities living around the mine. The section describes the alleged violence by security guards at the mine site, including both sexual and non-sexual abuses. The part also outlines the development of the Barrick remedy mechanism, as well as its procedures, created in response to the allegations of widespread sexual violence.

**Part II: The International Human Rights Framework** lays out the applicable human rights framework used to assess the remedy mechanism, with a focus on the international human right to a remedy. It sets out the general human rights standards at issue, including the responsibilities of corporations under international human rights law as identified in the UN Guiding Principles on Business and Human Rights and elsewhere.

**Part III: The Barrick Remedy Mechanism: A Human Rights Analysis** analyzes the remedy mechanism in light of international human rights and the UN Guiding Principles as set out in Part II. Part III contains seven chapters:

**Chapter 1: Promptness** examines whether Barrick responded in a timely manner to allegations of harms.

**Chapter 2: Consultation and Rights-Holder Engagement** explores whether there was adequate engagement with both local and international stakeholders, including survivors of alleged violence, during the design and implementation of the remedy mechanism.

**Chapter 3: Scope of Harms Remedied** examines the kinds of abuses included within the scope of the mechanism, and whether the scope was appropriate in light of the alleged violations and concerns on the ground.

**Chapter 4: Accessibility and Security** discusses the extent to which the mechanism was accessible to and safe for rights-holders; the analysis includes an examination of rights-holders' knowledge about and ability to make complaints to the mechanism, as well as the mechanism's provision of security measures for rights-holders.

**Chapter 5: Reparations** focuses on whether the remedy packages offered to rights-holders were proportional in light of the alleged harms and adequately addressed the needs, concerns, and expectations of rights-holders. It also examines other steps taken, including security force reform, administrative sanctions, and policing and judicial efforts.

**Chapter 6: Waiver of Legal Rights and Access to Counsel** discusses the implications



of the remedy mechanism's requirement that claimants waive their right to sue as a condition of receiving a remedy. This section also discusses the role of legal counsel in the process and its effect on outcomes for rights-holders.

**Chapter 7: Additional Rule of Law Issues: Transparency, Predictability, Continuous Learning, and Independence** analyzes several operational issues that arose during the design and implementation of the remedy mechanism, including: the nature of information disclosed to claimants and external stakeholders; whether the mechanism adhered in practice to the published procedures; feedback processes; and the extent of independence of the remedy mechanism.

The report's **Conclusions and Findings** summarize the overall findings of the report.

## Part I

# Background: Human Rights Abuse Allegations and the Creation of the Barrick Remedy Mechanism

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The Porgera Joint Venture (PJV) gold mine, the second largest gold mine in Papua New Guinea (PNG), is located in the Porgera Valley—a region in the highlands of PNG’s Enga Province. The mine began operations in 1989.

In 2006, Canadian company Barrick Gold, one of the world’s largest gold mining companies, acquired a 95% interest in the PJV mine as part of its takeover of mining company Placer Dome.<sup>1</sup> Barrick Gold’s wholly owned subsidiary, Barrick (Niugini) Ltd., managed the mine. The remaining 5% interest has been held by Mineral Resources Enga, divided between the Enga Provincial Government (2.5%) and local landowners (2.5%). In May 2015, Barrick announced that Chinese company Zijin Mining Group acquired 50% ownership of Barrick (Niugini) Ltd.<sup>2</sup>

The specific operations and effects of the Porgera mine have taken place against a backdrop of complex and contrasting national dynamics. PNG is rich in natural resources, but grapples with persistent poverty, weak regulatory oversight of companies, and an often ineffective justice system.<sup>3</sup>

The Porgera mine has brought some benefits to the local area. Communities have had greater access to infrastructure, educational facilities, a hospital, and roads.<sup>4</sup> The mine also has provided opportunities in the form of scholarships, employment, and increased government revenues.<sup>5</sup>

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1 Press Release, Barrick Gold Corp., Barrick Completes Acquisition of Placer Dome (Mar. 15, 2006), <http://www.barrick.com/investors/news/news-details/2006/BarrickCompletesAcquisitionofPlacerDome1520061200705/default.aspx>.

2 Press Release, Barrick Gold Corp., Barrick Announces Strategic Partnership with Zijin Mining Group (May 26, 2015), <http://www.barrick.com/investors/news/news-details/2015/Barrick-Announces-Strategic-Partnership-with-Zijin-Mining-Group/default.aspx>.

3 PNG is ranked 157 out of the 187 countries on the 2014 Human Development Index of the UN Development Programme (UNDP). The adult literacy rate is 62.4% and life expectancy is 62.42 years. See United Nations Development Programme, Human Development Reports: Papua New Guinea, <http://hdr.undp.org/en/countries/profiles/PNG> (last visited Nov. 1, 2015); United Nations Development Programme, UNDP in Papua New Guinea, About Papua New Guinea, [http://www.pg.undp.org/content/papua\\_new\\_guinea/en/home/countryinfo](http://www.pg.undp.org/content/papua_new_guinea/en/home/countryinfo) (last visited Nov. 1, 2015). The UNDP estimates that 75% of the population depends on subsistence agriculture. The justice system is under-resourced and insufficiently staffed, police are improperly trained, and there are high levels of corruption. See Press Statement, Christof Heyns, UN Special Rapporteur on extrajudicial, summary, or arbitrary executions, Preliminary Observations on the Official Visit to Papua New Guinea (Mar. 14, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14373&LangID=E>.

4 See Alex Golub, *Who Is the “Original Affluent Society?” Ipili “Predatory Expansion” and the Porgera Gold Mine, Papua New Guinea*, 18 CONTEMP. PAC. 265, 278 (2006) (“The Porgera gold mine meant massive physical change to the valley and well as in influx of money that was unimaginable.”); ALEX GOLUB, LEVIATHANS AT THE GOLD MINE: CREATING INDIGENOUS AND CORPORATE ACTORS IN PAPUA NEW GUINEA 11 (2014) (detailing the money donated to groups in Porgera Valley for education and infrastructure, and the additional building of a hospital and roads).

5 See BARRICK GOLD CORP., BARRICK GOLD IN PAPUA NEW GUINEA: A SPECIAL REPORT ON PORGERA (SEPT. 8, 2010), <http://barrickbeyondborders.com/mining/2010/09/barrick-gold-in-papua-new-guinea-a-special-report-on-porgera/>

Additionally, the mine has provided revenue streams to local communities in a variety of ways, including through compensation payments for mining impacts, and royalty payments for access to mineral resources.<sup>6</sup> The company has also provided funds for some civil society groups.<sup>7</sup>

However, the mine has often had a fraught relationship with the local community. Community grievances have stemmed from allegations of, among other concerns: unfairness in the original mining agreement; a perceived lack of sufficient employment opportunities at the mine; increases in risky small-scale mining practices; reductions in the land available for traditional subsistence agriculture due to mine operations; lack of food security; adverse mine impacts on air and water quality; noise pollution; and physical violence, including alleged killings, beatings, and rapes perpetrated by the mine security forces.<sup>8</sup>

The development of the mine has brought significant changes to the physical landscape of the immediate area, and to the local communities that live in and around the mine.<sup>9</sup> For example, there has been a widespread belief among the local population that mining operations are leading to environmental damage, which residents often refer to as the “poisoning” of their land and water. However, many residents have lacked access to information about the nature or type of any environmental and health impacts. The population has also increased significantly, with some estimates suggesting an increase from 9,253 in 1990 to 50,000 in 2010.<sup>10</sup> This has resulted in complaints about overcrowding, with various social and health implications.

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[hereinafter BARRICK SPECIAL REPORT ON PORGERA] (“PJV has invested over \$60 million in health, education and community infrastructure (e.g. roads, schools, medical facilities) . . . [and] has built or improved dozens of schools, including funding scholarships for over 700 students. An adult literacy program has helped more than 2,500 people learn essential reading and writing skills. A further \$40 million has been spent on sponsorships and training to improve the skills of employees.”); UNITED NATIONS DEVELOPMENT PROGRAMME, 2014 NATIONAL HUMAN DEVELOPMENT REPORT, PAPUA NEW GUINEA, FROM WEALTH TO WELLBEING: TRANSLATING RESOURCE REVENUE INTO SUSTAINABLE HUMAN DEVELOPMENT 2, 35, 37 (2014), [http://www.pg.undp.org/content/dam/papua\\_new\\_guinea/docs/Publications/FINAL%20PNG%20NHDR\\_low%20res.compressed.pdf](http://www.pg.undp.org/content/dam/papua_new_guinea/docs/Publications/FINAL%20PNG%20NHDR_low%20res.compressed.pdf).

6 These revenue streams do not impact every community equally. For an overview of these payments, see PETER JOHNSON, NAT’L RESEARCH INST., *LODE SHEDDING: A CASE STUDY OF THE ECONOMIC BENEFITS TO THE LANDOWNERS, THE PROVINCIAL GOVERNMENT, AND THE STATE FROM THE PORGERA GOLD MINE, BACKGROUND AND FINANCIAL FLOWS FROM THE MINE* (2012), [http://www.nri.org.pg/images/Downloads/Publications/2012\\_publications/Lode%20Shedding\\_A%20Case%20Study%20of%20the%20Economic%20Benefits%20from%20the.pdf](http://www.nri.org.pg/images/Downloads/Publications/2012_publications/Lode%20Shedding_A%20Case%20Study%20of%20the%20Economic%20Benefits%20from%20the.pdf).

7 See *id.* at 47; SEE ALSO BARRICK SPECIAL REPORT ON PORGERA, *supra* note 5.

8 See, e.g., Susan Bonnell, *The landowner relocation programme*, in *DILEMMAS OF DEVELOPMENT: THE SOCIAL AND ECONOMIC IMPACT OF THE PORGERA GOLD MINE (1989-1994)* 128-159 (Colin Filer ed., 2012), <http://press.anu.edu.au/wp-content/uploads/2012/12/ch04.pdf>; see also Interview 5-2014 (March 19, 2014), Interview 9-2014 (March 21, 2014), Interview 13-2014 (March 20, 2014), Interview 22-2014 (March 21, 2014); *International Human Rights Clinic, Harvard Law School and Center for Human Rights and Global Justice, New York University School of Law, Legal Brief before the Standing Committee on the Foreign Affairs and International Development House of Commons Regarding Bill C-300 (2009)*, <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Harvard-testimony-re-Porgera-Main.pdf> [hereinafter *Legal Brief Regarding Bill C-300*].

9 The PJV engages in both open pit and underground mining. See Barrick, Porgera, Operations, Papua New Guinea, <http://www.barrick.com/operations/papua-new-guinea/porgera/default.aspx> (last visited Nov. 1, 2015). The villages within the mining area were relocated to the border of the mine. For more detailed description of the relocation, see Bonnell, *supra* note 8; see also *Legal Brief Regarding Bill C-300, supra* note 8, at 5-6. The experience of displacement as a result of the mine, subsequent population growth and calls for further relocation is also documented in HUMAN RIGHTS WATCH, *GOLD’S COSTLY DIVIDEND: HUMAN RIGHTS IMPACTS OF PAPUA NEW GUINEA’S PORGERA GOLD MINE* 33 (FEB. 1, 2011) [HEREINAFTER *GOLD’S COSTLY DIVIDEND*].

10 See PENNY JOHNSON, *PORGERA ENVIRONMENTAL ADVISORY KOMITI, SCOPING PROJECT: SOCIAL IMPACT OF THE MINING PROJECT ON WOMEN IN THE PORGERA AREA* 17 (2010), <http://www.peakpng.org/resources/Women-in-Porgera-Report-Final.pdf>.

Due to a combination of a lack of land for subsistence farming and a lack of alternative sources of employment, many Porgerans have resorted to searching for gold on and around mine property. Porgerans have often done this because they believe that they have no better alternative to secure funds for basic necessities—such as food, healthcare, and clothing.<sup>11</sup>

Residents of Porgera now perceive conditions around the mine to be so harmful to their families that many express a desire to be relocated far away from the mine.<sup>12</sup>

### **Overview of Alleged Human Rights Abuses by Security Personnel at the PJV Mine**

Allegations of serious human rights abuses around the mine site have been documented and reported by assault survivors and their relatives, individual community members and leaders, members of local organizations including the Akali Tange Association (ATA) and the Porgera Landowners Association (PLOA), the clinics, and international human rights organizations including MiningWatch Canada, Human Rights Watch, and Amnesty International.<sup>13</sup> These include abuses allegedly committed by security personnel, including physical assaults against men and women, and rapes, gang rapes, and other acts of sexual violence against women in and around the mine site.<sup>14</sup>

Many of the sexual assault allegations presented have involved a similar pattern of conduct: mine security guards, sometimes in groups of five or more, would encounter a woman or group of women while patrolling on or near mine property, they would engage the woman with threats and violence, and then rape her.<sup>15</sup> Many of the sexual assault victims described brutal assaults in which they

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11 See, e.g., Statement of Sarah Knuckey Before the Canadian House of Commons' Standing Comm. on Foreign Affairs & Int'l Dev., *Hearing on Bill C-300, An Act Respecting Corporate Accountability* (Oct. 20, 2009), <http://business-humanrights.org/en/documents/testimony-before-canadian-parliament-re-barrick-porgera-jv-papua-new-guinea> [hereinafter *Knuckey Statement on Bill C-300*]; see also PORGERA LANDOWNERS ASSOCIATION, AKALI TANGE ASSOCIATION, MININGWATCH CANADA, THE OPERATIONS OF BARRICK GOLD CORP. AT THE PORGERA JOINT VENTURE MINE ON THE LAND OF THE INDIGENOUS IPILI OF PORGERA, ENGA PROVINCE, PAPUA NEW GUINEA, REQUEST FOR REVIEW SUBMITTED TO THE CANADIAN NATIONAL CONTACT POINT PURSUANT TO THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 5 (MARCH 2, 2011) [hereinafter 2011 REQUEST FOR REVIEW OF BARRICK OPERATIONS AT PORGERA], [http://www.miningwatch.ca/sites/www.miningwatch.ca/files/oecd\\_request\\_for\\_review\\_on\\_barrick\\_in\\_porgera.pdf](http://www.miningwatch.ca/sites/www.miningwatch.ca/files/oecd_request_for_review_on_barrick_in_porgera.pdf).

12 Expressions of a strong desire for relocation away from the mine have been a consistent feature of all clinic interviews. See, e.g., Interview 2-2014 (March 19, 2014); Interview 7-2014 (March 19, 2014); Interview 17-2014 (March 20, 2014). Frustration over the lack of relocation formed part of a complaint filed with the OECD National Contact Point by local community organizations. See 2011 REQUEST FOR REVIEW OF BARRICK OPERATIONS AT PORGERA, *supra* note 11.

13 See e.g. AKALI TANGE ASS'N, THE SHOOTING FIELDS OF PORGERA JOINT VENTURE (Apr. 2005), [http://www.miningwatch.ca/sites/www.miningwatch.ca/files/ATA\\_Case\\_Documentation.pdf](http://www.miningwatch.ca/sites/www.miningwatch.ca/files/ATA_Case_Documentation.pdf) [hereinafter *THE SHOOTING FIELDS OF PORGERA*]; PORGERA ALLIANCE, LANDOWNERS IN PORGERA DEMAND URGENT RESETTLEMENT (Oct. 2011), <http://www.porgeraalliance.net/wp-content/uploads/2011/10/Urgent-Resettlement-Porgera-web.pdf> [hereinafter *LANDOWNERS DEMAND URGENT RESETTLEMENT*]; GOLD'S COSTLY DIVIDEND, *supra* note 9; AMNESTY INTERNATIONAL, UNDERMINING RIGHTS: FORCED EVICTIONS AND POLICE BRUTALITY AROUND THE PORGERA GOLD MINE, PAPUA NEW GUINEA (JAN. 2010), <http://www.amnestyusa.org/sites/default/files/asa340012010eng.pdf>.

14 See *THE SHOOTING FIELDS OF PORGERA*, *supra* note 13. For advocacy by the Porgera Alliance, see PORGERA ALLIANCE, KILLINGS, RAPES, MINE-RELATED DEATHS AND ARBITRARY DETENTIONS, <http://www.porgeraalliance.net/issues/human-rights/killings-and-mine-related-deaths/> (last visited Nov. 1, 2015); GOLD'S COSTLY DIVIDEND, *supra* note 9, at 43–53; *Legal Brief Regarding Bill C-300*, *supra* note 8, at 11-16; MININGWATCH CANADA, PAPUA NEW GUINEA CONDUCTS FLAWED INVESTIGATION OF KILLINGS AT BARRICK MINE (July 10, 2006), <http://www.miningwatch.ca/papua-new-guinea-conducts-flawed-investigation-killings-barrick-mine>; Letter from Catherine Coumans, Ph.D., Asia-Pacific Program Coordinator, MiningWatch Canada to Phillip Alston, UN Special Rapporteur on extrajudicial, summary, or arbitrary executions (December 2, 2007), [http://www.miningwatch.ca/sites/www.miningwatch.ca/files/Letter\\_Special\\_Rapporteur\\_PNG\\_2007.pdf](http://www.miningwatch.ca/sites/www.miningwatch.ca/files/Letter_Special_Rapporteur_PNG_2007.pdf).

15 See *Knuckey Statement on Bill C-300*, *supra* note 11; *Legal Brief Regarding Bill C-300*, *supra* note 8, at 11-16; see also

were punched, kicked, or beaten with guns, sometimes resulting in severe injuries.<sup>16</sup> In a number of cases, women reported being forced to chew and swallow the condoms used by the guards during the rape.<sup>17</sup> Many of the women stated that they did not report the rapes to the police for fear of retribution, and those who did make reports stated that the police took no action.<sup>18</sup> Numerous women also did not report the assaults to family members (especially male family members) because of concerns of stigma and rejection, physical assault, and potential demands for the return of the bride price paid to the wife's family upon marriage.

Security personnel also allegedly committed acts of non-sexual violence against both men and women whom they encountered on or around mine property, including beatings with wooden sticks and butts of guns; shooting with what residents believed to be “rubber” or “less lethal” bullets; and punching, slapping, and kicking individuals.<sup>19</sup> Reports of a number of killings have also raised concerns about the legality of the use of force.<sup>20</sup>

### **Barrick's Acknowledgment of Harm**

Until 2010, Barrick responded poorly to human rights abuse allegations. In 2010, the company made a notable shift including commissioning its own internal investigation into the sexual assault allegations.<sup>21</sup> In December 2010, following the investigation, the company stated that, “we have not met the standards and expectations we set for ourselves.”<sup>22</sup> In February 2011, Barrick released a statement in which it acknowledged that the results of its investigations were “disturbing”:

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GOLD'S COSTLY DIVIDEND, *supra* note 9.

16 *Legal Brief Regarding Bill C-300, supra* note 8, at 11-12. *See also* Interview 23-2014 (March 21, 2014); Interview 24-2014 (March 24, 2014); Interview 30-2014 (March 22, 2014); Interview 33-2014 (March 22, 2014); Interview 35-2014 (March 22, 2014); Interview 2-2013 (March 6, 2013); Interview 11-2013 (March 7, 2013); Interview 14-2013 (March 7, 2013); Interview 17-2013 (March 7, 2013); Interview 20-2013 (March 7, 2013); Interview 21-2013 (March 8, 2013); Interview 22-2013 (March 8, 2013); Interview 23-2013 (March 8, 2013); Interview 24-2013 (March 8, 2013); Interview 31-2013 (March 8, 2013); Interview 35-2013 (March 9, 2013); Interview 24(1)-2011 (15 March 2011); Interview 27-2011 (16 March 2011).

17 *See* Knuckey Statement on Bill C-300, *supra* note 11.

18 *Id.*

19 *Legal Brief Regarding Bill C-300, supra* note 8, at 16-17, 22; *see also* LANDOWNERS DEMAND URGENT RESETTLEMENT, *supra* note 13; GOLD'S COSTLY DIVIDEND, *supra* note 9, at 55. A number of clinic interviewees alleged that they were victims of non-sexual violence, had a family member who was a victim, or witnessed such violence. *See e.g.* Interview 9-2014 (March 21, 2014); Interview 61-2014 (March 22, 2014); Interview 6-2013 (March 6, 2013); Interview 16-2013 (March 7, 2013); Interview 17-2013 (March 7, 2013); Interview 19-2013 (March 7, 2013); Interview 28-2013 (March 8, 2013); Interview 21-2013 (March 8, 2013); Interview 25-2013 (March 8, 2013); Interview 32-2013 (March 8, 2013); Interview 33-2013 (March 8, 2013).

20 Knuckey Statement on Bill C-300, *supra* note 11. At a number of points, the allegations of unlawful killings have been refuted by Placer Dome, Barrick, or the PJV. *See* Part III, Chapter 1: Promptness. *See also* Bob Burton, Canadian Firm Admits to Killings at PNG Gold Mine, INTER PRESS SERV., Nov. 17, 2005, <http://www.ipsnews.net/2005/11/rights-canadian-firm-admits-to-killings-at-png-gold-mine/> (a spokesperson for Placer Dome, the majority owner of the mine at the time, was reported as stating that the killings “were all in self-defence against armed villagers”); Nick O'Malley, A Walk Through the Valley of Death, SYDNEY MORNING HERALD, June 9, 2009, <http://www.smh.com.au/news/world/a-walk-through-the-valley-of-death/2009/06/09/1244313137827.html?page=fullpage#contentSwap2> (Barrick is reported as having refuted its responsibility for unlawful killings, and as calling into question the credibility of the organizations making the claims).

21 BARRICK GOLD CORP., A FRAMEWORK OF REMEDIATION INITIATIVES IN RESPONSE TO VIOLENCE AGAINST WOMEN IN THE PORGERA VALLEY 3 (May 16, 2013), <http://www.barrick.com/files/porgera/Framework-of-remediation-initiatives.pdf> [hereinafter BARRICK REMEDY FRAMEWORK]; BARRICK GOLD CORP., STATEMENT BY BARRICK GOLD CORPORATION IN RESPONSE TO HUMAN RIGHTS WATCH REPORT 10 (Feb. 1, 2011), <http://www.barrick.com/files/porgera/Response-to-Human-Rights-Watch-Report.pdf> [hereinafter BARRICK RESPONSE TO HRW REPORT].

22 GOLD'S COSTLY DIVIDEND, *supra* note 9, at 67.

At the Porgera mine, Barrick conducted a thorough internal investigation in relation to these incidents. Barrick and the PJV have terminated employees and are undertaking a series of actions which include changes to the security function at PJV. Our deepest concern is for the women who may have been the victims of these alleged crimes . . . .

Information was turned over to the police and the PJV has terminated employees who were found to have violated Barrick's Code of Conduct. In addition, PJV has terminated those who had knowledge of, but did not report, misconduct by others. Further terminations and other disciplinary actions may occur pending the results of police investigation.<sup>23</sup>

Barrick announced a range of measures, including the introduction of systems to monitor guards, and enhanced human rights training for security personnel.<sup>24</sup> In the view of the clinics, the changes appeared to have decreased the incidence of violence, including sexual violence, perpetrated by security and other personnel.

In the wake of Barrick's internal investigations and public statements, there was still uncertainty about whether the company would take steps to provide reparations to victims.

### **The Creation of the Porgera Remedy Mechanism**

In October 2011, Barrick publicly announced that it would set up a remedial framework.<sup>25</sup> In its announcement, Barrick stated that it recognized that there was a "need to provide remediation for human rights violations that may have been caused by mine employees at Porgera," and that the "right to remedy is a critical element in addressing human rights violations, in accordance with . . . [the] Guiding Principles for Business and Human Rights and international human rights norms."<sup>26</sup>

The resulting Barrick effort, the "*Olgeta Meri Igat Raits* (All Women Have Rights)" Framework, included two core components: reparations for individual victims (which this report refers to generally as "the remedy mechanism") and community-oriented initiatives. There is also a set of "other initiatives" listed in the framework document.

Barrick stated that the individual remedy aspect of the framework was designed to "provide individualized support and services to women who have been the subject of sexual violence or abuse by current or former employees of the PJV."<sup>27</sup> The remedy mechanism could provide remedies to survivors whose complaints were deemed eligible and legitimate.<sup>28</sup> As listed in the original written framework document, the individual remedy program could include: (a) facilitating access to justice mechanisms; (b) access to medical and/or psychosocial support services; (c) provision of "fair and appropriate" financial reparations for personal harm or economic damages suffered; and (d) to the extent practicable, rehabilitation of rights and circumstances experienced prior to

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23 BARRICK RESPONSE TO HRW REPORT, *supra* note 21.

24 *Id.*

25 BARRICK GOLD CORP., ADDRESSING VIOLENCE AGAINST WOMEN AT PORGERA (Oct. 27, 2011), <http://www.barrick.com/files/porgera/Progress-on-Human-Rights-at-Porgera.pdf>.

26 *Id.* at 4.

27 BARRICK REMEDY FRAMEWORK, *supra* note 21, at 7.

28 CLAIMS PROCESS PROCEDURES MANUAL 1 (undated), <http://www.barrick.com/files/porgera/Claims-Process-Procedures-Manual.pdf> [hereinafter CLAIMS MANUAL].

the alleged offense(s).<sup>29</sup> According to Barrick’s framework documents, the remediation packages could be in the form of financial compensation, but could also include access to support programs such as counseling, health care, livelihood assistance, household goods, micro-credit, or economic development grants.<sup>30</sup>

The community-oriented aspect of the framework included, according to Barrick, community-level initiatives designed to “complement and enhance” existing programs for women who had suffered sexual violence.<sup>31</sup> These services and facilities were to be available to women residing or working in Porgera.

The framework also included other initiatives, including internal reforms at the Porgera mine and external capacity development.<sup>32</sup> This involved facilitating counseling on violence against women and training for community representatives and people employed in key local positions, including local police. It also reportedly involved initiatives to build capacity in the law enforcement and justice sector.<sup>33</sup> Funding was provided to hire a women’s welfare liaison officer to provide support and assistance to victims of sexual and domestic violence. As part of this initiative, Barrick reported partnering with the Fiji Women’s Crisis Centre to provide training for PNG-based practitioners to assist women affected by violence.<sup>34</sup>

According to Barrick’s framework documents, the *Olgeta Meri Igat Raits* Framework would be overseen by the Porgera Remedy Framework Association (PRFA), a not-for-profit entity created by Barrick, incorporated in PNG, and comprised of “key stakeholders,” including Barrick representatives.<sup>35</sup> Barrick stated its intent to keep the individual reparations framework “to the maximum extent practical . . . independent of Barrick,” and Cardno, an Australian development contractor, was hired to implement the remedy mechanism portion of the framework.<sup>36</sup>

The remedy mechanism established a significant number of procedures. The mechanism placed the onus on individuals to file a claim with the mechanism.<sup>37</sup> A “Complaints Assessment Team [CAT]” administered the individual reparations program,<sup>38</sup> and claimants could file their claims with a CAT officer,<sup>39</sup> whose role was to explain the process, help claimants prepare their statements,

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29 BARRICK REMEDY FRAMEWORK, *supra* note 21, at 8.

30 BARRICK GOLD CORP., THE PORGERA JOINT VENTURE REMEDY FRAMEWORK 6 (Dec. 1, 2014), <http://www.barrick.com/files/porgera/Porgera-Joint-Venture-Remedy-Framework-Dec1-2014.pdf> [hereinafter BARRICK REMEDY FRAMEWORK SUMMARY].

31 BARRICK REMEDY FRAMEWORK, *supra* note 21, at 7.

32 *See eg* BARRICK GOLD CORP., A FRAMEWORK OF REMEDIATION INITIATIVES IN RESPONSE TO VIOLENCE AGAINST WOMEN IN THE PORGERA VALLEY (Oct. 22, 2012), <http://www.barrick.com/files/porgera/Porgera-Backgrounder-Framework-of-remediation-initiatives.pdf>; BARRICK REMEDY FRAMEWORK, *supra* note 21, at 8-9.

33 BARRICK REMEDY FRAMEWORK, *supra* note 21, at 8-9.

34 BARRICK REMEDY FRAMEWORK SUMMARY, *supra* note 30, at 2.

35 BARRICK REMEDY FRAMEWORK, *supra* note 21, at 17; *see also* BARRICK FRAMEWORK SUMMARY, *supra* note 30, at 5.

36 BARRICK REMEDY FRAMEWORK, *supra* note 21, at 14; Cardno, Eliminating Violence Against Women, <http://www.cardno.com/en-au/AboutUs/Pages/Eliminating-violence-against-women.aspx> (last visited Nov. 11, 2015). This webpage provides a very brief outline of Cardno’s involvement. The specific link to the webpage that refers to the Barrick Remediation Framework is no longer functioning.

37 BARRICK REMEDY FRAMEWORK SUMMARY, *supra* note 30, at 5.

38 BARRICK REMEDY FRAMEWORK, *supra* note 21, at 11 (stating that the CAT “will be responsible for administering the individual reparations program with guidance from an expert advisory group on establishing the parameters of the program.”).

39 The CAT included women trained in sexual violence issues. *See* Interview 11-2014 (March 20, 2014).

and then assess the eligibility of those claims.<sup>40</sup> The Claims Manual for the mechanism initially instructed CAT officers to accept claims for assaults that took place between January 1, 1990 and December 31, 2010.<sup>41</sup> Barrick reported in 2014 that claims relating to assaults outside this period are considered on a case-by-case basis.<sup>42</sup>

A CAT officer would provide an assessment of the claim to the Independent Expert, who prepared a decision as to eligibility and legitimacy.<sup>43</sup> Claimants could also appeal adverse decisions.<sup>44</sup>

During the claim submission and assessment process, claimants could meet with what Barrick referred to as an “Independent Legal Advisor” (ILA). The ILA was a PNG lawyer tasked with providing “free advice to any claimant on matters relating to their claim.”<sup>45</sup>

To accept the remedy package, the claimant was required to sign a waiver, giving up her right to bring any claim in any jurisdiction against the PJV, the PRFA, or Barrick “relat[ed] to in any way” the sexual violence.<sup>46</sup>

The remedy mechanism opened in October 2012, and accepted new claims until a “nominal end date” of May 25, 2013, with any subsequent claims assessed on a case-by-case basis. Claims were accepted through a series of “rotations” in Porgera, which involved sessions in which the office was open and staffed, usually for two weeks at a time.<sup>47</sup>

Barrick has advised that as of June 2015, a total of 253 claims were lodged with the remedy mechanism. Of those, 137 were considered eligible. Of these, 119 cases were settled. Eleven of the eligible cases were formally withdrawn from the mechanism. Negotiations for a remedy for those eleven cases continued with Barrick, which eventually led to a settlement through a different process. Finally, some eligible claims were discontinued (e.g., because of death).<sup>48</sup>

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40 Eligibility requires that the claim fit within the scope of the Framework. Legitimacy divides claims into two categories. Those previously investigated by the police or Ila Geno, the former PNG Ombudsman commissioned by Barrick to conduct an external investigation, are deemed *prima facie* legitimate. Claims which have not been previously investigated must be assessed by a CAT officer, who considers if and how the incident was first reported, the truthfulness of the story, any incident reports filed, consistency of information, and available supporting information. A CAT officer is not bound to follow civil or criminal law standards of evidence. CLAIMS MANUAL, *supra* note 28, at 5; BARRICK REMEDY FRAMEWORK, *supra* note 21, at 20-24; Interview 11-2014 (March 20, 2014).

41 CLAIMS MANUAL, *supra* note 28, at 1.

42 BARRICK REMEDY FRAMEWORK SUMMARY, *supra* note 30, at 6 n.7.

43 Letter from Peter Sinclair, Vice President, Corp. Soc. Responsibility, Barrick Gold Corp., to Dr. Navanethem Pillay, UN High Comm’r for Human Rights 4 (Mar. 22, 2013), <http://www.barrick.com/files/porgera/Letter-to-UN-High-Commissioner.pdf> (stating additionally that the Independent Expert was John Numapo, the former Chief Magistrate of Papua New Guinea); CLAIMS MANUAL, *supra* note 28, at 6-7.

44 If the CAT officer found the claim to be ineligible or illegitimate, the claimant was to be notified and could appeal to the Independent Expert. CLAIMS MANUAL, *supra* note 28, at 9-10. Claimants could also appeal decisions from the Independent Expert to a Review Panel. The Review Panel was composed of senior PNG individuals familiar with gender-based violence, hearing complaints, and determining responses. BARRICK REMEDY FRAMEWORK, *supra* note 21, at 27; BARRICK REMEDY FRAMEWORK SUMMARY, *supra* note 30 at 6, 7.

45 Email from Peter Sinclair, Senior Vice President, Corp. Affairs, Barrick Gold Corp. to Sarah Knuckey 6 (June 24, 2015) (on file with author) [hereinafter Barrick Email, June 24, 2015].

46 The waiver appeared in the “Individual Reparations Program Agreement” signed by each claimant, Barrick, and the PRFA. For additional information on the waiver, see Part III, Chapter 6: Waiver of Legal Rights and Access to Counsel.

47 BARRICK REMEDY FRAMEWORK SUMMARY, *supra* note 30, at 1; Barrick Email, June 24, 2015, *supra* note 45, at 2.

48 During the process, some of the cases that had been denied were appealed by the women. Thirty-one cases were appealed and nineteen of those cases were accepted. Barrick Email, June 24, 2015, *supra* note 45, at 7.



I was a young girl, I remember white people coming to put survey marks around our land. I was very surprised to see this. They wanted to get our land. The white people came with some kind of measurements, to make maps, and to claim our relatives land. They took over our lands. They moved us off where we had been living. They built fences. My people live at Kulapi. We don't have gardens; we can't plant there. That's why we go and collect gold dust and rocks, so that we can buy food. We get money out of the rocks . . . . We were looking for food. Food is our need. So we go there to look for stones. The guards chase us and rape us.

*- A woman from Porgera, Papua New Guinea*

## Part II

# The International Human Rights Framework

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Under international human rights standards, governments have obligations to respect, protect, and fulfill human rights. Corporations have obligations to respect human rights. People who have been affected by human rights violations have a right to a remedy.

### **Government obligations to respect, protect, and fulfill human rights, and corporate responsibilities to respect human rights**

International human rights law protects the right to life, and the right to freedom from torture and cruel, inhuman, and degrading treatment.<sup>1</sup> Governments are required to respect, ensure respect for, and implement procedures to realize these rights.<sup>2</sup> International law requires governments to protect those within their territory or jurisdiction from third party violations, including business-related human rights abuses. These state obligations include investigating, prosecuting, and providing redress for any abuse, and taking appropriate measures to prevent violations.<sup>3</sup>

In addition, and as noted in the UN Guiding Principles on Business and Human Rights, corporations have a responsibility to respect internationally recognized human rights and thus should avoid infringing the rights of others.<sup>4</sup> Where corporations commit or are complicit in gross human rights violations, such as crimes against humanity, they may be directly liable under international law for international crimes.<sup>5</sup>

### **The right to remedy for victims of human rights violations**

Victims of human rights violations have the right to a full and effective, adequate, and prompt remedy. This right is enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights,<sup>6</sup> and many other international human rights instruments

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1 International Covenant on Civil and Political Rights, Arts. 6, 7, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]; Universal Declaration of Human Rights, Arts. 3, 5, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights].

2 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Arts. ¶¶ 1-3, G.A. Res. 60/147, UN Doc. A/RES/60/147 (March 21, 2006) [hereinafter Right to Remedy Principles].

3 See, e.g., Special Representative of the U.N. Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Report of the Special Representative: Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, ¶ 10, Human Rights Council, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007) (by John Ruggie).

4 U.N. Office of the High Comm'r for Human Rights, Guiding Principles on Business and Human Rights, ¶ 11-12, UN Doc. HR/PUB/11/04 (2011) [hereinafter UN Guiding Principles].

5 See Brief of Former UN Special Representative for Business and Human Rights, Professor John Ruggie, Professor Philip Alston, and the Global Justice Clinic at NYU School of Law as *Amici Curiae* in Support of Neither Party, *Kiobel v Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

6 Universal Declaration of Human Rights, *supra* note 1, Art. 8; ICCPR, *supra* note 1, Art. 2. See also United Nations

explicitly require that those who have been harmed by human rights violations be provided reparations for harms suffered.<sup>7</sup> There is a substantial body of jurisprudence that affirms this right and the state's duty to ensure it.<sup>8</sup> The third pillar of the UN Guiding Principles also emphasizes that individuals must have access to an effective remedy.<sup>9</sup>

The right to a remedy has several purposes in international human rights law, including compensating losses, attempting to restore the position of the harmed party, expressing condemnation towards wrongdoers, promoting truth, and deterring future violations.<sup>10</sup>

The United Nations has defined the requirements of the right to a remedy as including: the right to equal and effective access to justice; adequate, effective, and prompt reparation for harms suffered; and access to relevant information concerning violations and reparation mechanisms.<sup>11</sup> The UN Secretary-General has noted the particular risks and needs associated with remedies for sexual violence, and has issued guidance in such cases.<sup>12</sup>

Ensuring that those affected by human rights violations have access to justice includes disseminating information about all available remedies, taking measures to minimize inconvenience to survivors, protecting individuals from any possible retaliation or interference with their privacy, and providing proper assistance and resources to those seeking access to justice.<sup>13</sup>

Survivors of human rights violations should be provided with full and effective reparations that are “proportional to the gravity of the violations and harm suffered.”<sup>14</sup> Reparations can include

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Declaration on the Elimination of All Forms of Racial Discrimination, Art. 7(2), G.A. Res. 1904, U.N. Doc. A/RES/18/1904 (Nov. 20, 1963). For a more extended explanation, see DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* (2D ED. 2005).

7 American Convention on Human Rights, Art. 10, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; African Charter on Human and Peoples' Rights, Art. 21(2), June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58; ICCPR, *supra* note 1, Art. 9(5). European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, Art. 5(5), Nov. 4 1950, 213 U.N.T.S. 222; CAT, *supra* note 1, Art. 14(1); Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. Doc. A/RES/40/34 (Nov. 29, 1985); United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), ¶ 11, G.A. Res. 40/33, U.N. Doc. A/RES/40/33 (Nov. 29, 1985); Right to Remedy Principles, *supra* note 2.

8 See, e.g., *Velásquez-Rodríguez v. Honduras*, Judgment, Inter-Am. Ct. H. R. (Ser. C) No.4 (July 29, 1988) (holding that Honduras must pay fair compensation for its violation of the right to life). See also, similarly, opinions by the Human Rights Committee, requiring compensation in cases finding violations of the right to life (*Irene Bleier Lewenhoff and Rosa Valiño de Bleier v. Uruguay*, Communication No.30/1978, U.N. Doc. CCPR/C/OP/1 at 109; *K. Baboeram-Adhin, and J. Kamperveen et al. v. Suriname*, Communication Nos. 146/1983 and 148-54/1983, U.N. Doc. CCPR/C/21/D/146/1983 (1984), U.N. Doc. CCPR/C/OP/2 AT 5 (1990)), as well as in cases finding a violation of the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (*Carmen Amendola Masslotti and Graciela Baritussio v. Uruguay*, Communication No. R.6/25, U.N. Doc. Supp. No. 40 (A/37/40) at 187 (1982); *Antonio Viana Acosta v. Uruguay*, Communication No. 110/1981 (31 March 1983), U.N. Doc. Supp. No. 40 (A/39/40) at 169 (1984)).

9 UN Guiding Principles, *supra* note 4, ¶ 6.

10 SHELTON, *supra* note 6, at 10-14.

11 Right to Remedy Principles, *supra* note 2, ¶ 11.

12 UN Secretary-General, *Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence*, OHCHR (June 2014), <http://www.ohchr.org/Documents/Issues/Women/WRGS/PeaceAndSecurity/ReparationsForCRSV.pdf> [hereinafter *Guidance Note of the Secretary-General*].

13 Right to Remedy Principles, *supra* note 2, ¶ 12.

14 *Id.* ¶¶ 15, 18.

restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.<sup>15</sup> *Restitution* should attempt to restore the harmed individual to the situation they were in before the violation of their rights.<sup>16</sup> *Compensation* should be provided for any economically assessable damage.<sup>17</sup> Efforts at *rehabilitation* should include medical and psychological care, as well as legal and social services.<sup>18</sup> *Satisfaction* is aimed at recognizing the harm done and should include effective measures aimed at the cessation of any continuing violations; verification of the facts, and, where appropriate, full and public disclosure of the truth; attempts to restore the dignity and reputation of survivors; and public apology, including acknowledgement of the facts and acceptance of responsibility.<sup>19</sup> *Guarantees of non-repetition* can include providing human rights training, implementing codes of conduct, promoting mechanisms for preventing social conflicts, and supporting the justice system.<sup>20</sup>

An effective remedy requires that the general public, and especially those who have experienced violations, have access to information. This includes information about the violation and conditions leading to the violation, as well as information about any remedies or services that may be available.<sup>21</sup>

A key component of the right to an effective remedy is that it must be consistent with international human rights law.<sup>22</sup> This includes equality before the law and, in particular, the enforcement of equal protection as well as non-arbitrary and non-discrimination policies, including for vulnerable groups such as women, those living in poverty, or indigenous communities.<sup>23</sup> Those seeking remedies should be treated with respect for their dignity and human rights.<sup>24</sup> A person should be able to seek a remedy regardless of whether the perpetrator of the violation is identified, prosecuted, or convicted.<sup>25</sup>

### **The right to a remedy, corporate responsibilities, and the role of operational level grievance mechanisms**

Barrick has stated that the principles used to develop the remedy framework “derive from the

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15 *Id.* ¶ 18.

16 *Id.* ¶ 19. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.

17 These can include: physical or mental harm; lost opportunities, including employment; education and social benefits; material damages; moral damage; or costs required for legal or expert assistance, medicine and medical services, and psychological and social services. *Id.* ¶ 20.

18 *Id.* ¶ 21.

19 *Id.* ¶ 22.

20 *Id.* ¶ 23(c), (e)-(g).

21 *Id.* ¶ 24.

22 *Id.* ¶ 25.

23 ICCPR, *supra* note 1, Art. 2; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007). With respect to the specific nexus between poverty and remedy, see Special Rapporteur on extreme poverty and human rights, *Report of the Special Rapporteur on extreme poverty and human rights*, ¶ 12, U.N. Doc. A/67/278 (Aug. 9, 2012) (by Magdalena Sepúlveda Carmona), <http://www.ohchr.org/Documents/Issues/Poverty/A-67-278.pdf> (“To ensure that the poor have de facto enjoyment of the rights to an effective remedy, equality before the courts and a fair trial, States must take effective measures to remove any regulatory, social or economic obstacles that impede or hamper persons living in poverty from accessing remedies and securing a fair and equitable outcome in any judicial or adjudicatory process. This includes removing obstacles imposed by the unequal economic or social status of those seeking redress, taking into account the principles of equality before the courts and equality of arms, which are integral parts of due process.”).

24 Right to Remedy Principles, *supra* note 2, ¶ 10.

25 *Id.* ¶ 9.

principles announced by U.N. Special Representative John Ruggie, the principles in the U.N.'s Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law, and elsewhere."<sup>26</sup> Barrick also notes that the framework designers considered "the remedy approaches taken by other corporate actors, and as set forth in the Report of the Panel on Remedies and Reparations for DRC (March 2011)."<sup>27</sup>

According to the UN Guiding Principles, a business has obligations to respect human rights that are independent of states' obligations and are "over and above national laws and regulations."<sup>28</sup> The UN Guiding Principles make clear that where a company has "caused or contributed" to human rights abuses, it should "provide for or cooperate in their remediation."<sup>29</sup> The UN Guiding Principles should also be implemented "with particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at a heightened risk of becoming vulnerable and marginalized, and with due regard to the different risks that may be faced by women and men."<sup>30</sup> In addressing human rights impacts, businesses should also be prepared to communicate externally, with a frequency and with sufficient information to allow other actors "to evaluate the adequacy" of an enterprise's response.<sup>31</sup>

An operational-level grievance mechanism is one way that businesses may seek to address their adverse impacts.<sup>32</sup> Such grievance mechanisms are meant to complement state judicial systems and should not be used to preclude access to alternative remedies.<sup>33</sup> UN Guiding Principle 31 sets out general "effectiveness criteria" for grievance mechanisms stating that they should be legitimate,<sup>34</sup> accessible,<sup>35</sup> predictable,<sup>36</sup> equitable,<sup>37</sup> transparent,<sup>38</sup> rights-compatible,<sup>39</sup> a source of continuous

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26 BARRICK, A FRAMEWORK OF REMEDIATION INITIATIVES IN RESPONSE TO VIOLENCE AGAINST WOMEN IN THE PORGERA VALLEY IO N.15 (May 16, 2013), <http://www.barrick.com/files/porgera/Framework-of-remediation-initiatives.pdf> [hereinafter BARRICK REMEDY FRAMEWORK]. The footnote further refers the reader to Michelle Maiese, *Compensation and Reparations, Beyond Intractability* (Guy Burgess & Heidi Burgess eds., September 2003).

27 BARRICK REMEDY FRAMEWORK, *supra* note 26, at 10 n.15.

28 UN Guiding Principles, *supra* note 4, ¶ 11 (commentary).

29 *Id.* ¶ 22.

30 *Id.* ¶ 18 (commentary).

31 *Id.* ¶ 21(a), (b).

32 The UN Guiding Principles define grievance mechanism as "any routinized, State-based or non-State-based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought." *Id.* ¶ 25 (commentary). Operational-level grievance mechanisms are "accessible directly by individuals and communities" and perform two functions: 1) they "support the identification of adverse human rights impacts," and 2) they make it possible for "adverse impacts to be remediated early and directly by the business enterprise, thereby preventing harms from compounding and grievances from escalating." *Id.* ¶ 29 (commentary).

33 *Id.* ¶ 11, 29 (commentary).

34 Legitimate is defined as "Enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes." *Id.* ¶ 31(a).

35 Accessible is defined as "being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access." *Id.* ¶ 31(b).

36 Predictable is defined as "Providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation." *Id.* ¶ 31(c).

37 Equitable is defined as "Seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms." *Id.* ¶ 31(d).

38 Transparent is defined as "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." *Id.* ¶ 31(e).

39 Rights compatible is defined as "Ensuring that outcomes and remedies accord with internationally recognized human rights." *Id.* ¶ 31(f).

learning,<sup>40</sup> and based on engagement and dialogue.<sup>41</sup> In the UN Guiding Principles, the aim of company non-judicial grievance mechanisms is primarily to serve the purposes of warning about harms and preventing harm escalation; they are generally thought of primarily as permanent mechanisms through which a wide range of (often low-level) complaints may be received and then remedied where appropriate.<sup>42</sup>

The UN Guiding Principles note that differences in “financial resources, access to information, and expertise” can exist between transnational businesses and those seeking remedies to human rights abuses.<sup>43</sup>

The UN Guiding Principles recommend dialogue based on culturally appropriate processes, and, where adjudication is necessary, the use of an independent third party “since a business enterprise cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome.”<sup>44</sup> The UN Guiding Principles stress that an effective mechanism should be context-specific and designed for the affected community, stating that “a grievance mechanism can only serve its purpose if the people it is intended to serve know about it, trust it and are able to use it.”<sup>45</sup> Engaging with affected stakeholder groups about its design and performance can help to ensure that “it meets their needs, that they will use it in practice, and that there is a shared interest in ensuring its success.”<sup>46</sup>

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40 Continuous learning is defined as “Drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms.” *Id.* ¶ 31(g).

41 Based on engagement and dialogue is defined as “Consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.” *Id.* ¶ 31(h).

42 See, e.g., Sarah Knuckey and Eleanor Jenkin, *Company-created remedy mechanisms for serious human rights abuses: a promising new frontier for the right to remedy?*, 663 INT’L J. HUM. RTS. 801, 802 (2015) (examining the purposes of general complaints focused grievance mechanisms, and distinguishing the Barrick remedy mechanism).

43 UN Guiding Principles, *supra* note 4, ¶ 26. See also *id.* (commentary) (“Many of these [practical and procedural barriers to accessing judicial remedy] are the result of, or compounded by, the frequent imbalances between the parties to business-related human rights claims, such as in their financial resources, access to information and expertise. Moreover, whether through active discrimination or as the unintended consequences of the way judicial mechanisms are designed and operate, individuals from groups or populations at heightened risk of vulnerability or marginalization often face additional cultural, social, physical and financial impediments to accessing, using and benefiting from these mechanisms. Particular attention should be given to the rights and specific needs of such groups or populations at each stage of the remedial process: access, procedures and outcome.”).

44 See *Id.* ¶ 28 (commentary) (stating that mechanisms “may use adjudicative dialogue-based or other culturally appropriate and rights-compatible processes.”); *Id.* ¶ 31 (commentary, h).

45 *Id.* ¶ 31 (commentary). *Guidance Note of the Secretary-General*, see *supra* note 12, is also useful in respect of the context of the harms identified in this report. The Guidance Note considers and explains different forms of reparation, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. It also notes the obstacles faced by many victims in accessing a remedy and considers the issue of security and protecting victims from future harms.

46 *Id.* ¶ 31 (commentary, h).

I went to Anawe [mine waste] dump . . . . I was hungry. I went and stood at the dumpsite, I had not found any gold yet. Then the security came and held me. They dragged [me] up towards a hill. There were five . . . . They pulled me and dragged me . . . . They dragged me into bush and then they raped. After raping they locked me in the cell. I was held in the cell for a week . . . . When they were raping me, the others were standing around. Some of them were holding me and pushing me down . . . . They had guns. When I was in the cell, I was still bleeding [and] was sore. I did not see a doctor . . . . After I was released from the cell I went home . . . .

*- A woman from Porgera, Papua New Guinea*

## Part III

### The Barrick Remedy Mechanism: A Human Rights Analysis

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This part presents an assessment of Barrick's remedy mechanism in light of international human rights and the UN Guiding Principles on Business and Human Rights. Seven sections follow, each analyzing distinct yet interrelated aspects of the human right to a remedy and the principal issues that arose during the course of the clinics' investigations:

- Promptness;
- Consultation and rights-holder engagement;
- Scope of harms remedied;
- Accessibility and security;
- Reparations;
- Waiver of legal rights and access to counsel; and
- Additional rule of law issues: transparency, predictability, continuous learning, and independence.

The analysis focuses on the remedy mechanism set up by Barrick to provide remedies to individual women sexually assaulted by mine staff, but also includes analysis of other steps taken to respond to the abuses. The assessment is primarily focused on corporate responsibilities, rather than state obligations.

Each section begins with a brief summary of the key findings on the issue. Then the section: (a) outlines the applicable human rights principles for that issue; (b) describes the facts related to the design and implementation of Barrick's remedy mechanism; (c) analyzes both design and implementation in light of human rights and the concerns expressed by rights-holders and community members; and (d) concludes by deriving lessons learned for the design and implementation of future remedy mechanisms.



## Chapter 1

### Promptness

**Summary of Findings:** Barrick failed to provide a prompt remedy, and many women suffered for years, waiting to have their sexual assaults investigated, acknowledged, and addressed. This failure was largely due to the company's grossly inadequate responses over a number of years to numerous allegations of human rights abuse. When the company did decide to take allegations of sexual violence seriously, it largely then acted swiftly to investigate and to take other steps to address abuse, including through the operation of the remedy mechanism and distribution of remedies. In contrast to the improved response to the sexual violence allegations, concerns continue to exist about inadequate company responses to allegations of other forms of violence at the mine site.

#### Applicable Human Rights Principles

The right to remedy includes a right to “prompt” reparations—promptness is a key component of the right to remedy in human rights law.<sup>1</sup>

Prompt reparations includes promptly ceasing continuing violations, providing full and public disclosure of the truth, accepting responsibility, and undertaking preventative measures such as human rights training and adopting codes of conduct.<sup>2</sup>

Prompt reparations are closely connected to and enabled by a company's fulfillment of its human rights due diligence responsibilities. The adoption of the UN Guiding Principles on Business and Human Rights confirmed that companies have a responsibility to respect human rights, which should include a “human rights due diligence process to identify, prevent, mitigate, and account for how they address their impacts.”<sup>3</sup> With respect to security personnel, companies should take proactive steps to prevent abuse, including, at a minimum, taking preventative measures where harms are foreseeable. *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, prepared by the UN Office of the High Commissioner for Human Rights, notes that policies and processes need to be in place to respect human rights:

Respecting human rights is not a passive responsibility: it requires action on the part of businesses . . . an enterprise needs to know and be able to show that it is indeed respecting human rights in practice. That, in turn, requires it to have certain policies and processes in place.<sup>4</sup>

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1 See, e.g., Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Arts. I(2)(c), II(3)(b), IX(15), G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (March 21, 2006).

2 *Id.* Art. IX(22)-(23).

3 UN Office of the High Comm'r for Human Rights, Guiding Principles on Business and Human Rights, ¶ 15(b), U.N. Doc. HR/PUB/11/04 (2011) [hereinafter UN Guiding Principles]. See also Organization for Economic Co-operation and Development, OECD Guidelines for Multinational Enterprises, ¶¶ II(A)(10), IV(5) (2011), <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

4 UN Office of the High Comm'r for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive*

The Voluntary Principles on Security and Human Rights, which Barrick has joined, also provide that risk assessments should “consider the available human rights records” of security forces.<sup>5</sup>

A failure to implement an effective human rights due diligence process can delay a company’s awareness of human rights abuses, and thus delay provision of remedies to survivors. Preventative and responsive steps can also help deter further abuses, thus keeping harms from continuing or escalating.

### **Barrick’s History of Responding to Allegations of Abuse**

Since at least 2005, local groups and human rights organizations have publicly raised concerns about security force abuse at the PJV mine. In mid-March 2005, the Porgera Landowners Association (PLOA) wrote to the PNG Prime Minister and called for a national commission of inquiry into the alleged deaths of approximately 20 people at the mine. In the same year, Human Rights Watch stated that mobile police squads, which had been deployed to the mine, “include some of the worst human rights abusers in PNG,” and warned about using police to provide security at the mine site.<sup>6</sup>

Through 2005-2006, numerous news articles were published that reported on alleged security force abuses at the mine.<sup>7</sup> Local NGO Akali Tange Association (ATA) also published a report in 2005 that alleged security forces at the mine had engaged in unlawful killings, and in 2006, the group publicly stated that they had “evidence of rapes by security guards.”<sup>8</sup>

In November 2005, before Barrick acquired Placer Dome and took over the mine, the ATA sent a letter to Barrick informing the company that Placer Dome was under investigation for a series of killings at the mine. The letter stated ATA’s belief that, should Barrick proceed with their take-over of the mine, they would inherit liability for these acts.<sup>9</sup>

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Guide 23, U.N. Doc. HR/PUB/12/02 (2012), [http://www.ohchr.org/Documents/Publications/HR.PUB.12.2\\_En.pdf](http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf) [hereinafter *Corporate Responsibility to Respect Human Rights*].

5 VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS, [http://www.voluntaryprinciples.org/wp-content/uploads/2013/03/voluntary\\_principles\\_english.pdf](http://www.voluntaryprinciples.org/wp-content/uploads/2013/03/voluntary_principles_english.pdf). Barrick has joined these principles. See BARRICK GOLD CORP., HUMAN RIGHTS POLICY (Oct. 30, 2015), <http://www.barrick.com/files/governance/Barrick-Human-Rights-Policy.pdf>. See also INTERNATIONAL COUNCIL ON MINING & METALS, 10 PRINCIPLES ¶ 4 (May 2003), <https://www.icmm.com/our-work/sustainable-development-framework/10-principles>.

6 Bob Burton, *RIGHTS: Canadian Firm Admits to Killings at PNG Gold Mine*, INTER PRESS SERV, Nov. 17, 2005, <http://www.ipsnews.net/2005/11/rights-canadian-firm-admits-to-killings-at-png-gold-mine/> (A spokesperson for Placer Dome, the majority owner of the mine at the time, was reported as stating that the killings “were all in self-defence against armed villagers.”).

7 See, e.g., *Porgera Mine Deaths Prompt Call for Independent Probe*, PNG Post-Courier, May 12, 2005, <http://pidp.eastwestcenter.org/pireport/2005/May/05-12-05.htm>; Bob Burton, *Canadian Firm Admits to Killings at PNG Gold Mine*, Inter Press Serv., Nov. 17, 2005, <http://www.ipsnews.net/2005/11/rights-canadian-firm-admits-to-killings-at-png-gold-mine/>; *Call for Probe of PNG’s Porgera Mine Deaths*, RADIO NEW ZEALAND INTERNATIONAL, <http://www.radionz.co.nz/international/pacific-news/155004/call-for-probe-of-png’s-porgera-mine-deaths; A deadly clash of cultures>, THE OTTAWA CITIZEN, June 5, 2006, <http://www.canada.com/ottawacitizen/news/story.html?id=26baccdd-fa28-4f96-b067-a436b6a6d881>.

8 AKALI TANGE ASSOCIATION, THE SHOOTING FIELDS OF PORGERA JOINT VENTURE (2005), [http://www.miningwatch.ca/sites/www.miningwatch.ca/files/ATA\\_Case\\_Documentation.pdf](http://www.miningwatch.ca/sites/www.miningwatch.ca/files/ATA_Case_Documentation.pdf); Press Release, MiningWatch Canada, Papua New Guinea Conducts Flawed Investigations of Killings at Barrick Mine (July 10, 2006), <http://www.miningwatch.ca/papua-new-guinea-conducts-flawed-investigation-killings-barrick-mine> (quoting Jethro Tulin of the Akali Tange Association).

9 Letter from Jethro C. Tulin, Chief Executive Officer, Akali Tange Association to Greg Wilkins, Chief Executive Officer, Barrick Gold Corp. (Nov. 4, 2005), [http://www.miningwatch.ca/sites/www.miningwatch.ca/files/barrick\\_wilkins.pdf](http://www.miningwatch.ca/sites/www.miningwatch.ca/files/barrick_wilkins.pdf).

In 2006, the government of PNG created a commission of inquiry to investigate the allegations of killings by security personnel at the mine; however, the clinics and civil society groups have yet to be able to obtain the results of the inquiry.<sup>10</sup>

In the following years, local groups continued to document and report allegations of violence by mine security personnel. The organizations presented their allegations in public reporting, in communications with the Organization for Economic Co-operation and Development (OECD) National Contact Point in Canada, and through direct communications with Barrick.<sup>11</sup>

In 2008, 2009, and 2010, local representatives addressed Barrick's Annual General Meetings and specifically mentioned allegations of security guard abuses, including killings and sexual assaults.<sup>12</sup>

In 2009, Mr. Jethro Tulin of the ATA presented a statement to the UN Permanent Forum on Indigenous Issues:

Last year, I explained that mine guards and police were killing locals and raping our women; there have been five more killings and many more rapes since...

The increasing global power and influence of trans-national companies like the Canadian Barrick Gold, managers of the Porgera mine[,] means that they, alongside the PNG government, must be responsible for upholding human rights within their spheres of influence.<sup>13</sup>

In a letter addressed to the PLOA in 2008, the then General Manager of the mine stated that: "we

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10 See, e.g., PORGERA LANDOWNERS ASSOCIATION, AKALI TANGE ASSOCIATION, MININGWATCH CANADA, THE OPERATIONS OF BARRICK GOLD CORP. AT THE PORGERA JOINT VENTURE MINE ON THE LAND OF THE INDIGENOUS IPILI OF PORGERA, ENGA PROVINCE, PAPUA NEW GUINEA, REQUEST FOR REVIEW SUBMITTED TO THE CANADIAN NATIONAL CONTACT POINT PURSUANT TO THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 9 (Mar. 1, 2011), [http://www.miningwatch.ca/sites/www.miningwatch.ca/files/oced\\_request\\_for\\_review\\_on\\_barrick\\_in\\_porgera.pdf](http://www.miningwatch.ca/sites/www.miningwatch.ca/files/oced_request_for_review_on_barrick_in_porgera.pdf) [hereinafter 2011 REQUEST FOR REVIEW OF BARRICK OPERATIONS AT PORGERA]; HUMAN RIGHTS WATCH, GOLD'S COSTLY DIVIDEND: HUMAN RIGHTS IMPACTS OF PAPUA NEW GUINEA'S PORGERA GOLD MINE 45 (Feb. 1, 2011) [hereinafter GOLD'S COSTLY DIVIDEND].

11 See, e.g., DAVID MARTINEZ, CORP WATCH, BARRICK'S DIRTY SECRET: MINING IN PAPUA NEW GUINEA (2006) (containing an interview with Jeffrey Simpson, ATA representative, in which he refers to rapes at the mine site); Mark Ekepa, *Letter to Barrick Management on Behalf of Porgera Landowners Association* (Mar. 8, 2008), <http://www.porgeraalliance.net/2008/03/letter-to-barrick-management-on-behalf-of-porgera-landowners-association/> (referring to various allegations, including "raping, even gang-raping" by mine security guards); Mark Ekepa, *Statement of Mark Ekepa, Chairman of the Porgera Landowners Association at Barrick's Annual General Meeting* (Apr. 28, 2010), <http://www.porgeraalliance.net/2010/04/statement-of-mark-ekepa-chairman-of-the-porgera-landowners-association-at-barrick%E2%80%99s-annual-general-meeting> (referring to allegations of "gross violations of human rights"); 2011 REQUEST FOR REVIEW OF BARRICK OPERATIONS AT PORGERA, *supra* note 10; Jethro Tulin, Akali Tange Association, *Statement at United Nations Permanent Forum on Indigenous Issues, Seventh Session* (Apr. 23, 2008), <http://www.porgeraalliance.net/statements/unpfi/7th-session-statement-at-united-nations-permanent-forum-on-indigenous-issues/>; Jethro Tulin, Akali Tange Association, *Statement at the UN Permanent Forum on Indigenous Issues, Eighth Session* (May 20, 2009), <http://www.porgeraalliance.net/statements/unpfi/8th-session/>.

12 See Jethro Tulin, *Jethro Tulin's testimony read to Barrick shareholders at their 2009 Annual General Meeting* (Apr. 29, 2009), <http://www.porgeraalliance.net/2009/04/jethro-tulins-testimony-read-to-barrick-shareholders-at-their-2009-annual-general-meeting/> (referring to "grave human rights" conditions and killings and rapes by guards, and referring to his testimony from the previous year). See also Mark Ekepa, *Statement of Mark Ekepa, Chairman of the Porgera Landowners Association at Barrick's Annual General Meeting* (April 28, 2010), <http://protestbarrick.net/article.php?id=593>.

13 Jethro Tulin, Akali Tange Association, *Statement at the UN Permanent Forum on Indigenous Issues, Eighth Session* (May 20, 2009), <http://www.porgeraalliance.net/statements/unpfi/8th-session/>.

found your public allegation of our employees “gang raping” Porgera Land Owners’ women to be most distasteful, to say the least as you know these allegations to be untrue.”<sup>14</sup>

The media continued to report on the issue throughout 2009, including on allegations of rape and other violence.<sup>15</sup> In one 2009 article, Barrick is reported as having refuted its responsibility for unlawful killings, and as calling into question the credibility of the organizations making the claims; no specific response from Barrick to the allegations of sexual abuse was reported.<sup>16</sup>

International groups, including MiningWatch Canada, have been involved in monitoring the PJV mine since at least 2002.<sup>17</sup> After Barrick’s acquisition of Placer Dome, MiningWatch Canada undertook field assessments and a range of advocacy efforts related to security guard abuse, including lodging an official complaint with the UN Special Rapporteur on extrajudicial, summary or arbitrary executions on behalf of the ATA in 2007.<sup>18</sup>

The clinics conducted numerous fact-finding investigations in PNG starting in 2006, interviewing hundreds of individuals and focusing primarily on alleged mine-related security abuses.<sup>19</sup> In 2009 and 2010, the clinics presented their findings to the Standing Committee on Foreign Affairs and International Development of Canada’s House of Commons.<sup>20</sup> The testimony reported on alleged

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14 Letter from Mark Fisher, General Manager, Porgera Joint Venture to Mark Ekepa, Chairman of the Porgera Landowners Association (July 23, 2008) (on file with author).

15 See, e.g., The World Today, PNG, *Australian governments respond to abuse claims*, AUSTRALIAN BROADCASTING CORP., June 11, 2009, transcript available at <http://www.abc.net.au/worldtoday/content/2008/s2595441.htm>; Nick O’Malley, *A Walk Through the Valley of Death*, SYDNEY MORNING HERALD, June 9, 2009, <http://www.smh.com.au/news/world/a-walk-through-the-valley-of-death/2009/06/09/1244313137827.html?page=fullpage#contentSwap2> [hereinafter O’Malley, *A Walk through the Valley of Death*]; Nick O’Malley, *Guards Accused of Assaulting Workers*, SYDNEY MORNING HERALD, June 10, 2009, <http://www.smh.com.au/news/world/guards-accused-of-assaulting-workers/2009/06/09/1244313137821.html> (“Villagers are keeping a list of the dozens of people they say have been killed or assaulted by police and security forces guarding a goldmine in Papua New Guinea run by the multinational, Australian-based Canadian mining company, Barrick Gold.”).

16 O’Malley, *A Walk Through the Valley of Death*, *supra* note 15.

17 MiningWatch Canada has been involved in monitoring environmental and other social impacts of the mine. See, e.g., CATHERINE COUMANS, PLACER DOME CASE STUDY: PORGERA JOINT VENTURE (Apr. 2002), [http://www.miningwatch.ca/sites/www.miningwatch.ca/files/PD\\_Case\\_Study\\_Porgera\\_0.pdf](http://www.miningwatch.ca/sites/www.miningwatch.ca/files/PD_Case_Study_Porgera_0.pdf); Press Release, MiningWatch Canada, Placer Dome Admits to Killings at Porgera Mine in Papua New Guinea (Apr. 8, 2006), <http://www.miningwatch.ca/placer-dome-admits-killings-porgera-mine-papua-new-guinea> [hereinafter MWC Press Release, Apr. 8, 2006] (discussing the violence at the mine from 2006).

18 The complaint to the Special Rapporteur set out a range of allegations of extrajudicial killings by private security and PNG police. See Letter from Catherine Coumans, Research Coordinator, Mining Watch Canada, to Philip Alston, Special Rapporteur on extrajudicial, summary, or arbitrary executions (Dec. 2, 2007), <http://www.protestbarrick.net/article.php?id=394>. More generally, see MiningWatch Canada, *Grievance Mechanisms*, <http://www.miningwatch.ca/categories/company-country-issue/issue/corporate-social-responsibility/grievance-mechanisms> (last visited Nov. 14, 2015) (setting out a history of MiningWatch Canada’s involvement in the issue). See also MWC Press Release, Apr. 8, 2006, *supra* note 17; Press Release, MiningWatch Canada, Papua New Guinea Conducts Flawed Investigations of Killings at Barrick Mine (July 10, 2006), <http://www.miningwatch.ca/papua-new-guinea-conducts-flawed-investigation-killings-barrick-mine> (documenting reports of killings, rapes and injuries). MiningWatch Canada also testified about alleged extrajudicial killings before the Canadian House of Commons’ Standing Committee on the Foreign Affairs and International Development. See Catherine Coumans, *Statement of Catherine Coumans Before the Canadian House of Commons’ Standing Comm. on Foreign Affairs & Int’l Dev., Hearing on Bill C-300, An Act Respecting Corporate Accountability* (Oct. 8, 2009), <http://business-humanrights.org/en/documents/testimony-before-canadian-parliament-re-barrick-porgera-jv-papua-new-guinea>.

19 See Methodology; Part I: Background.

20 International Human Rights Clinic, Harvard Law School and Center for Human Rights and Global Justice, New York University School of Law, *Legal Brief before the Standing Committee on the Foreign Affairs and International Development, House*

killings, violence, and rape that raised serious concerns that gross human rights violations had occurred at the mine.

The clinics' testimony was in response to the introduction of Bill C-300 into the Canadian Parliament, a bill designed to establish corporate accountability standards for Canadian companies in the mining, oil, and gas industry. Barrick responded generally to the proposed Bill C-300 with a statement on November 6, 2009:

[S]ome individuals have not been made to substantiate even their wildest allegations about the Canadian mining industry and Barrick Gold—much of which has been thoroughly disproved well before today. They have not provided the Committee with facts or evidence to support their claims as they conduct these hit-and-run company character assassinations.<sup>21</sup>

Barrick also responded in February 2010 by specifically calling into question the credibility of the allegations made by the clinics.<sup>22</sup> Press at the time reported that Barrick “flatly denied” the allegations referred to in the testimony before the Standing Committee.<sup>23</sup> Barrick made the following statement:

We are alarmed by the extraordinary and extremely serious accusation that security personnel working in the Porgera mine may have sexually assaulted local Porgeran women. This claim is further compounded by the outrageous and damaging accusation that the PJV or Barrick would fail to conduct an investigation should such an incident be reported . . . .

To our knowledge there have been no cases of sexual assault reported to mine management involving PJV security personnel while on duty, since Barrick acquired an interest in the mine in 2006 . . . .

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*of Commons, Regarding Bill C-300* (Nov 16, 2009), <http://www.miningwatch.ca/sites/www.miningwatch.ca/files/harvard-testimony-re-porgera.pdf> [hereinafter *Legal Brief Regarding Bill C-300*]. This supplemented testimony provided to the Committee by Tyler Giannini and Sarah Knuckey on October 20, 2009 regarding Bill C-300. See *id. at 1. Supplementary testimony was also provided on June 3, 2010. See Sarah Knuckey & Tyler Giannini, Statements of Sarah Knuckey and Tyler Giannini Before the Canadian House of Commons' Standing Comm. On Foreign Affairs & Int'l Dev., Meeting on Bill C-300, An Act Respecting Corporate Accountability (June 3, 2010)*, <https://openparliament.ca/committees/foreign-affairs/40-3/21/the-chair-4/>.

21 Press Release, Barrick Gold Sets out Position on Bill C-300 and Provides Facts (Nov. 26, 2009), <http://www.barrick.com/investors/news/news-details/2009/BarrickGoldSetsOutPositiononBillC-300andProvidesFacts1121285/default.aspx>.

22 Barrick stated:

We note that the witness prefaced her Bill C-300 public “testimony” regarding Porgera by specifically invoking “Parliamentary privilege,” which means, in effect, that she cannot be held responsible or accountable for the inaccuracy of any of the statements she makes. Her need to assert Parliamentary privilege in connection with her comments regarding Porgera speaks loudly as to her confidence in the credibility of her allegations. If the witness actually had credible evidence that security guards employed by the PJV have engaged in any instance of sexual abuse at the Porgera mine we urge her to immediately provide that evidence to all relevant authorities in PNG—as well as to PJV and Barrick—so that appropriate action may be taken. However, it is not possible for Barrick to respond to allegations that are so vague as to preclude any meaningful investigation by PJV or Barrick.

Letter from Barrick Gold Corp. to The Business and Human Rights Resource Centre (Feb. 2010), <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Barrick-Gold-response-re-Porgera-mine-Feb-2010.pdf>.

23 Les Wittington, *MPs Told of Gang Rapes at Mine*, TORONTO STAR, Nov. 24, 2009, [http://www.thestar.com/news/investigations/2009/11/24/mps\\_told\\_of\\_gang\\_rapes\\_at\\_mine.html](http://www.thestar.com/news/investigations/2009/11/24/mps_told_of_gang_rapes_at_mine.html).

It is not possible for the PJV to investigate an allegation it has never received . . . . [T]he [Barrick-funded NGO] PDWA has been a vocal advocate for women’s rights and law and order in the Porgera region. If incidents of rape and violence were being perpetrated by PJV personnel, this organization could be expected to draw attention to the issue and advocate on the behalf of the victims. To our knowledge, the PDWA has never raised such an allegation.<sup>24</sup>

In February 2011, Human Rights Watch released a report in which they documented violent abuses by security forces, including but not limited to sexual assault. Human Rights Watch also reported that Barrick’s early responses to abuse allegations were inadequate:

In the past Barrick has blithely stated that if incidents of sexual violence involving APD [security] personnel did occur, either the victims or international organizations compiling their accounts should refer the matter to the police. This was not only a deplorable abdication of responsibility on the part of the company, but also unrealistic.<sup>25</sup>

In 2010-2011, Barrick’s response to the allegations of harm changed, and the company took significant actions to begin to address the harms around the mine site. Barrick conducted an internal investigation, involving a 15-member investigative team, which spent several months at the mine interviewing over 650 employees and conducting an investigation of personnel and procedures.<sup>26</sup>

The investigation indicated a dramatic shift for the company and ended a period of inaction or refusal to take seriously allegations of security force abuse. It also paved the way for the creation of the remedy framework.<sup>27</sup> By 2014, the company had established a strong and public response of “zero tolerance” for human rights violations.<sup>28</sup>

Barrick’s initial public acknowledgement of human rights abuses at the PJV mine, however, heavily emphasized the allegations of violence against women.<sup>29</sup> Despite referencing the advocacy by Human Rights Watch, which included concerns other than sexual violence, Barrick did not directly respond to allegations of other forms of violence. *See* Part III, Chapter 2: Scope of the Mechanism.

## Human rights analysis

Human rights norms establish that remedies should be prompt to be effective. For too long, Barrick failed to adequately respond to serious allegations of violence. This delay had several consequences.

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24 Barrick Gold Corp., *Submission to the Standing Committee on Foreign Affairs and International Development, Canadian Parliament* (Nov. 26, 2009), available at <http://myspj.com/barrick-strikes-back/> (last visited Nov. 14, 2015). This quote is referred to and excerpted in: Letter from Harvard Human Rights Program to Katrina White, Regional General Counsel and Company Secretary, Barrick (Australia) (Feb. 16, 2011) (on file with author).

25 GOLD’S COSTLY DIVIDEND, *SUPRA* NOTE 10, AT 66-67.

26 BARRICK GOLD CORP., STATEMENT BY BARRICK GOLD CORPORATION IN RESPONSE TO HUMAN RIGHTS WATCH REPORT 10 (FEB. 1, 2011), [HTTP://S1.O4CDN.COM/808035602/FILES/PORGERA/RESPONSE-TO-HUMAN-RIGHTS-WATCH-REPORT.PDF](http://s1.o4cdn.com/808035602/files/porgera/response-to-human-rights-watch-report.pdf) [HEREINAFTER BARRICK STATEMENT, FEB. 1, 2011].

27 *See* Part I: Background.

28 BARRICK GOLD CORP., THE PORGERA JOINT VENTURE REMEDY FRAMEWORK 15 (DEC. 1, 2014), [HTTP://WWW.BARRICK.COM/FILES/PORGERA/PORGERA-JOINT-VENTURE-REMEDY-FRAMEWORK-DEC1-2014.PDF](http://www.barrick.com/files/porgera/porgera-joint-venture-remedy-framework-dec1-2014.pdf) [HEREINAFTER BARRICK REMEDY FRAMEWORK SUMMARY].

29 BARRICK STATEMENT, Feb. 1, 2011, *supra* note 26.

First, it is likely that numerous assaults could have been prevented if more prompt action had been taken.<sup>30</sup> Second, earlier action could also have led to an earlier remedy, and women could have received necessary psychological and medical assistance. Third, the delay undermined trust in the remedy mechanism that Barrick eventually created.

Abuse by security forces in Papua New Guinea is common, well-known, and foreseeable.<sup>31</sup> Due diligence should have revealed to a business seeking to use or cooperate with security forces in the country the serious risk of abuse. The high rates of sexual abuse in the country are also very well known.<sup>32</sup> In such an environment, Barrick was under a particular responsibility to put in place stringent policies to protect vulnerable people from harm, to actively monitor for potential abuse, and to take seriously all allegations of abuse.<sup>33</sup> Barrick, however, failed to take reports seriously for years, and did not launch necessary internal investigations despite repeated allegations of abuse from multiple sources.

Until 2010-2011, Barrick's response was instead to generally attack the credibility of messengers, and to argue that it had no responsibility to act on general or anonymized allegations of harm. Barrick also deferred to the police force, and referred complainants to the PNG police. This displayed a serious misunderstanding of the reality on the ground for many Porgerans, who had reasonable and significant concerns about approaching police with these kinds of complaints, due to well-founded

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30 See UN Guiding Principles, *supra* note 3, ¶ 29 (commentary) (noting that effective grievance mechanisms can help prevent "harms from compounding and grievances from escalating").

31 See Burton, *supra* note 6. See also GOLD'S COSTLY DIVIDEND, *supra* note 10, at 46 ("Barrick should have been well aware of the serious potential for violent abuses to occur"); AMNESTY INTERNATIONAL, UNDERMINING RIGHTS: FORCED EVICTIONS AND POLICE BRUTALITY AROUND THE PORGERA GOLD MINE, PAPUA NEW GUINEA (February 2, 2010), <http://www.amnestyusa.org/research/reports/undermining-rights-forced-evictions-and-police-brutality-around-the-porgera-gold-mine-papua-new-guin>; Press Release, UN Office of the High Comm'r for Human Rights, UN Special Rapporteur on Torture presents preliminary findings on his mission to Papua New Guinea (May 25, 2010), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10058&LangID=E/Findings>. See also Comm. on the Elimination of Discrimination Against Women, *Concluding Observations of the Committee on the Elimination of All Forms of Discrimination Against Women: Papua New Guinea*, ¶ 29, 46th Sess., July 12-30, U.N. Doc. CEDAW/C/PNG/CO/3 (July 30, 2010):

[T]he Committee expresses its deep concern about reports of sexual abuse of women upon arrest and in police custody, perpetrated by both police officers and male detainees, and at times in the form of collective rape, and that such abuses are rarely documented and investigated and perpetrators not prosecuted and punished.

32 See Rachel Jewkes et al., *Prevalence of and factors associated with non-partner rape perpetration: findings from the UN Multi-country Cross-sectional Study on Men and Violence in Asia and the Pacific*, 1 THE LANCET GLOBAL HEALTH 169, 208-18 (Oct. 2013), <http://www.sciencedirect.com/science/article/pii/S2214109X13700743>. A UN Special Rapporteur report noted that in one study, up to 60 percent of men interviewed indicated that they had participated in gang rape. See UN Special Rapporteur on Violence Against Women, its Causes and Consequences, *Report of the Special Rapporteur on violence against women, its causes and consequences, Mission to Papua New Guinea*, ¶ 27, Human Rights Council, U.N. Doc. A/HRC/23/49/Add.2 (March 18, 2013) (by Rashida Manjoo). A 2010 research project based on a validated World Health Organization (WHO) research instrument on domestic violence found that nearly two-thirds of participants were survivors of domestic violence. See Margit Ganster-Breidler, *Gender-Based Violence and the Impact on Women's Health and Well-Being in Papua New Guinea*, CONTEMPORARY PNG STUDIES: DWU RESEARCH JOURNAL 17, 24 (Nov. 13, 2010) [http://www.dwu.ac.pg/en/images/Research\\_Journal/2010\\_Vol\\_13/2\\_Ganster-Breidler\\_Gender\\_based\\_violence\\_in\\_PNG\\_17-30.pdf](http://www.dwu.ac.pg/en/images/Research_Journal/2010_Vol_13/2_Ganster-Breidler_Gender_based_violence_in_PNG_17-30.pdf).

33 See *Corporate Responsibility to Respect Human Rights*, *supra* note 4, at 65:

A grievance mechanism is not just an internal administrative procedure for handling impact or grievances. Whereas an internal procedure is typically passive, i.e., waiting for problems to arise and then responding, a grievance mechanism is active: it aims to facilitate the identification of grievances and address them as early as possible. It does so by ensuring it is known to, and trusted by, those stakeholders for whom it is intended.

fears of retaliation, imprisonment, and police inaction.<sup>34</sup> It also demonstrated a failure to meet the company's own corporate responsibilities to prevent and address harms: effective human rights due diligence, proactive monitoring, and complaints processes would have alerted the company to security force abuses. The allegations should have triggered immediate internal investigations.

Indeed, the standard of response to allegations voiced by Barrick in 2014 should have been its initial response:

We have zero tolerance for human rights violations and investigate all reports, suspicions or rumours of human rights abuses and take strong and appropriate action. Any employee implicated in serious human rights violations or other serious crimes, or who has direct knowledge of but fails to report such incidents, will be terminated, and where we create negative human rights impacts, we will provide an appropriate remedy.<sup>35</sup>

Barrick's changed public posture to the assault allegations starting in 2010-2011 was a commendable shift. Once it decided to take the sexual assault allegations seriously, it took swift and significant steps to investigate and put in place prevention and mitigation policies, and these steps appear to have helped reduce security force violence.<sup>36</sup> Further, the establishment of the remedy mechanism, and the processing of individual claims, was generally also timely. *See* Part III, Chapter 5: Reparations.

However, despite the change of posture, promptness concerns remain. First, Barrick still has not yet adequately responded to the other non-sexual violence allegedly committed by security forces. The people who were subject to this kind of violence are still waiting for investigation, acknowledgement, and remedy. *See* Part III, Chapter 5: Reparations. Second, with the formal closure of the remedy mechanism for sexual assaults, promptness concerns may arise again as there is uncertainty about how the company's general on-site grievance mechanism will respond to any newly reported incidents of human rights abuse. It is important that an effective, trusted, predictable, and transparent remedy mechanism be permanently in place.

## **Lessons Learned**

Allegations of human rights violations should be investigated as soon as possible after they have been raised. Businesses should not wait until such complaints meet a certain threshold. Whether allegations are relatively minor or more serious, and whatever their source, the investigation should be prompt to establish a practice of zero tolerance for human rights violations. Businesses should have robust policies in place to ensure that this happens.

If harms are in fact occurring, acting swiftly to address them can help stop additional violations from taking place. Having an established, trusted, and effective company grievance mechanism in place from the outset can also prevent violations from becoming widespread or escalating.

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<sup>34</sup> *Legal Brief Regarding Bill C-300, supra note 20.*

<sup>35</sup> BARRICK REMEDY FRAMEWORK SUMMARY, *supra* note 28, at 15.

<sup>36</sup> However, there are some allegations that some violence is ongoing. *See, e.g.,* Interview 1-2015 (January 2, 2015) ("Now it's better, but some of them they are still doing it. That is why I moved."). *See* Part III, Chapter 5: Reparations.



They raped me inside the car . . . . They . . . lifted the skirt up and raped me . . . . The boss man said . . . “I will get you. I will rape you,” and also the other ladies that ran away. He was the first man who raped me. He told the other securities to wait outside. When he finished he went out, and the other one came. Then he finished and the other one came in. When the third one finished, the man outside said, “Do it quickly; there are people coming.”

- *A woman from Porgera, Papua New Guinea*

## Chapter 2

### Consultation and Rights-Holder Engagement

**Summary of Findings:** Barrick did not opt to co-create with rights-holders and other stakeholders a jointly designed or co-appointed independent remedy mechanism. Instead, the company chose to create the remedy mechanism itself, bringing in the views of some other actors through a process of consultation. The consultation process during the design of the remedy mechanism included valuable discussions with international and national actors to establish one of the first company-created mechanisms intended to align with the UN Guiding Principles. However, the most critical group—directly impacted individuals—was not consulted during the design phase, which led to serious consequences throughout the subsequent remedy process. The inadequate consultation with survivors as well as with some other key stakeholders compromised the remedy mechanism’s ultimate effectiveness and legitimacy. A more effective remedy mechanism will begin with deep rights-holder engagement and dialogue and center survivors in the process. At a bare minimum, impacted individuals and communities must be carefully consulted at all phases. The interests of rights-holders are best served when remedy mechanisms are co-created by companies and the people the mechanism is intended to serve, or where companies and the intended users of a mechanism jointly appoint an independent mechanism.

#### Applicable Human Rights Principles

Meaningful consultation and engagement with rights-holders and stakeholders is a key component of fundamental human rights principles. The UN Guiding Principles recognize the importance of effective consultation, noting, for example, that when gauging “human rights risks,” companies should engage in “meaningful consultation with potentially affected groups and other relevant stakeholders.”<sup>1</sup>

In the remedy context, consultation with key stakeholders throughout the process of designing and implementing a remedy mechanism helps to ensure that the mechanism “meets the needs” of those it is intended to serve, “that they will use it in practice,” and “that there is a shared interest in ensuring its success.”<sup>2</sup>

Remedy mechanisms should be created primarily to benefit survivors and rights-holders. Survivors’ interests and rights are best advanced when their experiences, perspectives, interests, and opinions deeply inform how remedy mechanisms are created and implemented.

While the UN Guiding Principles do not detail what adequate consultation specifically looks like, to be effective, consultation should cover all aspects of the remedy mechanism’s design, processes,

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1 UN Office of the High Comm’r for Human Rights, Guiding Principles on Business and Human Rights, ¶ 18, U.N. Doc. HR/PUB/11/04 (2011) [hereinafter UN Guiding Principles].

2 *Id.* ¶ 31 (commentary, h).

and outcomes, and requires identifying the “legal, cultural, economic, and other obstacles” faced by victims to overcoming the harm they have experienced.<sup>3</sup> Consultation should consider a range of factors, including an assessment of security conditions, economic resources, and fears of retaliation or ostracism that may be associated with accessing the remedy mechanism. Consultation with human rights and other experts can also be critical to the success of a mechanism.

Consultation and engagement should be more than a box-ticking exercise. The aim should be for the remedy mechanism to avoid reinstating or reinforcing structural conditions that made the abuses possible in the first place, and to have the potential to trigger change, even if reparations “cannot alone” address the root causes of these problems.<sup>4</sup> A formalistic or top-down approach to consultation, in which rights-holders’ and stakeholders’ views are sought, but the company retains discretion over whether or how to incorporate their views, is likely to raise more legitimacy questions than deep engagement approaches that involve co-creating mechanisms with rights-holders.

The floor of rights-holder engagement should include consultation and dialogue with the potential users of the mechanism. Consultation can give ownership of the process to rights-holders, and ensure that their concerns are taken into account and that the process is empowering and transformative for the people it is intended to benefit.

An engagement approach that moves beyond consultation to a co-created or jointly-appointed mechanism is much more likely to ensure rights-compatibility and fulfilment of a rights-based approach. Such an approach is more likely to advance rights-holder interests, and therefore is more likely to meet the needs of impacted groups and to be perceived by stakeholders as effective and legitimate.<sup>5</sup>

### **Barrick’s Consultation Practice**

In designing its remedy mechanism, Barrick consulted with a number of groups, including some national and international non-governmental organizations, human rights and gender violence experts, as well as the former UN Special Representative for Business and Human Rights, who now serves as a Special Consultant to Barrick’s Corporate Social Responsibility Advisory Board.<sup>6</sup>

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3 See, e.g., The UN Secretary-General, *Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence* 11, OHCHR (June 2014), <http://www.unwomen.org/~media/headquarters/attachments/sections/news/stories/final%20guidance%20note%20reparations%20for%20crsv%203-june-2014%20pdf.ashx>.

4 See *Id.* at 1, 8 (“Consultations with victims are particularly important in order to hear their views on the specific nature of reparation . . . . Reparations have the potential to trigger important changes even if they alone cannot transform the root causes of conflict-related sexual violence or the structural conditions that make such violence possible.”).

5 See, e.g., ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, ANNEX 5 THE HUMAN RIGHTS BASED APPROACH TO DEVELOPMENT COOPERATION. TOWARDS A COMMON UNDERSTANDING OF THE HUMAN RIGHTS BASED APPROACH TO DEVELOPMENT COOPERATION (2003), <http://www.oecd.org/derec/finland/43966077.pdf>; Independent Expert on the Right to Development, *Report of the Independent Expert on the Right to Development*, ¶¶ 21-22, U.N. Doc. A/55/306 (Aug. 17, 2000) (by Arjun Sengupta); Margaret Satterthwaite & Amanda Klasing, *A Rights Based Approach: Assessing the Right to Water in Haiti*, in RIGHTS BASED APPROACHES TO PUBLIC HEALTH 143 (Elvira Beracochea, Corey Weinstein & Dabney P. Evans eds., 2011); UNITED NATIONS DEVELOPMENT PROGRAM (UNDP), A HUMAN RIGHTS-BASED APPROACH TO DEVELOPMENT PROGRAMMING IN UNDP – ADDING THE MISSING LINK (Aug. 8, 2001), <http://www.pogar.org/publications/other/undp/hr/hr-missinglink-00e.pdf>.

6 For a description of former UN Special Representative for Business and Human Rights John Ruggie’s involvement, see Barrick Gold Corp., CSR Advisory Board, <http://www.barrick.com/responsibility/csr-advisory-board/> (last visited Nov. 14, 2015). Barrick stated that it consulted with Human Rights Watch, UN Women, the former UN Special Representative for Business and Human Rights, the Harvard International Human Rights Clinic, the Porgera District Women’s

Barrick also engaged with two local non-governmental organizations in Porgera, the Porgera District Women's Association (PDWA) and the Porgera Environmental Advisory Komiti (PEAK)—both funded by the mining company—as well as local police and medical experts.<sup>7</sup> At a late stage in the design process, the clinics were given, at their request, an opportunity to review a draft and provide comments on the design.<sup>8</sup>

Sexual assault survivors were not, to the best of the clinics' knowledge, directly consulted about the design of the mechanism. The local and international organizations that were the most directly engaged with the community on the mine-related abuses and most vocally raising concerns about human rights abuses at the mine site—including the Akali Tange Association (ATA), Porgera Landowners Association (PLOA), and *MiningWatch Canada*—were also not brought meaningfully into the design of the mechanism.<sup>9</sup>

In contrast to the design phase, during the implementation of the remedy mechanism, Barrick and/or its third-party remedy mechanism implementer (Cardno) engaged in more dialogue with some of these groups, and women accessing the mechanism provided some feedback to the mechanism's third-party implementer, as well as to the women's welfare liaison officer. It appears that aspects of the remedy mechanism evolved in response to feedback, although the full extent to which the women's feedback was taken into account is not clear. *See further* Part III, Chapter 7: Additional Rule of Law Issues (discussing continuous learning).

## Human Rights Analysis

While Barrick took significant steps to consult with national and international experts, its failure to consult with survivors during the design phase did not meet minimum consultation standards.

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Association (PDWA) and the PDWA's Women's Welfare Office, Paiam hospital, the Porgera Medical Centre, local police, and the PJV's Community Affairs personnel. Barrick also stated that it held intensive consultation workshops with the Papua New Guinea Family and Sexual Violence Action Committee, the PNG Australia Law and Justice Partnership, the Family and Sexual Violence Unit of the Royal Papua New Guinea Constabulary, the PNG Department of Justice and Attorney General, the PNG Chamber of Mines and Petroleum (Women in Mining Program), human rights specialists from private legal practices, and the Porgera Environmental Advisory Komiti (PEAK). Further specifics are laid out in: BARRICK GOLD CORP., A FRAMEWORK OF REMEDIATION INITIATIVES IN RESPONSE TO VIOLENCE AGAINST WOMEN IN THE PORGERA VALLEY (May 16, 2013), <http://www.barrick.com/files/porgera/Framework-of-remediation-initiatives.pdf>; BARRICK GOLD CORP., THE PORGERA JOINT VENTURE REMEDY FRAMEWORK 4 (Dec. 1, 2014), <http://www.barrick.com/files/porgera/Porgera-Joint-Venture-Remedy-Framework-Dec1-2014.pdf> [hereinafter BARRICK REMEDY FRAMEWORK SUMMARY]; Letter from Peter Sinclair, Vice President, Corp. Soc. Responsibility, Barrick Gold Corp., to Dr. Navanethem Pillay, UN High Comm'r for Human Rights 2-3 (Mar. 22, 2013), <http://www.barrick.com/files/porgera/Letter-to-UN-High-Commissioner.pdf> [hereinafter BARRICK LETTER TO OHCHR (Mar. 22, 2013)].

7 BARRICK GOLD CORP., STATEMENT BY BARRICK GOLD CORP. IN RESPONSE TO HUMAN RIGHTS WATCH REPORT 10 (Feb. 1, 2011), <http://www.barrick.com/files/porgera/Response-to-Human-Rights-Watch-Report.pdf>; BARRICK GOLD CORP., ADDRESSING VIOLENCE AGAINST WOMEN AT PORGERA (Oct. 27, 2011), <http://www.barrick.com/files/porgera/Progress-on-Human-Rights-at-Porgera.pdf>; Porgera Environmental Advisory Komiti (PEAK), FAQs, <http://www.peakpng.org/faqs/> (last visited Nov. 14, 2015); BARRICK REMEDY FRAMEWORK SUMMARY, *supra* note 6, at 2.

8 GLOBAL JUSTICE CLINIC, NEW YORK UNIVERSITY SCHOOL OF LAW AND INTERNATIONAL HUMAN RIGHTS CLINIC, HARVARD LAW SCHOOL, COMMENTS ON THE FRAMEWORK OF REMEDIATION INITIATIVES IN RESPONSE TO VIOLENCE AGAINST WOMEN IN THE PORGERA VALLEY BY BARRICK GOLD CORPORATION—KEY HUMAN RIGHTS CONCERNS AND RECOMMENDATIONS (May 14, 2012).

9 Barrick's original remedy mechanism framework documents do not list *MiningWatch Canada*, the ATA, or PLOA among those it consulted. It is the clinics' understanding that those organizations only had an opportunity to provide feedback during a late stage, when the design was already finalized. In 2013, Barrick stated that in 2012, "ATA and PLOA both had the opportunity to review the framework and provide whatever feedback and thoughts they may have." *See* Barrick Letter to OHCHR (Mar. 22, 2013), *supra* note 6, at 6.

By failing to adequately consult the community members most affected by alleged abuses, the mechanism did not sufficiently center the individuals and communities it was intended to serve. The inclusion of these essential perspectives likely would have helped to ensure a remedy mechanism that best served the needs of rights-holders as well as those of the company.

### *Design Phase*

*Necessary but insufficient consultation:* Barrick's remedy mechanism design phase included consultation with well-regarded PNG national and international organizations and individuals. This consultation with subject matter experts was a necessary step in tailoring the mechanism to the PNG context, promoting rights-compliance, and taking into account gender-specific concerns. Consultation with highly respected national PNG women's rights advocates was particularly important. In addition, the inclusion of local organizations PEAK and (especially, given its focus on women's issues) PDWA represented a positive step towards the incorporation of Porgeran perspectives.

However, the consultation process did not provide for adequate and meaningful input from key local stakeholders, including survivors. This undermined local buy-in, perceptions of mechanism legitimacy, and the ability of the mechanism to meet rights-holders' needs.

*Possibilities for local consultation with survivors:* In 2011, shortly after Barrick publicly acknowledged the sexual assaults by its personnel, the clinics interviewed alleged victims in Porgera to assess their views about appropriate next steps. They were eager and available to discuss these issues, often articulated strong views about remedies, and many said that if asked they would attend a meeting with the company to discuss remedies.<sup>10</sup> It would not have been difficult or expensive to include them in remedy mechanism design efforts in a way that respected privacy and was sensitive to the subject matter. Including them in the early stages could have increased the likelihood that the mechanism would meet women's needs and concerns, and could have recognized rights-holders' agency and promoted a participatory role for women in determining how their needs would be met. It could have set in place a foundation of trust, based on engagement and dialogue, that could have helped to prevent some problems that arose later in the process.

Excluding directly affected rights-holders contributed unnecessarily to initial distrust of the remedy mechanism. Many sexual assault victims had been waiting *years* to have their harms acknowledged and to receive compensation, and reported to the clinics high levels of distrust towards the company. The long delay on the part of the company in acknowledging the harms and taking steps to provide a remedy contributed to an atmosphere of distrust and caution on the part of survivors. Barrick should have been aware of this dynamic, and once the decision was made to provide remedies, the company should have taken active steps to address it through its consultation process.

Against this background, when the remedy mechanism began, numerous rights-holders expressed a lack of faith about the company's efforts to provide a remedy.<sup>11</sup> One claimant indicated that if "they

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<sup>10</sup> Interview 2-2011 (Mar. 13, 2011) ("I would go if there was a big meeting about compensation. I would speak myself."); Interview 20-2011 (Mar. 17, 2011); Interview 21-2011 (Mar. 17, 2011). *See also* Clinic Interview 2-2014 (Mar. 19, 2014) ("No one ever spoke to us . . . They should have come and talked to us here instead of just starting this framework.").

<sup>11</sup> *See, e.g.*, Interview 36-2014 (Mar. 22, 2014) ("It was like we were locked in a cage, waiting so long."); Interview 32-2014 (Mar. 22, 2014).

came to us and did it our way, it would be good. Because they are doing it in their own way, I don't think they're doing something good."<sup>12</sup>

*Possibilities for local consultation with civil society:* Members of the local civil society groups who had been condemning security guard violence around the mine and carrying out advocacy to stop it—including members of human rights NGO the ATA and landowner organization the PLOA—were also largely excluded from the remedy design consultation process.<sup>13</sup>

Barrick has justified its decision to largely exclude the ATA and PLOA in part by referring to advice offered to the company that including “patriarchal groups” could “potentially discourage women from coming forward.”<sup>14</sup> Through the years, there has been clear distrust between these groups and Barrick, and Barrick also raised concerns regarding the “good faith and integrity” of the groups “regarding the advancement of human rights claims.”<sup>15</sup>

Such concerns are legitimate considerations when assessing how to engage local actors. However, the long and difficult history between the groups and Barrick should have prompted more deliberate consultation, rather than the exclusion of the groups during the design process. Such a consultative process might have proved difficult, but it could have led to a more a transformative process in the long term.

Furthermore, marginalizing members of the ATA/PLOA from consultation came at a high cost. Members of the groups had been the most important local actors documenting and advocating an end to and redress for security guard violence. Their advocacy brought abuse concerns to the attention of international groups and it is quite possible that the abuses would never have been internationally known without their advocacy.<sup>16</sup>

ATA/PLOA members were trusted by many of the victims, and members of the groups have occupied positions of authority. Indeed, many women reported cases of sexual violence directly to members of the ATA, and trusted individuals within that group to advocate for them and to inform and advise them about the mechanism; initially, some women were reluctant to use the mechanism without ATA verifying the process for them.<sup>17</sup>

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12 Interview 3-2014 (Mar. 19, 2014). An ERI representative advised that: “From the beginning one of the biggest problems was that none of these women were consulted as to what they view personally and culturally as appropriate. There were a number of preconceived notions that informed this, which were very prejudicial and really colored the way people were implementing it.” Interview 63-2014 (May 7, 2014).

13 See *supra* note 9.

14 Barrick letter to OHCHR (Mar. 22, 2013), *supra* note 6, at 6.

15 Barrick letter to OHCHR (Mar. 22, 2013), *supra* note 6, at 5. Human Rights Watch has also expressed concern regarding their internal administration and financial management. HUMAN RIGHTS WATCH, GOLD'S COSTLY DIVIDEND: HUMAN RIGHTS IMPACTS OF PAPUA NEW GUINEA'S PORGERA GOLD MINE 34–37 (Feb. 1, 2011).

16 These community leaders had spent many years seeking accountability. See Part I: Background (detailing the history of the ATA and PLOA demands for accountability).

17 Interview 1-2014 (Mar. 19, 2014); Clinic Interview 2-2014 (Mar. 19, 2014); Clinic Interview 10-2014 (Mar. 20, 2014); Clinic Interview 3-2014 (“Even though I live out there [outside of Porgera], if anything like this happens, we have the ATA.”). Some women expressed hesitation in filing a claim unless encouraged by the ATA; see also Interview 7-2013 (Mar. 7, 2013); Interview 9-2013 (Mar. 6, 2013) (“If it was one of these ATAs . . . not this PJV, who would come, then I would believe and trust them.”); Interview 1-2014 (“I have kept what happened to me secret all my lifetime [thinking that] if someone knows it was going to be a big problem. But when the boys of the ATA said that if you have been raped you can tell us, I decided to come out and take the risk.”); Interviews 4-2013 (Mar. 6, 2013); Interview 5-2013 (Mar. 7, 2013);

It is essential for any remedy mechanism to avoid reproducing gender dynamics that subordinate women's voices. Constructive engagement with local leaders can hold the potential to enhance women's access to, and engagement with, a remedy mechanism, as opposed to discouraging their participation.<sup>18</sup> While ATA/PLOA should not have been proxies for the survivors (just as national experts should not have been), the local organizations could have facilitated direct access to individuals. Thus, ATA/PLOA participation could have increased some individuals' and the community's ownership of the mechanism. When the mechanism did begin, some members of ATA were in fact active in facilitating women's access to it.

Finally, consulting with ATA and PLOA would have brought out the importance for some local actors of remedies to address both sexual violence and non-sexual violence. ATA, for example, was founded by individuals whose family members had died at or near the mine, and thus the mechanism did not address one of their priority concerns. *See* Part III, Chapter 3: Scope of Harms Remedied.

Other local groups PEAK and PDWA were appropriately consulted, but they did not sufficiently represent the range of local perspectives. These groups, for example, had not been leading investigations and advocacy to stop security guard assaults, and they had more limited connections to the individuals who had allegedly experienced violence. Indeed, Barrick noted in 2009 that it had received no complaints of sexual abuse from the PDWA.<sup>19</sup> PEAK and PDWA have also received funding from Barrick and are perceived by some local residents to be too connected to the company.<sup>20</sup> It was incumbent upon Barrick to look more broadly for individual survivors and organizations to consult.

*Quality of consultation:* There is also some cause for concern about the depth and outcomes of the consultation that did take place with other actors and groups. The clinics interviewed individuals

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Interview 7-2013 (Mar. 7, 2013); Interview 17-2013 (Mar. 7, 2013); Interview 18-2013 (Mar. 7, 2013). It is worth noting that advocacy by local groups continues. The ATA has advised that even after the remedy mechanism ended, it is assisting a further 280 people to make formal complaints to Barrick about alleged injuries, death, and assaults through the site's operational grievance mechanism. This includes numerous women who allege that they have been raped. Email from Langan Muri, Chairman, ATA to Sarah Knuckey (Oct. 3, 2015) (on file with author).

18 Sarah Knuckey & Eleanor Jenkin, *Company-Created Remedy Mechanisms for Serious Human Rights Abuses: A Promising New Frontier for the Right to Remedy?*, 19 INT'L J. HUM. RTS. 801, 806 (2015) (noting that "when 'gatekeeper' groups and leaders are engaged constructively, they have the potential to enable rather than block rights-holders' engagement"). *See also*, CENTRE FOR SOCIAL RESPONSIBILITY IN MINING, MINING INDUSTRY PERSPECTIVES ON HANDLING COMMUNITY GREIVANCES: SUMMARY AND ANALYSIS OF INDUSTRY INTERVIEWS, at xii, 38 (Apr. 2009) (arguing that "[i]gnoring or refusing to engage least trusted groups" is a strategy that "does not work" to enable responsible grievance-handling by mining companies).

19 Barrick Gold Corp., *Submission to the Standing Committee on Foreign Affairs and International Development, Canadian Parliament* (Nov. 26, 2009) available at <http://myspj.com/barrick-strikes-back/> (last visited Nov. 14, 2015) [hereinafter *Barrick 2009 Submission to Canadian Parliament*]. This document is additionally referenced in: Letter from Harvard Human Rights Program to Katrina White, Regional General Counsel and Company Secretary, Barrick (Australia Pacific) Limited (Feb. 16, 2011) (on file with author).

20 The PDWA has offices within the mine, and based on clinic interviews, it has had very mixed levels of awareness in the community over the years. During one visit by the clinics to Porgera, members of the clinics attempted to meet with the PDWA in their offices, but were told by a Barrick officer who came to the office that they could not be present at Community Affairs without undergoing Barrick security training. The PDWA's lack of work on sexual violence and mine site employees before 2009 was acknowledged by Barrick. *See Barrick 2009 Submission to Canadian Parliament, supra* note 19 ("To our knowledge, the PDWA has never raised such an allegation [of violence against women by PJV personnel]"). For background about PEAK, *see* Porgera Environmental Advisory Komiti (PEAK), FAQs, <http://www.peakpng.org/faqs/> (last visited Nov. 14, 2015) ("PEAK is funded by Barrick PNG Ltd and is a not-for-profit organization . . . . Although funded by Barrick, it must be noted that PEAK is absolutely independent of Barrick and PJV's views in decision-making").

who worked at some of the organizations listed by Barrick as having been consulted. Some of those individuals knew extraordinarily little about the mechanism, or stated that they provided only very general feedback or comments at a late stage of mechanism design.<sup>21</sup> In addition, an individual with knowledge of the remedy mechanism indicated that consultation during the design phase with those with experience in and responsibility for the mechanism's later implementation would have been worthwhile. It could have mitigated some of the problems that did, in fact, surface during implementation.<sup>22</sup> These responses indicate some weaknesses in the consultation that did take place, and highlight the importance of consultation being more than simply information collection. Engagement and dialogue must come early in the design phase, and be a responsive and interactive process.

### *Implementation phase*

Ad hoc feedback during implementation: Barrick and its third party implementer provided some *ad hoc* space for ongoing engagement and feedback, generally where specifically requested by external groups. Barrick has also stated: "advice on the operation of the Framework was received by claimants who were going through the process and wished to provide input."<sup>23</sup> Consultation of this nature represents a positive step, and the clinics witnessed constructive relationships between some women and some of the third party implementer staff, but there is little public information about how women were selected for consultation or the nature of the consultation.

The dialogue with certain claimants and external groups seems to have led to some positive changes during the mechanism's implementation, including changes in the design of the remedy packages offered, adding additional windows of time for receiving complaints, improving translation processes, and providing additional information about the role of the "Independent Legal Advisor."<sup>24</sup> However, the clinics' experience and interviews indicate that this feedback process was not subject to any formal or consistent procedure. *See further* Part III, Chapter 7: Additional Rule of Law Issues (discussing predictability and continuous learning).

Since the remedy mechanism ended, there have been additional complaints from the women about the adequacy of the remedy packages. *See* Part III, Chapter 5: Reparations. According to numerous interviews with the claimants themselves, these women were seriously aggrieved about the amounts of compensation they received through the remedy mechanism, when compared to the women who settled in a separate mediation. In response, they organized themselves and demanded additional payments in a large public protest, during which police were reportedly called.<sup>25</sup> As a result, women

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21 For example, Barrick states that it consulted with the Harvard International Human Rights Clinic. However, the consultation with the clinics was only carried out after repeated requests by the clinics, and occurred at the final stages of the design. At request, the clinics are withholding the details of additional individuals and organizations that provided negative information about the consultation.

22 Interview 21-2014 (Mar. 8, 2014).

23 BARRICK REMEDY FRAMEWORK SUMMARY, *supra* note 6, at 4.

24 *See* BARRICK GOLD CORP., CLARIFICATION OF THE PORGERA REMEDIATION FRAMEWORK (Dec. 3, 2013), <http://s1.q4cdn.com/808035602/files/porgera/Clarification-of-the-Porgera-Remediation-Framework.pdf>; BARRICK GOLD CORP., A SUMMARY OF RECENT CHANGES TO THE PORGERA REMEDIATION FRAMEWORK (June 7, 2013), <http://s1.q4cdn.com/808035602/files/porgera/Summary-of-Recent-Changes-to-the-Porgera-Remediation-Framework.pdf>; Interview 11-2014 (Mar. 20, 2014); Interview 21-2014 (Mar. 20, 2014); BARRICK REMEDY FRAMEWORK SUMMARY, *supra* note 6, at 13–14.

25 *See* Interview 10-2015 (July 23, 2015). Barrick has stated that "discussions" with women led to the additional payment. Email from Simon Jimenez, Director, Corporate Social Responsibility, Barrick Gold Corp., to Sarah Knuckey, (Sept. 29, 2015) (on file with author).



were provided an additional 30,000 kina payment each. This engagement, which was initiated by the women rather than the company, reinforces concerns that consultation was more *ad hoc* than institutionalized.

*Possibilities for improved feedback during implementation:* The process for claimants and others to provide feedback about implementation of the remedy mechanism could have been strengthened. Barrick and/or the third party implementer could have set up and publicized transparent processes for external groups, and designed a process to proactively and regularly seek out feedback—both formally and informally. They could have given women more opportunities to be heard, both privately and publicly, and improved the quality of feedback given by establishing a feedback process that was clearly and routinely made available to women participating in the process.

## **Lessons Learned**

To meet minimum standards, rights-holders who have experienced harms should be consulted at the design stage for any remedy mechanism. Consulting with international and national organizations and experts on human rights will often be an essential part of the process of creating an effective mechanism, but it should not replace or be a proxy for the perspectives of survivors and impacted communities. Companies would also benefit by considering and spending time finding organizations that understand the local context, as well as those who are trusted by those who will ultimately use the mechanism. Even such organizations, however, should not be proxies for direct consultation with survivors.

Effective consultation does not simply involve collecting information or providing stakeholders an opportunity to provide feedback after key decisions have already been made; it entails early, proactive, ongoing, and comprehensive dialogue and engagement with all stakeholders and other relevant experts. Organizations that have been particularly vocal about human rights abuse allegations should be at the table; they should not be automatically excluded because a company has low trust in those actors. Remedy mechanisms will benefit from structured consultations with a level of transparency to promote the integrity of such efforts. Such effective consultation with the local community and particularly victims is a necessary step towards establishing a remedy mechanism that is accessible, trusted, legitimate, and effective, and that advances human rights.

However, a “consultation” model of engagement with survivors and others impacted by corporate activity is the bare minimum required. Typical consultation models can maintain the unequal power relationship between rights-holders and companies; even where rights-holder views are taken into account, the company fundamentally retains control over the design and implementation of the mechanism.

While often difficult given the fact that harms have taken place, a co-creation model is far more likely to create space for meaningful reconciliation between the corporation and the community, and to best ensure that survivor perspectives are central and thus rights are better promoted. Co-creation models could involve direct and joint efforts by the company and rights-holders, or the design of an independent mechanism by a third party jointly appointed by the company and rights-holders.

I was panning for gold. In the riverside . . . there were five boys, and three girls. I came with my daughter . . . . The security guards came . . . . They came and surrounded us. They took the five boys away, and for us, they came and held the three of us. The security came and held me, and I struggled, and I fell down. When the security tackled me, I fell and hit my head on the sharp rock . . . . The security guards took the two girls to the other side. They tackled me and I fell. They took me to the bush and they raped me . . . and then the security guards removed my clothes . . . .

[M]y daughter was a bit of a distance away . . . . She looked really weak . . . . She told me what the security guards did to her; she said she was ashamed.

*- A woman from Porgera, Papua New Guinea*

## Chapter 3

### Scope of Harms Remedied

**Summary of Findings:** The Barrick mechanism provided access to remedy for a significant number of women who experienced sexual violence, including individuals whose rights were violated before Barrick took over majority ownership of the mine. However, the remedy mechanism was narrow in the scope of violations remedied, applying only to one category of abuse: sexual assault. Its exclusion of the numerous other forms of abuses also allegedly committed by security guards at the mine—including non-sexual physical assaults and killings—sidelined other alleged victims. The exclusion was arbitrary and undermined perceptions of the remedy mechanism’s legitimacy and fairness. Time limitations on accepted claims built into the design of the mechanism were also unjustified.

#### Applicable Human Rights Principles

Under international human rights law, all victims of human rights abuses have the right to an effective remedy, including prompt reparations.<sup>1</sup> Companies have a responsibility to provide, or to cooperate in the provision of, a remedy for adverse human rights impacts they have contributed to or caused.<sup>2</sup>

Individuals should receive equal protection before the law and equal access to justice; rules that arbitrarily exclude certain individuals or groups are not consistent with human rights law.<sup>3</sup>

In addition to providing required remedies, one of the purposes of a remedy mechanism is to open a channel for people directly affected to raise concerns, and to enable the business enterprise to identify systemic problems and adapt practices accordingly.<sup>4</sup>

#### The Scope of Barrick’s Mechanism

Barrick designed its remedy mechanism to be limited in scope explicitly in two ways.<sup>5</sup> First, the mechanism was available for survivors of sexual violence only and did not address cases of non-sexual violence or abuse.<sup>6</sup> Second, the remedy mechanism was generally limited to claims based on abuses that occurred within a certain specified time period. The written Claims Manual for the

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1 Universal Declaration of Human Rights, Art. 8, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); International Covenant on Civil and Political Rights, Art. 2, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 [hereinafter ICCPR]; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Art. 24, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

2 UN Office of the High Comm’r for Human Rights, Guiding Principles on Business and Human Rights, ¶ 22, U.N. Doc. HR/PUB/11/04 (2011) [hereinafter UN Guiding Principles].

3 See e.g., UN Special Rapporteur on extreme poverty and human rights, *Report of the Special Rapporteur on extreme poverty and human rights*, U.N. Doc. A/67/278 (August 9, 2012) (by Magdalena Sepúlveda Carmona), <http://www.ohchr.org/Documents/Issues/Poverty/A-67-278.pdf>; ICCPR, *supra* note 1, Arts. 14, 26.

4 UN Guiding Principles, *supra* note 2, ¶ 32 (commentary).

5 CLAIMS PROCESS PROCEDURES MANUAL (undated) 1, <http://www.barrick.com/files/porgera/Claims-Process-Procedures-Manual.pdf> [hereinafter CLAIMS MANUAL].

6 *Id.*; Interview 11-2014 (March 20, 2014); Interview 21-2014 (March 21, 2014).

remedy mechanism states that only claims involving assaults that took place between January 1, 1990, and December 31, 2010, would be assessed.<sup>7</sup> According to a footnote in a summary document published by Barrick after the remedy mechanism closed, “[c]laims after 31 December 2010 are considered on a case by case basis.”<sup>8</sup>

Barrick has recently advised the clinics that other or new complaints or concerns can be raised through the mine site’s “existing site grievance mechanism.”<sup>9</sup> There is no publicly available information on the Barrick website about this grievance mechanism.<sup>10</sup>

## Human Rights Analysis

*The positive attributes of the applicable scope:* The remedy mechanism provided access to partial remedy for a large number of women who had experienced sexual violence at the hands of mine personnel, and included violations occurring prior to Barrick’s involvement in the PJV. The mechanism incorporated broad interpretations of the kind and circumstances of sexual assaults to be remedied. It also accepted claims about sexual abuse by any mine employees, and was not limited to security guard cases, which had formed the basis of most initial public complaints. This unearthed credible claims of sexual assault by the mine’s other staff, dynamics which had not been reported in detail by civil society groups.

The clinics’ review of the remedy contracts and associated documents also indicates that the third party implementer of the remedy mechanism refrained from taking an overly legalistic approach when deciding whether to accept claims. The mechanism did not rely on an adversarial system, so women were evaluated largely on their accounts, as opposed to having to confront alleged abusers in proceedings. Thus, claims were remedied through the mechanism without the kinds of processes

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7 CLAIMS MANUAL, *supra* note 5, at 1. This document sets out who may lodge a claim. Among other criteria, it includes claims “where the assault took place after 1 January 1990, and before 31 December 2010.” *Id.*

8 BARRICK GOLD CORP., THE PORGERA JOINT VENTURE REMEDY FRAMEWORK 6 n.7 (Dec. 1, 2014), <http://www.barrick.com/files/porgera/Porgera-Joint-Venture-Remedy-Framework-Dec1-2014.pdf> [hereinafter BARRICK REMEDY FRAMEWORK SUMMARY]. This document refers to the “basic threshold requirements” of eligible claims, and in footnote 7, notes:

These include whether the claim is against a PJV employee, whether it involves a sexual assault, whether the claimant or a representative are coming forward personally, and whether it occurred between 1 January 1990 and 31 December 2010. Claims after 31 December 2010 are considered on a case by case basis. The Framework also was open to claims against contractors operating on site, though none were filed.

9 Email from Simon Jimenez, Director, Corporate Social Responsibility, Barrick Gold Corp. to Sarah Knuckey (Sept. 29, 2015) (on file with author). The clinics have not investigated this general grievance mechanism in detail, and do not assess it here. Local civil society members informed the clinics on October 3, 2015 that they had recently submitted 260 alleged cases to the mechanism, including numerous alleged cases involving sexual assault. One woman has also reported that she has repeatedly written to and visited the grievance office, but has received no substantive response yet to her sexual assault claim.

10 Barrick has had a general human rights policy in place since 2011; a 2015 version is publicly available. *See* BARRICK GOLD CORP., HUMAN RIGHTS POLICY (Oct. 30, 2015), <http://www.barrick.com/files/governance/Barrick-Human-Rights-Policy.pdf>. It sets out general processes for largely internal complaints. Barrick has also had a policy to put in place grievance mechanisms at all their sites by 2012. *See* Barrick Gold Corp., Community Engagement, <http://www.barrick.com/responsibility/community/community-engagement/> (last visited Nov. 14, 2015) (“[Barrick’s Community Relations Management System] specifies mandatory requirements related to the implementation and management of grievance mechanisms and we have committed to having an operating grievance mechanism at all of our sites. We achieved this goal in 2012 and are now focused on strengthening and improving the effectiveness of these grievance mechanisms.”).

that would potentially have been required in court. This was appropriate for a non-judicial mechanism, especially given how delayed the provision of remedies was, and was an efficient and effective use of resources. It also likely mitigated further re-traumatization for women.

*Problems with the limitation of the type of violence covered:* There have long been significant and credible allegations that mine security guards committed a range of non-sexual abuses, including physical assaults of men and women, as well as arbitrary detentions, and some alleged unlawful killings.<sup>11</sup> The remedy mechanism entirely excluded these types of cases, even though the various forms of security guard abuses often occurred in similar circumstances, sometimes concomitantly, and shared causes and dynamics. A number of individuals who allegedly suffered non-sexual violence did attempt to make claims with the remedy mechanism, but were turned away.<sup>12</sup> Interviews with those excluded revealed frustration and despair, perceptions of injustice or unfairness, and questions about why the mechanism did not remedy all the harms experienced by the community.<sup>13</sup>

These concerns were raised with Barrick.<sup>14</sup> The company, however, did not expand the scope of the mechanism. While Barrick has frequently spoken publicly about its fulfillment of the right to remedy through its remedy mechanism, entire categories of extensive abuse allegations remain unacknowledged.

By limiting the mechanism to one subset of claims, a large number of individuals have been sidelined. The limitation resulted in differential treatment of harmed individuals and is not consistent with human rights principles. The decision also adversely affected the full effectiveness and perceived legitimacy of the mechanism. The exclusion undermined trust in the process, led to a signaling effect that other security guard abuse allegations were less important, and aggravated grievances about broad security guard violence. Barrick lost an opportunity to remedy serious alleged harms and meet its responsibility to respect human rights as set out in the UN Guiding Principles.

*Problems with the time limitations:* Barrick has not publicly provided a justification for its decision to design the mechanism to be generally limited to sexual assaults that took place before December 31, 2010. While a time limitation is unavoidable for any remedy mechanism not established to operate permanently, such administrative justifications cannot explain a mechanism design that does not envisage processing claims of those subjected to abuses *during* the operational period of the mechanism. As discussed in more detail below in Part III, Chapter 4: Accessibility and Safety, the remedy mechanism accepted claims through 2013. Thus, during the operations of the remedy mechanism, the mechanism was open, yet potentially foreclosed to a class of women who were sexually assaulted within a nearly three-year window following the December 31, 2010 cut-off date. As with the claims of non-sexual violence, this distinction appears arbitrary on its face.

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11 For further information on the nature of the abuses, *see* Part I: Background.

12 *See, e.g.*, Interview 11-2014.

13 *See* Interview 5-2014 (March 19, 2014); Interview 8-2014 (March 19, 2014); Interview 24-2014 (March 24, 2014). In addition, many individuals expressed frustration over the lack of compensation for what they alleged were environmental harms, and many express a desire for resettlement.

14 Interview 11-2014; Interview 52-2014 (March 22, 2014). *See also* GLOBAL JUSTICE CLINIC, NEW YORK UNIVERSITY SCHOOL OF LAW AND INTERNATIONAL HUMAN RIGHTS CLINIC, HARVARD LAW SCHOOL, COMMENTS ON THE FRAMEWORK OF REMEDIATION INITIATIVES IN RESPONSE TO VIOLENCE AGAINST WOMEN IN THE PORGERA VALLEY BY BARRICK GOLD CORPORATION—KEY HUMAN RIGHTS CONCERNS AND RECOMMENDATIONS (May 14, 2012).

While a later document published by Barrick suggests that claims for alleged sexual assaults occurring after December 31, 2010 were or would be considered on a case by case basis,<sup>15</sup> there is no information publicly available as to whether or how that modification has been or will be applied. Particularly in light of the gravity of the human rights abuses at issue, limitations initially built into the design and ambiguous subsequent clarifications undermine the right to remedy for numerous potential claimants. If *ad hoc* claims will remain possible, they should be made available to all those who allegedly experienced harm; if individuals did not meet the initial deadlines, established tolling principles can help evaluate whether their claims should be considered or not.

## Lessons Learned

Companies must remedy all human rights violations that they have caused or to which they have contributed. Companies should not establish policies that unnecessarily result in exclusion of entire groups of individuals. The scope of harms remedied by the mechanism can impact its effectiveness and legitimacy.

If a remedy mechanism only covers one subset of the abuses committed, its legitimacy may be undermined and it risks causing divisions within an affected community. This can prevent more complete reconciliation from occurring at the community level. Limited scope can also undermine the ability of a remedy mechanism to alert a company to relevant adverse impacts that have occurred or are newly occurring.

Generally, grievance mechanisms should be permanently open to anyone who has suffered harm. Where a company seeks specifically to provide remedies for past harms (rather than to create a general process to receive complaints), there may, at times, be legitimate reasons for limiting a remedy mechanism to a specific group of individuals or human rights violations. This may allow the mechanism to be tailored to a particular group who may be experiencing vulnerabilities, or it may allow the company to highlight the seriousness of the harm caused.<sup>16</sup> Sexual violence, for example, requires staff with specialized training, and may require special processes to ensure accessibility and security for women.

However, it is important that any specialized efforts be based on legitimate reasons, not arbitrary ones, and the reasons should be explained from the outset. Any effort to create a specialized mechanism must “not lead to other classes of victims or violations being sidelined.”<sup>17</sup> Individuals who have non-eligible violations must be able to access an equally effective and adequate remedy through other means, such as a specific parallel remedy mechanism or a more comprehensive mechanism. It is also important to acknowledge that remedy mechanisms “are part of, and shape, the narrative of human rights violations and community-company relations. As such, it is critical that they reflect the concerns, experiences, and needs of the community at large.”<sup>18</sup> The mechanism(s) must be designed and messaged to the community so as not to cause divisions, and companies should design mechanisms in a way that contributes to accurate historical understanding of human rights abuses and of the connections between different abuses.

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15 See BARRICK REMEDY FRAMEWORK SUMMARY, *supra* note 8.

16 See Sarah Knuckey & Eleanor Jenkin, *Company-Created Remedy Mechanisms for Serious Human Rights Abuses: A Promising New Frontier for the Right to Remedy?* 663 INT'L J. HUM. RTS. 801, 807 (2015).

17 *Id.* at 808.

18 *Id.*

Specialized remedy mechanisms should at minimum be open to violations occurring during the operational life of the mechanism. Companies should consider carefully the implications of setting a cut-off date prior to the closing of the mechanism, and tolling principles should be considered as part of any grievance processes. Any limitation in this respect should be the subject of a clear justification and all possible steps should be taken to ensure that this does not prevent potential claimants from accessing a remedy.

We didn't think we had any options to fight Barrick. So we signed for the 20,000 kina.

I was not satisfied with what they paid us. Some got a lot, and some of us got less. We got bad names. We were colored with the bad name of rape. But some got 75,000 or 200,000 kina. We are not happy. The women who got more bought buses. We are about 120 women. The eleven women [represented by U.S.-based attorneys] got more than us. But we live in the same community. In our custom, we pay compensation.

Everyone one of us were complaining that other women got 200,000 kina . . . . We said it wasn't right that we received less.

*- A woman from Porgera, Papua New Guinea*



## Chapter 4

### Accessibility and Security

**Summary of Findings:** Inadequate steps were taken to ensure that the remedy mechanism was accessible and safe for as many potential claimants as possible. “Word of mouth” and targeted outreach strategies were adopted to inform women about the remedy mechanism, rather than a widely and openly publicized awareness campaign. The decision to rely on the narrower approach was reportedly adopted in response to legitimate concerns about the safety and privacy of sexual assault victims. However, once the decision was made to use “word of mouth,” insufficient steps were taken to mitigate the foreseeable problems that arose from this approach. For example, accurate information about the existence and nature of the mechanism did not reach as many potential claimants as it could have. This lack of information, along with the single and public location and limited time frame in which claims could be presented to the mechanism, undermined the accessibility and equitability of the remedy mechanism. Despite warnings about potential security impacts on women, inadequate steps were taken to mitigate harm and to ensure that necessary proactive measures were taken to protect women. For example, the single entry point intake process appears to have put women at risk of being identified. In general, there could have been a more consultative, comprehensive, and tailored approach that would have better mitigated risk for each individual woman entering the mechanism, moving through it, and receiving remedy packages.

#### Applicable Human Rights Principles

An effective remedy mechanism should be accessible to rights-holders. This means that it should be “known to all stakeholder groups for whose use [it is] intended” and that victims who “may face particular barriers to access” are provided “adequate assistance.”<sup>1</sup> To ensure that the right to a remedy is effective, individuals should have access to information regarding any possible remedies or services that might be available, and must be provided with proper assistance and resources in seeking access to justice.<sup>2</sup>

In addition, the design and implementation of a remedy mechanism should take into account potential security or other adverse impacts on mechanism users, and, where a security risk is present, proactive steps should be taken to mitigate risk, so that individuals feel more secure in accessing the mechanism. Attention to security is necessary to ensure a mechanism’s effectiveness and rights-compatibility, to ensure that a company does not cause further adverse impacts through its remedy

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1 UN Office of the High Comm’r for Human Rights, Guiding Principles on Business and Human Rights, ¶ 31(b), U.N. Doc. HR/PUB/11/04 (2011) [hereinafter UN Guiding Principles].

2 *See, e.g.*, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, ¶ 24, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) (there should be means of informing victims of all “rights and remedies addressed by these Basic Principles and Guidelines and of all . . . other services to which victims may have a right of access”); *id.* ¶¶ 12(a), 12(c) (states should “[d]isseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law” and “[p]rovide proper assistance to victims seeking access to justice”).

mechanism, and to advance remedy mechanism goals of preventing “harms from compounding and grievances from escalating.”<sup>3</sup> This is part of the general human rights principle of “do no harm,”<sup>4</sup> which is also a corporate responsibility.<sup>5</sup>

### **Accessibility and Security in the Remedy Mechanism Process**

*Outreach:* Initially, a public awareness campaign about the mechanism was planned, using, for example, public radio announcements.<sup>6</sup> However, Barrick has stated that some PNG experts advised that such a public campaign entailed risks in Porgera.<sup>7</sup> First, there was concern that if everyone in the community knew about the mechanism and its purpose, women who accessed it would face difficulties in keeping their sexual assault confidential, and publicity might lead to stigma, retribution, and physical violence against some women. Second, the fear of such effects could deter legitimate claimants from coming forward.<sup>8</sup>

In response to these concerns, more discreet “word of mouth” and individually targeted outreach approaches were adopted. The awareness strategy relied on sharing information about the mechanism with certain actors in the community, who would then share information with other women who might be potential claimants, or who could further relay information. During implementation, groups such as the PLOA, ATA, and the clinics, who were in possession of specific knowledge as to the identities of women who had previously made sexual assault allegations, also sought to individually notify women of the remedy mechanism, and to assist them in accessing it.<sup>9</sup> Cardno was amenable to the clinics sharing with them the names of additional women (at the women’s request) who sought to make claims.

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3 UN Guiding Principles, *supra* note 1, ¶ 29 (commentary).

4 UN Office of the High Comm’r for Human Rights, *Manual on Human Rights Monitoring*, at ch. 2, p. 4, U.N. Doc. HR/P/PT/7/Rev.1 (2011), <http://www.ohchr.org/Documents/Publications/Chapter02-MHRM.pdf>.

5 See Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, *Statement by Prof. John Ruggie during 63rd Session of the General Assembly* (Oct. 27, 2008) (by John Ruggie).

6 Interview 21-2014 (Mar. 21, 2014); BARRICK GOLD CORP., A FRAMEWORK OF REMEDIATION INITIATIVES IN RESPONSE TO VIOLENCE AGAINST WOMEN IN THE PORGERA VALLEY 28-29 (2013), <http://www.barrick.com/files/porgera/Framework-of-remediation-initiatives.pdf>.

7 Interview 21-2014 (Mar. 21, 2014); see also Email from Simon Jimenez, Director, Corporate Social Responsibility, Barrick Gold Corp., to Sarah Knuckey (Sept. 29, 2015) (on file with author) (“[Experts in gender based violence]” recommended a localised approach, rather than a broad media campaign, to protect confidentiality and avoid re-victimization”); see also Letter from Dame Carol Anne Kidu to Dr. Navanethem Pillay, UN High Commissioner for Human Rights (Mar. 24, 2013), <http://s1.q4cdn.com/808035602/files/porgera/Letter-from-Dame-Carol-Kidu-to-UN-High-Commissioner-for-Human-Rights.pdf> (“It was in fact the group of internal expert advisers at program design stage and the Claims Assessment Team (mature, highly experienced Papua New Guinean women) who insisted on confidentiality and opposed any media/public announcements at the commencement of the program by Barrick. This decision was made in consultation with women on the ground in Porgera.”). See also Letter from Patrick Bindon, Manager, Corporate Affairs, Australia–Pacific, Barrick Gold Corp. to Sarah Knuckey and Tyler Giannini 3 (Mar. 26, 2013) (on file with the author) (“[O]utreach and publicity on the program was overseen exclusively by Cardno and based on the advice of local and national experts on violence against women”).

8 *Id.*; Interview 21-2014.

9 During visits to Porgera, the clinics sought to locate individual women who had previously been interviewed about their alleged assaults. When these women were found, they were informed about the existence of the mechanism and provided information about how to access it. The clinics offered direct assistance in accessing the mechanism to women where necessary. In addition, during visits to villages, the clinics informed women about the mechanism. Through the duration of the mechanism, members of the ATA and PLOA also spent considerable time locating and assisting individual women in accessing the mechanism.

*Point of entry:* There was generally only one apparent physical entry point into the mechanism, which was an office located in Porgera Station, at the time in the same building as the Women’s Welfare Office. The building is behind a number of stores, off a street that is often busy with foot traffic and roadside vendors. The clinics were informed that the co-location with the Welfare Office was to provide women a safer pretext for necessary in-person visits when accessing the mechanism.<sup>10</sup>

During later phases of the mechanism, women could receive further information or seek follow-up information at an additional office in the center of Porgera Station, next to the town’s main market areas.

*Time frames:* Sexual assault victims could lodge complaints when the remedy mechanism staff members were on “rotation” in Porgera, starting in October 2012. The Claims Manual for the remedy mechanism states that claims must be lodged by the end of April 2013, but notes that claims lodged after that date may still be considered in certain circumstances, such as when referred by the clinics.<sup>11</sup> In separate communications with Barrick, the company stated that the “nominal end date” for new claims was shifted to May 25, 2013, with any subsequent claims assessed on a case-by-case basis.<sup>12</sup> Claims presented by some EarthRights International clients were lodged during an extra rotation that took place in November 2013.<sup>13</sup>

## **Human Rights Analysis**

The design and implementation of the Barrick remedy mechanism included steps towards consideration of accessibility, confidentiality, and security. However, the mechanism was insufficiently tailored to the context and to individual women’s unique circumstances. This is in significant part a consequence of the failure to adequately include sexual assault survivors themselves in consultations about the design of the mechanism. During implementation, insufficient steps were taken to ensure that accurate information regarding the mechanism reached as many potential claimants as possible, which undermined women’s access to the mechanism. More attention could have been paid to mitigating security risks, including by instituting intake procedures to better ensure anonymity as well as case-by-case assessment to protect women throughout the mechanism process.

Barrick and their mechanism implementer, Cardno, appear to have been aware of and to have taken into account the serious security concerns associated with women making sexual assault complaints, and the stigma associated with sexual assault in PNG, when designing and implementing the mechanism process. Domestic and sexual violence rates are extremely high in the country,<sup>14</sup>

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10 Interview 21-2014 (“[I]f we announced it publicly, women would be scared to come . . . men would watch to see if women went there.”). Early on, there was a plan to receive complaints at the local hospital, however this was never implemented. *Id.*

11 CLAIMS PROCESS PROCEDURES MANUAL 1 (undated), <http://www.barrick.com/files/porgera/Claims-Process-Procedures-Manual.pdf> [hereinafter CLAIMS MANUAL].

12 Email from Peter Sinclair, Senior Vice President, Corp. Affairs, Barrick Gold Corp. to Sarah Knuckey 2 (June 24, 2015) (on file with author) [hereinafter Email from Barrick (June 24, 2015)].

13 *Id.*

14 Rape of women by someone other than their partner was found to be occurring at a rate of 41% in Papua New Guinea, according to a study done on behalf of the United Nations. Rachel Jewkes et al., *Prevalence of and factors associated with non-partner rape perpetration: findings from the UN Multi-country Cross-sectional Study on Men and Violence in Asia and the Pacific*, 1 THE LANCET GLOBAL HEALTH e208, e208 - e218 (2013). A UN Special Rapporteur report noted that in one study, up to 60% of men interviewed indicated that they had participated in gang rape. Special Rapporteur on Violence Against Women, *Report of the Special Rapporteur on violence against women, its causes and consequences, Mission to Papua New Guinea* ¶ 27, U.N.

and rape carries a pernicious stigma. An assaulted woman is often at risk of additional negative consequences if the rape becomes known, including beatings from her husband or other family members, stigma in her community, and divorce and the return of her bride price.<sup>15</sup> Potential harm to women following a rape becoming publicly known through the process of accessing Barrick's remedy mechanism or after being provided a remedy was a foreseeable risk.<sup>16</sup> Security and privacy should be essential considerations at all stages of the mechanism, including communications strategies, access points, and remedy disbursement.

Indeed, in Porgera, harms associated with the stigma of sexual assault have greatly added to the suffering experienced by women following the initial rape by mine employees. These harms are detailed in Part III, Chapter 5: Reparations. In such a context, it was both appropriate and commendable for Barrick and the implementers of the remedy mechanism to take into account women's security and privacy in the design and implementation of the mechanism.

However, and despite Barrick and Cardno's consideration of these issues, deficiencies arose during design and implementation.

*“Word of mouth” strategy:* Legitimate concerns about privacy and security led to a decision to adopt a “word of mouth” and targeted outreach approach, instead of a broad public awareness campaign. Barrick has explained that the reason for this was that experts in gender based violence recommended “a localized approach, rather than a broad media campaign, to protect confidentiality and prevent re-victimization.”<sup>17</sup> In Porgera, the presence of multiple clans, numerous distinct villages, and some survivors' travel or movement away from the area, made the chosen approach to raising awareness complex and difficult. An approach that better met the goals of raising awareness as well as sensitivity to privacy and security might instead have combined targeted outreach with a broader public awareness effort, matched by close attention to security during outreach and in subsequent phases of implementation. In addition, as discussed below, the “word of mouth” and targeted outreach approach did not sufficiently inoculate women from security risks and privacy concerns later in the process. Ultimately, the strategy of seeking to address security at the outreach stage by limiting general awareness of the mechanism had a number of negative consequences for the mechanism's effectiveness, and in particular, its accessibility.

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Doc A/HRC/23/49/Add.2, (Mar. 18, 2013) (by Rashida Manjoo). A 2010 research project based on a validated World Health Organization (WHO) research instrument on domestic violence found that nearly two-thirds of participants were survivors of domestic violence. Margit Ganster-Breidler, *Gender-Based Violence and the Impact on Women's Health and Well-Being in Papua New Guinea*, 13 CONTEMPORARY PNG STUDIES: DWU RESEARCH JOURNAL 17, 24 (2010).

15 During the course of the clinics' investigations, several women said that their husbands or other male family members had assaulted them, and/or that their husbands had divorced or separated from them after learning about their alleged rape at the hands of Barrick personnel. Women shared their fears should certain family members learn of their assault, as well as the negative impacts that flowed from family members finding out about the rape. See, e.g., Interview 2-2014 (Mar. 19, 2014); Interview 13-2014 (Mar. 20, 2014); Interview 22-2014 (Mar. 21, 2014); Interview 24-2014 (Mar. 21, 2014); Interview 29-2014 (Mar. 22, 2014); Interview 35-2014 (Mar. 22, 2014); Interview 49-2014 (Mar. 22, 2014); Interview 17-2013 (Mar. 7, 2013). A person with knowledge of the mechanism was also aware of this problem. Interview 11-2013 (Mar. 20, 2013) (“Some women were further harmed by their husbands or families because of the rape.”).

16 In a submission to Barrick before the remedy mechanism began operating, the clinics noted this risk. GLOBAL JUSTICE CLINIC, NEW YORK UNIVERSITY SCHOOL OF LAW AND INTERNATIONAL HUMAN RIGHTS CLINIC, HARVARD LAW SCHOOL, COMMENTS ON THE FRAMEWORK OF REMEDIATION INITIATIVES IN RESPONSE TO VIOLENCE AGAINST WOMEN IN THE PORGERA VALLEY BY BARRICK GOLD CORPORATION—KEY HUMAN RIGHTS CONCERNS AND RECOMMENDATIONS 2, 11, (May 14, 2012).

17 Email from Barrick (June 24, 2015), *supra* note 12.

First, awareness of the mechanism was uneven, and numerous women with claims simply had not learned about the mechanism at the time of interviews with the clinics, or had not been properly informed of the mechanism in time to make a complaint.<sup>18</sup> From 2013 to 2015, the clinics interviewed a number of alleged sexual assault victims from different villages who had not heard about the mechanism, or had heard only vague details and did not understand its purposes or operations—some women explained that the mechanism was not well known in their area; others believed it was too late for them to seek remedies for their cases.<sup>19</sup>

Second, numerous women received incorrect information about the mechanism, and their access was compromised as a result. The lack of information from reliable or direct sources, such as Barrick or mechanism employees, led to distrust among some women in the villages and facilitated the spread of misinformation. For example, some women did not know that they could access the mechanism individually to make a complaint, and instead mistakenly believed they could only access the mechanism through an intermediary.<sup>20</sup> The clinics received reports that one woman who had been tasked with spreading information about the mechanism had offered to register other women from her village with the mechanism, but only in exchange for a fee.<sup>21</sup>

Third, it was not easy for Barrick or its implementer to assess the progress of this approach to raising awareness, and identify any limitations. It was difficult to verify the extent to which women were, in fact, receiving reliable information about the mechanism, or to know how far the “word of mouth” was extending. Individuals with knowledge of the mechanism’s outreach acknowledged the challenges, noting that some women were likely not accessing the mechanism.<sup>22</sup> They also acknowledged that “word of mouth not reaching women” was something that needed to be improved.<sup>23</sup>

Barrick and its third party implementer did accept referrals and the names of alleged victims from the clinics and other external actors. Barrick and Cardno’s acceptance of these referrals was a positive example of engagement with civil society and helped to increase access to remedies for victims. Given that the clinics and other groups do not know the full universe of survivors, their targeted outreach, while important, could not overcome the disadvantages of relying on “word of mouth” rather than conducting general public outreach.

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18 This concern was communicated to Cardno by the clinics. *See e.g.*, Email from Sarah Knuckey to Joshua de Bruin, Senior Consultant, Cardno Emerging Markets (Australia) (Mar. 17, 2013) (on file with author) (“[T]here is a general concern that outreach in Porgera about the framework has not been adequate. A number of women we spoke with had not heard of the framework. There are no doubt other women in the community who we did not meet with, and who also do not know of the framework. It seems to me that more dedicated effort will be necessary to cast the net more widely.”).

19 In one case, a woman only learned about the remedy mechanism by overhearing other women talking about it. Interview 24-2013 (Mar. 8, 2013). Another woman said she did not access the remedial framework because she did not know what it was or understand what it was about. Interview 17-2013. Some women who moved to other areas did not know about the mechanism, and could not access its benefits. One interviewee explained that she did not know anything about the remedy framework because she was in another town for two months, and that she didn’t know anything about it before the interview. Interview 19-2013 (Mar. 7, 2013). *See also* Interview 29-2014; Interview 49-2014; Interview 50-2014 (Mar. 22, 2014); Interview 51-2014 (Mar. 22, 2014); Interview 24-2014. In 2015, while there were many women who by that point had heard of the mechanism, the clinics interviewed some women who said that they had heard too late to take part in the mechanism. Interview 5-2015 (Jan. 8, 2015).

20 Interview 31-2014 (Mar. 22, 2014).

21 *Id.* These reports were communicated to Cardno by the clinics. *See* Email from Tamara Morgenthau to remedy mechanism staff (Mar. 24, 2014) (on file with author).

22 Interview 21-2014 (commenting that the women brought into the framework were “the tip of the iceberg”).

23 *Id.*

Clinic research teams were frequently surprised by the levels of confusion or lack of knowledge among women about the remedy mechanism during visits to Porgera, and it is the clinics' considered view that there are likely additional women with credible claims who did not access the remedy mechanism.<sup>24</sup> In practice, the "word of mouth" strategy alone was too *ad hoc*, relied on the unpredictable actions of individuals outside the control of the mechanism, and did not have sufficient reach. More time and effort should have been invested in ensuring that women knew about the remedy mechanism and in taking steps to improve the outreach to mitigate the limitations of the chosen strategy.

*Intake process—point of entry:* Establishing a point of entry co-located with another service assisted accessibility. The single point of entry at a public location that became associated with the mechanism however, also had security implications and accessibility disadvantages because of the risk that women could be identified.

Given its public location, and that numerous women would often gather there together during the intake process, some claimants with heightened fears of retribution were likely reluctant to access the mechanism's office. Individuals with knowledge of the remedy mechanism also informed the clinics that the location may have prevented some women from submitting complaints.<sup>25</sup> The clinics were informed that there had been a suggestion at one point to provide a point of entry at the hospital.<sup>26</sup> However, based on the clinics' onsite observations and discussions with mechanism staff and sexual assault survivors, only one formal access point was created and publicly disclosed. Particularly given the security concerns rightly taken into account in determining the outreach strategy, the failure to apply more consideration to the risks of identification when entering the mechanism was a design deficiency. Better consideration should have been given to the intake process, including the number, location, and nature of the points of entry.

The limited scope of the Barrick remedy mechanism also had implications for accessibility, privacy, and security. Had the mechanism's scope covered all claims of assault, and not been limited to sexual violence, some women may have been able to openly take part in the mechanism without publicly revealing themselves to have been survivors of assault of a sexual nature. *See Part III, Section 3: Scope of Harms Remedied.*

*Intake process—time limits for making claims:* A related issue that compromised the accessibility of the remedy mechanism, particularly when combined with a more limited outreach approach, was the time limit imposed upon the lodging of claims. In order to be accepted, claims needed to be made within a specified, limited period. *See Part III, Section 3: Scope of Harms Remedied.*

In 2015, the clinics were provided information from local actors that scores of additional women wanted to access the mechanism.<sup>27</sup> The clinics were not able to interview all women in this set

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24 Since 2006, the clinics have repeatedly visited villages in Porgera, frequently holding individual, small group, and public meetings. They have often met individually with women or groups of women, and have faced few difficulties in doing so.

25 Interview 21-2014.

26 *Id.*

27 One local actor stated in January 2015 that he had created a list of women who wished to lodge complaints. Interview 8-2015 (Jan. 8, 2015). In October 2015, another local actor stated that his organization had the names of numerous women allegedly sexually assaulted who had not made claims through the remedy mechanism. *See* Email from

of alleged cases. However, at least one of the women interviewed by the clinics had serious and detailed allegations.<sup>28</sup>

The cut-off date for making claims likely prevented some women with legitimate claims from receiving the benefits of the mechanism, and limited its accessibility, particularly when combined with the limited outreach strategy. Survivors should not bear the burden of the deficiencies of the intake system, and at minimum, all women with legitimate allegations should be taken seriously and have access to an effective and independently administered remedial process.

*Managing security risks with case-by-case assessment:* It was incumbent upon the mechanism to conduct thorough and effective case-by-case security assessments with each woman as she entered the mechanism and throughout the process, including during the disbursement of packages. (*See further* Part III, Chapter 5: Reparations). Women faced different levels of risk associated with the assaults committed against them becoming known or discovered by others. Some of the rapes were already known; others were not. Some women had already divorced from their husbands or were not married. These different statuses entailed varying levels of physical risk, from little to near certainty of harm.

Barrick and Cardno made various efforts to protect women from risk. Barrick's decision to not release the names of victims discovered through its internal investigations in any public materials was good practice. In the clinics' dealings with Barrick's third party implementer, both management and staff took steps to guard the confidentiality of women (such as protecting the names of claimants). In addition, the remedy mechanism documents stated that claimants would be informed of the "steps available to maintain . . . confidentiality and the privacy," and noted that any cash awards would be "carefully considered and discussed" with each claimant to "minimize" risk.<sup>29</sup>

Yet, some women reported to the clinics that, following submission of cases to Barrick's remedy mechanism and following the remedy payments, women had been threatened or physically harmed by family members, often husbands. Women stated that this harm related both to family members' discovery of the women's rape, as well as to attempts to force the woman to share or hand over her remedy payment. While the exact causes of each incident are difficult to discern, it is likely that both intake procedures and remedy distribution were at times contributing factors. *See further* Part III, Chapter 5: Reparations.

These potential harms were foreseeable, and could have been better addressed before and as women accessed and moved through and out of the mechanism.

Effective, in-depth consultation with survivors before the mechanism began could have led to improved security processes, and comprehensive information about security and privacy risks could then have been included in mechanism outreach strategies. During implementation, strong individualized security assessments and risk management plans to maintain anonymity could have helped women to assess and mitigate the ramifications of participating. *See further* Part III, Chapter 5: Reparations.

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Langan Muri, Chairman, ATA, to Sarah Knuckey (Oct. 3 2015) (on file with author).

<sup>28</sup> Interview 5-2015.

<sup>29</sup> CLAIMS MANUAL, *supra* note 11, at 3, 6.

## Lessons Learned

Accessibility requires that survivors have information about a remedy mechanism and that this information is accurate and provided in a tailored way to each specific context. It also requires that individuals feel safe in accessing the mechanism, and that the mechanism has multiple and clear points of entry that allow people to maintain anonymity.

Strategic decisions about how best to make a remedy mechanism accessible to survivors in a particular context are vitally important, and the issues are challenging and complex. There is unlikely to be a single model that works for all circumstances, and it is important that decisions are made with careful consideration of local context, and on the basis of frequent input from the individuals who use the mechanism.

Involvement and empowerment of the rights-holders is essential to provide insights into what necessary measures ought to be taken. Rights-holders should be assisted in making informed decisions about participation, including through the provision of information about potential negative security or privacy implications of taking part in a mechanism.

*Outreach:* A public awareness campaign, using a variety of communication strategies including radio and other mass media, repeated in-person visits by officials to areas where affected communities live and work, together with targeted outreach to potential claimants, will often be the most effective way to broadly disseminate accurate information. Exclusive reliance on “word of mouth” outreach carries the inherent risk that potential claimants are not adequately informed or are misinformed about the mechanism. If a limited outreach approach is necessary for survivor security and privacy in a particular case, it is then incumbent on the company to take steps to mitigate the limitations of this approach. Mitigation steps might include extending the life of a remedy mechanism, and frequent, repeated village and household level outreach by mechanism staff.

Rather than seeking to address security and privacy concerns by limiting public awareness during the outreach stage, an alternative approach that might better balance security and privacy with awareness could be to pair broad public outreach with taking full account of security and confidentiality during all subsequent stages of the remedy process (including when designing points of entry, communication strategies with women through the process, and through to remedy disbursement).

*Intake process—points of entry:* Multiple points of entry to a remedy mechanism will often be important to maximize opportunities for access and maintaining privacy. A central, public location or other methods that do not maximize anonymity can create a risk of unwanted identification, which may deter some survivors who might otherwise have come forward from doing so. Multiple, publicly-disclosed points of entry can create more points of “cover” for women who understandably fear having their sexual assaults exposed. Mechanisms should also develop flexible procedures for arranging meetings in remote areas when necessary, as well as in secure and neutral locations.

*Intake process—time frames:* Generally, remedy mechanisms should be open for extended time periods, to ensure that as many potential survivors as possible have an opportunity to access them. Any decision to limit outreach and points of entry should also influence other accessibility decisions, such as expanding time frames for making a complaint. With longer time frames, women can have



a greater opportunity to learn about and travel to a mechanism office, which can help women who live farther away, or who are concerned with keeping their claims private and need more time to generate a reason to travel to the mechanism.

*Managing risk through consultation and individualized assessment:* The intended users of a remedy mechanism should themselves be extensively consulted about security and privacy concerns, and should be asked for input into how mechanism design and implementation can mitigate risks. In cases of potential risk, users should be able to make informed decisions about participation that include security and privacy considerations. The mechanism should also incorporate security and privacy experts who can work with rights-holders to proactively discuss individualized harm-mitigation strategies. Mitigation should consider entry into the system, moving through it, and dispersal of packages. Protection plans and implementation are likely to be resource intensive, but are critical, especially given the potentially serious ramifications.

I was shy; I couldn't let out all the stories but then somehow I found the courage and felt relief from what has been kept as a nightmare in my life . . . I really appreciate what the company is doing. Now I know the company can do something like this. Before I was locked up in my nightmares. Now, I have people to help me.

*- A woman from Porgera, Papua New Guinea*

## Chapter 5 Reparations

**Summary of Findings:** Barrick's overall response to sexual assaults by PJV personnel included important steps towards meeting some of the elements of full and effective reparations, including compensation, rehabilitation, and guarantees of non-repetition. In particular, the company has: improved policies to better prevent abuses committed by its security guards; provided remedy packages including some degree of compensation to a significant number of women; and made medical and counseling services available to sexual assault victims. Additionally, Barrick's remedy mechanism provided a forum in which victims of sexual violence could speak about the harms they suffered, and the remedy packages provided some women in Porgera with a degree of acknowledgement about the harm that was done to them. However, for many victims, remedies were offered years after the initial harm, and, while Barrick's program formally offered acknowledgement and regret about the sexual assaults, Barrick did not accept responsibility through the remedy agreements, and there has not been a full public reporting by Barrick of mine staff abuses. Many rights-holders perceived the remedy packages offered by Barrick to be insulting, unfair, inadequate, and failing to reflect the severity of the harms suffered. These perspectives were heightened when eleven women represented by U.S.-based attorneys reportedly received, in a separate settlement, remedies ten times greater than those awarded through the Barrick remedy mechanism. Furthermore, the manner in which the remedy packages were disbursed could have been better tailored to each individual's needs or their security concerns. Additional security and support measures are now needed: some women report that they have been threatened and assaulted by family members in attempts to take their remedy. Finally, while Barrick fired employees and provided evidence to police, and the mechanism could theoretically facilitate complaints by victims to the police and prosecutors, it appears that, to date, there have been no criminal convictions.

### Applicable Human Rights Principles

Victims of human rights violations have the right to an adequate, effective, prompt, and appropriate remedy, including reparations.<sup>1</sup> The UN Guiding Principles reiterate that fundamental right, noting that where a company has caused or contributed to human rights violations, it should "provide for or cooperate in their remediation."<sup>2</sup>

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1 Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, ¶ 2(c), G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) [hereinafter Right to Remedy Principles].

2 UN Office of the High Comm'r for Human Rights, Guiding Principles on Business and Human Rights, ¶ 22, U.N. Doc. HR/PUB/11/04 (2011). See also UN Office of the High Comm'r for Human Rights, *Opinion Re: Allegations regarding the Porgera Joint Venture Remedy Framework* 6 (July 2013), <http://www.ohchr.org/Documents/Issues/Business/LetterPorgera.pdf> [hereinafter *OHCHR Opinion*]:

Where outcomes have implications for human rights, care should be taken to ensure that they are in line with internationally recognized human rights. In other words, assessing whether the programme is rights-compatible in terms of the outcomes and remedies it offers to the claimants, reference should be had to applicable international standards on remedy, such as the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation.

Full and effective reparation includes (where appropriate to the circumstances of the case) measures in the form of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.<sup>3</sup> Survivors have a right to equal and effective access to justice, and to equality of treatment before the law.<sup>4</sup> Remedies should not be arbitrary, and similarly situated individuals should receive equitable amounts.<sup>5</sup>

Restitution should, in cases where it is possible, restore the victim to the position before the harm was suffered.<sup>6</sup>

Compensation is provided for economically assessable damage including for physical or mental harm, lost opportunities, material or moral damages, and costs for legal or other expert assistance.<sup>7</sup> Reparations should be proportional to the gravity of the violations and the harm suffered.<sup>8</sup>

Rehabilitation should include medical and psychological care and legal and social services.<sup>9</sup>

In addition to compensation and rehabilitation, in order to provide the “full and effective” remedy required by human rights law, measures of satisfaction are crucial.<sup>10</sup> These measures should include “full and public disclosure of the truth” (with necessary caution so as not to undermine the security interests of individuals), sanctions against persons responsible, commemorations and tributes to victims, and public apology including “acknowledgment of the facts and acceptance of responsibility.”<sup>11</sup>

Under human rights law, satisfaction includes administrative and judicial sanctions against perpetrators.<sup>12</sup> Judicial sanctions are a state function.<sup>13</sup> With respect to corporate responsibilities, the right to satisfaction would require the company to ensure internal administrative sanctions against responsible employees, to ensure that it cooperated fully with police and prosecutors and handed over relevant evidence, and to ensure that a grievance mechanism complemented rather than supplanted state judicial processes.<sup>14</sup>

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3 Right to Remedy Principles, *supra* note 1, ¶ 18.

4 *Id.* ¶ 12; UN Secretary-General, *Guidance Note of the Secretary-General, Reparations for Conflict-Related Sexual Violence*, ¶ 5, OHCHR (June 2014) [hereinafter *Guidance Note of the Secretary-General*]; UN Special Rapporteur on Violence against Women, its Causes and Consequences, *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences*, U.N. Doc. A/HRC/14/22 (Apr. 23, 2010) (by Rashida Manjoo); UN Special Rapporteur on Extreme Poverty and Human Rights, *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, ¶¶ 6-13, U.N. Doc. A/67/278 (Aug. 9, 2012) (by Magdalena Sepúlveda Carmona).

5 *See, e.g.*, Right to Remedy Principles, *supra* note 1, ¶¶ 18, 25.

6 *Id.* ¶ 19.

7 *Id.* ¶ 20.

8 *Id.* ¶¶ 15, 18.

9 *Id.* ¶ 21. Rehabilitation and compensation can overlap: the costs of medical services and counseling can, for example, be included in the compensation award. *See id.* ¶ 20(e).

10 *See* Brief for The Ctr. for Justice and Accountability et al. as Amici Curiae Supporting Appellees 17-19, *Mamani v. Berzain*, 654 F.3d 1148 (11th Cir. 2011) (No. 14-15128) (and jurisprudence cited therein) [hereinafter CJA Amicus Brief].

11 Right to Remedy Principles, *supra* note 1, ¶ 22.

12 *Id.*; CJA Amicus Brief, *supra* note 10, at 20-21.

13 Right to Remedy Principles, *supra* note 1, ¶ 22(f); International Covenant on Civil and Political Rights, Arts. 2, 3(b), Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 [hereinafter ICCPR].

14 Right to Remedy Principles, *supra* note 1, ¶¶ 22, 25 (commentary), 29 (commentary).

Guarantees of non-repetition should include measures to prevent harms occurring in the future.<sup>15</sup>

Reparations must also take into account the security of survivors, and consideration should be given for the security implications of the content of a remedy and how it is disbursed.<sup>16</sup> With respect to company-created remedy mechanisms, attention to security is necessary to ensure the mechanism's effectiveness and rights-compatibility, and to ensure that a company does not cause or contribute to further adverse impacts through its remedy mechanism.

### **Reparations Provided by Barrick**

Barrick initially provided remedy packages valued at, according to Barrick, on average 23,630 kina (USD \$9,248.17) to each woman.<sup>17</sup> This included direct compensation in the amount of 15,000 kina (USD \$5870.61), provided through the form of a "business grant." In addition to the kina that was disbursed, the packages also included rehabilitation measures in the form of counseling, medical expenses, business training, and school fees (or a financial supplement for those without need of school fees). In addition, satisfaction measures undertaken by Barrick included terminating the employment of some employees, referring some individuals for criminal investigation and prosecution, and acknowledging the sexual assaults. Important steps were also taken to cease and prevent future harms.

*Restitution and compensation:* Sexual assault victims interviewed by the clinics initially understood their remedy offers to consist of some goods and services. When the remedy mechanism first started, claimants explained to the clinics that remedy mechanism staff had offered them services, such as medical care, and a list of goods or items, such as chickens or second-hand clothes, from which women could choose. The items seemed to be offered with the intent that they would form the basis of small businesses which the women could start, although not all women interviewed were clear about the amount of goods being offered or the purpose. In its published remedy mechanism documents, Barrick has cited concerns for the safety of women should they receive lump sums of cash, although Barrick's remedy framework documents foresaw the possibility of cash payments being made to women.<sup>18</sup> Rights-holders and NGOs criticized the packages, as they were then understood, as not being proportionate to the gravity of the sexual assaults, and as not reflecting

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15 *Id.* ¶ 23.

16 *Id.* ¶ 12(b); *Guidance Note of the Secretary-General, supra* note 4, ¶ 16 ("Issues of security should also be considered.")

17 This conversion is calculated based on the exchange rate on December 1, 2014, the date of Barrick's Framework Summary Document. *See infra* note 20.

18 BARRICK GOLD CORP., A FRAMEWORK OF REMEDIATION INITIATIVES IN RESPONSE TO VIOLENCE AGAINST WOMEN IN THE PORGERA VALLEY 12 (2013), <http://www.barrick.com/files/porgera/Framework-of-remediation-initiatives.pdf> [hereinafter BARRICK REMEDY FRAMEWORK]:

Some participants [in Barrick's consultation meetings] recommended against there being any cash component as it would create a real risk that the Claimant would not get the benefit of any cash award; instead family members may appropriate the cash, often by using violence against the Claimant. There was also a concern expressed that the potential for a cash award would induce false claims, often with the Claimant being coerced through intimidation or violence into making the claim. Barrick has determined that there are compelling reasons for including awards of cash among the potential remedies available under the program where this is the stated preference of the Claimant. A primary guiding principle is that remedies should be designed based on principles of individual agency and empowerment of women to determine their own destiny. Another guiding principle is that awards should be culturally appropriate; as noted above, the granting of a cash award is consistent with cultural practice at Pongera. As a practical measure, it may be necessary to include a cash component as a means of facilitating another type of remedy.

the wishes of the sexual assault survivors.<sup>19</sup>

In 2014, the clinics learned that the women were not (or were no longer) being offered chickens or second-hand clothes. Copies of remedy agreements reviewed by the clinics in 2015 (most of which were identical or near-identical) indicate clearly that women were offered, in addition to health and other services, “business grants,” of 15,000 kina (USD \$5,870.61). In practice, the “grants” were paid as cash amounts deposited in bank accounts which the women could access at their discretion.

In December 2014, Barrick publicly reported that the average remedy package value was 23,630 kina (the highest was 32,740 kina and the lowest was 23,040 kina).<sup>20</sup> In a subsequent communication from Barrick to the clinics, Barrick confirmed these amounts.<sup>21</sup> However, numerous claimants showed the clinics original and signed remedy agreements that included total values that were lower than the amounts reported by Barrick.<sup>22</sup> The clinics have been unable to determine whether the error is in Barrick’s public reporting or in the signed agreements.

On April 3, 2015, eleven women (represented by U.S.-based NGO EarthRights International (ERI)) who had refused Barrick’s remedy packages through the mechanism and engaged in separate negotiations with Barrick, finalized their own agreements for remedy.<sup>23</sup> Although the terms of that settlement were not announced by Barrick or ERI, it is widely reported in Porgera that the eleven women received about 200,000 kina each. News of this settlement quickly spread in Porgera, and the women who had been given only a tenth of that reported amount through Barrick’s remedy mechanism organized themselves to privately and publicly petition the PRFA to provide them similar remedies (i.e., an additional 180,000 kina each).

Following the claimants’ advocacy, in June 2015, each of the women was offered an additional 30,000

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19 See, e.g., Letter from Catherine Coumans, Ph.D., Asia-Pacific Program Coordinator, MiningWatch Canada, to Dr. Navanethem Pillay, UN High Commissioner for Human Rights 2 (Sept. 4, 2013), [http://www.miningwatch.ca/sites/www.miningwatch.ca/files/letter\\_to\\_unhchr\\_re\\_porgera\\_opinion\\_2013-09-04.pdf](http://www.miningwatch.ca/sites/www.miningwatch.ca/files/letter_to_unhchr_re_porgera_opinion_2013-09-04.pdf); Sarah Knuckey, *On Australia’s doorstep: gold, rape, and injustice*, 5 MED. J. AUST. 305, 315 (2013).

20 BARRICK GOLD CORP., THE PORGERA JOINT VENTURE REMEDY FRAMEWORK 13 (Dec. 1, 2014), <http://www.barrick.com/files/porgera/Porgera-Joint-Venture-Remedy-Framework-Dec1-2014.pdf> [hereinafter BARRICK REMEDY FRAMEWORK SUMMARY].

21 Email from Peter Sinclair, Senior Vice President, Corporate Affairs, Barrick Gold Corp., to Sarah Knuckey (June 24, 2015) (on file with author) [hereinafter Email from Barrick (June 24, 2015)].

22 This included remedy amounts of 20,180 kina (Remedy Agreement XT6 (on file with author)), 20,720 kina (Remedy Agreement SW3 (on file with author)), 20,780 kina (Remedy Agreement RP2 (on file with author)), 21,320 kina (Remedy Agreement BK1 (on file with author)), 22,370 kina (Remedy Agreement DL9 (on file with author)), and 22,780 kina (Remedy Agreement QG8 (on file with author)). EarthRights International also published agreements that contained lower total amounts. See Reparations Package Proforma Agreement, [https://d2zyt4oqqla0dw.cloudfront.net/sites/default/files/documents/annex\\_3\\_-\\_redacted\\_package\\_2.pdf](https://d2zyt4oqqla0dw.cloudfront.net/sites/default/files/documents/annex_3_-_redacted_package_2.pdf).

23 Press Release, EarthRights International and Barrick Gold Corp. (Apr. 3, 2015), <http://www.earthrights.org/media/survivors-who-alleged-rape-and-killing-papua-new-guinea-mine-pleased-barrick-gold-settlement>:

Barrick Gold Corporation and EarthRights International (ERI) have negotiated a settlement of claims . . . . Eleven of these individuals are women with claims alleging acts of sexual violence, including rape. Pursuant to the terms of the settlement, the women will receive compensation under the Porgera Remedy Framework, and a payment in connection with their participation in the mediation process which led to the resolution of their claims. The remaining claims, which relate to alleged deaths, were lodged through the operational grievance mechanism at Porgera, and have also been resolved. All claimants are pleased with this resolution.”)

kina.<sup>24</sup> In October 2015, Barrick stated that it had no plans to provide further compensation.<sup>25</sup>

*Rehabilitation:* In addition to the “business grants,” many women were offered three years of school fees for their children. Some women were also offered the costs of resettlement to another village, or school fees for the claimants’ own education, or a small “financial supplement.”<sup>26</sup> The remedy contracts also generally (but not always) include provision for counseling services and medical costs, and women were offered business training.<sup>27</sup>

*Satisfaction:* After a number of years of investigation and advocacy by civil society groups, *see* Part I: Background, Barrick publicly *acknowledged*, on its website and in international fora, the occurrence of the sexual violence. According to their framework summary document: “at the conclusion of the process, the company formally apologizes to the claimant,”<sup>28</sup> and Business for Social Responsibility, the consultancy retained by Barrick, explained that “the inclusion of the waiver allows Barrick to issue a formal apology—an important component of remediating human rights impacts.”<sup>29</sup> However, while the written remedy agreements contain an acknowledgement and “regret” of harm, they explicitly do “not admit[] any liability” and do not include an apology.<sup>30</sup>

Barrick has publicly stated that sexual assaults occurred, but there has not been full and public disclosure of the nature and extent of the sexual violence and other abuses.<sup>31</sup>

Barrick reports that its mechanism was designed with the intent to complement and not replace the PNG criminal justice system.<sup>32</sup> This design intent would help facilitate the state’s fulfilment of its obligations to provide judicial sanctions. Barrick also reports that the PJV is a partner in a multi-stakeholder initiative designed to address rule of law concerns and to build the capacity of the justice system in PNG.<sup>33</sup> Barrick’s response to abuse allegations included internally investigating sexual

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24 Supplementary Payment Letter WN6 (on file with author); Supplementary Payment Letter KH4 (on file with author). *See also* Interview 11-2015 (July 24, 2015) (explaining that women went as a group to the remedy office, and told staff that they wanted an additional payment of 180,000 kina).

25 Email from Simon Jimenez, Director, Corporate Social Responsibility, Barrick Gold Corp., to Sarah Knuckey (Sept. 29, 2015) (on file with author) [hereinafter Email from Barrick (Sept. 29, 2015)] (“Barrick does not anticipate providing additional cash compensation beyond what was provided within the Framework.”).

26 Remedy Agreement QG8 (on file with author) (including cost of resettlement).

27 *See e.g.*, Remedy Agreement BK1 (on file with author); Remedy Agreement QG8 (on file with author); Remedy Agreement UJ7 (on file with author). The value of the business training was 180 kina and was to be paid directly to the service provider. The average cost of counseling for 12 sessions was 540 kina and was to be paid to the service provider. Medical expenses varied.

28 BARRICK REMEDY FRAMEWORK SUMMARY, *supra* note 20, at 10.

29 *Id.* at 44.

30 The recitals to the Individual Reparations Program Agreement state: “While not admitting any liability, Barrick acknowledges the Conduct, expresses its regret for the harm suffered by the Claimant . . . .” *See, e.g.*, Remedy Agreement DL9 (on file with author).

31 *SEE, E.G.*, CLAIMS PROCESS PROCEDURES MANUAL (undated) 3, <http://www.barrick.com/files/porgera/Claims-Process-Procedures-Manual.pdf> [hereinafter CLAIMS MANUAL]; BARRICK REMEDY FRAMEWORK SUMMARY, *supra* note 20, at 2, 3; Letter from Barrick Gold Corp. to Business and Human Rights Resource Ctr. (Feb. 2010), <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Barrick-Gold-response-re-Porgera-mine-Feb-2010.pdf>.

32 Barrick’s materials note that the mechanism was designed to complement PNG public policy and programs focusing on violence against women and human rights. *See* BARRICK REMEDY FRAMEWORK, *supra* note 18, at 14 (“Another significant guiding principle is that the program should be designed in such a way as to conform with or complement relevant elements of PNG public policy and programs dealing with the issues of [violence against women] and human rights more broadly.”).

33 BARRICK GOLD CORP., STATEMENT BY BARRICK GOLD CORP. IN RESPONSE TO HUMAN RIGHTS WATCH REPORT (Feb.

assaults, firing 14 employees,<sup>34</sup> as well as urging police to conduct investigations.<sup>35</sup> In 2011, Barrick stated that the evidence from its investigations led to several arrests, and that criminal investigations were then ongoing. However, while four arrests were made, it is the clinics' understanding based on questions to Barrick and to local officials that no convictions have yet resulted.<sup>36</sup> In addition to taking steps themselves, Barrick and remedy mechanism staff stated that they encouraged claimants to file complaints with the police, although the clinics have no data as to how many claimants did file complaints with police after they approached the remedy mechanism.<sup>37</sup> Reporting to the police was reportedly facilitated where appropriate, but was not mandatory.<sup>38</sup>

While states, not corporations, bear the legal obligation for ensuring criminal investigations and sanctions, corporations do have responsibilities to cooperate with such processes. A private actor mechanism alone cannot fulfill all elements of an individual's right to remedy because it cannot undertake criminal sanctions.

*Guarantees of non-repetition:* Barrick stated in 2011 that it had taken a number of steps towards the prevention of future harm, including through systems to monitor guards, enhancing human rights trainings for security personnel, and developing initiatives to address sexual violence generally in the Porgera Valley.<sup>39</sup> In 2014, Barrick reemphasized its "condemnation of violence against women in the strongest possible terms" and stated that those from Barrick "have zero tolerance for human rights violations and investigate all reports, suspicions or rumours of human rights abuses and take strong and appropriate action."<sup>40</sup>

## Human Rights Analysis

Barrick's remedy mechanism provided women who had been sexually assaulted by mine personnel with access to a remedy that many women reasonably considered would otherwise have been very difficult to obtain. It took steps towards meeting a number of the elements of an adequate, effective, and appropriate remedy. However, survivors' right to remedy and the corporate responsibility to provide a remedy have not been fully satisfied, and Porgeran women sexually assaulted by mine staff have serious concerns about the adequacy of Barrick's remedy. We address each element of reparation in turn below, focusing on the corporate responsibility and individual remedies provided through the Barrick mechanism, but noting additional elements as necessary to assess fulfilment of the victim's right to remedy.

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1, 2011), <http://www.barrick.com/files/porgera/Response-to-Human-Rights-Watch-Report.pdf> [hereinafter **BARRICK RESPONSE TO HRW REPORT**].

34 Email from Barrick (June 24, 2015), *supra* note 21.

35 BARRICK REMEDY FRAMEWORK, *supra* note 18, at 3.

36 Email from Barrick (June 24, 2015), *supra* note 21 (responding to the question, "how many Barrick employees were . . . [s]ubject to criminal investigation, prosecution, and conviction for any involvement in sexual abuse?" by stating, "13 incidents of criminality were identified, some involving sexual assault. Barrick provided 30 witness statements to the police. A total of four arrests were made.").

37 CLAIMS MANUAL, *supra* note 31, at 3 (stating that claimants are encouraged but not required to report criminal conduct to police). *See also* BARRICK REMEDY FRAMEWORK, *supra* note 18, at 13-14. *See also* Interview 11-2014 (Mar. 20, 2014) (noting that the ILA encouraged women to file complaints to the police and offered to help take them there, and expressing the belief that the claimants "hadn't made complaints because they were scared of police, they saw police as the ones who had done these things to them.").

38 BARRICK REMEDY FRAMEWORK, *supra* note 18, at 11.

39 BARRICK RESPONSE TO HRW REPORT, *supra* note 33.

40 BARRICK REMEDY FRAMEWORK SUMMARY, *supra* note 20, at 15.



Importantly, negotiating power appears to have been a significant factor in determining remedy package outcomes. Substantially larger remedies were reportedly provided when women were represented by U.S.-based attorneys through a process external to the remedy mechanism. Remedies were also improved when the claimants collectively acted to demand additional compensation in 2015, resulting in a supplemental payment that more than doubled the package provided through the mechanism. When women were isolated, acting alone, or not represented as strongly, their bargaining power was significantly lessened, which appears to have led to smaller average packages.

### *Restitution and Compensation*

A principal concern for rights-holders is that compensation offered through the remedy mechanism be proportional and just in light of the harm experienced, and not arbitrarily determined.

The value of remedies offered continues to raise serious concerns about proportionality and fairness. The vast differential in compensation given to those represented by U.S.-based attorneys as compared to those without similar representation also raises questions about arbitrariness, and highlights the critical importance of addressing negotiating power for the rights-holders in any mechanism.

*The harms:* The sexual assaults committed by mine staff caused and continue to cause grave harm to women. The women have suffered long-term and serious physical, psychological, and societal/communal impacts. Women have reported harms that include: peritraumatic and continuing fear; ongoing nightmares; anxiety; extreme physical pain at the time of and after the assaults; the need for ongoing medical care; fears about pregnancy and sexually transmitted diseases; treatment for infections contracted; menstruation and reproductive issues; miscarriages believed by women to be connected to harm caused by the assaults; dislocated bones; broken teeth; scars; hearing and visual impairments resulting from beatings; back pain; stomach and abdomen pain; digestive and intestinal issues; decreased sense of self-worth; discrimination and rejection by family and community members; demands from husbands for divorce and the return of bride price; and beatings and sometimes mutilation from male family members upon learning of the sexual assaults.<sup>41</sup>

A number of women emphasized their continued feelings of emotional pain, and shame. One woman expressed: “I don’t feel good about the rape that happened . . . I don’t feel good about myself . . . I’m still living with those feelings.”<sup>42</sup> In addition to feeling personally discriminated against by others in her community, this woman also experienced guilt associated with her belief that her family now has a “bad reputation.”<sup>43</sup>

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41 In the remedy mechanism’s individual claims assessments, a variety of harms were noted. *See, e.g.*, Claims Assessment Form TS7 (on file with author) (stating that the claimant was still traumatized and had constant nightmares, flashbacks of the incident); Claims Assessment Form ZE8 (on file with author) (noting that the claimant was raped by three men, was hit around the head and ears, and now finds it difficult to hear properly); Individual Reparation Program Form YF9 (on file with author) (noting that when the claimant’s husband discovered that she had been raped: “He started attacking her and told her to go marry the men who raped her. He ordered her to put out her hands so he could chop them off. When he swung the bush knife she moved her hands and only her last finger on the left hand was chopped off.”). Women often told the clinics about harms suffered in interviews. *See, e.g.*, Interview 31-2013 (Mar. 8, 2013); Interview 1-2015 (Jan. 8, 2015); Interview 2-2015 (Jan. 8, 2015); Interview 4-2015 (Jan. 8, 2015); Interview 23-2014 (Mar. 21, 2014) (“They belted me in the head several times, and they cut one of the nerves which goes through my eyes, and now I’ve got problems with both of my eyes”); Interview 7-2015 (Jan. 7, 2015); Interview 4-2013 (Mar. 6, 2014); Phone interview (Sept. 28, 2015).

42 Interview 4-2013 (Mar. 6, 2013).

43 *Id.*

*Reactions to initially reported packages:* Claimants understandably became greatly upset with the remedy packages as they initially understood them—believing the packages to consist of chickens, second-hand clothes, and other items as “remedy” for brutal rapes.<sup>44</sup> One claimant stated, “My life is important. It is our custom. If someone dies or if someone spoils the life of another person, we don’t give clothes. Or small money.”<sup>45</sup> Another explained, “[t]hese materials, sewing and things . . . these are not enough. With what happened to me . . . from our customs, we don’t pay compensation with these things. We pay with cash and other things.”<sup>46</sup> Another woman explained that she felt as though she was already dead, and chickens or second-hand clothes were not enough to compensate her for her life.<sup>47</sup> The early offers, as understood by the women, caused them emotional distress given how insignificant they were in comparison to the harm they had experienced. If these initial offers were indeed understood correctly, the packages should never have been offered in that form.

The final remedies offered in the remedy contracts were an improvement on what women initially believed they were being offered. The signed remedy agreements reviewed by the clinics almost all appear to envision the provision of “grants” to begin or strengthen small businesses (such as poultry farms or trade stores).<sup>48</sup> In practice, it does not appear that women were offered grants, but rather each woman received deposits of cash in her own bank account, and could spend it at her discretion.<sup>49</sup>

*Reactions to the remedy package agreements:* Numerous claimants interviewed did not consider the amount of compensation offered in the remedy agreements to be proportional to the gravity of the violations and harm suffered,<sup>50</sup> and expressed that the remedy does not adequately reflect their expectations of a just and fair remedy. One woman who reported being raped and beaten by ten mine personnel stated that: “[t]he amount given to us is not fair—it is not good enough. The pain and trauma is big. There was no option, so I took it . . . . These are lifetime injuries we are going through.”<sup>51</sup> Other women who spoke about the monetary compensation echoed the concern that the money was grossly inadequate. One woman said, “I was unemployed, four kids, jobless husband. My only way was to say yes. If during that time I had money, I would have told Barrick to get lost. It’s peanuts, it[] doesn’t compensate my life.”<sup>52</sup> Another said, “The remedy framework was set up by the company itself. The claim we put in was big amount of money. This framework is just like a mother buying a crying child a small snack. The company set up the framework so they can just pay us small money.”<sup>53</sup>

Another woman expressed: “As for me, I feel that the payment that was paid is making us feel embarrassed. I am not happy with the payment. It is embarrassing to women.”<sup>54</sup> One woman stated:

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44 See, e.g., Interview 2-2013 (Mar. 6, 2013); Interview 6-2013 (Mar. 6, 2013); Interview 14-2013 (Mar. 7, 2013); Interview 21-2013 (Mar. 8, 2013); Interview 23-2013 (Mar. 8, 2013); Interview 63-2014 (May 7, 2014).

45 Interview 21-2013.

46 Interview 14-2013.

47 Interview 17-2013 (Mar. 7, 2013).

48 See, e.g., Remedy Agreement UJ7 (on file with author); Remedy Agreement BK1 (on file with author).

49 Email from Barrick (June 24, 2015), *supra* note 21.

50 See, e.g., Interview 1-2014 (Mar. 19, 2014); Interview 3-2014 (Mar. 19, 2014); Interview 4-2014 (Mar. 19, 2014). See also Interview 18-2014 (Mar. 21, 2014); Interview 19-2014 (Mar. 21, 2014); Interview 22-2014 (Mar. 21, 2014).

51 Interview 35-2014 (Mar. 22, 2014).

52 Interview 7-2015 (Jan. 7, 2015).

53 Interview 4-2014 (Mar. 19, 2014).

54 Interview 11-2015 (July 24, 2015).

We have been abused by the company and we have been badly raped by the company's security and the company treated us like pigs and dogs. In our culture, when someone does something bad, we pay a big amount of compensation. But what the company is doing is just buying twisties [a snack] for women.<sup>55</sup>

Forces such as poverty, lack of viable alternatives, years of waiting, and barriers to justice through the national legal system,<sup>56</sup> left numerous women feeling as though they had no option but to accept the compensation package.<sup>57</sup> “Since I am not going to get anything from my land, I must get it [the compensation] to survive,” one woman said.<sup>58</sup>

Another explained why she signed the agreement despite being dissatisfied with the compensation: “I don’t have anywhere else to go. Nobody is looking at me. There is no option. I would just die like this.”<sup>59</sup> “Barrick is a big company,” said another claimant, “how can I put them to court?”<sup>60</sup> Women explained that the compensation was offered on a “take it or leave it” basis: “Cardno told us we had to sign or we wouldn’t get the remedy . . . . All the 120 women are not satisfied with the payment. Everyone disagrees with the smaller payment. Everyone will come and say the same thing.”<sup>61</sup> A group of claimants did make requests through the remedy mechanism for greater compensation amounts (exceeding the 20,000–25,000 kina packages generally offered), but the PRFA Advisory Panel denied those requests.<sup>62</sup>

A small number of the women interviewed by the clinics expressed initial positive reactions to the amounts offered in the remedy agreements.<sup>63</sup> However, when women in Porgera became aware that eleven women represented by ERI received what they believed to be remedies *ten times* greater than those awarded through Barrick’s mechanism, negative views about the remedy packages cemented and increased. When the clinics conducted interviews in July 2015, women voiced this perceived unfairness between the two groups. One woman said:

I was not satisfied with what they paid us. Some got a lot, and some of us got less. We got bad names. We were colored with the bad name of rape. But some got 75,000 or 200,000.

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55 Interview 4-2014.

56 See *infra*, *Judicial and administrative sanctions*.

57 See, e.g., Interview 10-2014 (Mar. 20, 2014) (“I do not want to wait anymore . . . . Even though I am not happy I have to accept it because it was brought into my attention.”); Interview 13-2014 (Mar. 20, 2014) (“I don’t like this [offer], but I did sign the agreement because I wanted the money.”); Interview 18-2014 (Mar. 21, 2014) (“I am accepting this little money because I have no other way to get some money. I see this as the only chance, so I have to accept.”); Interview 22-2014 (“I just signed it to get the money and I know I won’t get help from anywhere else.”); Interview 23-2014 (Mar. 21, 2014) (“I don’t like the package, but I’ll still take it . . . . I have no choice, so I accept it . . . . I have been waiting for so long . . . so I just sign it so I can get the compensation quickly.”); Interview 32-2014 (Mar. 22, 2014) (“If I take them to court, it will take another couple years, so I accept the package.”); Interview 35-2014 (Mar. 22, 2014) (“I didn’t have any choice, so I took it—it’s better than nothing . . . . I don’t have money to take a gold mine to court.”).

58 Interview 44-2014 (Mar. 22, 2014).

59 Interview 36-2014 (Mar. 22, 2014); see Part III, Chapter 1: Promptness.

60 Interview 30-2014 (Mar. 22, 2014).

61 Interview 10-2015 (July 23, 2015).

62 See, e.g., Email from Marco Simons, Legal Director, EarthRights International, to Joshua de Bruin, Project Director, Cardno (Nov. 27, 2014) (on file with author).

63 See Interview 46-2014 (Mar. 22, 2014) (“I think 20,000 kina is enough and I’m happy to get that money.” However, within the same interview the claimant stated: “The company has taken everything from me and I don’t think I will get anything else.”); Interview 13-2014 (Mar. 20, 2014) (explaining that 20,000 kina was a good amount); Interview 27-2014 (Mar. 22, 2014) (stating that she was happy to receive the money).

We are not happy . . . . We are about 120 women. The eleven women got more than us. But we live in the same community.<sup>64</sup>

Another woman raised the question of why the eleven women got 200,000 kina: “Were they raped in their ears? They were raped just like us.” Women see no difference between the two sets of cases, except that the group of eleven women were represented by U.S.-based lawyers in a negotiation process outside Barrick’s remedy mechanism. Women protested their smaller remedy packages, and publicly demanded packages of equal value to those given to the eleven women. In June 2015, Barrick offered each woman an additional 30,000 kina,<sup>65</sup> an amount which many women consider insulting and insufficient.<sup>66</sup> The disparity has led to a great deal of resentment and sadness among the women who went through Barrick’s mechanism. One woman described their shared resentment and confusion with the disparate treatment:

[We are] all harmed the same. Company is the same. Our case is the same. Barrick must treat us equally.<sup>67</sup>

In September 2015, Porgeran women informed the clinics that they had heard rumors that Barrick was going to pay further compensation, and asked the clinics to clarify with Barrick. Barrick told the clinics that the company did “not anticipate providing additional cash compensation beyond what was provided within the Framework.”<sup>68</sup> When this information was conveyed to women, they reported being deeply dismayed and upset. They had been hopeful that they would receive sums equal to those women represented by ERI. The women remain hopeful, and insist that they should be compensated equitably.<sup>69</sup>

*Proportionality and consistency:* Several human rights concerns arise with regards to the remedies provided. Remedies should not be arbitrary and should be “proportional to the gravity of the violations and harm suffered.”<sup>70</sup>

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64 Interview 10-2015 (July 23, 2015).

65 Supplementary Payment Letter WN6 (on file with author); Supplementary Payment Letter KH4 (on file with author).

66 The clinics expected to find in July 2015 that women would be very happy with the additional 30,000 kina. Instead, questions about the additional payments were met with significant expressions of anger and perceived unfairness. A number of women stated that they considered refusing the 30,000 kina as a sign of protest. *See* Interview 10-2015 (July 23, 2015) (“We complained about the amount given to the other women. We thought we would get the same. But they only gave us 30,000. We thought they would pay us for 3 years. Barrick and Cardno team told us they would look after us for 3 years. First year, they gave us 20,000. This year, 30,000. Next year, more.”); Interview 11-2015 (July 24, 2015) (“We didn’t want to accept the 30,000. We told [staff in the remedy office] it wasn’t fair if others got 200,000. We thought we would receive the same. [Staff] said it was the final payment. People could sign the papers or not. There were so many ladies there at Station. All of us we told [the staff]. We were complaining about the 30,000. We were not happy to take the 30,000.”); Interview 12-2015 (July 24, 2015) (A group of women explained that they went as a group to PRFA. They explained, “[w]e wanted [an] additional payment. We said these other women got 200,000. We said we wanted another 180,000. [The woman in the office] said she’d send to Cardno who would talk to Barrick. We were waiting and waiting until we received the 30,000 kina. This 30,000, we didn’t want to take it. We expected 180,000. [The woman in the office] said, whether we like it or not, we take it. She said whether we signed for it is up to us.”).

67 Phone interview (Oct. 12, 2015).

68 Email from Barrick (Sept. 29, 2015), *supra* note 25.

69 Phone interview (Sept. 28, 2015); Interview 11-2015; Interview 12-2015.

70 Right to Remedy Principles, *supra* note 1, ¶ 15. Barrick states that the framework was developed using the Right to Remedy Principles. *See*, BARRICK REMEDY FRAMEWORK, *supra* note 18, at 10; *See also* Sarah Knuckey & Eleanor Jenkin, *Company-created remedy mechanisms for serious human rights abuses: a promising new frontier for the right to remedy?*, 663 INT’L J. HUM. RTS. 801, 809 (2015).

The differences in compensation received amongst individuals who appear to be similarly situated with regards to their harms raises concerns about equitability, fairness, and arbitrariness. It is also concerning that the mechanism was completed and had provided “final” packages and then suddenly—without any apparent formal procedure—the amounts were more than doubled without a clear explanation.

Barrick states that the mechanism is “rights-compatible”<sup>71</sup> and that the remedies offered ensured “proportionality” and complied with the UN Guiding Principles on Business and Human Rights.<sup>72</sup> However, there are serious concerns about whether the packages signed by women meet international legal standards for remedies. “Proportionality” concerns in this case have related to both the *nature* as well as the *quantum* of compensation. As discussed above, concerns about the exact nature of the content of each package have shifted during the course of the remedy mechanism—with there being early concerns particularly about packages that might involve chickens and used clothes, for example. As the mechanism has closed, proportionality concerns now primarily relate to the quantum or valuation of the compensation that has been provided.

*Determining the valuation:* With respect to how quantum was determined, Barrick’s materials can be difficult to understand and raise concerns about both arbitrariness and proportionality.

Earlier materials appear to give the impression that PNG domestic awards were a reference point or benchmark for the quantum. Barrick’s 2013 framework document states that “the range of damages awards made by PNG courts for proven instances of rape, similar to those experienced at Porgera, will be considered as a point of reference for the total value of the remediation package.”<sup>73</sup> In a subsequent document in 2013, Barrick stated that “the total value of remedy packages provided are determined based on reference to . . . [among other factors] the upper levels of compensation that have been awarded by PNG courts in civil claims concerning rape and sexual assault,”<sup>74</sup> and in 2014 Barrick stated that “the total value of the remedy package was benchmarked against the upper range of awards that have been rendered in the PNG civil justice system for rape and sexual assault.”<sup>75</sup> However, in some communications, a different impression is given. For example in a 2015 communication with the clinics, Barrick stated that the company only set “a general lower limit for remedy package value—not an upper limit. The lower limit was benchmarked against the

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71 BARRICK REMEDY FRAMEWORK SUMMARY, *supra* note 20, at 10.

72 BARRICK, A SUMMARY OF RECENT CHANGES TO THE PORGERA REMEDIATION FRAMEWORK 3 (June 7, 2013), <http://www.barrick.com/files/porgera/Summary-of-Recent-Changes-to-the-Porgera-Remediation-Framework.pdf> [hereinafter BARRICK, A SUMMARY OF RECENT CHANGES].

73 BARRICK REMEDY FRAMEWORK, *supra* note 18, at 12. *See also* Letter from Peter Sinclair, Vice President, Corp. Social Responsibility, Barrick Gold Corp., to Dr. Navanethem Pillay, UN High Commissioner for Human Rights 4 n.13 (Mar. 22, 2013), <http://www.barrick.com/files/porgera/Letter-to-UN-High-Commissioner.pdf> (“A recent enhancement is to make clear that, while each remediation package will be distinct, the CAT, independent expert, and review panel will bear in mind the range of awards that have been rendered in the Papua New Guinea civil justice system for rape and sexual assault.”). The OHCHR appears to have understood the offered remedy amounts as typical of a PNG judicial damages award. *See OHCHR Opinion*, *supra* note 2, at 11:

These programs will be chosen with the claimant during the follow-up meeting, and selected from a standard range of programmes available to claimants in general. These may include, but are not limited to: counseling, health care, education and training, appropriate financial reparations for personal harm or economic damage suffered (at levels reflecting those awarded for sexual offences in the civil justice system in Papua New Guinea).

74 BARRICK, A SUMMARY OF RECENT CHANGES, *supra* note 72, at 2-3.

75 BARRICK REMEDY FRAMEWORK SUMMARY, *supra* note 20, at 6.

upper range of awards that have been rendered in the PNG civil justice system for rape and sexual assault [found to be 20,000-25,000 kina], as identified by external legal counsel based on a review of published decisions.”<sup>76</sup> It is not clear whether the “reference” amounts were focused solely on cases of sexual assault, or if the legal research also examined cases of torture, multiple and repeated rapes, or corporate liabilities.<sup>77</sup> The company said that the remedy mechanism itself, independently of Barrick, could determine the amounts, above the lower limit.<sup>78</sup>

Barrick states that the amounts awarded to women generally were of about 23,630 kina of which 15,000 kina was direct compensation in the form of a “business grant.” Therefore, it appears that in practice, the awards given by the remedy mechanism were generally “benchmarked” against the amounts Barrick’s retained lawyers advised represented the upper limit.

What is ultimately essential is that compensation be proportional to the human rights violation and not arbitrary. Available domestic remedies should not be determinative of this assessment.<sup>79</sup> This is particularly so where a domestic judicial system is regularly criticised for failing survivors of abuse. Awards made in comparable domestic cases are a relevant, but not decisive consideration.<sup>80</sup> Both the European and the Inter-American human rights courts have emphasized that compensation must be awarded on an equitable basis, and have departed from domestic awards if found inequitable.<sup>81</sup>

Here, there are serious equity concerns about using the PNG amounts as a dominant “reference point” or “benchmark” because women also had to sign legal waivers, which purport to prevent them from seeking compensation in countries like the United States, Australia, or Barrick’s home state of Canada, where payments would be significantly higher.<sup>82</sup>

Given that the waivers purport to preclude civil action in all foreign jurisdictions, it is especially important to question whether the sums offered by Barrick, a company operating outside of its home country, have taken into account the average awards in jurisdictions that would have otherwise been available.<sup>83</sup>

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76 Email from Barrick (June 24, 2015), *supra* note 21. Barrick states that it retained a law firm to analyze published case law in PNG, and that the firm found that damages awarded for similar cases of rape have been within the upper range of 20,000 to 25,000 kina. See CLAIMS MANUAL, *supra* note 31, at 6. See also Letter from Patrick Bindon, Manager, Corp. Affairs, Australia–Pacific, Barrick Gold Corp., to Sarah Knuckey (Mar. 26, 2013) (“Our stated position, in fact, is that such civil awards more properly should be considered a floor for claims believed to be legitimate, particularly where there are aggravating circumstances.”).

77 See Sarah Knuckey & Eleanor Jenkin, *Company-created remedy mechanisms for serious human rights abuses: a promising new frontier for the right to remedy?*, 663 INT’L J. HUM. RTS. 810 (2015).

78 Email from Barrick (June 24, 2015), *supra* note 21 (“The company felt it was not appropriate for it to dictate any element of potential remedy, beyond setting broad lower limit . . . Those determinations were to be made solely by the local experts implementing the program.”).

79 See, e.g., Right to Remedy Principles, *supra* note 1, ¶¶ 12, 18; Velasquez Rodriguez, Compensatory Damages, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 7, ¶ 30 (July 21, 1990) (discussing how fair compensation, as a principle of human rights, is not limited to “deficiencies of national law, but functions independently of it.”).

80 *Z & Others v. UK*, 34 Eur. H.R. Rep. 3, ¶¶ 120, 131 (2001) (applying the principle that “the rates applied in domestic cases, though relevant, are not decisive.”).

81 *El Amparo v. Venezuela*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Sept. 14, 1996); Velasquez Rodriguez, *supra* note 79, ¶ 30; *Z & Others v. UK*, *supra* note 80, ¶ 131 (determining that equity required a departure from the levels of awards in similar cases in domestic court).

82 See Sarah Knuckey & Eleanor Jenkin, *Company-created remedy mechanisms for serious human rights abuses: a promising new frontier for the right to remedy?*, 663 INT’L J. HUM. RTS. 810 (2015).

83 *Id.* In addition, given that part of the purpose of compensation is to serve as a deterrent to future human rights

The additional payments of 30,000 kina in June 2015 more than double the value of the remedy offered, and thus raise concerns about whether remedy determinations were arbitrary and inequitable. Although the quantum of compensation had previously been finalized, an extra amount was offered to each woman after the public outcry that followed the reports that women represented by ERI received ten times greater remedies. Barrick stated that “following discussions with eligible claimants, it was determined that each claimant who had resolved their claims through the Framework would receive an additional 30,000 Kina in financial compensation,”<sup>84</sup> and that this additional sum was arrived at “in conjunction” with PRFA.<sup>85</sup> It is not clear how the 30,000 kina figure was arrived at (or why a sum of 180,000 kina was not given to match the reported amounts given to women represented by ERI). It is not clear why Barrick was willing to pay this additional sum of money when the company previously has defended the rights-compatibility of the remedy mechanism and its remedy packages. Further, while Barrick has stated that this sum “was intended to broadly bring claimants who resolved claims under the Framework into line with the second set of claimants who settled their claims outside of the remediation framework,” ERI has stated that the compensation received by claimants in the remedy mechanism, including the recent 30,000 kina additional compensation, is not “broadly in line” with the compensation received by ERI’s clients.<sup>86</sup>

*Individually tailoring packages:* In addition to concerns about the consistency of the packages and whether they generally were proportionate to the harms, there are concerns about whether the packages were appropriately tailored to each woman.

It is unclear to the clinics if Barrick or Cardno worked from any specific guidelines related to defining the content of the individual remedy packages. Barrick’s framework documentation gives the impression that the packages were individualized, which would have helped to ensure that the unique needs of individual women were met.<sup>87</sup> Yet the packages were largely set *for*, not *with*, the claimants.<sup>88</sup> In practice, the amount of compensation and the amount of services were broadly set, so that the packages were generally nearly identical. For instance, if a woman did not have children, she would generally receive 5,000 kina more in financial compensation to make her package equivalent to the amount of school fees given to women that did have children.<sup>89</sup> Although women report suffering a wide range of abuse—some, for example, report being gang raped; some report suffering additional physical assault; some report suffering long-term physical injuries; some reported being raped on multiple separate occasions,<sup>90</sup> and some presented in interviews with symptoms consistent with severe PTSD and/or depression—it is not clear the extent to which or how such circumstances were individually accounted for in the packages. One woman explained:

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abuse, it is worth considering whether the relatively low amounts awarded could fulfil that purpose. See DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 14 (2d ed. 2005).

84 Email from Barrick (Sept. 29, 2015), *supra* note 25.

85 *Id.* (“The amount was determined in conjunction with the independent and external entity that oversaw the implementation of the Framework.”).

86 EARTHRIGHTS INTERNATIONAL, EARTHRIGHT INTERNATIONAL’S RESPONSE TO BARRICK GOLD’S STATEMENT (Nov. 6, 2015), <http://www.earthrights.org/blog/earthrights-internationals-response-barrick-golds-statement>.

87 See, e.g., BARRICK REMEDY FRAMEWORK, *supra* note 18, at 7-8 (“[T]he individual reparations program will consist principally of the provision of individualized services.”).

88 See Interview 33-2014 (Mar. 22, 2014) (“We never asked them for what we want but this is the package they set up for us.”).

89 Interview 21-2014 (Mar. 21, 2014).

90 Remedy Agreement CD5 (on file with author) (noting that in one incident, the claimant was sexually assaulted by one man, and then gang raped in a subsequent year.)

“Some women have minor injuries. Some have big injuries. But the remedies are all the same.”<sup>91</sup>

Importantly, the standardization additionally meant that packages were inadequately tailored to respond to each woman’s security and familial situation. *See* Security and Remedy, below, for additional treatment of this concern.

### *Rehabilitation*

In the clinics’ view, the mere existence of the mechanism, and the positive relationships developed between mechanism staff and some women, contributed to a certain degree of recognition for the harms suffered by some Porgeran women. Some women told the clinics how important it had been for them to be able to speak about the abuses they suffered. Some initially talked about the framework as a means to free themselves from a “nightmare.”<sup>92</sup> While talking about the ILA and Cardno, one of the women stated that she was happy to have been able to speak to them about her problems and get their assistance.<sup>93</sup> Another woman expressed that while she was not happy about the value of the package, she was happy that Cardno listened to her and other women’s stories.<sup>94</sup>

Importantly, remedy contracts provided for counseling, which was reportedly made available to all women. Some women found it useful in the healing process and to instill a sense of courage.<sup>95</sup> However, some women told the clinics that they did not know what counseling was; others said that they had not been personally provided it, or did not think that the counseling provided was good.<sup>96</sup> Numerous survivors and those assisting survivors expressed to the clinics through 2015 their strong interest in receiving counseling training and becoming counselors in Porgera.

All claimants were reportedly entitled to medical care related to their assaults.<sup>97</sup> Initially, it appeared that the mechanism would only pay for medical care for those women who had accepted the remedy package and signed a waiver of their legal rights to sue.<sup>98</sup> But after concerns were raised by Cardno and civil society groups about excluding some women, Barrick clarified that all eligible claimants could receive medical care, regardless of whether they signed a waiver.<sup>99</sup>

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91 Interview 35-2014 (Mar. 22, 2014).

92 Interview 44-2014 (Mar. 22, 2014) (“I was shy, I couldn’t let out all the stories but then somehow I found the courage and felt relief from what has been kept as a nightmare in my life . . . I really appreciate what the company is doing. Now I know the company can do something like this. Before I was locked up in my nightmares. Now, I have people to help me.”).

93 Interview 30-2014 (Mar. 22, 2014) (“Barrick never looked up for us, puts eyes on us, when Cardno team is coming up, they do good things for us, help us.”).

94 Interview 32-2014 (Mar. 22, 2014).

95 *See* Interview 1-2015 (Jan. 2, 2015) (“That counseling gave me courage that I was able to do what other ladies do . . . It helped me a lot.”). *See also* Interview 7-2015 (Jan. 7, 2015) (“[I]t’s helping me to release my inner feelings.”).

96 *See* Interview 2-2015 (Jan. 8, 2015); Interview 4-2014 (Mar. 19, 2014).

97 Interview 21-2014 (Mar. 21, 2014); CLAIMS MANUAL, *supra* note 31, at 6. However, not all agreements reviewed by the clinics contained a provision for medical care. *See* Remedy Agreement HR3 (on file with author); Remedy Agreement QG8 (on file with author); Remedy Agreement SR7 (on file with author).

98 *See, e.g.*, Interview 63-2014.

99 Interview 21-2014; Press Release, MiningWatch Canada, Rape Victims Must Sign Away Rights to Get Remedy from Barrick (Jan. 30, 2013), <http://www.miningwatch.ca/news/rape-victims-must-sign-away-rights-get-remedy-barrick>. Barrick subsequently clarified the framework. *See* BARRICK, CLARIFICATION OF THE PORGERA REMEDIATION FRAMEWORK (Dec. 3, 2013), <http://s1.q4cdn.com/808035602/files/porgera/Clarification-of-the-Porgera-Remediation-Framework.pdf>. However, several women who had accessed the mechanism in the last rotations reported that they were only able to gain medical care after signing the waiver. *See, e.g.*, Interview 1-2015; Interview 4-2014. It is not fully clear to the clinics whether this arose from miscommunication, misunderstanding, or a failure to properly implement the clarified policy.



Medical care, if properly provided, is a significant contribution to rehabilitation and could support the well-being and protection of the women in the long term.<sup>100</sup> However, some women reported that they did not receive adequate treatment.<sup>101</sup> Several women stated that the medical care was only covered up to a certain amount, and that care would discontinue once that amount was reached.<sup>102</sup> There was confusion about how much money was allocated for health care services and how the money for health care was administered.<sup>103</sup>

Business training was also provided to women as part of their remedy packages. The business training, combined with the cash compensation, appears to have been intended to assist the women in developing a sustainable income. Claimants have expressed positive responses to the business training aspects of the remedy packages.<sup>104</sup> Several women supported the idea of using the cash and training to start businesses to support themselves and their children.<sup>105</sup> One woman told the clinics, “I am feeling happy because I didn’t know how to budget and they are teaching me to budget.”<sup>106</sup> While the business training sessions represent an important step in supporting women in the establishment of businesses and achieving self-sufficiency, the level of training provided does not appear to have adequately met that goal. When the clinic interviewed an individual with knowledge of the mechanism, she echoed this concern:

If this process is to be genuine, and long-term and sustainable, more must be done. They can’t just have one or two training sessions. They need long-term training and assistance, not a short training without continued engagement or follow-up. The businesses need to be monitored. The women need ongoing support. They need to know their legal rights. They need empowerment. The training now is two weeks. It is not enough. Many women are illiterate. They need long-term support.<sup>107</sup>

Many women expressed a desire for a longer-term intervention.<sup>108</sup> It is crucial that these aspects of the packages receive continued support and monitoring to ensure that they meet the goal of increasing “individual agency and empowerment of women to determine their own destiny.”<sup>109</sup>

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100 BARRICK, CLARIFICATION OF THE PORGERA REMEDIATION FRAMEWORK (Dec. 3, 2013), <http://www.barrick.com/files/porgera/Clarification-of-the-Porgera-Remediation-Framework.pdf>; See Interview 21-2014 (The medical care was to include two gynecological exams and payment of all rape-related medical services, which if necessary, could include specialist treatment in Port Moresby. If a woman had paid rape-related medical fees prior to making the claim they would receive reimbursement of 75%). See also BARRICK GOLD CORP., BARRICK CORRECTS FALSE CLAIMS CONCERNING REMEDIATION PROGRAM AT PORGERA (Feb. 1, 2013), <http://www.barrick.com/files/porgera/Barrick-corrects-false-claims-concerning-Remediation-Program-at-Porgera.pdf>.

101 Interview 1-2015 (Jan. 2, 2015) (“Health [program] is very poor”); Interview 3-2015 (Jan. 8, 2015) (“I’m willing and I’m happy to go to the other hospital and the PRFA didn’t make a recommendation to the other hospitals, so I’m still where I am. I’m thinking that this is the end of my life.”); Interview 4-2015 (Jan. 8, 2015).

102 Interview 1-2015 (“The 400 is not enough for our health, the health issue is very poor. Our doctors are working properly, but we don’t have enough to cover the fees.”); Interview 4-2015 (“I went to Paiam hospital once, but never again. They told me that I had no more money to go.”).

103 Interview 4-2015 (Jan. 8, 2015) (“I think the medical package was 5,000. But I don’t know how we have used that money up. I don’t know how much my medical package was.”).

104 See, e.g., Interview 1-2015 (“I went to the business training. It helped me so much.”).

105 Interview 22-2014 (Mar. 21, 2014); Interview 44-2014 (Mar. 22, 2014).

106 Interview 30-2014 (Mar. 22, 2014). See also Interview 26-2014 (Mar. 21, 2014) (a member of a local civil society group stating that the training was a good element of the mechanism.).

107 Interview 11-2014 (Mar. 20, 2014).

108 Interview 4-2015. (When asked about the business training one claimant said, “That was a good training,” but added “they should have given us more time.”).

109 BARRICK REMEDY FRAMEWORK, *supra* note 18, at 12.

From a human rights perspective, the rehabilitation efforts included key measures, including counseling, medical care, and support of livelihoods. The concerns to date have come during implementation and follow through, and require ongoing monitoring and measures to continue to support rehabilitation.

### *Satisfaction*

*Public apology and acceptance of responsibility:* A number of women expressed a desire for formal apology.<sup>110</sup> Barrick publicly *acknowledged* the occurrence of sexual assaults at its Porgera mine through press releases and statements in documents published on its website. It has also done so in international business and human rights fora, and has—through its remedy contracts—directly acknowledged to individual women the harms caused.

Some claimants viewed the remedy packages as an “apology,”<sup>111</sup> and Barrick stated that it would apologize to each claimant at the end of the remedy process.<sup>112</sup> However, Barrick’s signed remedy agreements with women express “regret,”<sup>113</sup> but do not provide an apology, and they explicitly disavow liability. While Barrick has used the word “reparation” to describe its program,<sup>114</sup> Barrick’s program might thus be understood as equivalent to *solatia* or condolence payments connected to harm, rather than as true reparations connected to an admitted violation of a human right for which responsibility is accepted.

As far as the clinics are aware, Barrick staff did not visit villages around the mine to acknowledge or apologize for assaults. Given that the most important audiences for public acknowledgement are the Porgeran communities directly affected by security guard abuses, and that most Porgerans do not have access to the internet or to international conferences, “public” acknowledgement and apology in this context should include in-person statements delivered at the village or household level.

As examined in Part III, Chapter 3: Scope of Harms Remedied, the remedy mechanism only handled cases of sexual assault, and did not respond to the many credible allegations of non-sexual assaults. This exclusion exists despite longstanding, extensive, and serious allegations of non-sexual abuses committed by the security guards against male and female members of the Porgeran community. Ignoring these abuses in public responses to security guard abuse allegations, and failing to open the remedy mechanism to such cases, has led to a great deal of confusion amongst the local stakeholders as to why the scope of the mechanism does not acknowledge or adequately reflect the widespread harm suffered by the local community and certain classes of individuals.<sup>115</sup>

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110 See, e.g., Interview 13-2014 (Mar. 20, 2014) (When asked if the company apologized, the claimant said no and expressed that she wants them to).

111 See, e.g., Interview 19-2014 (Mar. 21, 2014) (A woman stated that Barrick has not personally apologized to her but “through these actions, by paying school fees, training, medical fees the company has apologized by what it’s doing to me.”).

112 BARRICK REMEDY FRAMEWORK SUMMARY, *supra* note 20, at 10.

113 BARRICK REMEDY FRAMEWORK, *supra* note 18, at 45. (The final paperwork given to the claimants states, “While not admitting any liability, Barrick acknowledges the Conduct, expresses its regret for the harm suffered by the Claimant . . .”).

114 See, e.g., Remedy Agreement QG 8 (on file with author).

115 Sarah Knuckey & Eleanor Jenkin, *Company-created remedy mechanisms for serious human rights abuses: a promising new frontier for the right to remedy*, 663 INT’L J. HUM. RTS. 801, 808 (2015).

Barrick's acknowledgment of the harms was a critical element in providing satisfaction. The lack of a full apology as well as the sole focus on survivors of sexual violence indicates that this element of reparations remains incomplete.

*Full and Public Disclosure of the Truth:* Barrick has yet to engage in a full publication of facts regarding abuses by security guards and other personnel. Barrick's public documents note that sexual assaults were committed by mine staff. They "condemn[ed]" violence against women,<sup>116</sup> and described the findings of the company's investigations as "disturbing."<sup>117</sup> However, publicly provided details about the incidents are minimal. Barrick has not provided information that explains the nature and extent of the abuses committed, or of the horrific physical and psychological impacts that the women continue to struggle with years after the assaults. Many questions remain: How widespread were abuses? What was their nature? What have been the short and long-term impacts on women and communities? What were the causes of the abuses, and how did they remain "hidden" and unaddressed for so many years? Barrick has not reported on these issues, and thus, this aspect of satisfaction remains largely incomplete.

*Judicial and administrative sanctions:* Barrick has taken steps towards helping fulfill individuals' right to remedy by imposing administrative sanctions, including firing some of its employees.<sup>118</sup> Barrick has also taken some steps to facilitate judicial sanctions, including handing over evidence to the police.<sup>119</sup> An individual with knowledge of the mechanism said that mechanism staff tried to facilitate women making formal complaints with police.<sup>120</sup> The mechanism was intended to complement the judicial system, and does not formally preclude criminal sanctions.

Barrick informed the clinics in June 2015 that following its 2010-2011 investigations, "[i]n total, fourteen people implicated in the investigation have been terminated," noting that six people were terminated "immediately," and another eight were terminated "shortly before for other policy breaches."<sup>121</sup> Barrick did not clarify specifically what these terminations were for, but noted that of the crimes discovered through the investigation, "some" were sexual assaults. Barrick stated that the number of employees subjected to internal sanction, but not dismissed, was "very difficult [] to calculate with any accuracy."<sup>122</sup> According to Barrick, thirteen "incidents of criminality were identified" in its review and investigation of the security and community relations function of the PJV, and four individuals were arrested to face criminal prosecution.<sup>123</sup>

However, to the clinics' understanding, none of the perpetrators uncovered through Barrick's internal investigations have been convicted. That administrative sanctions were imposed on a fairly small number of staff, and that only thirteen crimes were uncovered, when compared with the high number of allegations and claims remedied, raises concerns about whether the investigation has identified all the abuses and the perpetrators involved.

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116 BARRICK REMEDY FRAMEWORK SUMMARY, *supra* note 20, at 15 ("We reiterate our condemnation of violence against women in the strongest possible terms; it is a serious crime and is not tolerated in any form at any Barrick workplace.").

117 BARRICK RESPONSE TO HRW REPORT, *supra* note 33, at 2.

118 Email from Barrick (June 24, 2015), *supra* note 21; See BARRICK REMEDY FRAMEWORK SUMMARY, *supra* note 20, at 2.

119 Email from Barrick (June 24, 2015), *supra* note 21 ("Barrick provided 30 witness statements to the police.").

120 Interview 11-2014 (Mar. 20, 2014) ("[The ILA] encouraged women to make complaints to the police, and offered to help take them there. They often hadn't made complaints because they were scared of police, they saw police as the ones who has done these things to them.").

121 Email from Barrick (June 24, 2015), *supra* note 21.

122 *Id.*

123 *Id.*

The impunity in Porgera for sexual assault is reflective of a pattern of impunity across the country. Crime rates are high in PNG and the criminal justice system lacks the capacity to prosecute many offenders.<sup>124</sup> In particular, violence against women has reached “epidemic levels.”<sup>125</sup> Despite the prevalence of violence against women, most crimes of sexual violence are unreported and those that are reported rarely result in prosecutions.<sup>126</sup> The limited capacity of the justice system significantly undermines access to remedy through either civil or criminal procedures.

The state has a legal obligation to pursue judicial sanctions, as prosecution and punishment form part of the right to remedy. A non-judicial grievance mechanism can never alone fulfill all aspects of a right to remedy, especially for serious human rights violations. International human rights courts have recognized that financial compensation is not a full and effective remedy.<sup>127</sup> Remedy requires accountability, including criminal investigations, prosecution, and punishment of those responsible, including, where appropriate, companies themselves.<sup>128</sup>

Many men and women who reported mine site personnel abuses to the clinics expressed a desire to have the perpetrator and/or the company investigated and brought to account through formal judicial proceedings.<sup>129</sup>

Only minimal information is available about whether senior management in the company was investigated or held to account in the case of any wrongdoing. Barrick informed the clinics in 2015 that “14 people implicated in” Barrick’s investigation had been terminated, and that they could not “calculate with any accuracy” how many employees had been subject to internal sanction, but were not dismissed.<sup>130</sup>

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124 See, e.g., HUMAN RIGHTS WATCH, BASHED UP: FAMILY VIOLENCE IN PAPUA NEW GUINEA 41 (2015); SADAF LAKHANI & ALYS M. WILLIAM, THE SOCIO-ECONOMIC COSTS OF CRIME AND VIOLENCE IN PAPUA NEW GUINEA: RECOMMENDATIONS FOR POLICY AND PROGRAMS, RESEARCH DIALOGUE SERIES NO. 5 WORLD BANK GROUP 9 (2014).

125 UN Special Rapporteur on Violence Against Women, its Causes and Consequences, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences*, ¶ 27, U.N. Doc. A/HRC/23/49/Add.2 (Mar. 18, 2013) (by Rashida Manjoo) [hereinafter *Special Rapporteur Report on Violence against Women*] (finding that gang rape is a common practice with up to 60% of men interviewed by a 2006 study indicating that they had participated in gang rape.).

126 Victims of sexual violence frequently do not report to the police due to the associated stigma, fear of reprisal from family, community members, and the fact that police, in many cases, take no action. If cases are reported they usually do not proceed beyond an investigation. See *id.* at ¶ 46. A few individuals the clinics interviewed filed complaints, but told the clinics that nothing happened after making a complaint or they were unaware of the status of the case. See, e.g., Interview 46-2014 (Mar. 22, 2014). Additionally, perpetrators often have ties to the police, or are policemen themselves, and women do not feel safe reporting to them. See Interview 17-2013 (Mar. 7, 2013). Many sexual violence cases are instead handled through village courts and traditional means of compensation. *Special Rapporteur Report on Violence against Women*, *supra* note 125, at ¶ 84.

127 The CJA Amicus Brief, *supra* note 10, at 29.

128 *Id.* at 28. See also *Nikolova v. Bulgaria*, App. No. 7888/03, Eur. Ct. H.R. ¶ 55 (2008) (Such gross abuses “cannot be remedied exclusively through an award of compensation” because such a remedy does not involve the “prosecution and punishment of those responsible.”).

129 Interview 1-2011 (Mar. 11, 2011) (“They want the individual perpetrators to be fired, arrested, prosecuted and jailed.”); Interview 2-2011 (Mar. 13, 2011) (“I wish to lock him up at the cell and get rid of him from the job. I wish he could pay compensation. But I don’t know his face, so he is lucky.”). Many women said that they did not initiate complaints due to stigma associated with rape, belief that their claims would not be pursued, fear of prosecution for trespassing, and fear of being threatened for bringing forward allegations. See *International Human Rights Clinic, Harvard Law School and Center for Human Rights and Global Justice, New York University School of Law, Legal Brief before the Standing Committee on the Foreign Affairs and International Development House of Commons Regarding Bill C-300* (Nov. 16, 2009), <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Harvard-testimony-re-Porgera-Main.pdf>.

130 Email from Barrick (June 24, 2015), *supra* note 21.

No action appears to have been taken by PNG officials to investigate senior management or the company for any liability. A full inquiry into whether the company itself bears liability, however, is an essential component of the right to remedy.

At the moment, the long-term effects of the remedy mechanism on the justice system in PNG are not known. Some human rights and criminal justice experts have expressed concern that mechanisms like this might undermine the development of criminal cases around these instances of violence as well as the criminal justice system more generally; Barrick's reported assistance to local law and order systems may lessen this concern in the Porgera context.<sup>131</sup> One senior government official expressed concern that creating a parallel structure could set a bad precedent for other companies considering a similar approach.<sup>132</sup> In many regions in PNG, local justice systems are ineffective and if companies begin to create their own alternative systems, local justice systems may be neglected. This risk is heightened if the reporting around harms is that sufficient remedies have been provided to individuals, as this may take pressure off the state to pursue prosecutions.

### *Guarantees of Non-repetition*

Barrick has now unequivocally and publicly stated that it will not tolerate sexual assaults by its employees, and has reportedly implemented important initiatives aimed at the prevention and deterrence of future abuses.<sup>133</sup> These initiatives reportedly include expanding on-site monitoring and surveillance of security personnel, and tracking their movements in and around the mine site.<sup>134</sup>

Clinic investigations in Porgera suggest that these initiatives appear to have made a difference in terms of the safety of women in and around the mine site vis-à-vis Barrick security personnel. Interviews with numerous women suggest improvements in security, and interviews with security personnel indicate improved training and messaging around zero tolerance for sexual assault.<sup>135</sup> However, despite the positive changes, some women still report feeling a general lack of security; for example, one woman reported that while security has improved, she decided to move away because of continuing violence.<sup>136</sup> The clinics have also received some reports of alleged rapes in recent years by mine staff, but do not have information as to how widespread any continuing violence is, and have not been in a position to investigate the cases to assess their credibility.

Barrick has not publicly reported the results of any internal assessments about changed mine staff conduct or changes in allegations of abuse following the new violence prevention initiatives. Thus, while Barrick has taken significant and important steps to guarantee non-repetition, it should continue to sufficiently resource efforts to eliminate violence, and monitor and publicly report on the effects of its prevention policies and initiatives.

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131 See Interview 53-2014 (Mar. 25, 2014); Interview 59-2014; Interview 45-2014 (Mar. 24, 2014).

132 Interview 53-2014.

133 BARRICK REMEDY FRAMEWORK SUMMARY, *supra* note 20, at 11, 15.

134 See *infra* for a list of measures reported.

135 During recent visits to Porgera, security guards have reported to the clinic that they have been prohibited by the mine from speaking with outsiders, but some guards agreed to speak on condition of strict anonymity.

136 Interview 1-2015 (Jan. 2, 2015) (“Now it’s better, but some of them they are still doing it. That is why I moved.”).

## *Security and Remedy—Survivors Experience New Harms after Disbursement of Reparations*

A number of women reported to the clinics in July 2015 that when women were provided remedies, they: (a) were stigmatized, threatened, or physically harmed by relatives who discovered the women had been raped when the remedies became known; and (b) were compelled to give some, most, or all of their remedy to their husband and other relatives, including under threat of physical harm. Some women reported that they were beaten by their husbands when their husbands demanded the remedy.<sup>137</sup>

Without maintaining anonymity of the survivors *throughout the entire process* (see Part III, Chapter 4: Accessibility and Security), these harms were foreseeable, given well-known pervasive domestic violence, stigma around rape, and common compensation practices in the PNG Highlands. Indeed, the potential harms were explicitly foreseen during the design phase of the mechanism.<sup>138</sup>

While it is unclear exactly how each woman was identified, problems with the intake process and disbursement of funds were likely contributing factors. Given the stated intent of the remedy mechanism to provide support for the women, this is a most regrettable end result from the entire effort.

In the Highlands context, there is no easy solution, and each woman's situation is unique, requiring tailored responses and proactive protection measures. This is a key reason why excluding women from the consultation phase of the mechanism was a critical omission as it excluded the very individuals with specific knowledge of risk and with the local cultural knowledge to discuss how the risk could be best mitigated. Mechanisms must be considered in integrated and holistic ways; security cannot be isolated from reparations, for example. The disbursement of remedies would best be done through assessing with each woman on a case-by-case basis and in-depth any risks she faced, how she planned to manage any risk that might occur when receiving the remedy, and what strategies (such as staggered payments, delayed payments, grants for items she wanted, relocation in necessary cases) could assist her. *See also* Part III, Chapter 4: Accessibility and Security.

It is critical now that new measures are instituted to assess past harm and any ongoing risk for women, and to meet with each woman individually to ascertain any concerns she may have, and institute any necessary protective measures.

### **Lessons Learned**

The significant power imbalance between transnational corporations and many individual rights-holders and communities risks companies offering inadequate “take it or leave it” remedy packages that rights-holders feel they have little ability to influence or refuse. Companies, and the international community, need to take proactive steps to ensure that in the provision of remedies, businesses do not benefit from the structural imbalances of bargaining power reinforced by poor governance and weak judicial systems in host countries. Remedy mechanisms must affirmatively seek to minimize structural inequalities and power imbalances to recalibrate negotiating power between rights-holders and companies. This will likely have a significant effect in seeing that remedies meet international standards, and that the choice to accept a remedy package is made freely, and not out of economic desperation or a perceived lack of alternatives.

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137 *See, e.g.*, Interview 10-2015 (July 23, 2015).

138 *See infra* Part III, Chapter 4: Accessibility and Security.

Privatized, company-created remedy mechanisms may carry the risk of supplanting or diverting resources from the local justice system, even if that is inadvertent. Therefore, a mechanism must be designed such as to complement, and not substitute for, judicial systems. Both businesses and governments should work to ensure that local law and order systems are strengthened in parallel with the creation of any private remedy mechanism. The limits of company-created remedy mechanisms should be acknowledged, their inability to provide full remedies clearly understood, and efforts should be undertaken to ensure that discussion of such mechanisms includes assessment of the full right to remedy, including criminal sanctions.

When implementing reparation measures, a number of factors should be taken into account. Human rights law provides a guide for important types or forms of reparations, and rights-holders and affected communities themselves are key to designing adequate, effective, and appropriate remedies. At the time of design, community participation is critically important. Adequate remedies are much more likely to be achieved when the rights-holders are placed at the center of the mechanism.<sup>139</sup> Further, how remedies are managed and disbursed should be capable of evolving based on ongoing community feedback.

Compensation needs to be proportional to the human rights abuse and should not be limited to the common damage awards provided in the domestic legal context, especially in cases involving legal waivers and abuses by staff of multinational corporations. Further, reparations should be equitable and individualized and not arbitrary.

The content of any remedy should also seek to contribute to rehabilitation and long-term empowerment. This means that certain elements of the remedy, such as skills training, medical services, or counseling, may need to be monitored and resourced over a long time frame.

In addition to compensation and rehabilitation, attention needs to be paid to satisfaction measures, and in particular, acknowledgment of the wrong-doing and a public apology, including acceptance of responsibility. Satisfaction is a critical component of a remedy, and corporations should ensure that they effectively communicate apologies to communities, and that there is a full and public disclosure of the short and long-term harms suffered. Corporations should also ensure that they provide clear information about any administrative sanctions imposed on the staff responsible for harms, and take active steps to facilitate the imposition of judicial sanctions.

As part of efforts to ensure non-repetition of human rights violations, companies should publicly report on the measures taken to prevent abuse, and provide public information on internal reviews of such efforts, regularly updating stakeholders on the nature of any continued abuse. Independent assessments should be done periodically to review policies and implementation efforts to address any continued violations.

The design and implementation of a remedy mechanism should take into account potential security or other adverse impacts on mechanism users. Where a security risk is present, proactive

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139 See, e.g., UN Office of the High Commissioner for Human Rights, *Interpretive Guide on the Corporate Responsibility to Respect Human Rights* 64, U.N. Doc. HR/PUB/12/02 (2012), [http://www.ohchr.org/Documents/Publications/HR.PUB.12.2\\_En.pdf](http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf) (“Remedies can take a variety of forms and it is important to understand what those affected would view as effective remedy, in addition to the enterprise’s own view.”).

steps should be taken to mitigate risk. Security and privacy should be essential considerations at all stages of the mechanism and with respect to key elements such as outreach and communications strategies, access points, and remedy disbursement. Attention to security is necessary to ensure a mechanism's effectiveness and rights-compatibility, and to ensure that a company does not cause further adverse impacts through its remedy mechanism. Otherwise, if rights-holders experience new harms as a result of using the mechanism itself, the entire endeavor of the mechanism may be undermined.



As for me, I feel that the [remedy] payment that was paid is making us feel embarrassed. I am not happy with the payment. It is embarrassing to women . . . . We are different ages. Some are teenagers; some are mothers, some newly married. [They] paid us 20,000 . . . . The 20,000 was not enough. In our custom, we do compensation . . . . By comparing with the [other] women who got 200,000—they can divide to relatives, and to start business. But the 50,000 [we were given] is not much, comparing it. Barrick also has to pay us 200,000. It has to be fair.

*- A woman from Porgera, Papua New Guinea*

## Chapter 6

### Waiver of Legal Rights and Access to Counsel

**Summary of Findings:** To receive a remedy, rights-holders were required to waive their legal rights to sue Barrick in any jurisdiction in the world. In a context of gross structural inequality between the company and the rights-holders, the waiver raised particular concerns, especially as many claimants did not have or did not know about alternative legal avenues and thus felt compelled to accept the waiver in exchange for the remedy package. There should be a presumption against waivers, and they should only be considered in extremely narrow circumstances where rights-holders can negotiate on more equal terms with the company and where the mechanism strictly meets human rights standards. The legal advisor provided by the company was not adequately equipped to overcome this power imbalance, and the majority of claimants experienced the mechanism without sufficient legal advice and representation. The legal waiver was therefore not appropriate in this case, and should be rescinded by Barrick.

#### Applicable Human Rights Principles

Victims have a right to a full and effective remedy. Accordingly, corporate non-judicial grievance mechanisms should complement and not replace justice systems and should not preclude access to alternative remedies.<sup>1</sup>

The Office of the High Commissioner for Human Rights (OHCHR) has, appropriately, stated that there is a presumption “as far as possible” against requiring a victim to waive their legal rights to sue a company as a condition for receiving a remedy through a company grievance mechanism<sup>2</sup> The OHCHR’s view is that waivers should be construed as narrowly as possible, particularly in cases concerning rape, sexual violence, and other “gross human rights violations.”<sup>3</sup>

A central concern emanates from the recognition that power imbalances underlie the negotiating positions of rights-holders and the company. Concerns about legal waivers are particularly acute when there is a significant power discrepancy that has not been offset so as to increase the negotiating power of rights-holders.

Relatedly, the UN Guiding Principles recognize that it is critical that claimants have access to the advice and expertise necessary to engage in any grievance process on “fair, informed and respectful

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1 UN Office of the High Comm’r for Human Rights, Guiding Principles on Business and Human Rights, ¶ 25 (commentary), ¶ 29 (commentary), U.N. Doc. HR/PUB/11/04 (2011) [hereinafter UN Guiding Principles]. *See also* Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, ¶ 12, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) (“A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have *equal access to an effective judicial remedy* as provided for under international law.”) (emphasis added).

2 UN Office of the High Commissioner for Human Rights, *Re: Allegations regarding the Porgera Joint Venture remedy framework* 8-9 (July 2013), <http://www.ohchr.org/Documents/Issues/Business/LetterPorgera.pdf> [hereinafter *OHCHR Opinion*].

3 *Id.* at 8.

terms.”<sup>4</sup> The need for legal advice can be especially necessary given that the significant power imbalances between corporations and the victims of human rights abuses can otherwise limit the fairness and effectiveness of remedy mechanisms.<sup>5</sup> In international human rights law, access to counsel is an essential component of the right to access justice, and is necessary for procedural fairness and equality before the law.<sup>6</sup>

### **Barrick’s Practice: Legal Waiver and Access to Counsel**

Each claimant was required to sign a legal waiver to receive a remedy package from Barrick.<sup>7</sup> By signing the waiver, the claimants waived their rights to “pursue any claim for compensation, or any civil legal action, that relates in any way to the Conduct.”<sup>8</sup> The “Conduct” is defined as “sexual violence attributable to one or more current or former employees of the Porgera Joint Venture.”<sup>9</sup> Initially, the waiver did not expressly exclude pursuing any criminal actions, but it was criticized, and later amended to eliminate any possibility that the waiver would be read as affecting criminal proceedings.<sup>10</sup> The waiver was designed by Barrick and was non-negotiable. Barrick has stated that the waiver will “cover only instances where a claimant may seek a double recovery from the company for the same injury.”<sup>11</sup>

Through the claims process, all claimants had access to what Barrick called an “Independent Legal Advisor” (ILA), who was selected by and funded through the PRFA (which was funded by Barrick).<sup>12</sup> The ILA’s desk was located in the remedy mechanism office with the remedy mechanism implementation team. Barrick reports that the ILA’s role was “to provide advice on different legal options, explain the process and consequences of resolving the claim, and to discuss whether it is in

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4 UN Guiding Principles, *supra* note 1, ¶ 31(d).

5 *See id.* ¶ 31 (d) (commentary) (“In grievances... between business enterprises and affected stakeholders, the latter frequently have much less access to information and expert resources, and often lack the financial resources to pay for them. Where this imbalance is not redressed, it can reduce both the achievement and perception of a fair process.”).

6 *See* International Covenant on Civil and Political Rights, Arts. 2, 14, 26, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967) [hereinafter ICCPR]; Human Rights Committee, *General Comment No. 32 on Art. 14 of the ICCPR, 90<sup>th</sup> Sess.*, CCPR/C/GC/32 (Aug. 23, 2007); Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined seventh to ninth periodic reports of United States of America, 85<sup>th</sup> Sess.*, CERD/C/USA/7-9 (Aug. 29, 2014). For a detailed study of the issue of access to justice in the context of people living in poverty, *see* UN Secretary-General, *Extreme poverty and human rights, Note by the Secretary-General*, U.N. Doc. A/67/278 (Aug. 9, 2012), <http://www.ohchr.org/Documents/Issues/Poverty/A-67-278.pdf>.

7 CLAIMS PROCESS PROCEDURES MANUAL (undated) 45, <http://www.barrick.com/files/porgera/Claims-Process-Procedures-Manual.pdf> [hereinafter CLAIMS MANUAL].

8 *Id.*

9 *Id.* The full text of the sample waiver states:

The Claimant agrees that, in consideration for the Reparations, on and from the date of signing this Agreement, she will not pursue any claim for compensation, or any civil legal action, that relates in any way to the Conduct, against the Porgera Joint Venture, PRFA or Barrick in Papua New Guinea or in any other jurisdiction. This expressly excludes any criminal action that may be brought by any state, governmental or international entity.

10 Initially the waiver stated, “the claimant agrees that she will not pursue or participate in any legal action against PJV, PRFA . . . or Barrick.” *OHCHR Opinion, supra* note 2, at 6. Barrick amended the waiver to specify that it applies only to claims for compensation and civil legal actions relating to the conduct in question, and to expressly state that the waiver does not apply to future criminal actions. BARRICK GOLD CORP., A SUMMARY OF RECENT CHANGES TO THE PORGERA REMEDIATION FRAMEWORK 4 (June 7, 2013), <http://www.barrick.com/files/porgera/Summary%20of%20Remediation%20Framework%20Amendments.pdf> [hereinafter BARRICK SUMMARY OF FRAMEWORK CHANGES].

11 *Id.* at 4.

12 CLAIMS MANUAL, *supra* note 7, at 12 (“The Program will assist with the financing of independent legal advice.”). *See also id.* at 2 (“The Program is run by the [PRFA]” and “Barrick provides funding for the Program.”).

the best interests of the Claimant to accept any offer made to her under this Program.”<sup>13</sup> The ILA, according to the Claims Manual, would “advise the claimant how she can take criminal or civil legal actions against the alleged perpetrator, and advise the claimant of other legal options available to her” including “seeking redress against the PJV or others through the courts.”<sup>14</sup> To the clinics’ knowledge, with the exception of claimants represented in the mechanism process by international NGO EarthRights International, the claimants did not have other legal representation and only had access to the ILA lawyer during the remedy mechanism process.<sup>15</sup>

## Human Rights Analysis

*Inappropriateness of legal waiver in these circumstances:* In these circumstances, Barrick’s requirement that rights-holders waive their legal rights to receive the remedy was not appropriate.

Barrick has argued that the waiver was not contrary to the UN Guiding Principles and that it was important to ensure final settlement and certainty.<sup>16</sup> The OHCHR provided an opinion in July 2013 on the waiver issue:

[T]he presumption should be that as far as possible, no waiver should be imposed on any claims settled through a non-judicial grievance mechanism. Nonetheless, and 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 may be required from claimants at the end of a remediation process.<sup>17</sup>

While predictability and finality are important considerations, such values must be balanced against the needs for fairness and the right to a *full and effective* remedy, and waivers prepared by highly trained lawyers for the benefit of large transnational companies, and signed by rights-holders living in remote and extremely disadvantaged areas, are deserving of particular scrutiny.

In this case, five factors give rise to concerns about the appropriateness of the waiver Barrick required rights-holders to sign in order to receive a remedy. In the clinics’ view, the core concern is that the women did not have sufficient negotiating power, due in large part to lack of knowledge of and access to feasible alternatives and lack of adequate representation.

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13 CLAIMS MANUAL, *supra* note 7, at 3, 12; BARRICK GOLD CORP., A FRAMEWORK OF REMEDIATION INITIATIVES IN RESPONSE TO VIOLENCE AGAINST WOMEN IN THE PORGERA VALLEY 21 (2013), <http://www.barrick.com/files/porgera/Framework-of-remediation-initiatives.pdf>; The ILA is funded through the PRFA. *Id.* at 21 n.41.

14 CLAIMS MANUAL, *supra* note 7, at 8.

15 Under the framework guidelines, claimants have the right to seek outside counsel, and a fund was available to provide some assistance to claimants unable to afford independent counsel. *See* CLAIMS MANUAL, *supra* note 7, at 12; *See also* Letter from Peter Sinclair, Vice President, Corporate Social Responsibility, Barrick Gold Corp. to Dr. Navanethem Pillay, UN High Commissioner for Human Rights 4 (Mar. 22, 2013), <http://www.barrick.com/files/porgera/Letter-to-UN-High-Commissioner.pdf> [hereinafter *Barrick Letter to OHCHR (Mar. 22, 2013)*]. In June 2015, Barrick informed the clinics that “No claimant opted to use the own-lawyer funding option.” *See* Email from Peter Sinclair, Senior Vice President, Corporate Affairs, Barrick Gold Corp. to Sarah Knuckey (June 24, 2015) (on file with author) [hereinafter *Email from Barrick Gold Corp. (June 24, 2015)*].

16 *Barrick Letter to OHCHR (Mar. 22, 2013)*, *supra* note 15, at 7.

17 *OHCHR Opinion*, *supra* note 2, at 8-9. For analysis of the deficiencies of the OHCHR analysis, *see* Sarah Knuckey and Eleanor Jenkin, *Company-created remedy mechanisms for serious human rights abuses: a promising new frontier for the right to remedy?*, 663 INT’L J. HUM. RTS 801, 811-813, 816 (2015).

First, claimants have raised serious concerns about the adequacy of the remedy packages they accepted. *See* Part III, Chapter 5: Reparations. For these women, the waiver, if upheld, would operate to effectively deny the possibility of ever achieving full reparations for their harms—as might otherwise be achieved, for example, by obtaining a supplementary award in another legal proceeding.

Second, given the particularly weak justice system available in Porgera as well as the general lack of formal education or familiarity with legal processes among many Porgeran women, Barrick’s remedy mechanism was perceived by many as the only viable path to a remedy.<sup>18</sup> Many women who signed the waiver believed that they had no choice or no other feasible options. The fact that women did not feel they could opt out of the mechanism into an alternative system raises serious doubts about whether the signing of the waiver represents a free and informed decision. As the OHCHR has noted, the “functioning or not of legal systems” is an important contextual factor in considering whether and to what extent waivers may be appropriate.<sup>19</sup>

Third, as discussed below, the legal representation provided through the mechanism was inadequate to overcome structural power imbalances and the general lack of access to formal education among rights-holders.

Fourth, there was confusion amongst at least some claimants as to the meaning and effect of the waiver when they signed it. ERI reported that many of their clients found the waiver explanation confusing and “had no idea what was happening.”<sup>20</sup> One woman indicated to the clinics, “I didn’t know what was on the paper. I just signed.”<sup>21</sup> A number of other claimants interviewed by the clinics appeared to understand the basic concept that by signing the waiver and receiving compensation, they could not then sue Barrick.<sup>22</sup> However, some claimants seemed to be confused about whether the waiver meant they could not sue Barrick for *any* reason, even for violations unrelated to the sexual violence incident.<sup>23</sup> Several women were reluctant to speak with the clinics as they believed that the waiver meant that they could not talk about their remedy package or say anything negative about Barrick.<sup>24</sup>

In at least one case, the waiver was allegedly read to the claimant in a language in which she was not fluent.<sup>25</sup> In addition, ERI reported that the translator ERI brought with it to the remedy office “found that the [mechanism’s] translator wasn’t translating literally but was summarizing, as she had heard it so many times and was also falling asleep in more than one session.”<sup>26</sup>

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18 For further discussion on the local justice system and the remedy mechanism’s interaction with and effect on the local justice system, *see supra* Part III, Chapter 5: Reparations.

19 *OHCHR Opinion, supra* note 2, at 8 (citing UN OHCHR, Rule of Law Tools for Post-Conflict States: Reparations Programs, at 35, U.N. Doc. HR/Pub/08.01, U.N. Sales No. E.08.XIV.3 (2008)).

20 Interview 63-2014 (May 7, 2014).

21 Interview 39-2014 (Mar. 22, 2014). Similar comments were made by other claimants; *See e.g.* Interview 27-2014 (Mar. 22, 2014) (When asked what she signed, one woman replied “I don’t really know. I don’t know how to read and write. The people who helped me to do the signing did it for me.”); Interview 33-2014 (Mar. 22, 2014) (“I’m illiterate and I don’t know what was in the documents—I just signed.” This woman did indicate that she was told that if she accepted compensation she couldn’t sue the company).

22 *See also* Interview 63-2014.

23 *See e.g.* Interview 22-2014 (Mar. 21, 2014); Interview 24-2014; Interview 32-2014 (Mar. 22, 2014).

24 *See* Interview 3-2015 (Jan. 8, 2015).

25 Interview 23-2014 (Mar. 21, 2014).

26 Interview 63-2014.

Further complicating matters, some women were reportedly advised by mechanism staff that they could possibly sue Barrick even if they signed the waiver.<sup>27</sup>

Finally, the scope of the waiver, even after an amendment intended to explicitly narrow its scope to civil claims, risks being interpreted in an overly broad manner. As currently written, the waiver could be interpreted to prohibit women from pursuing claims for violations beyond sexual violence that women were not compensated for through the remedy mechanism, such as beatings and arbitrary detention “related to” the sexual violence.<sup>28</sup>

Together, these factors indicate that the ability to exercise free choice and negotiate sufficiently was heavily compromised, and thus the legal waiver was not appropriate in this context. An alternative approach that would have better balanced concerns about “double recovery”<sup>29</sup> with fair remedies could have been a remedy agreement that offset any subsequent damage award or settlement by the value of the accepted remedy package.

*Adequacy of “legal counsel” provided in the mechanism:* Barrick should be credited for designing a remedy mechanism that recognized the need for an “independent legal advisor.” In discussions with the clinics, the ILA demonstrated forthrightness about her experiences in the mechanism, as well as care for claimants. She said that she saw herself as the claimants’ lawyer, and would tell women at the initial interview, “I’m here for you. I am your lawyer.”<sup>30</sup>

However, the actual implementation of this role was deficient in two important respects.

First, the lack of physical separation between the ILA and the mechanism’s implementers undermined perceptions of independence. The ILA was located in the mechanism’s office, in the same room as those receiving and hearing the claimants’ alleged cases. This integration, together with insufficient and context-tailored explanations of her role, as well as the nature of the functions she in fact performed, contributed to a perception for numerous women that the ILA was the lawyer for Barrick or Cardno, rather than for the claimants.<sup>31</sup> A person with knowledge of the mechanism recommended that: “in [the] future, the legal advisor really should be fully separate to create an appearance of independence.”<sup>32</sup>

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27 *Id.* See also Interview 21-2014 (Mar. 21, 2014).

28 The waiver states that the claimant “will not pursue any claim for compensation, or any civil legal action, that relates in any way to the Conduct.” The “Conduct” is defined as “sexual violence attributable to one or more current or former employees of the Porgera Joint Venture.” CLAIMS MANUAL, *supra* note 7, at 45, 18.

29 BARRICK SUMMARY OF FRAMEWORK CHANGES, *supra* note 10, at 4.

30 Interview with ILA (2014). Some claimants did see the ILA as their lawyer and the ILA explained that a number of the women brought their own personal matters to her and remarked that this showed a sense of trust in her as their representative. See, e.g., Interview 24-2014; Interview 30-2014 (Mar. 22, 2014); Interview 32-2014. However, a number of claimants showed high levels of confusion regarding the ILA. Some were unsure whether they had met with the ILA or a CAT officer or both, and unsure of exactly what occurred at the meeting; See e.g. Interview 10-2014 (Mar. 20, 2014); Interview 44-2014 (Mar. 22, 2014); Interview 21-2013 (Mar. 8, 2013). ERI indicated that “None of [their clients] understood what [the ILA’s] role was” and clients would come out of their meetings without understanding what happened. Interview 63-2014. The claimants’ confusion can be attributed to a number of factors, most significantly the prevalence of illiteracy and lack of formal education, particularly with respect to legal rights.

31 See, e.g., Interview 22-2014 (“She must be Barrick lawyer or PRFA lawyer.”); Interview 35-2014 (Mar. 22, 2014) (“[She] is Cardno’s lawyer.”); Interview 10-2015 (July 23, 2015) (“We didn’t have our own lawyers. . . The lawyer was with Cardno.”); Interview 11-2015 (July 24, 2015) (“We didn’t have lawyers but there was a woman lawyer in the Cardno office. She was Cardnos? PRFAs? Was she representing us? I don’t know.”).

32 Interview 11-2014.

Second, the ILA's role in practice did not sufficiently advocate for and represent the interests of the claimants in a manner that could sufficiently overcome gross structural inequalities.

According to information provided by Cardno, the ILA was “free to provide any advice.”<sup>33</sup> She generally seems to have provided advice on, for example the mechanism processes, the waiver, and on making complaints to the police. She did not prepare the statement of claims, but could review the claims with the women and make revisions.<sup>34</sup> Yet, importantly, ERI has stated that the ILA did not meet with clients to determine their desired remedy and advocate for that remedy on the clients' behalf.<sup>35</sup> In addition, according to a person with knowledge of the mechanism, while the ILA reportedly did tell claimants they could take Barrick to court if they did not accept the waiver, the ILA did not advise claimants on, for example, the feasibility of bringing civil suits in foreign jurisdictions.<sup>36</sup>

The clinic investigations indicate that the ILA's role was generally to facilitate engagement with the remedy mechanism, rather than to act as a more independent legal counsel for each woman; she functioned as a legal advisor on certain issues, but not as a lawyer who fully advocated for the interests of each woman. The clinics do not consider that, in practice, and as understood by the claimants, the women were provided sufficient independent counsel and representation of their legal rights.

Without more robust legal counsel, many women did not believe they had a meaningful choice as to whether to accept the reparation package.<sup>37</sup> As one claimant remarked, “most of us were illiterates. No one was a brave woman who could speak for us. Whatever they told us to do [we] would say yes only.”<sup>38</sup> Another told us:

We did not have assistance . . . . If we had some support, and people to fight [for] us, like the lawyers . . . the eleven women [had], then we'd be in a better position to understand. Then we would have rejected that early package. I talked to the lawyer in Cardno. That lawyer told me Barrick is very giant like the mountain, and she said I could not challenge. I thought if I didn't sign, I wouldn't get any payment. So I signed. I didn't know there could be people to fight for me.<sup>39</sup>

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33 Email from Joshua de Bruin, Senior Consultant, Cardno Emerging Markets (Australia), to Sarah Knuckey and Tyler Giannini (Mar. 2, 2013) (on file with author). *See also* Email from Joshua De Bruin, Senior Consultant, Cardno Emerging Markets (Australia) to Sarah Knuckey (Feb. 27, 2013) (on file with author) [hereinafter Email from Cardno (Feb. 27, 2013)] (“The independent legal advisor provides claimants advice on all judicial and non-judicial options they may pursue”); Interview 11-2014 (a person with knowledge of the mechanism noted that the ILA could also encourage women to make complaints to the police and offer to go with them.); CLAIMS MANUAL, *supra* note 7, at 13.

34 *See, e.g.*, Email from Cardno (Feb. 27, 2013), *supra* note 33.

35 *See* Interview 63-2014 (“In no way does she advocate for them—she leads them through the process . . . . My understanding is that she has never sat in on the meetings where people were presenting their claims. She never ensured that the process was followed. She was never sitting there advocating for the rights of that individual in presenting the story.”).

36 Interview 11-2014.

37 An ERI representative explained that, “Some of our clients are prepared to walk away from the process, where they wouldn't have been if they didn't have us to back them up.” Interview 63-2014. Of the women the clinics interviewed in 2014 who had made claims to the mechanism, although the majority were dissatisfied with the remedy amount offered, the only women interviewed who refused the packages were represented by ERI.

38 Interview 33-2014. Another claimant indicated she was not given legal advice. *See* Interview 14-2013 (Mar. 7, 2013).

39 Interview 10-2015.

The limitations of the legal advocacy thus appear to have prevented claimants from participating in the mechanism on more equal footing.

In light of the deep power imbalance between the corporation and the claimants, and particularly in light of the legal waiver, it was necessary for the claimants to have independent legal advice and representation that more fully advocated for their range of rights and interests. While the company may have intended for the ILA to fulfill this role, her perceived lack of independence and inability to provide more comprehensive legal advice and to advocate for claimants outside of the mechanism significantly undercut the effectiveness of the role.

The comparative negotiating disadvantage of the claimants is underlined by the fact that women represented by U.S.-based human rights lawyers, in separate negotiations with Barrick, reportedly received a compensation package of approximately as much as ten times that received by those who went through Barrick's remedy mechanism. Numerous claimants, and women subsequently chosen as spokeswomen for those who went through the remedy mechanism, state that women are "not satisfied with the payment," and believe the lower amount to be unfair.<sup>40</sup> To many of the women, the reason that the eleven claimants received a higher compensation package was "because [they] had assistance."<sup>41</sup> See further Part III, Chapter 5: Reparations.

### **Lessons Learned**

Where non-judicial corporate remedy mechanisms are used, they should be designed such that they complement justice systems and provide a forum to provide remediation and reconciliation between business and communities. Corporations using remedy mechanisms to remedy grave human rights abuses, particularly in the context of remote locations and weak domestic justice systems, should do so in a manner that does not exacerbate power inequalities between parties. Indeed, such mechanisms should strive to meaningfully increase the negotiating power of rights-holders in and through the process.

There should be a strong presumption against waivers, which should only be employed when a remedy mechanism satisfies strict standards, and rights-holders were demonstrably able to negotiate on par with the company. The use and extent of waivers are deserving of particular scrutiny where used in poor governance zones or where rights-holders have limited options and choices but to accept offers from companies.

Where a company seeks to use a waiver, it should bear the burden of ensuring and showing that rights-holders come to the table on more equal footing, that rights-holders are able to make truly informed and free choices, that the waiver is as narrow in scope as necessary to balance concerns of finality or double recovery with those of fairness, and that all other aspects of the mechanism meet strict human rights standards.

Particularly where companies seek legal waivers from rights-holders, claimants should have access to expert, comprehensive, and fully independent legal counsel from outside the mechanism in order to ensure meaningful and robust representation and informed decision-making within the

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<sup>40</sup> *Id.*

<sup>41</sup> Interview 11-2015. For further discussion, see *supra* Section III, Chapter 5: Reparations.



remedy mechanism. It will often likely be difficult for claimants to retain this counsel on their own, particularly in the context of disadvantaged and remote areas such as Porgera, and companies will likely need to make extensive efforts to ensure such counsel is secured.

Strict standards in the design of a corporate mechanism to remedy serious human rights abuses are imperative to ensure that the vulnerability of survivors of human rights abuses, often compounded by intersecting factors of marginalization and power asymmetry, is not further exploited by a mechanism.

The remedy framework was set up by the company itself. The claim we put in was [a] big amount of money. This framework is just like a mother buying a crying child a small snack.

*- A woman from Porgera, Papua New Guinea*

## Chapter 7

### Additional Rule of Law Issues: Transparency, Predictability, Continuous Learning, and Independence

**Summary of Findings:** Barrick’s creation and publication of a written framework for its remedy mechanism enhanced the mechanism’s predictability and transparency. At a number of points, Barrick showed a willingness to modify the mechanism in response to external feedback, to communicate those changes, and to engage in continuous learning to improve the mechanism. A degree of flexibility in implementation is valuable, and indeed at times necessary to ensure that a mechanism is responsive to feedback, criticism, and unanticipated challenges. However, claimants and outside experts too often experienced confusion regarding the process and outcomes of the remedy mechanism, and feedback was inhibited by the absence of formal communication channels. Several aspects of implementation seemed to deviate from the written procedures and descriptions. Finally, although important aspects of the mechanism’s implementation were appropriately independent of Barrick, the company’s role in the mechanism’s funding and design and its interventions to make changes during implementation mean that the mechanism was not independent in certain respects. Joint design or creation with rights-holders could have improved the practice and perception of independence.

#### Applicable Human Rights Principles

Predictability and transparency are fundamental rule of law principles, and core elements of any mechanism designed to provide a remedy for human rights abuses.<sup>1</sup> Similarly, continuous learning and independence advance human rights by helping to secure the legitimacy and effectiveness of institutional design and implementation.

The UN Guiding Principles emphasize—in line with human rights and rule of law principles—that grievance mechanisms should be *transparent*, defined as “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.”<sup>2</sup> The Commentary to the UN Guiding Principles notes that providing transparency about a mechanism’s performance to wider stakeholders (while respecting the confidentiality of individual claimants) can be important to “demonstrate its legitimacy and retain broad trust.”<sup>3</sup>

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1 See, e.g., UN Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies* ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004) (noting that rule of law must include “procedural and legal transparency.”). See also Alan Boyle & Kasey McCall-Smith, *Transparency in International Law-Making*, in *TRANSPARENCY IN INTERNATIONAL LAW* (Andrea Bianchi & Anne Peters eds., 2013); Larry Cata Backer, *Transparency Between Norm, Technique and Property in International Law and Governance: The Example of Corporate Disclosure Regimes and Environmental Impacts*, 22 MINN. J. INT’L L. 1, 4 (2013); ANDREW SAVITZ & KARL WEBER, *THE TRIPLE BOTTOM LINE: HOW TODAY’S BEST-RUN COMPANIES ARE ACHIEVING ECONOMIC, SOCIAL AND ENVIRONMENTAL SUCCESS—AND HOW YOU CAN TOO*, 49-51, 59-61 (2006).

2 UN Office of the High Comm’r for Human Rights, *Guiding Principles on Business and Human Rights*, ¶ 31(e), U.N. Doc. HR/PUB/11/04 (2011) [hereinafter UN Guiding Principles].

3 *Id.* ¶ 31(e) (commentary) (“Providing transparency about the mechanism’s performance to wider stakeholders, through statistics, case studies or more detailed information about the handling of certain cases, can be important to demonstrate its legitimacy and retain broad trust.”).

The UN Guiding Principles also note that grievance mechanisms should be *predictable*, with a “clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available.”<sup>4</sup> Predictability is critical to ensuring the accessibility, legitimacy, and underlying fairness of a grievance mechanism.

The UN Guiding Principles provide that an effective non-judicial grievance mechanism should be a “source of *continuous learning*,” and should be structured to enable the identification of “lessons for improving the mechanism.”<sup>5</sup>

Finally, since a company “cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome,” remedy mechanisms should focus on dialogue-based solutions, or, where “adjudication is needed, this should be provided by a legitimate, *independent* third-party mechanism.”<sup>6</sup>

### **Barrick’s Practice: Transparency, Predictability, Continuous Learning, and Independence**

Barrick created a detailed plan for the structure and operations of its remedy mechanism. This plan is reflected in the framework documents and the Claims Manual, both of which were made publicly available. There have been numerous modifications to the framework over the course of its implementation and a number of these written updates or clarifications became available on Barrick’s website.<sup>7</sup>

The company and the implementers of the mechanism were also willing to receive feedback from and provide some additional information to external stakeholders through informal channels at the stakeholders’ request. Barrick has stated that some of the women who accessed the mechanism provided feedback to mechanism staff.<sup>8</sup>

In early 2013, Barrick retained Business for Social Responsibility (BSR), an organization that works with businesses such as Monsanto, Rio Tinto, and Microsoft on human rights issues, to conduct a mid-program review of the mechanism.<sup>9</sup> The complete review is not public, although Barrick released a limited summary of the findings.<sup>10</sup> In 2015, Barrick retained Enodo Rights, an

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4 *Id.* ¶ 31(c).

5 *Id.* ¶ 31(g) (emphasis added).

6 *Id.* ¶ 31(h) (commentary) (emphasis added).

7 For example, on Oct. 22, 2012, Barrick released a four page framework description; on Oct. 23, 2012, it released a two page update; on Feb. 1, 2013, it released a two page response to a public statement by MiningWatch Canada; on Apr. 16, 2013, Barrick released its Mar. 22, 2013 letter to the UN High Commissioner for Human Rights; on June 7, 2013 it released a four page summary of changes to the framework; on Nov. 1, 2013 it released a one page update; and on Dec. 3, 2013, it released a one page update with amendments to the framework. Then, on Dec. 1, 2014 Barrick published a summary of the framework. *See* Barrick Gold Corp., Operations, Papua New Guinea, Porgera (47.5%), <http://www.barrick.com/operations/papua-new-guinea/porgera/default.aspx> (last visited Nov. 14, 2015), [hereinafter Barrick Framework Publications].

8 BARRICK GOLD CORP., THE PORGERA JOINT VENTURE REMEDY FRAMEWORK 4 (Dec. 1, 2014), <http://www.barrick.com/files/porgera/Porgera-Joint-Venture-Remedy-Framework-Dec1-2014.pdf> [hereinafter BARRICK REMEDY FRAMEWORK SUMMARY].

9 *Id.* at 4; Business for Social Responsibility, Human Rights Client List, <http://www.bsr.org/en/consulting/advisory-services/human-rights> (last visited Nov. 14, 2015).

10 BARRICK GOLD CORP., A SUMMARY OF RECENT CHANGES TO THE PORGERA REMEDIATION FRAMEWORK (June 7, 2013), <http://www.barrick.com/files/porgera/Summary-of-Recent-Changes-to-the-Porgera-Remediation-Framework.pdf> (discussing suggestions including “involving victim representatives in key decisions going forward,” and “ensuring effective

organization that companies can hire to help them address their “human rights risks,”<sup>11</sup> to assess the mechanism.<sup>12</sup> Barrick and Enodo Rights state that Enodo Rights was commissioned to “prepare an independent final report on the implementation of the [remedy] framework.”<sup>13</sup> Barrick and Enodo Rights have stated that this report will be public.<sup>14</sup>

Barrick often describes its remedy mechanism as “independently” implemented or administered.<sup>15</sup> It is the clinics’ view that remedy mechanism staff decided independently from Barrick which individual claims were eligible and legitimate. However, Barrick designed the mechanism, and Barrick was involved in and influenced aspects of implementation and issued various amendments throughout implementation.

## Human Rights Analysis

Barrick’s efforts to create written procedures and to make them publicly available were positive steps towards creating a predictable and transparent process for claimants. In practice, information provided a useful overall sense of the mechanism and its operations, as well as specifics on a number of important issues. However, some of the information made publicly available was not as detailed as it could have been or was inconsistent with other information, the process in practice at times differed from the procedures that were recorded in the official framework documents, and at times claimants and external stakeholders experienced confusion regarding the procedures.

Outside actors found Barrick and Cardno (the third party implementer) willing to directly receive criticism, feedback, and suggested reforms, but this generally occurred through informal processes initiated by outside actors. Improved, formalized communication with outside parties, and the public release of more specific and clarifying information about the remedy mechanism (including the results of the review Barrick funded) would have improved transparency, and contributed

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engagement with individual victims in determining the most appropriate individualized remedy”).

11 See Enodo Rights, Our Services, <http://enodorights.com/services> (last visited Nov. 14, 2015).

12 BARRICK GOLD CORP., CONTINUED PROGRESS OF CLAIMS UNDER THE PORGERA REMEDIATION FRAMEWORK (Nov. 1, 2013), <http://www.barrick.com/files/porgera/Continued-progress-of-claims-under-the-Porgera-Remediation-Framework.pdf>; BARRICK REMEDY FRAMEWORK SUMMARY, *supra* note 8, at 11.

13 E-mail from Yousuf Aftab, Principal, Enodo Rights to Sarah Knuckey (Apr. 20, 2015) (on file with author) [hereinafter Enodo Rights Email (Apr. 20, 2015)]; Letter from Peter Sinclair, Senior Vice President, Corporate Affairs, Barrick Gold Corp. to Zeid Ra’ad Al Hussein, UN High Commissioner for Human Rights (Sept. 21, 2015), [http://business-humanrights.org/sites/default/files/documents/Barrick%20Letter%20to%20OHCHR\\_Sept21-15.pdf](http://business-humanrights.org/sites/default/files/documents/Barrick%20Letter%20to%20OHCHR_Sept21-15.pdf) [hereinafter Barrick Letter to OHCHR (Sept. 21, 2015)].

14 Letter from Yousuf Aftab, Principal, Enodo Rights to Zeid Ra’ad Al Hussein, UN High Commissioner for Human Rights (Sept. 21, 2015), <http://business-humanrights.org/sites/default/files/documents/Enodo%20Letter%20to%20OHCHR%2020150921.pdf> [hereinafter Enodo Rights Letter (Sept. 21, 2015)]; Barrick Letter to OHCHR (Sept. 21, 2015), *supra* note 13; Letter from Barrick to Mark Ekepa, Chairman, Porgera Landowners Association (Sept. 24, 2013) <http://business-humanrights.org/sites/default/files/media/barrick-response-sep-24-2013.pdf>.

15 BARRICK REMEDY FRAMEWORK SUMMARY, *supra* note 8, at 1, 5, 6 (“[T]he Framework is implemented independently,” “The Framework is specifically designed to be easily accessible. . . cognizant of local tradition and/or social circumstances, and to be independent of the PJV and Barrick to ensure the privacy and confidentiality of women submitting claims,” “The Framework is independently overseen by the PFRA,” “The individual remediation program . . . is administered independently of Barrick and the PJV,” “CAT [is] comprised of individuals independent of PJV and Barrick,” “An eligible claim then goes to an independent expert for determinations”). See also Letter from Peter Sinclair, Vice President, Corporate Social Responsibility, Barrick to Dr. Navanethem Pillay, UN High Commissioner for Human Rights, Office of the United Nations High Commissioner for Human Rights (Mar. 22, 2013), <http://www.barrick.com/files/porgera/Letter-to-UN-High-Commissioner.pdf> (“The Framework is implemented independently of Barrick.”); Barrick Letter to OHCHR (Sept. 21, 2015), *supra* note 13.

towards greater legitimacy. The mechanism would also have benefited from more clarity about the role that Barrick played in its design and then maintained in its implementation, which appeared to fluctuate in ways that could be difficult to predict and which affected perceptions of independence of the remedy mechanism.

### *Transparency*

*Publication of information about the mechanism and its performance:* Barrick published several documents on its website explaining the framework, and providing updates to the framework regarding implementation.<sup>16</sup> This public communication regarding the processes of the remedy mechanism aided transparency, and was an important step towards “build[ing] confidence” and meeting the “public interest.”<sup>17</sup>

Despite the efforts given to transparency, further improvements could be made. Some of the remedy mechanism documents that Barrick has made available provide only very general information on key issues. For example, Barrick’s summary of the remedy mechanism’s implementation could include additional information to better enable external monitoring and assessment, including, for example:

- The type and nature of harms suffered by victims awarded remedies, and the conduct and position of perpetrators;
- The specific reasons claims were refused by the remedy mechanism;
- The values and content of each and every remedy package, and the basis for any variation between the packages; and
- Details regarding Barrick’s administrative sanctions, including how many employees were terminated for direct involvement in sexual assaults and how many for a failure to prevent, and how many sexual assault allegations have been referred to police.

In addition, the remedy mechanism summary document contains some mistakes or inconsistencies with other available information, limiting its usefulness for transparency and monitoring.<sup>18</sup>

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16 See BARRICK FRAMEWORK PUBLICATIONS, *supra* note 7. In addition, Barrick’s third party implementer, Cardno, engaged in email communication with external stakeholders who were seeking information on the design and functioning of the mechanism. Cardno provided clarity on some points of confusion or concern, but at times refused to provide information. See Email from Joshua De Bruin, Senior Consultant, Cardno Emerging Markets (Australia) to Sarah Knuckey (Mar. 2, 2013) (on file with author).

17 Guiding Principles, *supra* note 2, ¶ 31(e).

18 For example, Barrick reports that the lowest value package awarded to a claimant in the mechanism was 23,040 kina. BARRICK REMEDY FRAMEWORK SUMMARY, *supra* note 8, at 13. However, signed remedy contracts reviewed by the clinics contain lower amounts, such as 20,180 kina. See, e.g., Remedy Agreement AB1 (2013) (on file with author). Another discrepancy and source of confusion involved school fees. The public documents stated that school fees would be paid for two years per child, BARRICK REMEDY FRAMEWORK SUMMARY, *supra* note 8, at 14, however the claimants’ remedy agreements provide for three years, see, e.g., Remedy Agreement EF2 (2013) (on file with author). Following the clinics’ requests for clarification, Barrick has stated that the fees were to be awarded for three years. Email from Peter Sinclair, Senior Vice President, Corporate Affairs, Barrick Gold Corp. to Sarah Knuckey (June 24, 2015) (on file with author) [hereinafter Barrick Email (June 24, 2015)]. In an October 2015 phone interview with claimants, numerous women expressed concern about whether the school fees and medical expenses would continue to be paid. Phone Interview (Oct. 12, 2015).

Barrick has also not made public the full mid-program assessment of the remedy mechanism that it commissioned from BSR, or financial information about the total amount provided for remedy packages, the mechanism's design and implementation costs, assessment costs, or costs associated with disseminating information about the mechanism in national and international forums and in the media.<sup>19</sup>

Without such important relevant information fully being made public, there have been limits on the ability of third parties to monitor the performance of the mechanism and reach conclusions regarding its efficacy.

### *Predictability*

*Moving from paper to practice:* At a broad level, the mechanism was predictable—women made claims that were assessed and were then provided with remedy packages. In a number of important ways, however, the claimants did not consistently experience in practice the procedures as they appear on paper and as they were communicated to claimants and other stakeholders.<sup>20</sup>

Some examples of these discrepancies include:

- Contrary to what was described in the official documents, claimants have reported that they were not all given a clear explanation or overview of the claims process or the appeals process.<sup>21</sup>
- The Claims Manual states that “[c]laims may be lodged from 25th October [2012] until the end of April 2013.”<sup>22</sup> In practice, the mechanism did not continuously receive complaints, but received complaints during a number of distinct two week “rotations.”<sup>23</sup> This “rotation” structure differed from the continuous period readers may understand from the manual,<sup>24</sup>

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19 See *supra*, Recommendations.

20 An individual with knowledge of the remedy mechanism explained, “there is a structure in place on paper, but it is not well implemented.” Interview 11-2014 (March 20, 2014). An ERI representative noted, “what Barrick and Cardno said was going to happen looked nothing like what women were experiencing when they went to the office.” Interview 63-2014 (May 7, 2014).

21 See, e.g. Interview 1-2014 (Mar. 19, 2014); Interview 63-2014 (May 7, 2014).

22 BARRICK, CLAIMS PROCESS PROCEDURES MANUAL (undated) 1, <http://www.barrick.com/files/porgera/Claims-Process-Procedures-Manual.pdf> [hereinafter CLAIMS MANUAL]. As noted above, this period was extended during implementation, so that the “nominal end date for new claims” was May 25, 2015, with additional claims allowed on a “case-by-case basis.” See Barrick Email (June 24, 2015), *supra* note 18.

23 *Id.* (The email includes a table of the rotations, noting Rotation 1 as Oct. 20-Nov. 3, 2012, for “Expert panel [to] meet women leaders and initial claimants;” Rotation 2 as Nov. 24-Dec. 8, 2012; Rotation 3 as Jan. 5-19, 2013; Rotation 4 as Feb. 9-23, 2013; Rotation 5 as Mar. 15-23, 2013; Rotation 6 as Apr. 6-13, 2013; Rotation 7 as Apr. 27-May 4, 2013; and Rotation 8 as May 18-25, 2013, with the notation “Nominal end date for new claims; any claims from this point were to be considered on a case-by-case basis.” Two more rotations took place, Oct. 12-26, 2013 and Nov. 16-26, 2013, which were designated as “special rotation to consider only ERI claims; no other new claims at this point.” A total of 23 “rotations” are detailed in this response: six were “health and counseling rotations;” three were “financial literacy trainings;” four involved expert panel and/or board members’ visits; three were CAT Teams specifically “available for ERI claims.” Several of the 23 rotations had more than one purpose.

24 Barrick’s main framework document BARRICK GOLD CORP., A FRAMEWORK OF REMEDIATION INITIATIVES IN RESPONSE TO VIOLENCE AGAINST WOMEN IN THE PORGERA VALLEY (2013), <http://www.barrick.com/files/porgera/Framework-of-remediation-initiatives.pdf>, and its framework summary document, BARRICK REMEDY FRAMEWORK SUMMARY, *supra* note 8, do not discuss a “rotation” schedule. The discussions in these documents about opening the claims office give the impression that the office is continuously open.

and could have made accessing the mechanism more difficult for some claimants. For further discussion, *see* Part III, Chapter 4: Accessibility and Security.

- Compensation packages were not “individualized” for all women to the extent suggested in published materials. According to the procedures laid out in the Claims Manual, if a claim was found to be legitimate and eligible, “a tailored remediation package” would be designed “in conjunction with the Claimant.”<sup>25</sup> The Claims Manual states that the recommended remediation package should be selected from a “standard range of programs” listed in the manual.<sup>26</sup> Making this list of remedial options publicly available was a positive step towards transparency. In practice, however, compensation packages were not “individualized” in any strong sense for all women. Some packages differed in relatively small ways by awarding, among other things, school fees for the claimant’s education and/or that of her children, or varying amounts for health care.<sup>27</sup> However, many claimants received near or actually identical packages.<sup>28</sup> Numerous claimants stated that they played only a marginal role, if any, in proposing or negotiating their own remedy packages. “They didn’t give us time to talk about it, they didn’t get our opinion,” reported one woman who had accepted the package.<sup>29</sup> In another case, even when the claimant expressed a clear desire for specific forms of reparations, the Independent Expert overruled her and designed the remedy package as they “consider[ed] . . . appropriate.”<sup>30</sup> It also does not appear that disbursement of the remedy was sufficiently tailored to individuals with regards to security and privacy considerations. *See* Part III, Chapter 5: Reparations. The description of the different compensation options identified in the Claims Manual, and the suggestion that packages would be “tailored” to the needs of the specific claimants, appears to overstate—and may give readers the wrong impression about—the actual extent of individualization.
- Claimants reported to their lawyers that remedy mechanism staff sometimes failed to disclose financial reparations as one of the remedy options.<sup>31</sup>
- At various points, claimants have reported inadequate communication from those associated with the mechanism, causing confusion and distress.<sup>32</sup> At the initial stages, this included confusion over the specific content of the remediation packages that were being offered. Some women expressed confusion about the length of time that they would benefit from the remedy package, and in particular whether the cash compensation was a one-time payment, or an annual payment paid over multiple years.<sup>33</sup> One woman stated that remedy mechanism

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25 CLAIMS MANUAL, *supra* note 22, at 6.

26 *Id.*

27 For a detailed description and analysis on the forms a remedy package could and did take, *see* Part III, Chapter 5: Reparations.

28 *See, e.g.*, Remedy Agreement XT6; Remedy Agreement SW3; Remedy Agreement RP2; Remedy Agreement QG8; Remedy Agreement BK1 (on file with author); *See also* Part III, Chapter 5: Reparations.

29 Interview 7-2015 (Jan. 7, 2015).

30 Claim Assessment by Independent Expert: Appeal of Final Report of CAT, case CD5 (on file with author) (“Claimant wanted assistance on school fees for her children and also wanted some financial assistance on her livelihood. These sorts of assistance, however, are unsustainable in a long term and should not be encouraged. It also encourages a ‘hand-out’ mentality.” The Independent Expert then listed medical attention, micro-funding assistance “to set up small businesses such as a poultry project,” and “life skills trainings” as the remedies that should be awarded).

31 *Id.*

32 *See, e.g.*, Interview 1-2015 (January 2, 2015); Interview 3-2015 (January 8, 2015).

33 Interview 1-2015 (January 2, 2015); Interview 3-2015 (January 8, 2015); Interview 7-2015 (January 7, 2015); Phone Interview (Oct. 12, 2015) (“Barrick told us we’d have three years of the remedy—they would look out for us for three years. It’s been cut off in the middle. They haven’t finished the three years of payments. Our school fees and medical fees have not been completed. It’s not finished.”). For further details of a lack of satisfaction among the claimants, *see* Part III, Chapter 5: Reparations.



staff told her “that they would be with us for three years, and we were happy and we signed the paper, but now I don’t know if I get more benefits in 2015, 2016, 2017.”<sup>34</sup> Another woman explained, “It [20,000 kina] is not enough for me to support my living. My body has been spoiled. I thought they were going to give me 60,000 and that’s why I agreed.”<sup>35</sup> More recently, inadequate communication has also contributed to confusion over whether the mechanism has fully closed or if it will continue to meet claimants’ medical, psychological, and school fee needs.<sup>36</sup>

- Women also expressed confusion as to how much of their remediation package was earmarked for specific uses, such as health care or school fees, and whether such expenses would be taken from their general cash awards or were part of a separate allocation.<sup>37</sup>
- Compounding this confusion, and contrary to what is described in the Claims Manual, some women reported that they found it difficult at some points to obtain access to copies of their paperwork.<sup>38</sup> Some women reported that remedy mechanism staff had denied their direct requests for access to their paperwork.<sup>39</sup> These women felt that they were unable to verify questions and concerns regarding the amounts and composition of their original remedy packages.

While no mechanism could be immune from challenges in implementation, the discrepancies that claimants experienced in Barrick’s mechanism caused unnecessary confusion and distress, and challenged the predictability of the mechanism.

### *Continuous learning*

*Identifying key lessons and improvements:* As discussed above in Part III, Chapter 2: Consultation and Rights-Holder Engagement, the mechanism evolved in some important and positive ways for the women in light of feedback received. Continuous learning would have been improved through additional formalized and regular processes of feedback from stakeholders to complement the informal mechanisms and assessments used.<sup>40</sup>

Barrick’s decision to hire a consultant to conduct a mid-program review of the mechanism was a positive step for company continuous learning. The full report should be made public so that third

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34 Interview 3-2015 (January 8, 2015).

35 *Id.*

36 Phone interview, Oct. 12, 2015.

37 Interview 2-2015 (January 8, 2015); Interview 4-2015 (January 8, 2015).

38 See CLAIMS MANUAL, *supra* note 22, at 7-9 (“A copy of the report will be made in a language or form that the Claimant can understand and offered to her, or held for safe-keeping by the CAT if requested by the Claimant to do so.” “A copy of the Claim Assessment, prepared in a manner or format that the Claimant can understand, must be given to the Claimant.” “A copy of the Appeal Assessment must be made in a language or format that the Claimant can understand, and offered to her by the CAT, or retained for safe-keeping if requested to do so by the Claimant.”). Compare with Interview 2-2015 (January 8, 2015); Interview 3-2015 (January 8, 2015) (“I wasn’t given a copy of the paper work, and I was not given a copy of what Barrick was agreed to give us. We were not given any copy of this information.”); Interview 4-2015 (January 8, 2015) (“I want [the remedy mechanism] to provide all the information and show me all the documents . . . We want to see for ourselves what is in the documents.”); Interview 10-2014 (July 23, 2015); Interview 63-2014 (May 7, 2014) (“[W]e did have to push to get documents [for our clients] from Cardno.”

The clinics view is that it is possible that some of the claimants may be mistaken. However, the fact that so many women report confusion about the mechanism in interviews with the clinics suggests that more could have been done to clearly communicate with claimants.

39 Interview 2-2015 (January 8, 2015).

40 See Part III, Chapter 2: Consultation and Rights-Holder Engagement.

parties can best understand and participate in the monitoring of the mechanism.<sup>41</sup> In addition, Barrick should explain what specific steps it took to respond to the review.<sup>42</sup>

The Office of the High Commissioner for Human Rights (OHCHR) and civil society organizations have recommended an independent review of the Barrick remedy mechanism.<sup>43</sup> The OHCHR has specifically recommended that the process for establishing and conducting the review be inclusive and transparent.<sup>44</sup>

In 2015, Barrick retained Enodo Rights to conduct what they called an “independent” and “authoritative” review of the remedy mechanism.<sup>45</sup> The Barrick-funded review will likely be important for corporate learning. However, because Barrick is funding the assessment and chose both the external committee of review and the assessors, and key local stakeholders played no role in setting up the review, the design and establishment of the review were not as inclusive as they should have been.<sup>46</sup>

While the assessment is independent in the sense that Enodo Rights and the external committee overseeing the report have stated that they control the report’s content, the process is not as independent as it could be. Independence considerations also include sources of funding, who designs and sets up a review, who selects reviewers or implementers, and the effect of repeat players on independence perceptions. By selecting and compensating those who will review it,

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41 BARRICK REMEDY FRAMEWORK SUMMARY, *supra* note 8, at 44-45.

42 Barrick has claimed that “a number of aspects of the Framework were adjusted following BSR’s review and recommendations.” CLAIMS MANUAL, *supra* note 22, at 7. Barrick has yet to adequately explain, however, what concrete steps were taken. *See also* BARRICK GOLD CORP., A SUMMARY OF RECENT CHANGES TO THE PORGERA REMEDIATION FRAMEWORK (June 7, 2013), <http://www.barrick.com/files/porgera/Summary-of-Recent-Changes-to-the-Porgera-Remediation-Framework.pdf> (“The Framework already has adopted some of the suggestions, and will be implementing and considering others.”).

43 UN Office of the High Comm’r for Human Rights, *Re: Allegations regarding the Porgera Joint Venture Remedy Framework* 10 (July 2013), <http://www.ohchr.org/Documents/Issues/Business/LetterPorgera.pdf> [hereinafter *OHCHR Opinion*]. The opinion calls for:

[E]fforts . . . 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. [ ] The independent review should be focused on the perspectives of the victims of sexual abuse, and the implementation of the programme should be assessed against the effectiveness criteria for non-judicial remedy mechanisms as set out in Guiding Principle 31. 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.

(emphasis added); Letter from the clinics to Peter Sinclair, Senior Vice President, Corporate Affairs, Barrick Gold Corp. et al (May 27, 2015) (on file with author) [hereinafter Clinics Letter (May 27, 2015)]; Letter from Catherine Coumans, Ph.D., Asia-Pacific Program Coordinator, MiningWatch Canada to Dr. Navanethem Pillay, UN High Commissioner for Human Rights 2, 5 (September 4, 2013), [http://www.miningwatch.ca/sites/www.miningwatch.ca/files/letter\\_to\\_unhchr\\_re\\_porgera\\_opinion\\_2013-09-04.pdf](http://www.miningwatch.ca/sites/www.miningwatch.ca/files/letter_to_unhchr_re_porgera_opinion_2013-09-04.pdf) [hereinafter MiningWatch Canada Letter (Sept. 4, 2013)]; Letter from Catherine Coumans, Ph.D., Asia-Pacific Program Coordinator, MiningWatch Canada to Zeid Ra’ad Al Hussein, UN High Commissioner for Human Rights (July 13, 2015) (on file with author) [hereinafter MiningWatch Canada Letter (July 13, 2015)].

44 *OHCHR Opinion*, *supra* note 43, at 10 (“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.”).

45 Enodo Rights Email (Apr. 20, 2015), *supra* note 13; Enodo Rights Letter (Sept. 21, 2015), *supra* note 14; Barrick Letter to OHCHR (Sept. 21, 2015), *supra* note 13.

46 Sexual assault survivors in Porgera were not consulted about the review, and some have expressed concerns about its potential outcomes. *See, e.g.*, MiningWatch Canada Letter (July 13, 2015), *supra* note 43; Phone Interview (Oct. 12, 2015).

Barrick has been involved in designing its own assessment. Given the history of controversy and international debate surrounding this mechanism, it was particularly important that a review be as fully independent as possible and that it be seen to be independent. Barrick should have taken further steps to establish the review through a process that is, as the OHCHR has recommended, “inclusive” of the various stakeholders, particularly rights-holders.<sup>47</sup>

### *Independence*

*Separation between Barrick and the remedy mechanism:* Barrick asserts that its remedy mechanism is independently implemented.<sup>48</sup> Independence has a number of elements, including who designs systems, who selects implementers, who selects key decision-makers, who provides funding, and who can make changes to the system during implementation. While the mechanism was largely independent in some ways, it was not independent in other important aspects.

The clinic investigations indicate that the mechanism was independent in at least one important sense: remedy mechanism staff decided independently from Barrick which sexual assault claims were eligible and legitimate, and claimant names and other confidential claim information were not shared with Barrick. The clinics found no evidence that Barrick played any role in assessing individual claim decisions.

However, the mechanism was not fully independent from Barrick:

First, Barrick itself designed and funded the remedy mechanism, and thus controlled *ab initio* critical aspects of its scope and functioning, including the nature of the waiver.<sup>49</sup>

Second, when the clinics and others raised concerns with Barrick about implementation, Barrick stepped in at certain points to adjust or modify the remedy framework, indicating ongoing involvement in design and decision-making. For example, Barrick made the decision to change the legal waiver language, and introduced amendments and proposed refinements to clarify available medical and counseling services as well as the availability of translation, the types and amounts of remedies, and the role of and advice given by the “Independent Legal Advisor.”<sup>50</sup> Barrick also

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47 Clinics Letter (May 27, 2015), *supra* note 43.

48 BARRICK REMEDY FRAMEWORK SUMMARY, *supra* note 8, at 1.

49 In addition, at some points, where substantive questions were asked of Cardno (the implementer), the clinics were referred to Barrick. *See, e.g.*, Email from Joshua De Bruin, Senior Consultant, Cardno Emerging Markets (Australia) to Sarah Knuckey (Mar. 2, 2013) (on file with author) (“Cardno is the implementing partner for the remediation framework, any substantive questions on the design of the program should be directed to Barrick.”); *See also* Interview 21-2014 (Mar. 21, 2014).

50 *See* BARRICK GOLD CORP., CLARIFICATION OF THE FRAMEWORK (Dec. 3, 2013), <http://s1.q4cdn.com/808035602/files/porgera/Clarification-of-the-Porgera-Remediation-Framework.pdf>; BARRICK GOLD CORP., A SUMMARY OF RECENT CHANGES TO THE PORGERA REMEDIATION FRAMEWORK (June 7, 2013), <http://www.barrick.com/files/porgera/Summary-of-Recent-Changes-to-the-Porgera-Remediation-Framework.pdf>. On some issues, in response to critiques, Barrick proposed “solution[s] to the concerns,” and stated that it would “request that the CAT” begin to implement new processes “immediately” and request that the new changes “be documented in each client case file.” *See* Email from Jonathan Drimmer, Vice President, Deputy General Counsel, Barrick Gold Corp., to Marco Simons, Legal Director, EarthRights International (Nov. 26, 2013) (on file with author). *See further* Email from Jonathan Drimmer, Vice President, Deputy General Counsel, Barrick Gold Corp., to Marco Simons, Legal Director, EarthRights International (Nov. 22, 2013) (on file with author) (“We will check to make sure that these matters have been explained clearly to claimants, and address it if not.”). Barrick also brought itself into conversations about improving implementation. *See* Email from Peter Sinclair, Senior Vice President, Corporate Affairs, Barrick Gold Corp. to Catherine Coumans, Ph.D., Asia-Pacific Program

stated that “it would consider further amendments and improvements to the implementation of the Remediation Framework where practical changes are proposed.”<sup>51</sup> Barrick stepping in at these points improved the mechanism, and Barrick’s involvement in such changes is not in and of itself a negative feature. However, Barrick’s capacity to intervene qualifies the mechanism’s independence, and highlights the likely independence limitations of any company-created mechanism.

## Lessons Learned

The publication of remedy mechanism designs and processes are critical for transparency and predictability. Systems should be put in place to ensure that procedures, designed to advance rights and justice, are carefully followed. At the same time, some flexibility in the implementation of a remedy mechanism is important to ensure that the mechanism is responsive to the local context, unforeseen problems, and changing circumstances. Because modifications during implementation can lead those accessing the mechanism to experience confusion or unpredictability, if changes are made, the content of these changes should be well documented, shared publicly, and explained in detail. Continuous learning must therefore be done in a way that fosters predictability through clear and transparent communication to the claimants, community, and general public.

The privacy and security of individual claimants should be of paramount concern at all times, but transparency about mechanism procedures and outcomes should be as complete and detailed as possible. Any mechanism should strive to make sure that claimants and participants themselves have a clear understanding of the procedures and outcomes of the mechanism. Involving rights-holders in design directly would likely help avoid information and expectation gaps. Transparency to third parties is also important for external monitoring, and to enable the dialogue necessary for facilitating trust in the mechanism and promoting its legitimacy.

Implementers of a mechanism should be proactive about transparency and continuous learning—regularly releasing information as a matter of course, and providing formal and informal systems for feedback. Processes that incorporate feedback from community members, victims, external monitors, and those implementing the mechanism aid in institutionalizing constructive feedback and help to ensure that the concerns of all claimants and third parties are heard. A lack of transparency and insufficient formal feedback procedures can exacerbate existing power imbalances, and limit the ability of claimants and broader stakeholders to monitor and assess a mechanism or to suggest improvements.

Continuous learning through company commissioned reviews of a mechanism can be important for assessing the process and identifying areas for improvement. Internal, company-created reviews are appropriate for a company’s continuous learning. However, when designed and funded by the

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Coordinator, MiningWatch Canada (Mar. 23, 2013) (on file with author) (“[W]e . . . encourage [MiningWatch Canada] to provide, either to us or Cardno, interview notes . . . from [those] who participated in the remedy framework to ascertain whether enhancements to the framework are necessary and appropriate.”). *But see* Letter from Patrick Bindon, Manager, Corporate Affairs, Australia—Pacific, Barrick Gold Corp., to Sarah Knuckey and Tyler Giannini (Mar. 26, 2013) (on file with author) (stating that “outreach and publicity on the program was overseen exclusively by Cardno”).

51 BARRICK GOLD CORP., CLARIFICATION OF THE FRAMEWORK (Dec. 3, 2013), <http://s1.q4cdn.com/808035602/files/porgera/Clarification-of-the-Porgera-Remediation-Framework.pdf>. *See also* BARRICK GOLD CORP., A SUMMARY OF RECENT CHANGES TO THE PORGERA REMEDIATION FRAMEWORK (June 7, 2013), <http://www.barrick.com/files/porgera/Summary-of-Recent-Changes-to-the-Porgera-Remediation-Framework.pdf> (noting that Barrick will continue to review the framework’s operation “to assess whether further enhancements are appropriate.”).

company, their independence is inherently limited. Particularly in contentious cases, the best review model would entail involving rights-holders and key stakeholders in jointly appointing the reviewing body and jointly designing its scope and methods.

Remedy mechanisms created by companies themselves are unlikely to ever be fully independent of the company. Independence involves a number of dimensions, including design, selection of implementers, implementation decision-making, and funding. Companies can best ensure independence around the assessment of complaints by facilitating the creation of a separate institution to carry out assessments, and creating structural measures to insulate such decisions from the company's influence. Companies may experience challenges to maintaining independence in connection with continuous learning: if monitoring and feedback processes reveal concerns, the company may seek to step in. Such revisions may be important, but may also simultaneously affect perceptions of independence.

Actual and perceived independence is inherently limited where a company itself designs a process to remedy its own harms. Given that a primary goal of independence is to increase the actual and perceived legitimacy of a mechanism, it is critical that the actor under scrutiny does not retain undue control over a remedy mechanism. Thus, concerns about independence are likely to be greatly mitigated if the mechanism is jointly created with rights-holders or jointly appointed by companies and affected individuals and stakeholders. If a jointly designed arrangement involves significant power sharing, concerns about company control (and thus mechanism independence) would be diminished.

## Conclusion

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Barrick Gold created a novel non-judicial remedy mechanism that provided remedy packages to more than a hundred women who had been sexually assaulted by its security guards and other employees. Yet Barrick's remedy mechanism falls short, and a close analysis reveals numerous serious deficiencies in its design and implementation. The mechanism left many survivors feeling dissatisfied, and failed to adequately meet international human rights standards. Significant strains on the relationship between the company and the survivors and communities remain today. The myriad of concerns about the design and implementation of the mechanism highlight that companies and right-holders would be better served with a different approach.

Fundamentally, a remedy mechanism must center rights-holders in every step of the process and address power imbalances if it is to advance rights and transform the damaged relationships that accompany human rights violations. In the long run, such an approach can work toward a more restorative form of justice that will better benefit the community as well as the business. Without centering rights-holders and addressing power differences, remedy mechanisms are likely to fall short in both their effectiveness and their legitimacy.

One pervasive deficiency of the Barrick mechanism was the treatment of rights-holders as passive recipients of remedy packages instead of as active participants in the design and implementation of the entire process. While businesses may instinctually favor maintaining control over the design and implementation of a mechanism established to remedy abuses, the experience of the Barrick mechanism demonstrates that the failure to place rights-holders at the center of mechanism design and implementation not only negatively affected the mechanism's outcomes, but also led to a chain of problems starting from the very beginning of the process. As a result, the legitimacy of the mechanism was severely undermined, and the mechanism has not produced the reconciliation with local stakeholders that Barrick may have intended.

Barrick's failure to ameliorate the power differential between itself and the rights-holders also contributed to an array of concerns. Barrick missed an opportunity through its remedy mechanism to address the problem of power inequality resulting from factors such as poverty, lack of education, prolonged waiting, and lack of alternatives. Important measures that could have elevated rights-holders' power, such as early and deep engagement with survivors and providing more robust independent counsel, were either not implemented or implemented poorly. In contrast, when the rights-holders were able to augment their bargaining power, such as by coming together as a group to demand additional remedies, they secured much better outcomes for themselves than when they were isolated as individuals during the two-year mechanism process. When rights-holders can organize towards a better bargaining position for themselves, the outcome can be significantly improved.

This report illustrates that a company-created remedy mechanism has inherent limitations especially when used to redress gross human rights abuses. When businesses themselves set up systems to remedy abuses caused by or associated with their own activities, conflict of interest concerns arise. When the violations are egregious or widespread and where the company seeks legal waivers from

survivors, those concerns are all the more present. Thus, company-created mechanisms to remedy serious human rights violations, if they are used at all, should only be used in the most narrow of circumstances and when the strictest human rights standards apply.

The development of an effective and legitimate remedy mechanism must include the active participation of a number of key stakeholders. Rather than *company-created* models, a better approach would be for companies, survivors, and communities to jointly design remedy mechanisms, or for these key stakeholders to jointly appoint an independent third party to develop and implement the mechanism. Co-creation centers the rights-holders in the process from the outset, can help address power differentials, and may aid in achieving more transformative reconciliation. It must also be recognized that non-judicial remedy mechanisms alone can never provide a full remedy to survivors; state action is needed to provide the required judicial sanction under human rights law.

Thus, states, companies, mechanism implementers, civil society, and rights-holders all need to be proactively engaged to bring about full and appropriate remedy for survivors. States must investigate and prosecute those responsible for violations. Corporations should participate with rights-holders in the co-creation or joint appointment of an independent remedy mechanism, and cooperate with state investigations and prosecutions. Those implementing remedy mechanisms should abide by clear, transparent, and predictable processes, maintain independence from corporate influence, and facilitate the provision of full, effective, and appropriate remedies. Civil society should be ready to monitor these processes, support communities, and assist rights-holders in their advocacy and negotiations. And rights-holders should be active participants in co-designing or jointly appointment such mechanisms, and their interests should be centered throughout the process.

In considering these different roles and responsibilities, the valuable lessons drawn from the experience with the Barrick mechanism will not only benefit other corporations contemplating remedy mechanisms, but should also generate a longer and on-going conversation between rights-holders, communities, states, international bodies, companies, and civil society about how best to advance the human right to remedy.

## Annex

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### **Barrick Remedy Agreements**

This Annex contains a sample of Barrick remedy agreements provided to the clinics.  
Identifying information has been redacted at request.



**Individual Reparations Program  
Agreement**

Date [REDACTED] 2013

**Parties**

1. [REDACTED] (the *Claimant*)
2. Barrick (Niugini) Limited (*Barrick*)
3. Porgera Remediation Framework Association Inc. (*PRFA*)

**Recitals**

- A. The Claimant was the subject of sexual violence attributable to one or more current or former employees of the Porgera Joint Venture (the *Conduct*).
- B. While not admitting any liability, Barrick acknowledges the Conduct, expresses its regret for the harm suffered by the Claimant and encourages the Claimant to pursue criminal and any other civil legal action against the alleged individual perpetrator(s) of the Conduct.

It is **agreed** as follows:

1. PRFA agrees to provide the reparations set out in the attached
  - Reparations Pro Forma Agreement signed by the Claimant dated [REDACTED] 2013,
  - Claim Assessment dated [REDACTED] 2013and the recommendations of the Independent Expert (the *Reparations*), to the Claimant in order to provide remedy for the harm(s) suffered as a result of the Conduct.
2. PRFA agrees to provide grants, reimbursements and pay for services to and for the Claimant up to and equal to the sum of *K21 320.00* per the Claimants Reparations Pro Forma Agreement. PRFA will also enable access to each of the programs listed in the attached Claim Assessment and Proforma Agreement, subject to availability.
3. The Claimant accepts the Reparations, and acknowledges that they and this release (together, this *Agreement*) have been provided or explained to her in a language with which she is familiar by a qualified lawyer, and that she is entering into this Agreement voluntarily and without coercion or duress.
4. The Claimant agrees that, in consideration for the Reparations, on and from the date of signing this Agreement, she will not pursue any claim for compensation, or any civil legal action, that relates in any way to the Conduct, against the Porgera Joint Venture, PRFA or

Barrick in Papua New Guinea or in any other jurisdiction. This expressly excludes any criminal action that may be brought by any state, governmental or international entity.

5. This Agreement may be pleaded and tendered by Barrick, the Porgera Joint Venture and PRFA as an absolute bar and defence to any civil legal action relying on any acts related to the Conduct which the Claimant may bring or participate in against Barrick, the Porgera Joint Venture or PRFA. The Agreement may be relied on Barrick, the Porgera Joint Venture or PRFA in any form of dispute resolution process connected to such a legal proceeding.
6. A Party cannot change or transfer any of its rights or obligations under this Agreement, or attempt or claim to do so, without the prior written consent of each other Party.
7. In the event of any dispute arising out of or in connection with this Agreement, including any question regarding its formation, existence, validity, enforceability, performance, interpretation, breach or termination (a *Dispute*), the Parties shall use reasonable efforts to resolve such Dispute through amicable negotiations.
8. This Agreement, and any Disputes, shall be governed by the laws of Papua New Guinea.
9. Any and all Disputes relating to this Agreement shall be resolved exclusively by the courts of Papua New Guinea. Each Party submits to the jurisdiction of the courts of Papua New Guinea.

Executed in \_\_\_\_\_, PAPUA NEW GUINEA

Signed by \_\_\_\_\_ in the presence of:

\_\_\_\_\_

Witness Signature

\_\_\_\_\_

Print Name

\_\_\_\_\_

Signature

Signed by \_\_\_\_\_ on behalf of  
Barrick in the presence of:

\_\_\_\_\_

Witness Signature

\_\_\_\_\_


Print Name

\_\_\_\_\_

Signature








**Reparations Package Proforma Agreement**






I, , acknowledge that the following reparations package has been discussed with me, and that I am satisfied with the proposed reparations package being offered.

**SUMMARY OF REPARATIONS PACKAGE COMPONENTS**

**Part A Components**

REMEDY	DETAIL	VALUE (PGK)
Counselling	12 sessions available to be provided directly to Service Provider	540
Business Grants and Start Up	Available only subject to completion of Business training and is non transferable	15,000
Business Training	To be paid directly to Service Provider	180
Transport Allowance	Related to Training in Porgera area Only if living outside of Porgera – for 12 trips related to counselling	To be provided by PRFA
Reparation (  )	Airline Ticket to  bus fare to 	K800 ( ticket to  and 10 ( Bus fare) 810
Resettlement	Assistance for Claimant to settle back  for the 3 months K 300	900
		Total K17,430.00

**Part B Components**

REMEDY	DETAIL	VALUE (PGK)
School Fees	Child 1 – (  )  ( Cost x 3)	6000
	Child 2 –   	900
		Total K 6900.00

**Grand Total K24,330.00**



OLGETA MERI IGAT RAITS  
"All women have rights"

A FRAMEWORK OF REMEDIATION INITIATIVES IN RESPONSE TO VIOLENCE  
AGAINST WOMEN IN THE PÖRGERA VALLEY

Proforma Agreement

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I understand and acknowledge that a formal settlement agreement including the Reparations Package outlined above will now be prepared and provided to me for consideration and signing.

Claimant Name: \_\_\_\_\_  
Claimant Signature: \_\_\_\_\_  
Date: \_\_\_\_\_ 2013 \_\_\_\_\_  
Witness Name: \_\_\_\_\_  
Witness Signature: \_\_\_\_\_

### Reparations Package Proforma Agreement

I, [REDACTED] acknowledge that the following reparations package has been discussed with me, and that I am satisfied with the proposed reparations package being offered.

#### SUMMARY OF REPARATIONS PACKAGE COMPONENTS

##### Part A Components

REPERATION	DETAIL	VALUE (PGK)
Counselling	12 sessions available to be provided directly to Service Provider	540
Business Grants and Start Up	Available only subject to completion of Business training and is non transferable	15,000
Business Training	To be paid directly to Service Provider	180
Transport Allowance	Related to Training in Porgera area Only if living outside of Porgera – for 12 trips related to counselling	To be provided by PRFA

Total Part A : K15, 720

##### Part B Components

REPERATION	DETAIL	VALUE (PGK)
School Fees	NIL	

Financial Supplement : K5,000

Total Part B : K5, 000

**Total Value cost : K20, 720 Overall value of claimant package**

I understand and acknowledge that a formal settlement agreement including the Reparations Package outlined above will now be prepared and provided to me for consideration and signing.



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AGAINST WOMEN IN THE PORGERA VALLEY

Proforma Agreement

Claimant Name: \_\_\_\_\_

Claimant Signature: \_\_\_\_\_

Date: \_\_\_\_\_ 2013 \_\_\_\_\_

Witness Name: \_\_\_\_\_

Witness Signature: \_\_\_\_\_

\_\_\_\_\_




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AGAINST WOMEN IN THE PORGERA VALLEY



Proforma Agreement

**Reparations Package Proforma Agreement**

I, , acknowledge that the following reparations package has been discussed with me, and that I am satisfied with the proposed reparations package being offered.

**SUMMARY OF REPARATIONS PACKAGE COMPONENTS**

**Part A Components**

REMEDY	DETAIL	VALUE (PGK)
Medical	Full Medical Check Up paid directly to service provider	400
	Associated Medical Support to be provided to Service Provider	200
Counselling	12 sessions available to be provided directly to Service Provider	540
Business Grants and Start Up	Available only subject to completion of Business training and is non transferable	15,000
Business Training	To be paid directly to Service Provider	180
Transport Allowance	Related to Training in Porgera area Only if living outside of Porgera – for 12 trips related to counselling	To be provided by PRFA
		Total K 16,320.00

**Part B Components**

REMEDY	DETAIL	VALUE (PGK)
Financial Supplement	Financial Assistance	4562.50
Medical Expenditure Refund	Claimant contracted gonorrhoea when raped. She spent K250 on medicals.( K250 +75% )	K437.50
		Total K5000.00

**Grand Total K21,320.00**



I understand and acknowledge that a formal settlement agreement including the Reparations Package outlined above will now be prepared and provided to me for consideration and signing.

Claimant Name: \_\_\_\_\_

Claimant Signature: \_\_\_\_\_

Date: \_\_\_\_\_

Witness Name: \_\_\_\_\_

Witness Signature: \_\_\_\_\_





**Reparations Package Proforma Agreement**

I, [REDACTED] in Porgera, acknowledge that the following reparations package has been discussed with me, and that I am satisfied with the proposed reparations package being offered.

**SUMMARY OF REPARATIONS PACKAGE COMPONENTS**

**Part A Components**

REPARATION	DETAIL	VALUE (PGK)
Counselling	12 sessions available to be provided directly to Service Provider	540
Business Grants and Start Up	Available only subject to completion of Business training and is non transferable	15,000
Business Training	To be paid directly to Service Provider	180
Transport Allowance	Related to Training in Porgera area Only if living outside of Porgera – for 12 trips related to counselling	To be provided by PRFA
	Total	K 15,720.00

**Part B Components**

REPARATION	DETAIL	VALUE (PGK)
Financial Supplement	Additional Financial Support.	K 5,000
School Fees	Child 1 – (name)(age)(Year/Grade)(School Name) ( Cost x 3) 1. [REDACTED] in [REDACTED] School, Porgera. (2013 Project fees of K200.00 to be Reimbursed to [REDACTED] while Project Fees for 2014 & 2015 be paid to the School = K200 x 3 yrs = K 600).	K 600
	2. [REDACTED] years old in	K210



	██████████ (2013 Uniform & Project fees of K70.00 to be Reimbursed to ██████████ while School Fees for 2014 & 2015 be paid to the School – K 70 x 3 yrs = K 210.)	
	<b>Total School Project &amp; Uniform Fees</b>	K 810.
	The Balance to be Deposited into her New Business Account to be Opened.	K4190
	Total	K 5,000.00
	Grand Total A & B	K 20,720.00

I understand and acknowledge that a formal settlement agreement including the Reparations Package outlined above will now be prepared and provided to me for consideration and signing.

Claimant Name: ██████████ \_\_\_\_\_  
 Claimant Signature: ██████████ \_\_\_\_\_  
 Date: ██████████ 2013 \_\_\_\_\_  
 Witness Name: ██████████ \_\_\_\_\_  
 Witness Signature: ██████████ \_\_\_\_\_



**Reparations Package Proforma Agreement**

I, [REDACTED], acknowledge that the following reparations package has been discussed with me, and that I am satisfied with the proposed reparations package being offered.

**SUMMARY OF REPARATIONS PACKAGE COMPONENTS**

**Part A Components**

REMEDY	DETAIL	VALUE (PGK)
Business Grants and Start Up	Available only subject to completion of Business training and is non transferable	15,000
Business Training	To be paid directly to Service Provider	180
Transport Allowance	Related to Training in Porgera area Only if living outside of Porgera – for 12 trips related to counselling	To be provided by PRFA
		Total K15,180.00

**Part B Components**

REMEDY	DETAIL	VALUE (PGK)
Financial Supplement	Financial Support	5000
		Total: K5000

**Grand Total: K20,180.00**

I understand and acknowledge that a formal settlement agreement including the Reparations Package outlined above will now be prepared and provided to me for consideration and signing.

Claimant Name: [REDACTED]

Claimant Signature: [REDACTED]



OLGETA MERI IGAT RAITS  
*All women have rights*

A FRAMEWORK OF REMEDIATION INITIATIVES IN RESPONSE TO VIOLENCE  
AGAINST WOMEN IN THE PORGERA VALLEY

Proforma Agreement

---

Date: [REDACTED] 2013

Witness Name: [REDACTED]

Witness Signature: [REDACTED]



OLGETA MERI IGAT RAITIS  
"All women have rights"

A FRAMEWORK OF REMEDIATION INITIATIVES IN RESPONSE TO VIOLENCE  
AGAINST WOMEN IN THE PORGERA VALLEY

Porgera Remediation Framework  
Association (PRFA) Board  
c/- Cardno Limited

Suite 7, Ground Floor  
CHM Corporate Park  
Corner of Kawai Drive and  
Waigani Industrial Estate Drive  
Gordons  
Port Moresby  
Papua New Guinea

██████████ 2015

Dear ██████████

This letter is to advise you that you are being provided with a supplementary payment as part of your remediation package provided by the Porgera Remediation Framework ("PRF").

A payment of **PGK 30,000** will be made to your PRF bank account in the coming days.

This is the final component of your remediation package made under the Porgera Remediation Framework. The terms of the agreement signed by you continue to apply to your package.

Please complete the authorization below and return it to the PRF office at Puluperale Lodge, Porgera Station in order to progress this payment as soon as possible.

**AUTHORITY TO MAKE SUPPLEMENTATION PAYMENT**

I, ██████████ acknowledge receipt of this letter and accept the supplementary payment of **PGK 30,000**. I authorize the PRFA to deposit this amount directly to my banking account.

Claimant Name: ██████████

Claimant Signature: ██████████ \_\_\_\_\_

Witness Name: ██████████

Witness Signature: ██████████ \_\_\_\_\_

Date: ██████████ \_\_\_\_\_