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# Pillar III on the Ground

An Independent Assessment of the  
Porgera Remedy Framework

# ACKNOWLEDGEMENTS

This report is built on the insights of legion individuals in Papua New Guinea and internationally who generously gave their time to support our research. We are indebted in particular to the Porgeran survivors of sexual violence who shared their experiences with us despite our inability to promise any further assistance. We would also like to thank the numerous international experts, community leaders, members of civil society, and individuals responsible for designing and implementing the Porgera Remedy Framework for their invaluable candor.

Throughout this process, we have been advised by an External Committee of human rights experts: Chris Albin-Lackey of Human Rights Watch; Lelia Mooney of Partners for Democratic Change; and Dahlia Saibil of Osgoode Hall Law School. Their guidance helped structure the assessment, sharpen our methodology, and hone the final report. (The External Committee bears no responsibility for the content of this assessment, and their advisory role does not imply endorsement of our findings.)

This assessment is an Enodo Rights product. While Yousuf Aftab is the author, Marianna Almeida, Rita Villanueva Meza, and Audrey Mocle provided critical research and analytical support. Pauline Kenna Dee interviewed a hundred survivors of sexual violence in Porgera with exceptional compassion and professionalism.

Fault for the assessment's shortcomings lies with Yousuf Aftab alone.

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The views expressed in this report are those of Enodo Rights and do not necessarily reflect the opinions of the External Committee, Barrick Gold or any individual interviewed in conducting the assessment.

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# 1. EXECUTIVE SUMMARY

This report concerns an ambitious corporate program to remedy egregious human rights violations. Barrick Gold conceived the Olgeta Meri Remedy Framework (the Framework) in response to devastating accounts of sexual violence committed by private security personnel at the Porgera gold mine in Papua New Guinea. The Guiding Principles on Business and Human Rights<sup>1</sup> were the Framework's touchstone. Barrick drew on them to design an elaborate operational-level grievance mechanism (OGM) to adjudicate sexual violence claims and determine individual remedies. Between 2012 and 2014, the Framework was implemented by two organizations independent of Barrick: the Porgera Remedy Framework Association (PRFA), an entity led by prominent Papua New Guinean women's rights advocates; and Cardno Emerging Markets, an environmental, social and infrastructure consultancy. Ultimately, 119 women were awarded remedies—including cash compensation, medical care, counseling, school fees and business training—for sexual violence committed between 1990 and 2010.

The Framework's design has been praised for its remarkable ambition and commitment to the Guiding Principles. At the same time, however, the Framework has been the flashpoint of local and international stakeholder controversy. Stakeholders have at various times raised concerns about the Framework's alignment with the Guiding Principles; its respect for international human

rights; its incorporation of local custom; its sensitivity to claimant wishes and the views of local human rights advocates; and its exclusive focus on sexual violence. More recently, Barrick has been accused of unfairness for agreeing to higher compensation than under the Framework for a group of women who rejected Framework remedies and threatened to sue the company in the United States. Controversy continues to this day.

## 1.A: ASSESSMENT BACKGROUND AND STRUCTURE

This assessment was launched in early 2015 to evaluate the Framework publicly and comprehensively against the Guiding Principles, incorporating international law and a particular focus on claimant experience. The research was funded by Barrick. But the process and report were conceived to be independent. Enodo Rights conducted the assessment with the guidance of an External Committee comprised of Chris Albin-Lackey of Human Rights Watch, Lelia Mooney of Partners for Democratic Change, and Dahlia Saibil of Osgoode Hall Law School. With the External Committee's advice, we<sup>2</sup> determined the assessment's scope and methodology, including the assessment metrics, documents to review, stakeholders and company personnel to interview, and the length and structure of the onsite research. Barrick provided only logistical and administrative support as requested. We retained at all times final discretion over the assessment's

<sup>1</sup> OHCHR, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework ("Guiding Principles") (2011), HR/PUB/11/04 at 1.

<sup>2</sup> "We" throughout this assessment refers to Enodo Rights. The External Committee has played an invaluable peer review and guidance role, but ultimate responsibility for any conclusions and errors is Enodo Rights' alone.

content. To ensure independence, all research funding was provided long before we processed our results, let alone shared any conclusions with Barrick.

We have aimed with this assessment to evaluate the Framework objectively against an authoritative standard. This is not a report about our impressions of private actors' responsibilities under public international law. We seek instead to identify exactly how and why the Framework did or did not align with the Guiding Principles. Mathematical certainty in this context is impossible. To minimize the risk of caprice we have privileged analytical structure and methodological transparency. We started by identifying the relevant Guiding Principles—GPs 22, 29 and 31. We then applied interpretive maxims from international law to unravel the practical meaning of each GP. The process resulted in 26 indicators. These serve as the assessment's template by delineating the boundaries of acceptable decisions and outcomes.

We assess the Framework against each indicator on two dimensions: design and implementation. Design refers to the Framework's blueprint in the foundational documents developed by Barrick. Implementation focuses particularly on claimant experience and captures the activity of Cardno and the PRFA. The design-implementation division allows us to home in on the cause and institutional source of any failings.

The assessment's structure comes at the price of narrative flow. Tracking the Guiding Principles limits our discretion in identifying material Framework elements and helps us evaluate them (relatively) precisely. That precision, however, is built on compartmentalized analysis of discrete issues. Moreover, it does not provide for differential weighting. We cannot say definitively, for instance, whether "equitability" under GP 31(d) is of more, less or equal importance to "rights-compatibility" under GP 31(f). This weighting limitation extends to the specific indicators we have chosen. Certain GPs lend themselves to more segregated analysis than others. Thus we have two indicators for "stakeholder engagement" under GP 31(h), but five indicators each for "legitimacy" under GP 31(a) and "accessibility" under GP 31(b).

These limitations mean that we do not seek to conclude whether the Framework itself was a success or a failure. We focus instead on discrete successes and failures, drawing lessons and unspooling underlying themes as appropriate. At this formative

stage of Guiding Principles-aligned assessments, we leave overarching judgment to readers. We caution against judging based on hindsight. Business and stakeholder understanding of corporate human rights obligations is nascent and developing. It was even less choate when the Framework was launched. We have not tried to assess the Framework against standards a reasonable responsible business may have applied in 2012. Rather, with an eye to durable lessons for businesses and stakeholders, our benchmark for Barrick, the PRFA and Cardno is a rigorous, contemporary application of the Guiding Principles. It is not a standard that we could have expected any business reasonably to have followed when the Framework was designed and implemented; we hope it is a standard that businesses can reasonably follow in the future. For accurate understanding and representation of our findings, we would stress the importance of critically examining the indicators we have developed before considering our conclusions.

## 1.B: SUMMARY OF OUR FINDINGS

The Framework was conceived with sincere and considered commitment to the Guiding Principles. Barrick's design should be lauded for its rare ambition and meticulous attention to claimants' rights. But implementation errors compromised the Framework's actual performance. Claimants were thus exposed to a process which failed adequately to protect them and which they did not understand. In the end, successful claimants received remedies that were equitable, even generous, under international law. Nevertheless, many were left disaffected, stigmatized and abused. Responsibility for these results is not the Framework's alone. It should be shared by international stakeholders whose errors of judgment and unwillingness to engage in good faith exacted a great toll on claimants.

### 1.B.1: FRAMEWORK DESIGN

The Framework was designed following extensive stakeholder engagement and considered analysis. Over 18 months, from early 2011 to late 2012, a Barrick team of sustainability specialists and in-house counsel consulted an array of expert advisors and credible stakeholders to develop a hugely ambitious Guiding Principles-aligned OGM. Rather than a company-led, dialogue-based grievance process, Barrick sought to empower a legitimate, independent institution to hear and resolve sexual violence claims against the company. The Framework would serve a quasi-judicial

role for vulnerable women whose access to justice before courts was virtually non-existent.

Barrick's aspiration was exacting. Accordingly, the Framework required detailed rules to ensure fair procedures and results. Collectively, the *Framework of Remediation Initiatives*<sup>3</sup> and the *Manual*<sup>4</sup> establish the Framework's governance structure, procedures, and guidelines for substantive outcomes. They demonstrate assiduous care for claimants' rights and each of the Guiding Principles' effectiveness criteria for OGMs.

- **Legitimacy:** Barrick delegated authority to decide all claims against it to the PRFA, an independent institution led by two of Papua New Guinea's most prominent women's rights advocates. Decisions regarding eligibility for remedies and the nature of those remedies would be made by women with a wealth of experience engaging with survivors of sexual violence. The former Chief Magistrate of Papua New Guinea would ensure awards were reasonable and consistent; his decisions could be appealed to the PRFA leadership. Thus conceived, the Framework met the most rigorous standards of procedural fairness under international law
- **Accessibility:** The Framework's design took great pains to ensure its accessibility. It would be available as a means of first resort to all survivors of sexual violence by personnel of the Porgera Joint Venture (PJV), the local entity that managed the concession. The location would be as accessible as possible for women from all over Porgera. Evidentiary thresholds were minimal, and protocols were in place for translation, confidentiality, and claimant support through the process.
- **Predictability:** The Framework would follow a detailed process, with established timelines, to arrive at clearly defined potential outcomes. Specific protocols were developed for Framework staff to meet with claimants and explain every stage of the process orally and in person. As designed, the Framework would ensure that each claimant had a reasonable

basis for her legitimate expectations about both the process and the awards.

- **Equitability:** Barrick's design was extremely sensitive to the impact of power disparities with claimants, who were socio-economically and sometimes psychologically vulnerable. To ensure that all claimants made decisions freely and on an informed basis, the Framework would provide or fund access to independent legal expertise, so that claimants understood their rights and the implications of accepting Framework remedies.
- **Transparency:** Claimants would be consistently apprised of their claim's progress and informed of appeal options as needed. Framework officers would meet with claimants at every stage of the process to explain why decisions were made, to discuss remedy options, and to facilitate appeals as requested. Every decision and every stage of the process was to be carefully documented.
- **Rights-compatibility:** The Framework's design reflected an ambition to provide novel and empowering remedies. The Framework would not just issue cash compensation. Instead, it would invest in tailoring business support, school fees, and medical and therapeutic care to individual claimants. The Framework's potential outcomes would address all dimensions of the right to remedy under international law. Participation in the Framework would remain voluntary: while accepting Framework remedies would require claimants to waive future civil claims against Barrick or the PJV, they would be able to opt out of the process at any point.
- **Stakeholder Engagement:** Remedies would be decided in consultation with claimants and tailored, from a range of options, to their individual needs and preferences.

The Framework's intricate design was built on the advice of Porgeran stakeholders and leading experts in the Guiding

<sup>3</sup> Barrick Gold [Barrick], *A Framework of Remediation Initiatives in Response to Violence Against Women in the Porgera Valley*, 16 May 2013, barrick.com [*Framework of Remediation Initiatives*].

<sup>4</sup> Barrick, *Claims Process Procedures Manual*, 16 May 2013 [*Manual*].

Principles, human rights, and sexual violence in Papua New Guinea. It should be a touchstone for future adjudicative OGMs. But it was not flawless. First, the scope was limited to (i) historical incidents of sexual violence (ii) committed by PJV employees. The focus on a narrow, historical wrong is contemplated by GP 22; the limitation to PJV employees, however, is difficult to reconcile with a reasonable “cause or contribute to” involvement analysis. Second, the Framework did not envision a mechanism to ensure that all PRFA officials would be accountable for procedural errors, such as misapplying Framework standards or giving claimants insufficient or inaccurate information.

These errors were accompanied by two latent design flaws—both of which were formally justifiable under the Guiding Principles. The first was the Framework’s focus on sexual violence. Barrick conceived of a specialized Framework to redress the existing OGM’s proven weaknesses. That exclusive focus, however, was an inherent barrier to access. Survivors of sexual violence are stigmatized in Porgera. They legitimately fear opprobrium in their community and reprisal at the hands of male family members. The Framework contorted itself to account for these risks, with diffuse adverse effects. To begin, the PRFA adopted a word-of-mouth publicity campaign to keep the Framework secret from men. That necessarily limited its accessibility, and some potential claimants never knew the Framework existed. When discretion failed, accessibility was limited by potential claimants’ fears of reprisal. The discreet campaign also constrained the PRFA’s ability to educate potential claimants about their rights and the Framework’s processes, thereby limiting the Framework’s predictability, equitability and transparency. Claimants were thus acutely vulnerable to implementation errors by PRFA officials and the Framework’s independent legal advisor (ILA).

A second latent design flaw lay in the Framework’s unrealistic ambition to provide individualized remedy, particularly once cash compensation was introduced. The Framework was (i) an adjudicative OGM governed by an independent institution (ii) to provide remedies to a specific type of stakeholder—one who had suffered sexual violence at the hands of a PJV employee. These two elements inherently limited the ability to individualize remedy. Decision-making discretion in adjudicative OGMs, which ought to be delegated to an independent institution, must be

limited to ensure legitimacy and predictability. And a specialist OGM, even when considering claims with distinct facts, must privilege the *perceived* relative equity of remedies to ensure legitimacy. This is especially true in an intimate community like Porgera, where nothing remains confidential. The combination of these factors meant that the Framework’s ambition to provide individually tailored remedies was unrealizable. Promising it ultimately undermined the Framework’s legitimacy, predictability and transparency.

### 1.B.2: FRAMEWORK IMPLEMENTATION

These latent design flaws did not affect the Framework’s formal alignment with the Guiding Principles. They simply heightened its vulnerability to implementation failings. In the event, the dissonance between design and implementation was significant. The Framework’s extensive procedural protections were substantially compromised in implementation. As a result, the process was less accessible, predictable, equitable and transparent than it was designed to be. We highlight below the most significant errors:

- **Misunderstanding of “sexual violence”:** The Claims Assessment Team (CAT)—the PRFA officers tasked with initial claimant contact, evaluating claims, and recommending remedies—conflated ‘sexual violence’ with ‘rape’, thereby likely denying Framework access to a number of legitimate claimants.
- **Failure to explain Framework process and remedies:** The claimants we interviewed expressed a shared lack of understanding of Framework processes, potential outcomes, and the settlement agreement. (As explained in Section 4: Methodology, we would treat claimant interviews with some caution based on exogenous intervening events.) The Framework’s remedial posture also changed over time to focus on cash compensation at the expense of small-business support, but claimants did not seem to understand the implications for their legitimate expectations.
- **Failure to explain the right to counsel:** The CAT officers, by their own admission, did not inform claimants of their right under the Framework to retain independent counsel at the PRFA’s expense.

- **Failure to respect the role of the ILA:** Neither the CAT nor the ILA herself respected the role of independent advisor to the claimants. Instead, the ILA simply became an auxiliary CAT member to assess claimant honesty.

We do not attribute these faults to the individual CAT members and ILA alone. That the errors were consistent and shared suggests disturbing institutional failings by the PRFA leadership and Cardno. In particular, it seems that the CAT and the ILA were insufficiently trained in critical Framework elements, including an understanding of sexual violence and claimants' procedural rights. This error was compounded by failures of supervision. It does not appear that the PRFA or Cardno instituted quality-control measures to ensure that the CAT and the ILA were respecting Framework processes. If such measures did exist, they were not effective.

The most troubling procedural failing was the ILA's. The Framework's design gave pride of place to the ILA's role to preserve equitability: she was to ensure that claimants made properly informed decisions regarding whether to access the Framework and whether to accept remedies. Our findings suggest that she did not. She did not seem to appreciate claimants' rights or her duties as their independent advisor. She appeared to act largely as an assessor of truth. Most claimants recall only spending a couple of minutes with her before being asked to swear on the Bible. They do not recall receiving any advice, save that they should sign the settlement agreement because Barrick was much more powerful than them. The result was that claimants only seemed to understand the waiver, without a firm comprehension of the rest of their remedy package.

It is important to note, however, that the Framework's procedural failings did not result in substantial unfairness to successful claimants. First, everyone involved with the Framework's implementation—including an independent doctor and the local NGO most critical of the process—believes that the process was so open and accessible that the PRFA awarded remedies for many fabricated claims. Second, the financial reparations successful claimants received aligned with principles of equity under international human rights law. In particular, the Framework's remedies were more generous, on a purchasing power parity basis, than those awarded by the

Inter-American Court of Human Rights in 2010 for a range of human rights violations, including brutal sexual violence, by the Mexican military. Claimants' remedies were thus rights-compatible and, from the perspective of compensation under international human rights law, complete.

## 1.C: FRAMEWORK IMPACT ON CLAIMANTS

Assessing the Framework's impact on claimants' lives is complicated by a settlement reached between Barrick and 11 claimants represented by EarthRights International who left the Framework and threatened to sue the company (the ERI Claimants). The settlement's terms are confidential. But our onsite research made clear that the alleged generosity of that settlement—reached after all other claimants had received Framework remedies—pervades current claimant and community perceptions of the Framework. We therefore urge caution in considering the summary below, which is based on our interviews of 62 claimants who only received Framework remedies.

The Framework ultimately did not have the empowering effect for which it was designed. The vast majority of claimants believe they were treated unfairly and that they did not receive the remedies they were promised. Indeed, it seems that relatively few benefited from the remedies they did receive. Most were threatened and physically abused by men in their family to give up much of the compensation. Many were left with nothing. A number of women claim to be worse off now than before approaching the Framework: their families assaulted them, their money was taken, their husbands left them, and they are now pariahs in their community.

Responsibility for these horrific results is not the Framework's alone. It must be shared with certain international stakeholders who helped ensure that the Framework was (i) known about by all men in Porgera and (ii) that Framework remedies would expose claimants to substantial risk of heinous abuse. In this regard, MiningWatch Canada played an important role. Despite the advice of women's leaders in Porgera that secrecy was essential to protect claimant security, MiningWatch publicized the Framework widely, facilitating community stigma for all claimants and exposing them to the risk of physical abuse for surviving sexual violence.

Concerted pressure on the Framework to issue cash compensation was even more pernicious for claimant security. Claimants themselves first applied the pressure. International stakeholders magnified it. In doing so, a few of these international stakeholders allied themselves with two local, male-run, self-styled human rights organizations whose interest in women, let alone in survivors of sexual violence, appears instrumental and recently minted. The credibility of both groups had previously been questioned by Human Rights Watch. (When discussing sexual violence, a prominent member of one of these groups callously joked, in front of two survivors, about gang rape by dogs.) The cash-oriented position of this alliance contravened the advice of *every single* expert in sexual violence in Papua New Guinea Barrick consulted when designing the Framework, including (i) representatives from UN Women, (ii) government officials, (iii) human rights defenders, and (iv) Porgeran women's leaders. Each of these experts warned that women in Porgera are commodified subjects of a customary patriarchy. In this oppressive social context, they argued, cash compensation would largely benefit claimants' male relatives at the expense of claimants themselves. Their prescience haunts this assessment.

The pressure from international stakeholders and claimants led the PRFA to make cash<sup>5</sup> the lion's share of all remedy packages. Successful claimants each ultimately received 50,000 Kina—8 times the national per capita income—in cash. The decision, notwithstanding its popularity, undermined the Framework's ability to empower socio-economically disadvantaged and vulnerable women in Porgera. First, cash made every award fungible. Claimants became targets for avaricious relatives, and could be easily dispossessed by their families. Second, cash made every award easily comparable. The Framework could no longer tailor remedies to individual claimants without compromising the OGM's legitimacy. Third, cash is easily dissipated. For claimants who retained their money, the PRFA could no longer patiently build their capacity to launch and run a business. All of these possibilities materialized. Claimants were immediately, often forcefully, dispossessed of their remedy; every award was virtually identical; and, what cash remained in claimants' possession was quickly spent, with no durable benefit.

## 1.D: CONCLUSIONS AND RECOMMENDATIONS

The Framework disappointed many involved in its implementation and almost everyone it was designed to benefit. It would be facile, however, to blame any one actor for its shortcomings. Barrick designed the Framework based on the insight of local stakeholders and leading experts in the Guiding Principles and sexual violence in Papua New Guinea. The Framework's foundational documents evidence sincere and considered attention to claimant-oriented procedural protections. The PRFA and Cardno made mistakes. But they implemented the Framework against a complex backdrop of impossible confidentiality, widespread gender-based violence, and socio-economic deprivation. Fidelity to the Framework's original conception was inevitably a challenge. It was exacerbated by claimant and international stakeholder pressure to issue cash awards, which ultimately exposed survivors to the very perils of custom and patriarchy that the Framework was designed to transcend. In short, beyond institutional errors, the Framework's ambitions were not realized because of a confluence of powerful external forces.

### 1.D.1: RECOMMENDATIONS FOR BARRICK

This assessment was not geared to developing specific recommendations for Barrick regarding the Framework, which had already run its course. Yet we cannot ignore that the cost of institutional failures—no matter their cause—was borne by the most vulnerable rights-holders. A number of the women the Framework was designed to benefit may not have been able to access it. Those who did may have been improperly denied remedies. And those who received remedies ultimately did not enjoy the lasting benefits to which the Framework aspired, often suffering further harm at the hands of their families. If Barrick remains committed to its initial aims, these failures demand a response.

The specifics of the response will require considered analysis and planning based on extensive stakeholder engagement. In particular, the path forward will need to account carefully for the risks to survivors of sexual violence inherent in a cultural context where women are commodified and gender-based violence is pervasive. To be effective and sustainable, such

<sup>5</sup> We use the term "cash" in its colloquial sense to denote monetary amounts. Claimants under the Framework received such amounts through direct deposit into bank accounts, not physical currency.

solutions would need to include Barrick and the Zijin Mining Group—now a 50-percent owner of the PJV—in the analytical process. Based on our assessment findings, however, we advance some preliminary recommendations to calibrate expectations and ground further stakeholder engagement.

1. **Do not extend or re-launch the Framework:** The

Framework has been delegitimized in Porgera. Implementation errors no doubt played a role. But the most significant delegitimizing force was the ERI settlement, which led to persistent and consistent rumors of relative inequity. In the currently charged environment, the Framework itself could only regain legitimacy if Barrick gave everyone who alleged sexual violence by PJV personnel K200,000 (the amount widely rumored to be what the ERI Claimants received). That is neither a reasonable expectation nor a sustainable solution. The Framework had virtually no evidentiary thresholds. Stakeholders—including claimants, critical activists and medical personnel—consistently state that the Framework awarded remedies for fabricated claims. The expectation of an improbably generous cash award heightens the risk of false, and possibly coerced, claims. That is not to encourage Barrick or the PJV to ignore OGMs. To the contrary, we believe that the path forward should seek an enduring solution that addresses the Framework’s implementation gaps while minimizing risks to claimants and advancing the Framework’s original ends.

2. **Take monetary or other fungible compensation off the table for all claims of gender-based violence:** Denying the possibility of fungible remedies would be unpopular. But we believe that bowing to stakeholder pressure to award substantial cash compensation critically undermined the Framework. It made tailored empowerment and durable remedies virtually impossible. Tragically, cash compensation exposed successful claimants to horrific domestic violence. As experts in sexual violence in Papua New Guinea predicted from the outset, fungible remedies do not benefit the female survivors of sexual violence in Porgera. Denying the possibility of fungible remedies would

also make clear that any OGM is simply a complement to, and not a substitute for, existing judicial processes. Survivors who so desired could continue to seek monetary remedies from Barrick, the PJV or individual perpetrators, but only in fora legitimately equipped to assess the truth of claims and their associated damages.

3. **Ensure that the existing OGM at the Porgera mine is able to receive and process gender-based violence claims:**

Parallel to the Framework, Barrick developed a more formalized, general grievance process at the Porgera mine. We recommend directing all future gender-based violence claims—including those that, if filed at the right time, would have gone through the Framework—to this non-specialized OGM, without differentiating between sexual and non-sexual violence. The Framework’s focus on sexual violence, with its associated social stigma, rendered the filing of a grievance a source of risk for claimants. An OGM for an array of grievances would mitigate that risk. The broader OGM would permit the PJV safely to invest in more public education about the process and remedy options for all types of claims without compromising women’s safety. That would obviate the Framework’s challenges of accessibility, predictability, equitability and transparency. And, from the perspective of effective implementation, the PJV may better handle sensitive human rights issues directly rather than relying on an intermediary to implement key protocols and procedural protections.

4. **Focus on community-based empowerment and sustainable development programs:** Beyond individual remedy, the Framework’s *raison d’être* was economic empowerment: it was conceived to provide sustainable and enduring benefits to survivors of gender-based violence in Porgera. Disappointment over the failure to provide such solutions animated our interviews with PRFA decision-makers, community leaders, and most successful claimants. The clock cannot be turned back for Framework claimants. But community-level empowerment programs geared to small-business development could help address one overriding concern about the Framework’s implementation and deliver on the Framework’s initial ambitions.

### 1.D.2: LESSONS LEARNED

The Framework was at the vanguard of corporate efforts to develop Guiding Principles-aligned OGMs. As such, it faced a host of unforeseen, and possibly unforeseeable, challenges. Its experience is replete with lessons for stakeholders and businesses. We distill six overarching lessons for OGMs of all types:

1. **Understand the virtues and limits of different OGM types:** An OGM cannot be all things to all stakeholders. Distinct OGM structures serve distinct purposes. An adjudicative OGM, for instance, may be preferred to a dialogue-based OGM when facts are in dispute and legitimacy is a paramount concern. But each type also brings inherent institutional constraints. An adjudicative OGM inevitably has less remedial discretion than a dialogue-based OGM in pursuit of legitimacy and predictability. Similarly, a rolling OGM may set higher evidentiary thresholds than an historical OGM without compromising accessibility, because facts and grievances are contemporaneous. OGM designers should recognize the virtues and limits of distinct institutional types to ensure they tailor the OGM to context and to avoid setting impossible targets.
2. **Anticipate the butterfly effect:** A cognate of institutional limits is the network effect of apparently discrete decisions. In the Framework's case, for instance, the decision to focus on sexual violence forced the PRFA to seek institutional secrecy, which in turn limited Framework efforts to promote accessibility, predictability, equitability and transparency. Similarly, the decision to include a waiver, while justifiable under the Guiding Principles, significantly heightened the importance of equitability and forced the Framework to offer complete remedies under international human rights law to ensure rights-compatibility. OGM decision-makers should thus avoid considering issues in isolation, as apparently narrow decisions may have diffuse effects.
3. **Do not rely on confidentiality:** In communities as intimate as Porgera, confidentiality is likely chimerical. OGMs should therefore be implemented as if any and all information will become widely disseminated. Confidentiality may still be an aspiration, but it should not be a foundation. An OGM that requires confidentiality to protect critical interests should be reconceived. The conservative assumption will help ensure the OGM's resilience if sensitive information does become public.
4. **Prepare always to be audited:** A key virtue of the Guiding Principles is that stakeholders have an authoritative benchmark for OGM effectiveness. The benchmark encourages reporting and auditing. OGM decision-makers should keep detailed records regarding stakeholder engagement and individual grievances to ensure they can explain their decisions in the future. Such records are most important for unsuccessful grievances or claims so that observers can confirm that decisions were fair. In addition to readiness for reporting, such records ensure rigorous implementation and facilitate continuous learning.
5. **Ensure consistent monitoring:** The Framework is a testament to the risks of imperfect implementation. OGM decision-makers should anticipate dissonance between design and implementation. Even the most qualified and best-intentioned OGM decision-makers will make mistakes. To minimize the risk of implementation errors, OGMs should incorporate quality-control mechanisms. Such measures should ensure that decision-makers are held accountable contemporaneously for implementation failings.
6. **Trust the stakeholder engagement (within limits):** Stakeholder engagement is the cornerstone of an effective OGM. But over-sensitivity to stakeholder views can compromise the stability and efficacy of an intricately designed OGM. While stakeholder engagement is an important element of continuous improvement, in certain circumstances—as with the Framework and cash compensation—adopting stakeholder views to change an already-operating OGM is dangerous. We therefore suggest a presumption against deviating from pre-OGM stakeholder advice when three circumstances obtain: (i) the OGM was developed based on the guidance of myriad independent and credible experts; (ii) those experts reach a consensus about an important aspect of the OGM; and (iii) that aspect is at the heart of an intricate institutional design.

## 2. INTRODUCTION

This assessment evaluates the Framework against the Guiding Principles. That focus imposes two limitations of scope. First, we do not attempt to apply international human rights norms regarding judicial and administrative institutions—conceived and developed in international law to apply to states—directly to Barrick, the PRFA or Cardno.<sup>6</sup> We consider international human rights norms only as incorporated in the Guiding Principles and adapted for the private sector. Second, we have not conducted an independent investigation of the facts and allegations that led Barrick to create the Framework. Nonetheless, we aspire to give the reader sufficient background to understand the context in which the Framework was designed and implemented with reference to undisputed facts. Our ambition is to provide a comprehensive and detailed analysis of the Framework’s successes and failures under the Guiding Principles, with a particular focus on how the Framework was perceived by, and impacted, affected stakeholders. To that end, the assessment is divided into six sections.

### ***Section 1: Executive Summary***

***Section 2: Introduction*** provides some background on the Porgera mine and the impetus behind the Framework’s development. We also provide a brief overview of the Framework’s design and implementation. The overview is only to orient the reader. We will consider each of the Framework’s elements in depth in Section 6: Integrated Assessment. We also summarize the 2013 opinion of the Office of High Commissioner on Human Rights (OHCHR) regarding the Framework’s alignment with the Guiding Principles.

***Section 3: Assessment Scope*** briefly explains the assessment’s parameters with reference to the OHCHR opinion. We also explain why we have chosen an integrated approach in conducting the OHCHR’s suggested independent review of the Framework.

***Section 4: Assessment Methodology*** provides a detailed explanation of the process we followed to conduct the assessment. We explain the steps taken to ensure the assessment’s legitimacy, including measures directed to the assessment’s independence, transparency, inclusiveness and stakeholder confidentiality.<sup>7</sup> In addition, we explain the protocols followed to interview Porgeran survivors of sexual violence. (The full breakdown of our survivor interview results, including the questions we asked, is available in Appendix 1.)

***Section 5: Interpretive Approach*** establishes the principles we followed to ascertain the practical meaning of the Guiding Principles. The maxims are derived from international law and the text of the Guiding Principles themselves. We do not pretend that these interpretive maxims are definitive. We identify them to ensure methodological transparency in developing our indicators and evaluating the Framework.

***Section 6: Integrated Assessment*** is the heart of this assessment. It is divided into ten subsections, corresponding to GPs 22 and 29 and the eight effectiveness criteria under GP 31. Each subsection starts with an interpretive discussion from which we derive specific assessment indicators. We then

evaluate the Framework's design and implementation against each indicator. In total, we consider the Framework against 26 indicators and 3 sub-indicators. The complete list is available in the Table of Indicators, above.

**Section 7: Conclusions and Recommendations** distills the lessons learned from the assessment to develop recommendations for Barrick and for future OGMs. Our recommendations for Barrick regarding Porgera are preliminary, with the narrow aim of setting the stage for future engagement. The lessons for OGMs in general are not granular. We do not seek to repeat the Integrated Assessment's findings. Instead, we focus on overarching challenges revealed by the Framework's implementation.

## 2.A: PORGERA'S SOCIO-ECONOMIC CONTEXT

Papua New Guinea is almost incomprehensibly diverse, with over 800 distinct linguistic-cultural groups comprising almost 12 percent of the world's languages.<sup>8</sup> It is also relatively poor, ranking 198th in the world in terms of per capita GDP<sup>9</sup> and 157 (out of 187) on the United Nations Human Development Index<sup>10</sup>. These low levels of development persist despite (some say because of) a wealth of natural resources.<sup>11</sup> Resource extraction—including copper, gold, oil and natural gas—has fueled the country's economic growth and “underpinned budgets that have improved health and education outcomes, as well as provided significant improvements in incomes and livelihoods for some.”<sup>12</sup> These very resources, however, are the source of significant social tension and economic volatility: “this production has sparked civil strife, caused massive environmental damage, arguably distorted the economy, and brought about a range of negative impacts on communities.”<sup>13</sup>

The Porgera gold mine's history illustrates the full array of these benefits and costs.<sup>14</sup> The mine is owned by the Porgera Joint Venture (PJV), which was, during all periods relevant to this assessment, predominantly owned by Barrick Gold.<sup>15</sup> It has been operational since 1990.<sup>16</sup> Barrick acquired the Porgera mine as part of its 2006 acquisition of Placer Dome.<sup>17</sup> As Human Rights Watch frames it: “Barrick was already a large international company when it purchased Placer Dome, but it came of age as a company with that acquisition, increasing dramatically in size

and taking on board several complex and troubled operations, including the Porgera mine.”<sup>18</sup> The Porgera mine is a dominant force in the economy of Porgera and the province of Enga; indeed, with gold production valued at one eighth of national exports in 2009, it is a significant force in Papua New Guinea's economy overall.<sup>19</sup> In a largely impoverished community, it is viewed by many locals as “their only possible chance to catch up to the rest of Papua New Guinea after years of neglect.”<sup>20</sup>

The mine is located in a volatile environment: “Porgera, like many other parts of Papua New Guinea's notoriously restive Enga province, is plagued by diverse forms of violence ranging from tribal warfare and armed robbery to widespread domestic violence.”<sup>21</sup> The mine's existence has intensified the violence, in large part due to in-migration that has multiplied the population up to eightfold since 1990.<sup>22</sup> The problem has been compounded by serious public institutional deficiencies. Papua New Guinea's formal justice sector is resource constrained, with a limited capacity to protect the rule of law.<sup>23</sup> Rural communities like Porgera suffer most from such governance gaps: “Police investigations into crimes [in rural areas] are often deficient due to a combined lack of capacity, resourcing issues and sometimes unwillingness.”<sup>24</sup>

The lack of protection for the rule of law disproportionately affects women and girls.<sup>25</sup> Gender-based violence is pervasive.<sup>26</sup> In the Western Highlands, including the Enga Province, “rapes and sexual assault account for the majority of violent crimes.”<sup>27</sup> But police and prosecution authorities often do not seek to protect female victims due to traditional “cultural perceptions.”<sup>28</sup> Customary institutions, such as village courts, have also been accused of applying discriminatory principles to wrongs against women.<sup>29</sup> As a result, women remain particularly vulnerable to violent crime and particularly disempowered in seeking remedy through legal institutions: “Survivors of family violence face daunting obstacles to seeking services, protection, and justice.”<sup>30</sup> The Framework is rooted in this context of sexual violence and lack of institutional protection.

## 2.B: FRAMEWORK GENESIS

The Framework was conceived in response to credible allegations by Human Rights Watch of gruesome sexual violence by PJV security guards. The report, *Gold's Costly Dividend*,

was published in February 2011 and documented “a pattern of violent abuses, including horrifying acts of gang rape, carried out by members of the mine’s private security forces in 2009 and 2010.”<sup>31</sup> Such allegations were not new. Representatives of human rights clinics from Harvard Law School and the New York University School of Law (the Clinics) had previously raised these issues with Barrick and before a Canadian Parliamentary Committee.<sup>32</sup> And MiningWatch noted in 2009 that “[a]llegations of rapes, beatings and killings of community members by [PJV] security forces have been prevalent for at least a decade.”<sup>33</sup>

We understand that Barrick took Human Rights Watch’s findings far more seriously than those of the Clinics or MiningWatch for three reasons. First, when MiningWatch and the Clinics approached Barrick, the company had reached out to its community affairs representatives—an informal network of individuals embedded within communities neighboring the mine—to assess the veracity of the claims. Those representatives said that the allegations were not credible.<sup>34</sup> That initial skepticism regarding the claims was confirmed by Chris Albin-Lackey of Human Rights Watch, who said that when he first to Papua New Guinea to conduct his research, Barrick did not believe the allegations of sexual violence, but encouraged Human Rights Watch to conduct its own research.<sup>35</sup> Once Human Rights Watch reached the same conclusion, the company felt that the claims were credible and needed to be investigated appropriately.<sup>36</sup>

Second, both MiningWatch and the Clinics worked very closely with two local Porgeran organizations—the Porgera Landowners’ Association (PLOA) and the Akali Tange Association (ATA)—which had a fairly antagonistic relationship with Barrick.<sup>37</sup> Barrick was therefore predisposed to doubt the veracity of the claims. Because Human Rights Watch’s research was not shepherded by those two local groups, it was treated as more credible.<sup>38</sup> Senior local Barrick personnel also believed that Human Rights Watch was willing to engage in good faith.<sup>39</sup>

Third, the Human Rights Watch findings came at the same time as a change in leadership at Barrick. In particular, the new General Counsel at the time, Sybil Veenman, was committed to addressing allegations of human rights abuses seriously and transparently. Senior Barrick personnel and Human Rights

Watch personnel, interviewed separately, each confirmed a corporate culture shift that occurred in tandem with Human Rights Watch’s findings.<sup>40</sup> The Porgera allegations thus became Barrick’s first open response to a major crisis.<sup>41</sup> In the words of one of Barrick’s senior staff, the change in the openness to engagement with stakeholders since then “is night and day.”<sup>42</sup>

Barrick had been alerted to Human Rights Watch’s findings in May 2010.<sup>43</sup> In response, the company instigated “a series of internal and independent inquiries” regarding the allegations.<sup>44</sup> The inquiries included the retention of Ila Geno, the former Ombudsman of Papua New Guinea, to interview potential victims and report results to the Royal Papua New Guinea Constabulary (RPNGC).<sup>45</sup> The internal investigation led to “some 700 interviews, including nearly every member of the APD and Porgera’s community affairs department.”<sup>46</sup> The PJV terminated all employees implicated in sexual violence, all those who were complicit or remained silent, and all those who gave false evidence to investigators.<sup>47</sup> Senior PJV security personnel we interviewed estimate that a total of 25 to 30 employees were terminated following this investigation.<sup>48</sup>

### ***i. Research on Sexual Violence in Porgera***

In the wake of these findings, Barrick commissioned Dr. Margit Ganster-Breidler, an Austrian psychotherapist at the Institute for Innovative Trauma Therapies, to research violence against women and its impacts in Porgera.<sup>49</sup> Dr. Ganster-Breidler found that sexual violence is disturbingly prevalent in Porgera: 79 percent of the 138 women she interviewed reported being survivors of such violence.<sup>50</sup> Gender-based violence is widespread and, more troublingly, accepted: a “high percentage of women ... believe that they deserve to be hit” in certain circumstances.<sup>51</sup> She concluded that the acceptance of violence against women was born of “strong traditional patriarchal structures”.<sup>52</sup> Those structures also served to stigmatize survivors so that they would “suffer in silence” rather than risk public disclosure; in that context, mandatory reporting to police was counterproductive because it discouraged women from coming forward.<sup>53</sup> Quoting independent research confirmed by her own findings, Dr. Ganster-Breidler’s report noted:

*“There is widespread public acceptance of violence as a legitimate expression of anger, resolution of*

*conflict or means of control. A belief in the authority of husbands over wives, usually associated with the payment of bride price but also supported by some Christian churches, is frequently used to excuse all but the most extreme violence by husbands against wives. Both for family and sexual violence, there is a strong tendency for victims to be blamed, offenders not to be held accountable, and the violence to be trivialized.*<sup>54</sup>

Against this cultural backdrop—characterized by “a climate of aggression, violence and trauma”—Dr. Ganster-Breidler recommended “sustained collective efforts to promote gender equality and the empowerment of women and girls.”<sup>55</sup> A core part of that response would be to push back against entrenched patriarchal attitudes, “to challenge deeply embedded social norms that posit men’s right to control female behaviour.”<sup>56</sup>

### **ii. Conceiving the Framework**

Dr. Ganster-Breidler’s research formed part of Barrick’s broader analysis regarding how to respond to sexual violence by PJV employees and how to improve human rights practices across Barrick’s global operations.<sup>57</sup> Regarding the former, concerns about women’s reluctance to turn to legal institutions or the PJV’s existing operational-level grievance mechanism led Barrick to develop the Framework, i.e. “an independent remedy framework that could ensure strict confidentiality, and was aligned with the [Guiding Principles].”<sup>58</sup>

The Framework was developed following an “extensive 18-month review, analysis, and consultation process”.<sup>59</sup> We will consider that process critically in the Integrated Assessment, under GP 31(h). By way of brief overview, the initial design process was largely led by Barrick corporate responsibility personnel and in-house legal counsel; it was also supported by expert advice from external legal counsel, John Ruggie (former UN Special Representative on Business and Human Rights), Human Rights Watch, and the Clinics.<sup>60</sup> Barrick then sought the views of a wide array of national and international stakeholders regarding effective remedies and implementation of the Framework in Porgera. These stakeholders included representatives of various Papua New Guinea government agencies, leading national advocates for women’s rights, experts in Papua New Guinean law, and experts in women’s rights in Porgera.<sup>61</sup>

The resulting Framework was comprised of an individual and a community element. The “individual remediation program” was conceived to provide remedies to survivors of sexual violence at the hands of PJV personnel in line with the Guiding Principles.<sup>62</sup> It is the focus of this assessment. The individual program was to be complemented by “a suite of community-level initiatives” to support women in Porgera, improve the treatment of survivors of sexual violence, and to increase awareness of human rights and help prevent violence against women in the community.<sup>63</sup> The design and implementation of these community programs is beyond the scope of this assessment.

## **2.C: OVERVIEW OF FRAMEWORK DESIGN**

The overview below is for basic orientation. To that end, we largely summarize the Framework documents published by Barrick. Nothing in this section should be read as a finding of fact regarding the Framework’s design or implementation. Each relevant element of the Framework<sup>64</sup>—including relevant facts—is considered in depth in the Integrated Assessment.

### **i. Governance Structure**

The Framework’s implementation was overseen by the Porgera Remedy Framework Association (PRFA), a corporate entity incorporated in Papua New Guinea independently of Barrick and the PJV.<sup>65</sup> The PRFA’s Board is comprised of one Barrick representative and two independent representatives: Dame Carol Kidu, a prominent Papua New Guinean politician and women’s rights advocate; and, Ume Wainetti, National Director of the Family and Sexual Violence Action Committee. The Barrick representative does not take part in any decisions regarding individual cases that come before the Framework.<sup>66</sup>

### **ii. Funding**

Barrick was responsible for funding the Framework. Those funds would be placed in a trust to be administered by Deloitte’s Port Moresby office.<sup>67</sup> The PRFA would control the disbursement of the funds, subject to financial reporting requirements.<sup>68</sup>

### **iii. Administration**

The Framework’s implementation was administered by Cardno Emerging Markets, a prominent “international development and infrastructure consultancy”.<sup>69</sup> Cardno was initially responsible

for stakeholder consultation in Papua New Guinea, after the Framework's design was largely set.<sup>70</sup> The organization then managed the Framework's implementation, acting as the Framework's "secretariat" and reporting exclusively to the PRFA.<sup>71</sup> According to the company's public statements about the Framework, "Cardno provides advisory, design and project management services, and has deployed a team of project officers and legal experts experienced in dealing with gender-based violence and human rights."<sup>72</sup> In this capacity, Cardno recruited, trained and managed Framework personnel on behalf of the PRFA.<sup>73</sup>

#### **iv. Framework Process**

The Framework was conceived as a time-bound, adjudicative OGM under the Guiding Principles, with a limited mandate to address a specific type of historical adverse human rights impact: sexual violence by PJV employees. Eligible claimants would need to demonstrate that they met four criteria to obtain a remedy under the Framework: (i) they had suffered an act of sexual violence; (ii) at the hands of current or former PJV employees; (iii) where assault took place after 1 January 1990 and before 31 December 2010; and, (iv) where the assaulters were acting in their capacity as PJV employees when the sexual violence occurred.<sup>74</sup> The PRFA, with Cardno's administrative support, would act as an independent adjudicative body to hear and process individual grievances.<sup>75</sup> Its decisions, both on the legitimacy of claims and on individual remedies, would, if accepted by the claimants, be binding on Barrick and the PJV.<sup>76</sup>

To decide on individual claims, the Framework was comprised of three institutional decision-making layers with distinct responsibilities:

1. *Claims Assessment Team (CAT)*<sup>77</sup>: The CAT was claimants' primary point of contact. For the majority of the Framework's operation, it was comprised of three women experienced in engaging with survivors of sexual violence: Onnie Teio, Josephine Mann, and Mary Toliman.<sup>78</sup> Their responsibilities included: explaining the Framework's processes and possible outcomes to the claimants; conducting an initial assessment to determine if the claims were eligible (meeting the Framework criteria on their face) and legitimate (supported by testimony or other evidence); and, if the claim was legitimate, agreeing on remedies with the claimants.<sup>79</sup> The CAT was contracted and paid by Cardno.<sup>80</sup>
2. *Independent Expert*: The Independent Expert served two roles in the process. First, he would conduct an independent assessment of the claim's eligibility and legitimacy.<sup>81</sup> Second, he would conduct an independent assessment of the remedies agreed between the CAT and the claimant.<sup>82</sup> In these capacities, he could either confirm the CAT's recommendations or overturn them, in whole or in part. He was, therefore, the Framework's first level of appeal. The role was filled by John Numapo, former Chief Magistrate of Papua New Guinea. He was contracted and paid by Cardno.<sup>83</sup>
3. *Review Panel*: The Review Panel was the final appeal layer available to claimants. Unlike the Independent Expert's automatic involvement in all claims, the Review Panel would become involved only to "consider and determine appeals from assessments of the Independent Expert."<sup>84</sup> The Review Panel was comprised of Dame Kidu and Ms. Wainetti, both of whom also served on the PRFA's Board.<sup>85</sup>

The Framework decision-makers were not allowed to rely on legal standards of evidence in reaching conclusions on eligibility, legitimacy or appropriate remedies.<sup>86</sup> All decisions regarding individual claims were to be made based on what the decision-makers considered "fair and reasonable".<sup>87</sup>

#### **v. Independent Legal Advice**

To participate in the Framework, each claimant was required to obtain independent legal advice.<sup>88</sup> That advice could be provided by a lawyer selected by the claimant and funded by the PRFA or by the PRFA's in-house independent legal advisor (ILA), Maya Peipul:

*"A Claimant must obtain independent legal advice, including advice in relation to the Claimant's legal options and the consequences of resolving a claim, to participate in the Program. Independent legal advice can be facilitated on behalf of the Claimant. Every Claimant will be offered ... the services of an independent lawyer if they do not have one. Protocols will exist for Claimants who wish to use their own independent lawyer including access to set funds*

*to pay for an independent lawyer, and for certifying the representation and ensuring that the Claimant understands that the lawyer will act on their behalf.”<sup>89</sup>*

The ILA was to address the claimant’s legal options (including those outside the Framework), explain the implications of resolving a claim through the Framework, and discuss whether accepting a Framework remedy “is in the best interests of the Claimant”.<sup>90</sup> In particular, the ILA was to ensure that she advised the claimant on (i) “the merits of her Claim”; (ii) the claimant’s continued ability to take legal action against the perpetrator; (iii) the legal and non-legal alternatives to the Framework available to the claimant; (iv) the Framework’s processes; and (v) the legal implications—including in particular the limitation on further civil action against Barrick, the PJV or the PRFA—of signing a settlement agreement under the Framework.<sup>91</sup> Before the claimant signed a settlement agreement, the ILA was to certify in writing that she had provided all relevant advice.<sup>92</sup>

#### **vi. Determining Remedies**

Framework remedies were to be recommended by the CAT following consultation with each claimant to develop a “tailored remediation package”.<sup>93</sup> Before being finalized, the package would need to be endorsed by the Independent Expert (or, if necessary due to appeal, by the Review Panel). The Framework’s design set out parameters for the PRFA’s exercise of remedial discretion:

1. *Range of remedies:* Remedies were to be selected from a non-exclusive “range of programs available to Claimants in general”, including: (i) counseling; (ii) health care; (iii) education and training; (iv) financial compensation; (v) “livelihood assistance (such as livestock, cooking utensils, clothing)”; (vi) “micro-credit or economic development grants”; (vii) school fees; (viii) repatriation assistance; and (ix) assistance with filing a formal RPNGC criminal complaint.<sup>94</sup>
2. *Value of remedies:* The benchmark for the total value of remedy packages was set against the range of Papua New Guinea’s civil “damage awards for proven instances of rape”.<sup>95</sup> Based on advice from Allens Linklaters, that range was identified as 20,000 to 25,000 Kina (K).<sup>96</sup> This amount was to serve as the referent for the *lowest* value of Framework awards; no upper limit was set.<sup>97</sup>

#### **vii. Settlement Agreement**

The Framework process was conceived to end with a binding agreement between the claimant, the PRFA and Barrick. The agreement would specify the terms of the remedy package agreed with the claimant and endorsed by the Independent Expert or the Review Panel.<sup>98</sup> It would be governed by Papua New Guinea law.<sup>99</sup> In addition, the agreement included a waiver of further civil liability relating to the conduct underpinning the grievance for Barrick, the PJV, and the PRFA.<sup>100</sup> The language of the waiver evolved in response to stakeholder concerns, and under the guidance of Barrick’s counsel, in the first few months of the Framework’s operation. The original waiver provided:

*“[T]he claimant agrees that she will not pursue or participate in any legal action against PJV, PRFA or Barrick in our outside of PNG. PRFA and Barrick will be able to rely on the agreement as a bar to any legal proceedings which may be brought by the claimant in breach of the agreement.”<sup>101</sup>*

The language of this waiver was subsequently modified to ensure that it was narrowly tailored to the conduct underlying the grievance, and that it did not extend to any criminal proceedings in which the claimant chose to participate:

*“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 [underlying the grievance], 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.*

*“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 [by] Barrick, the Porgera Joint Venture or PRFA in any form of dispute resolution process connected to such a legal proceeding.”<sup>102</sup>*

## 2.D: OVERVIEW OF FRAMEWORK IMPLEMENTATION

The Framework began operating in Porgera on a rotational basis starting in October 2012.<sup>103</sup> The last rotation ended on 2 March 2015.<sup>104</sup> Between 20 October 2012 and 2 March 2015, the PRFA team had 23 rotations in Porgera.<sup>105</sup> The first 13 of those rotations involved the CAT conducting assessments of individual claims: they were initially two-week rotations, once per month, which were reduced to one week after the fourth rotation in February 2013.<sup>106</sup> The last ten rotations, between July 2014 and March 2015, were largely focused on training and counseling for survivors of sexual violence.<sup>107</sup>

Ultimately the Framework received 253 claims.<sup>108</sup> Of these, 137 were deemed eligible.<sup>109</sup> Almost all of the claims deemed eligible were also deemed legitimate: 130 of the 137 eligible claims were entitled to a remedy package under the Framework.<sup>110</sup> The seven who were not offered a remedy package included five women who died during the process and two who stopped participating.<sup>111</sup> The PRFA concluded settlement agreements with 119 of the 130 legitimate claimants; the other 11 rejected Framework remedies and settled with Barrick outside the Framework.<sup>112</sup> These 11 were represented by EarthRights International, a law firm and advocacy group, and are referred to in this assessment as the “ERI Claimants” or the “ATA Claimants”; the latter term is used by the people we interviewed in Porgera.

The 119 claimants who settled their grievances through the Framework received remedy packages worth, on average, K23,630.<sup>113</sup> Following Barrick’s settlement with the ERI Claimants, the company gave each successful claimant under the Framework a ‘top-up payment’ of K30,000, bringing the average award to K53,630.<sup>114</sup> For the purposes of this assessment, however, we do not consider the top-up payment as part of the Framework, as it was exogenously imposed in the wake of Barrick’s settlement with the ERI Claimants.

## 2.E: OHCHR OPINION

Soon after it was launched, the Framework was criticized by certain international stakeholders. The most vociferous of these was MiningWatch, which made a “series of allegations”

about the Framework’s procedural and substantive failings with reference to the Guiding Principles.<sup>115</sup> In response to submissions by MiningWatch and Barrick, the United Nations Office of the High Commissioner of Human Rights (OHCHR) issued an opinion regarding the Framework’s design, built on “principled interpretive guidance based on the Guiding Principles.”<sup>116</sup>

The OHCHR first considered the appropriateness of the waiver in the settlement agreement, noting that the Guiding Principles do not “explicitly address” whether an OGM can finalize a civil claim against the company.<sup>117</sup> Drawing on the Guiding Principles and the practice of “state-based remediation frameworks”, the OHCHR concluded that there should be a presumption against waivers.<sup>118</sup> “Nonetheless, 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 be required from claimants at the end of a remediation process.”<sup>119</sup> Where such a waiver exists, it should be “narrowly construed”, to ensure claimants can continue to participate in criminal proceedings.<sup>120</sup> The Framework’s waiver met these criteria.

The OHCHR also briefly considered a few of the panoply of procedural allegations lodged by MiningWatch. Regarding accessibility of the Framework to claimants, the OHCHR pointed to the Framework’s provision of translators “at every step of the process” and the requirement that the CAT explain the Framework process in detail to every claimant.<sup>121</sup> In response to MiningWatch’s angst that the ILA was “paid for by Barrick”, the OHCHR highlighted the trust established to fund the PRFA and noted, in any event, that “[i]t is not clear ... who else [MiningWatch] would expect to fund legal representation for victims in the process.”<sup>122</sup>

A further procedural concern raised by MiningWatch was that Barrick had failed to consult the ATA and the PLOA in designing and implementing the Framework. On this point, the OHCHR cited Human Rights Watch’s submission that this critique was “misguided” and noted that “doubts have been raised ... as to the legitimacy and role of these two organizations.”<sup>123</sup> Against the backdrop of these concerns, the decision not to involve these two organizations “directly ... in the development” of the Framework did not necessarily breach GP 31.

MiningWatch’s primary substantive concern was the Framework’s failure to provide “culturally appropriate” compensation.<sup>124</sup> The OHCHR considered the range of remedies available under the Framework, finding that “it appears that many of the possible outcomes and remedies offered by the [Framework] are ‘rights-compatible’”.<sup>125</sup> It further noted, however, “that there may be significant differences” between the Framework’s design and implementation.<sup>126</sup> To ensure alignment with the Guiding Principles, the OHCHR emphasized that “the remedy offered should be agreed with the claimant based on their wishes, and be in line with what is considered a culturally appropriate form of civil or mediated remedy for violations of the same nature, i.e. rape and sexual violence.”<sup>127</sup>

Despite the endorsement of the Framework’s design, the Opinion emphasizes the OHCHR’s inability to comment on the Framework’s implementation. To address this gap, the OHCHR recommended “an independent review” of the Framework: “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.”<sup>128</sup>

<sup>6</sup> For an analysis of this type, please see *Righting Wrongs? Barrick Gold’s Remedy Mechanism for Sexual Violence in Papua New Guinea: Key Concerns and Lessons Learned* (November 2015) published by the Human Rights Clinic of Columbia Law School and the International Human Rights Clinic of Harvard Law School. This assessment was virtually complete when *Righting Wrongs* was released. And our distinct analytical approaches render cross-referencing without a richer understanding of the authors’ methodology difficult. *Righting Wrongs* is therefore not incorporated in this assessment. We have, however, endeavored to incorporate a number of the authors’ prior statements regarding the Framework.

<sup>7</sup> In the interests of stakeholders, we have chosen to keep almost all attributions anonymous. While many were content for us to attribute statements to them, there were a number who preferred that we did not. The latter might be easily identifiable by their particular knowledge or expertise if placed alongside named stakeholders. We would also like to protect the many individuals who answered our questions with a candor that might affect their professional or physical security. We have therefore refrained from specific attribution save where inescapable or where necessary to protect the confidentiality of that stakeholder’s other contributions to the assessment.

<sup>8</sup> UNDP, *2014 National Human Development Report: Papua New Guinea*, “From Wealth to Wellbeing: Translating Resource Revenue into Sustainable Human Development”, [hdr.undp.org](http://hdr.undp.org), at 1 (“Papua New Guinea is one of the world’s most diverse, most dispersed and most rural nations, with many remote and inaccessible communities. It has an extremely varied set of landscapes and environments spread over more than 600 islands. Of its more than 7 million people most (80 percent) live in rural areas, speak almost 12 percent of the world’s languages, and culturally belong to more than 800 distinct groups with different belief systems, languages, material culture and forms of social organization.”)[*Human Development Report*].

<sup>9</sup> CIA, *World Factbook: Papua New Guinea (2014)*, [cia.gov](http://cia.gov) (noting that GDP per capita of US\$2,400 ranks it as 198th in the world)[*World Factbook*].

<sup>10</sup> *Human Development Report* at 3 (according to 2013 estimates).

<sup>11</sup> *World Factbook*; Human Rights Watch, *Gold’s Costly Dividend: Human Rights Impacts of Papua New Guinea’s Porgera Gold Mine*, February 2011, [hrw.org](http://hrw.org), at 30 (“Papua New Guinea’s extractive resources have proved to be as much a curse as they have a blessing.”)[*Gold’s Costly Dividend*].

<sup>12</sup> *Human Development Report* at i; *Gold’s Costly Dividend* at 30 (“Many Papua New Guineans believe that these industries are their country’s best—and perhaps only—realistic avenue to economic development.”).

<sup>13</sup> *Human Development Report* at i; *Gold’s Costly Dividend* at 30 (“Extractive projects and the economic resources they represent have fueled violent conflict, abuse, and environmental devastation in Papua New Guinea.”)[citations omitted].

<sup>14</sup> *Gold’s Costly Dividend* at 30.

<sup>15</sup> Until May 2015, Barrick retained a 95 percent stake in the PJV through its wholly owned Papua New Guinea subsidiary, Barrick Niugini. The remaining five percent is held by Mineral Resources Enga, which is “jointly owned by the Enga Provincial Government and the landowners of Porgera.” (*Gold’s Costly Dividend* at 31.) In May 2015, Barrick sold half its stake in Barrick Niugini to China’s Zijin Mining Group Co. (Cecilia Jamasine, “Barrick Sells 50% in Papua New Guinea Unit to China’s Zijin”, 26 May 2015, [mining.com](http://mining.com)).

<sup>16</sup> *Gold’s Costly Dividend* at 31.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* (citations omitted).

<sup>19</sup> *Id.* at 32.

<sup>20</sup> *Id.* (quoting Susanne Bonnell, “The Landowner Relocation Programme”, in Colin Filer, ed., *Dilemmas of Development: the social and economic impact of the Porgera gold mine, 1989-1994*, Canberra: Asia Pacific Press, 1999, at 130.).

<sup>21</sup> *Id.* at 38.

<sup>22</sup> *Id.*

- <sup>23</sup> *Id.* (“Porgera has at times approached true lawlessness.”); *Human Development Report* at 24 (“Papua New Guinea’s performance in relation to corruption, government effectiveness, and the rule of law is still relatively low.”).
- <sup>24</sup> *Human Development Report* at 24.
- <sup>25</sup> *Id.* at 54.
- <sup>26</sup> *Id.*
- <sup>27</sup> World Bank, “Trends in Crime and Violence in Papua New Guinea”, May 2014, Social Cohesion and Violence Prevention Team, Social Development Department, [openknowledge.worldbank.org](http://openknowledge.worldbank.org) at 12 [World Bank, Trends in Crime].
- <sup>28</sup> *Human Development Report* at 54.
- <sup>29</sup> *Id.*; see also, World Bank et al., *Papua New Guinea Country Gender Assessment 2011-2012*, [openknowledge.worldbank.org](http://openknowledge.worldbank.org) (“Traditional gender relations in many cultures in Papua New Guinea are characterized by inequality and the subordination of women”)[World Bank, *Gender Assessment*].
- <sup>30</sup> Human Rights Watch, “Bashed Up: Family Violence in Papua New Guinea”, 2015, [hrw.org](http://hrw.org) at 26 [Human Rights Watch, “Bashed Up”]; see also, World Bank, Trends in Crime at 20.
- <sup>31</sup> *Gold’s Costly Dividend* at 5.
- <sup>32</sup> International Human Rights Clinic, Harvard Law School, and Center for Human Rights and Global Justice, New York University School of Law [Clinics], *Legal Brief before The Standing Committee on the Foreign Affairs and International Development (FAAE), House of Commons, Regarding Bill C-300*, 16 November 2009, at 11 [Clinics, *Legal Brief*].
- <sup>33</sup> Catherine Coumans, “Backgrounder: Issues Related to Barrick’s Porgera Joint Venture Mine in Papua New Guinea”, 17 May 2009, [miningwatch.ca](http://miningwatch.ca) [MiningWatch, Backgrounder].
- <sup>34</sup> Enodo Interview with Senior Barrick Personnel (#2). In the interests of stakeholders, we have refrained from specific attribution save where inescapable or where necessary to protect the confidentiality of that stakeholder’s other contributions to the assessment.
- <sup>35</sup> Enodo Interview with Chris Albin-Lackey.
- <sup>36</sup> Enodo Interview with Senior Barrick Personnel (#2).
- <sup>37</sup> *Gold’s Costly Dividend* at 35 (“The PLOA leadership and Barrick generally behave less like negotiating partners than mortal enemies. ... The essence of the allegations leveled against the PLOA by Barrick officials and aggrieved community members is that the organization’s leaders are lining their pockets with royalty payments that might otherwise flow to ordinary landowners.”); Enodo Interview with Chris Albin-Lackey.
- <sup>38</sup> Enodo Interview with Chris Albin-Lackey.
- <sup>39</sup> Enodo Interview with Senior Barrick Personnel (#2).
- <sup>40</sup> Enodo Interview with Senior Barrick Personnel (#2); Enodo Interview with Senior Barrick Personnel (#3); Enodo Interview with Human Rights Watch (#1); Enodo Interview with Human Rights Watch (#2).
- <sup>41</sup> Enodo Interview with Senior Barrick Personnel (#3).
- <sup>42</sup> Enodo Interview with Senior Barrick Personnel (#2).
- <sup>43</sup> *Framework of Remediation Initiatives* at 3; Barrick, *Remedy Framework Summary*, 1 December 2014, [barrick.com](http://barrick.com), at 2 [*Framework Summary*].
- <sup>44</sup> *Id.*
- <sup>45</sup> *Framework of Remediation Initiatives* at 3.
- <sup>46</sup> *Id.*
- <sup>47</sup> *Id.*
- <sup>48</sup> Enodo Interview with Senior PJV Security Personnel (#1).
- <sup>49</sup> *Framework of Remediation Initiatives* at 4; Enodo Interview with Dr. Margit Ganster-Breidler.
- <sup>50</sup> Dr. Margit Ganster-Breidler, “Gender-based violence in Porgera district and the traumatic impact on women’s lives”, 2011, made available in confidence by Barrick, at 4. Throughout this assessment, we use the term “survivor” rather than “victim” because of the latter’s disempowering implications.
- <sup>51</sup> *Id.* at 10.
- <sup>52</sup> *Id.* at 11.
- <sup>53</sup> *Id.* (“In settings where mandatory notification laws are enforced, women are afraid of telling a services provider about violence because they think this will lead to police involvement and possible reprisals on the part of the abuser.”).
- <sup>54</sup> *Id.* at 12 [quoting Christine Bradley, *Family and Sexual Violence in Papua New Guinea: An Integrated Long-Term Strategy*, Report to the Family Violence Action Committee of the Consultative Implementation and Monitoring Council, Discussion Paper No. 84, Institute of National Affairs, Port Moresby at 46].
- <sup>55</sup> *Id.* at 41.

- <sup>56</sup> *Id.*
- <sup>57</sup> *Framework Summary* at 3.
- <sup>58</sup> *Id.* A description of Barrick's broader policy changes is available in the *Framework Summary* at 3 ("On a global level, starting in 2011, Barrick instituted a global human rights compliance program, which included new human rights and labour policies, new procedures mandating immediate reporting of human rights allegations and investigation by independent sources, extensive human rights training across the organization—more than 10,000 employees received some form of human rights training in 2013—new diligence processes for employee and third-party hiring, and a global human rights risk and impact assessment program at all Barrick operations conducted by independent experts. Progress reports on the human rights program are submitted on a quarterly basis to the Corporate Responsibility Committee of the Board of Directors, which oversees the program.").
- <sup>59</sup> *Id.* at 4.
- <sup>60</sup> See Section 6.C.2.
- <sup>61</sup> *Id.*; *Framework Summary* at 4.
- <sup>62</sup> *Framework of Remediation Initiatives* at 10.
- <sup>63</sup> *Id.* at 8.
- <sup>64</sup> For the remainder of this assessment, "the Framework" refers only to the individual remedy program, not the community programs.
- <sup>65</sup> *Framework Summary* at 5; PRFA Incorporation Documents, 24 October 2012 shared with Enodo in confidence by Barrick. We understand that the PRFA has applied for, though not yet officially received, recognition as a non-profit association under Papua New Guinea law (Enodo Interview with Senior Barrick Personnel (#4)).
- <sup>66</sup> *Framework of Remediation Initiatives* at 17; Enodo Interview with Senior Barrick Personnel (#4).
- <sup>67</sup> *Id.* at 18; Enodo Interview with Senior Barrick Personnel (#4); Enodo Interview with Cardno Personnel (#2).
- <sup>68</sup> *Id.*
- <sup>69</sup> *Framework Summary* at 5.
- <sup>70</sup> Enodo Interview with Cardno Personnel (#1).
- <sup>71</sup> *Id.*
- <sup>72</sup> Cardno, "Responding to Violence against Women in Porgera Valley", cardno.com.
- <sup>73</sup> *Id.*; Enodo Interview with Cardno Personnel (#1); Cardno Remedy Framework Implementation Outline, 22 September 2011, made available to Enodo in confidence by Barrick.
- <sup>74</sup> *Manual* at 1.
- <sup>75</sup> *Framework of Remediation Initiatives* at 17 ("Claims made under the individual reparations program will be processed and administered by PRFA's [Claims Assessment Team]").
- <sup>76</sup> *Manual* at 4 ("[I]f the Claim is found to be both eligible and legitimate and an assessment is made by the Independent Expert that the Claimant should be assisted under the Program, then an agreement on those recommendations will be signed by the Claimant, Barrick and PRFA. The agreement will mean that Barrick and PRFA must provide the recommended Program response and the Claimant agrees not to make any further civil claim based on the facts of the claim being resolved against Barrick and PRFA, in or outside Papua New Guinea. The Claimant is still able to take legal action against the individual perpetrator if the identity of that person is known.").
- <sup>77</sup> The CAT was referred to as the "Complaints Assessment Team" in the *Framework of Remediation Initiatives*. We prefer the term "Claims Assessment Team" because that is what was used in the *Manual* and in most of our discussions with CAT, PRFA and Cardno personnel.
- <sup>78</sup> We consider the CAT's qualifications in more detail in Section 6.D.5, under GP 31(a). We understand that Lesley Bennett was initially a CAT member, but ultimately decided not to continue due to personal reasons. We attempted to speak to Ms. Bennett during our site visit, without success.
- <sup>79</sup> *Manual* at 2-7.
- <sup>80</sup> Enodo Interview with Cardno Personnel (#2).
- <sup>81</sup> *Manual* at 7.
- <sup>82</sup> *Id.*
- <sup>83</sup> Enodo Interview with Cardno Personnel (#2).
- <sup>84</sup> *Manual* at 10.
- <sup>85</sup> While the initial intention was for the Independent Expert to form part of the Review Panel, this was not carried out in practice. Rather, the Review Panel operated completely independently of the Independent Expert. (Enodo Interview with Cardno Personnel (#2); Enodo Interview with PRFA Leadership (#1); Enodo Interview with PRFA Leadership (#2).)
- <sup>86</sup> *Manual* at 5, 8 and 10 (specifying that the CAT, Independent Expert, and Review Panel "will not refer to civil or criminal law or standards of evidence.").
- <sup>87</sup> *Id.* at 8 and 10 (noting that the Independent Expert and the Review Panel "will make an assessment based on their expertise, experience, and what they consider as being fair and reasonable."); see also, *id.* at 5 (noting that the CAT "will make an assessment based on the information available ... objectively").

<sup>88</sup> *Manual* at 3; *Framework of Remediation Initiatives* at 21.

<sup>89</sup> *Framework of Remediation Initiatives* at 21 (citations omitted).

<sup>90</sup> *Manual* at 3.

<sup>91</sup> *Id.* at 8; see also, *id.* at 12-13; and, *id.* at 26.

<sup>92</sup> *Id.* at 48, "Form 10: Signed Statement of Independent Legal Advisor".

<sup>93</sup> *Id.* at 6.

<sup>94</sup> *Id.* at 6.

<sup>95</sup> *Id.*

<sup>96</sup> The prevailing rate when the Framework was launched was K1= US\$0.4858 (rates on 31 October 2012, xe.com). At that exchange, the total value of the package was to range, at a minimum, between US\$9,716 and 12,145. By the time remedies were disbursed, however, the Kina had lost value. The prevailing rate on 31 December 2013—approximately when most remedies were disbursed—was K1=US\$0.3990 (xe.com). In implementation, K20,000 to 25,000 thus equaled US\$7,980 to 9,975.

<sup>97</sup> Enodo Interview with Senior Barrick Personnel (#4).

<sup>98</sup> *Manual* at 45.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Office of the High Commissioner of Human Rights [OHCHR], "Re: Allegations regarding the Porgera Joint Venture remedy framework" [22 August 2013], barrick.com, at 6 [OHCHR Opinion].

<sup>102</sup> *Manual* at 45-46.

<sup>103</sup> Enodo Interview with Senior Barrick Personnel (#4).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Framework Summary* at 13. As discussed in Section 6.C.2, the financial component of the awards was largely standardized at K20,000.

<sup>114</sup> Enodo Interview with Senior Barrick Personnel (#4).

<sup>115</sup> OHCHR Opinion at 2.

<sup>116</sup> *Id.* at 1.

<sup>117</sup> *Id.* at 7.

<sup>118</sup> *Id.* at 8.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 9.

<sup>122</sup> *Id.* at fn. 27.

<sup>123</sup> *Id.* at 13.

<sup>124</sup> *Id.* at 10.

<sup>125</sup> *Id.* at 12.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 10.

## 3. ASSESSMENT SCOPE

This assessment has been conducted by Enodo Rights with the advice of an External Committee comprised of leading experts in mining, human rights, and sexual violence: Chris Albin-Lackey of Human Rights Watch; Lelia Mooney of Partners for Democratic Change; and Dahlia Saibil, a legal academic at Osgoode Hall Law School whose research focuses on sexual violence in mining communities. The OHCHR Opinion is the touchstone for the assessment's scope.<sup>129</sup> The assessment therefore focuses on two broad issues:

1. The degree to which the Framework has been implemented as designed, including specifically the experience of claimants who have participated in the Framework and how remedies have impacted the lives of recipients to date.
2. How the Framework's design and implementation align with relevant provisions of the Guiding Principles relating to operational level grievance mechanisms, specifically GPs 29 and 31, as well as relevant norms of international law.

The assessment's parameters were initially suggested by Barrick, in deference to the OHCHR Opinion. Enodo Rights refined this scope in consultation with the External Committee to emphasize the perspective of claimants and to integrate principles of international human rights law.

In drafting the assessment, we<sup>130</sup> found that, to avoid redundancy and privilege parsimony<sup>131</sup>, both issues were best addressed

as an integrated whole. First, an assessment of how well the Framework was implemented is inseparable from claimant experience, albeit with a recognition of the limitations of *post hoc* opinion surveys.<sup>132</sup> Second, in comparing the Framework's design to its implementation, materiality is critical—both regarding issues that would concern a reasonable observer and differences that such an observer would consider significant. Otherwise, we would be left with an undifferentiated mass of issues with little meaningful analysis. The Guiding Principles provide the barometer of materiality. As the OHCHR has noted, they are “an authoritative framework” for OGMs.<sup>133</sup> They were also the Framework's principled blueprint.<sup>134</sup> We therefore assess the Framework's design and implementation, including claimant experience, through the lens of the Guiding Principles, as informed by principles of international human rights law.<sup>135</sup>

We should also emphasize the aspirational nature of this assessment. Barrick has been clear from the outset that it sought an assessment that could serve as a “source of learning for [Barrick], companies, governments, civil society and others”.<sup>136</sup> We have thus strived to apply the Guiding Principles rigorously rather than comparing the Framework to other OGMs, which may themselves be making common errors. In short, nothing in this assessment should be read as indicating what a reasonable responsible business already does—and particularly not when the Framework was designed. We have only assessed the Framework against the benchmark of the best practical application of the Guiding Principles.

<sup>129</sup> OHCHR Opinion at 10.

<sup>130</sup> While the External Committee has provided invaluable insight throughout this process, Enodo Rights alone is responsible for the content of this assessment: “we” refers only to Enodo Rights, save as expressly noted otherwise.

<sup>131</sup> To the extent possible given the assessment’s scope.

<sup>132</sup> These limitations are discussed in Section 4: Methodology.

<sup>133</sup> OHCHR Opinion at 1.

<sup>134</sup> *Framework Summary* at 9-11 (comparing the Framework to GP 31 and 29); *see also*, *Framework of Remediation Initiatives* at 10; and, Barrick Gold, “Backgrounder: A Framework of Remediation Initiatives in Response to Violence against Women in the Porgera Valley”, 22 October 2012, [barrick.com](http://barrick.com), at 2 (“In developing the remediation framework, Barrick adopted an approach that is consistent with the UN Guiding Principles on Business and Human Rights, which provides guidelines for companies in addressing human rights issues.”) [*Framework Backgrounder*].

<sup>135</sup> *See* Section 6: Integrated Assessment.

<sup>136</sup> Peter Sinclair, E-mail to Stakeholders, 23 April 2015 (“As such, we hope the review will capture and share the many lessons we have learned throughout this multi-year process, providing a source of learning for us, companies, governments, civil society, and others, and insights into the impact that the program has had on claimants who have received remedies.”).

## 4. ASSESSMENT METHODOLOGY

The assessment was started in April 2015. Over the past eight months, we have followed a deliberative process in service of an authoritative assessment. That process was conceived to move in four distinct stages: Planning and Contextual Research; International Stakeholder Engagement; Site Visit; and Report Development and Finalization.<sup>137</sup> In practice, the stages were overlapping and interrelated. We took the following discrete steps:

1. In consultation with the External Committee, we settled on the assessment's scope.
2. We conducted extensive background research regarding the Framework, including a review of all publicly available stakeholder concerns.
3. We engaged with an array of international stakeholders—including the OHCHR, Human Rights Watch, Shift, John Ruggie, EarthRights and leading experts on the right to remedy and sexual violence in Papua New Guinea—regarding their concerns about the Framework and their suggestions regarding the appropriate metrics to assess alignment with the Guiding Principles. As part of this process, we reached out repeatedly to Sarah Knuckey, Tyler Giannini and Catherine Coumans to solicit their thoughts on the Framework and on the assessment's methodology, to no avail.<sup>138</sup>
4. We interviewed Barrick personnel in Toronto, Australia and Papua New Guinea to understand their decision-making processes and their integration of findings from the Framework.
5. We conducted detailed interviews with almost all Framework decision-makers and advisors, both internal to Barrick and external experts involved in the Framework's design and implementation.
6. Perhaps most importantly, we engaged extensively with local stakeholders in Porgera, including:
  - 62 women who received remedies through the Framework—that is, over half the successful claimants.
  - 15 women who believed their claims were legitimate but did not receive remedies under the Framework.
  - 13 women who had never heard of the Framework until after its operations had ceased.
  - Male and female community leaders.
  - And, leading figures from the ATA—the local organization implicated in almost all critiques of the Framework—who shared with us their concerns about the Framework in particular and their grievances with Barrick more generally.

## 4.A. MEASURES TO ENSURE LEGITIMACY

Throughout this process, with the guidance of the External Committee, we have strived to preserve the credibility and independence of the assessment.

### *i. Independence*

To protect our independence, Enodo and Barrick agreed to a few procedural safeguards. First, while Barrick is funding the research, we retain complete discretion over the public report's content. This control is ensured by the assessment's terms of reference and our contract. Barrick has at no point sought to influence or constrain that discretion. Second, to protect against any implicit pressure, all funding was provided to Enodo long before we processed our results, let alone shared any findings with Barrick. Third, at all stages of the research and report writing, we deferred only to the External Committee, whose credentials speak for themselves. The External Committee took on its role in a volunteer capacity, further bolstering the assessment's independence protections.

We exercised our discretion in consultation with the External Committee to modify the terms of reference in several important ways:

1. *Assessment Scope:* From the outset, the External Committee sought to ensure that the Guiding Principles would not be considered in a vacuum. The assessment therefore incorporates international law, including the right to remedy and principles of due process. A core part of our international stakeholder engagement was to identify the applicable Guiding Principles and norms of international law.
2. *Assessment Timeline:* We substantially revised the assessment timeline to accommodate our concerns and those of international stakeholders. The first two phases—Planning and Contextual Research; and International Stakeholder Engagement—therefore took 14 weeks. The Site Visit was expanded from 5 to 22 days to ensure that it was as comprehensive and in-depth as possible. Report Development and Finalization took 16 weeks.

3. *Onsite Assessment Methodology:* In response to concerns expressed by Ms. Knuckey regarding the potential impact of power dynamics in Porgera on stakeholder engagement, we consulted with experts in sexual violence in Papua New Guinea, including UN Women and UNDP, to identify a qualified local researcher. With their assistance we retained Pauline Kenna Dee, a human rights lawyer from the Highlands with extensive experience engaging with, and representing, survivors of sexual violence, to conduct survivor interviews. To accommodate a further concern expressed by Ms. Knuckey, Ms. Kenna Dee traveled to remote villages to interview survivors who may not have heard of, or were unable to access, the Framework.

To reiterate, Barrick had no control—explicit or implicit—over the structure of our research or the content of our findings. The only role that Barrick played during the research was one of logistical support. Once our preliminary findings were ready, we provided Barrick an opportunity to comment on our factual conclusions and to provide further evidence as appropriate. We contemporaneously provided the External Committee any drafts sent to Barrick, both to solicit their feedback and to ensure transparency regarding any changes we made.

### *ii. Transparency*

We have been as transparent as possible with all stakeholders from the outset of the assessment. With international stakeholders, we explained the scope of the assessment in writing to every individual we contacted from April 2015 onwards. Barrick complemented this outreach with its own introductory message to international stakeholders on 23 April 2015, which identified the Assessment Team, the External Committee, and the scope of the assessment. With all stakeholders who have so requested, we have also shared the assessment's terms of reference, an overview of the assessment's scope and methodology, and a summary of our engagement expectations. We have also been completely transparent with all stakeholders regarding the source of funding for our assessment, the scope of our assessment, the role of the External Committee, and the fact that our final report will be public.

Regarding methodology, we repeatedly committed to providing a detailed discussion in the public report.<sup>139</sup> We meet that commitment in this assessment with detailed explanations of how we arrived at each indicator throughout Section 6: Integrated Assessment. Preparing a methodological exegesis before our final assessment was complete would have been premature and may have compromised our fact-finding. First, a core part of our stakeholder engagement was to interpret the Guiding Principles and develop appropriate assessment criteria, both of which are central to our methodology. Second, given the novelty of this assessment, each methodological choice would require sufficient explanation for observers to judge the criterion chosen as well as the substantive assessment. The best place to provide this context, as in virtually all assessments and research papers of which we are aware, is in the final report. Third, one assurance of credible interviews—particularly with individuals involved with the Framework’s design and implementation—was that they could not tailor their responses to our particular assessment criteria. As a result, we obtained forthright and candid answers, even when they did not reflect well on the Framework itself.

### *iii. Inclusiveness*

To the end of a rigorous and credible assessment, we engaged with a diverse group of national and international stakeholders. In addition to the individual Framework claimants and potential claimants, we interviewed 47 national and international stakeholders, including Barrick personnel and expert advisors, on a range of subjects—from the design of the Framework, to the intricacies of its implementation, to the proper interpretation of the Guiding Principles, to the responsiveness of Papua New Guinean public authorities to sexual violence, to appropriate remedies for sexual violence in Porgera, among others.<sup>140</sup> In this process, we purposely sought out national and international voices that had been critical of the Framework, including Ms. Coumans, Ms. Knuckey, Mr. Giannini, EarthRights, the ATA and the PLOA. Despite our best efforts, of these, only EarthRights and the ATA were willing to engage with us to share their concerns about the Framework. For each of the others, we have reviewed all of their public statements and commentaries to ensure we understand their perspectives as well as possible.

### *iv. Confidentiality*

This assessment touches on a range of issues that are very sensitive to the lives and careers of those who took the time to speak to us. Confidentiality has therefore been a paramount concern from the outset of our stakeholder engagement. In each of our interviews with national and international stakeholders, we followed a consistent protocol to ensure that interviewees were: (i) informed about the nature and scope of our research, including its funding source; (ii) aware of the information that we are hoping to obtain from them; (iii) aware that the final assessment will be public; and (iv) able to determine how, if at all, they would like their views to be attributed. All of this occurred before we posed any questions.

In the interests of stakeholders, we have chosen to keep almost all attributions anonymous. While many were content for us to attribute statements to them, there were a number who preferred that we did not. The latter might be easily identifiable by their particular knowledge or expertise if placed alongside named stakeholders. We would also like to protect the many individuals who answered our questions with a candor that might affect their professional or physical security. We have therefore refrained from specific attribution save where inescapable or where necessary to protect the confidentiality of that stakeholder’s other contributions to the assessment.

## **4.B. SURVIVOR INTERVIEW PROTOCOL**

Interviewing survivors of sexual violence was the most sensitive element of our research. The interviews were conducted from 12 August to 31 August 2015 by Ms. Kenna Dee, a Papua New Guinean human rights lawyer with extensive experience engaging with survivors of sexual violence. Ms. Kenna Dee came recommended by the Papua New Guinea office of the United Nations Development Programme (UNDP) based on her experience representing survivors of gender-based violence and training human rights defenders. She was assisted by a translator<sup>141</sup> retained and trained by Enodo who had never worked with the Framework.

### *i. Notice*

The interviews were facilitated by Everlyne Sap, the PRFA’s Community Liaison Officer. In the lead-up to our site visit, she

informed successful and unsuccessful claimants about the assessment and invited them to participate in interviews. We relied on Ms. Sap's assistance to ensure that we interviewed as many Framework claimants as possible, as she was based in Porgera and knew all the claimants. (Neither Ms. Sap nor any PRFA representative was present at any of the survivor interviews.) We also relied on the assistance of the ATA and Karath Mal, the local liaison with the ERI Claimants, to ensure that unsuccessful claimants participated in the interviews.

In addition to Framework participants, we sought to interview survivors of sexual violence who may never have heard of, or were unable to access, the Framework. This posed obvious challenges from a notice perspective. To find them, we asked various PRFA representatives, community leaders, and PJV personnel for their thoughts on which communities near the mine would be most likely (i) never to have heard of the Framework, or (ii) to have been impeded from accessing the Framework due to accessibility challenges or ethnic tensions. Three communities came up most often: Apalaka, Yarik and Olonga. We were able to arrange in-person introductions to community leaders in Apalaka and Yarik. Through them we obtained permission to interview women in their community about the narrow issue of whether they had heard about the Framework. To protect claimant security to the best of our ability, we made it clear that we were interested in speaking to any woman who wanted to speak to us—irrespective of whether she was a survivor of sexual violence.

### **ii. Location**

The interviews of women who had participated in the Framework were initially conducted in a private, walled office in the Porgera District Women's Association (PDWA) building, just off Porgera Station's main thoroughfare. In the last week of interviews, unrest outside the PDWA office—causing Ms. Kenna Dee to fear for her security—led to interviews being conducted in the Framework office, which was up the street, in a more secure and populated location.

We were sensitive to the fact that the PDWA building was the Framework's local operating site for many of the CAT's rotations. Unfortunately, it seemed the only practical option. Cardno and the PRFA advised us that this location would offer the best blend of accessibility and confidentiality for survivors.

Other international experts who had researched sexual violence in Porgera independently recommended the PDWA office for survivor interviews.

To interview women in Apalaka and Yarik we traveled to the communities. Out of necessity, the interviews were conducted in open spaces. We were therefore unable to protect the identity of those who participated. The interviews were, however, conducted individually, with no one—particularly no men—within listening distance.

### **iii. Informed Consent**

As with all stakeholders, we sought to ensure that all claimants and non-claimants we interviewed understood the purpose and scope of our assessment and that they freely consented to participate. The script used by Ms. Kenna Dee to introduce the assessment to all interviewees is in Appendix 1, along with the questions asked. In relevant part, it reads:

*"I am here because I am working with Enodo Rights, which is an organization that helps businesses respect human rights. Enodo Rights has been asked by Barrick to conduct an independent and public evaluation of the Remedy Framework. We are operating independently of Barrick and do not report to the company. Our work is being overseen by a group of international human rights experts. Barrick will have the chance to comment on our findings, but we have final control over the report.*

*"The purpose of this assessment is to evaluate the Remedy Framework, so that we can help Barrick and other mining companies learn for the future. There will not be any new remedies flowing from our assessment, and there will not be any new grievance mechanism in Porgera. The purpose of this assessment is simply to learn how the Remedy Framework could have been better.*

...

*"I would like to focus on your personal experience with the Remedy Framework before you received any top-up payment from Barrick. This interview will take approximately one hour. Do you agree to be interviewed for this assessment?"<sup>142</sup>*

We reviewed this script in Tok Pisin and Ipili—the languages most commonly spoken in Porgera—with the translator to ensure that it could be effectively communicated.<sup>143</sup> In addition to this explanation, which was provided orally to every interviewee, we explained the purpose of the assessment—and its limitations—to a large group of claimants on our first day in Porgera. Upon learning that we were not there to provide additional remedies, a number of those claimants decided not to participate in the interviews.

#### ***iv. Confidentiality and Security***

Protecting claimant confidentiality and security was our ever-present and paramount concern. In the context of the Framework, the two are inseparable: security for survivors of sexual violence in Porgera turns largely on confidentiality. We made confidentiality clear to every interviewee: “I want to emphasize that everything you tell me today is completely confidential. No one outside Enodo Rights will know what you have said. When we publish the report, we will include the statements of the people we interview, but will not tell anyone who made those comments.”<sup>144</sup> To highlight this point in practice, we did not ask or record the names of any of the women we interviewed. For claimants who were willing to share their Framework claimant number, we recorded these in our interview notes. When claimants requested further counseling, we shared the claimant number with Cardno and Anglicare, a social welfare charity that is providing trauma counseling in Porgera. The critical importance of confidentiality was also explained to the translator, who signed a confidentiality agreement with Enodo.

Confidentiality of the interviews at the PDWA and Framework offices was ensured by conducting them in private, walled rooms. Only the interviewee, Ms. Kenna Dee and the translator were present during interviews. The interview notes have only been reviewed by members of the Enodo assessment team: Yousuf Aftab, Ms. Kenna Dee, and Marianna Almeida.

Security was primarily a concern for interviews in Apalaka and Yarik. To protect interviewees in these communities, we made it clear to the men that we were interviewing any women who wished to speak to us—not just survivors of sexual violence.<sup>145</sup> (As discussed under GP 31(b) in Section 6.E.2, confidentiality for Framework claimants proved a chimera; they had thus already been exposed to devastating security risks.)

#### ***v. Interview Questions***

The full list of interview questions is available in Annex 1. These questions were derived from the indicators we developed for each relevant Guiding Principle, as elaborated in Section 6: Integrated Assessment. The questions were modified after the first five interviews to rationalize the responses and to ensure the phrasing was appropriate. This change only affected the interviews of successful claimants. Throughout the Integrated Assessment, references to answers received from 57 successful claimants indicate that the question was not posed to the first 5 interviewees.

#### ***vi. Research Limitations***

One important research limitation to note flows from the timing of our claimant interviews. The interviews were conducted in August 2015, over two years after most claimants had gone through the Framework process. That timing necessarily affects the accuracy of recollections, particularly about how the Framework was perceived when it was operating. This limitation was exacerbated in the Framework’s case by the increasingly tense context following Barrick’s settlement with the ERI Claimants. The terms of that settlement are confidential. But every claimant (successful or not), every PRFA officer, every community leader, and the ATA itself believed that the ERI Claimants had received K200,000, approximately four times what successful claimants under the Framework received. As a result, there was a clear, present and shared sense of injury founded on the perception of inequity.

The strength of this sentiment was manifest from the moment we arrived in Porgera. On our first day at the PDWA building, we had expected to interview five to seven claimants. They arrived in the morning. Through the day, however, the ranks of women in front of the building swelled, peaking at approximately 50.<sup>146</sup> Their anger at the relative inequity of their remedy packages compared to those of the ERI Claimants was inescapable. When we tried to explain our assessment and answer their questions, a handful of women started screaming: “I want my 200 grand!” Only when the crowd accepted our limited mandate and powerlessness to offer any additional remedies did they disperse and the situation calm. The ERI settlement remained top of mind in each and every claimant interview.

This general sense of resentment appears to have been tapped and promoted by local actors. Throughout our time in Porgera, we heard rumors of women paying to register a new lawsuit

against Barrick with Mr. Mal, who was previously a member of the ATA and served as ERI's Porgera liaison. We do not know if that is true. But, when Mr. Mal came to meet us at the PDWA, he brought with him between 40 and 50 women whom the PRFA officials did not recognize as Framework claimants. He presented us a written document noting the following: "[The Framework] was first welcomed by everyone in the Porgera Valley; however, due to the huge monetary compensation payment offered by Barrick to the eleven ladies that were supported by ERI, most of the ladies are angry with the remedial program. Barrick & PJV must be fair in providing equivalent remedy values to the one hundred and twenty ladies."<sup>147</sup> The document also requested that the Framework be re-opened to provide remedies to "[m]ore than one hundred rape victims" who had missed out.<sup>148</sup> When Mr. Mal left, he said something that we could not discern to the crowd of women, who cheered and followed him.

We do not take any position on the legitimacy of potential future claims. Rather, we wish only to highlight that widespread current disenchantment with the Framework born of the ERI settlement, and agitated by local stakeholders, inevitably compromises our ability to apprehend how claimants perceived the Framework and its outcomes. From a pure analytical perspective, the ERI settlement should not bear on whether the Framework aligned with the Guiding Principles, as it was an independent and exogenous variable. Given the timing of our research, however, we were unable to separate out the impact of this settlement in our assessment. Had we conducted our research in late 2014 or early 2015, it is likely that our interview results would have differed markedly from our current findings. Indeed, claimant interviews conducted by Dame Kidu and Ms. Wainetti in January 2015—before the ERI settlement—provided rather different answers to some of the very same questions we asked regarding the clarity of the process and the impact of the remedies.<sup>149</sup> We do not consider those results definitive for our assessment. But the discrepancy points to the possible impact of the ERI settlement on all claimant responses.

<sup>137</sup> Porgera Assessment Terms of Reference, 23 April 2015, at 2-3.

<sup>138</sup> Public documentation of our exchanges with each of these stakeholders is available on the Business and Human Rights Resource Centre (BHRRC) website, [business-humanrights.org](http://business-humanrights.org).

<sup>139</sup> See, in particular, our correspondence with Ms. Knuckey, Mr. Giannini and Ms. Coumans, which is available on the BHRRC website, [business-humanrights.org](http://business-humanrights.org).

<sup>140</sup> The complete list of non-survivors we consulted in our research is available in Appendix 2.

<sup>141</sup> We have not identified the translator for her security. During the interviews, she was physically threatened by others who wished to serve as our translators in her stead.

<sup>142</sup> Survivor Interview Script, Appendix 1 [Interview Results].

<sup>143</sup> Given the sensitivity of the issues, we preferred to have a translator that we had trained in the script, the relevant questions, and confidentiality. But we never denied any interviewee the right to bring her own translator.

<sup>144</sup> Interview Results, Appendix 1.

<sup>145</sup> We have heard unverified accounts of women being abused simply for participating in interviews with international researchers focused on survivors of sexual violence. We wanted at all costs to avoid that risk.

<sup>146</sup> We understood from Ms. Sap that almost all of the women were successful Framework claimants.

<sup>147</sup> Karath Mal Letter of 14 August 2015, Appendix 3, at 3 (edited mildly for grammar).

<sup>148</sup> *Id.*

<sup>149</sup> Dame Carol Kidu and Ume Wainetti, "Report of Visit to Porgera by PRFA Board Members, 18-21 January 2015", and "Notes on 11 Claimant Responses Regarding Use of the Financial Components of Remedy Packages, January 2015", made available to Enodo in confidence.

## 5. INTERPRETIVE APPROACH

This assessment is structured around the Guiding Principles. One of their chief virtues is the creation of a shared language for business and stakeholders. The contours and limits of that language are still being tested; they will continue to evolve as corporate practice develops. In the interim, for dialogue about the Guiding Principles to be meaningful, we need a shared framework from which to understand them.

This assessment therefore begins with a brief explanation of our interpretive approach. Failure to adopt one would risk undermining effective engagement with stakeholders and a community of business and human rights practitioners. As John Tobin has noted about international human rights in general: “Simply clothing an assertion about the content of an internationally recognized human right with the apparel of humanity may satisfy a moral or political urge, but it does not necessarily accord with the nature of the legal obligations actually assumed by a state under a human rights treaty.”<sup>150</sup> We have thus sought to use an interpretive approach that would be most compelling to the “interpretive community” of stakeholders, businesses, and corporate responsibility practitioners.<sup>151</sup>

Our launching point is Article 31 of the Vienna Convention on the Law of Treaties (VCLT): “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>152</sup> This article is a cornerstone of customary international law.<sup>153</sup> It is also accepted as foundational and binding in the international human rights context.<sup>154</sup> Under the

VCLT, the focus of the interpretive process should, as far as possible, be on the text, which is taken to reflect the intentions of those acceding to it: “the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties.”<sup>155</sup>

The Guiding Principles are obviously not a treaty under international law. But the interpretive approach remains apposite because the Guiding Principles’ influence is based on consent. They have gained normative force over the last few years because of their widespread endorsement by the private sector, public sector and civil society. That endorsement is of the Guiding Principles’ text, not the intentions of any drafter. As a judge of the European Court of Justice noted in the context of treaty interpretation: “It is not, in actual fact, on the intentions of the contracting parties that agreement is reached, but on the written formulas of the treaties and only on that. It is by no means certain that agreement on a text in any way implies agreement as to intentions. On the contrary, divergent, even conflicting, intentions may perfectly well underlie a given text.”<sup>156</sup>

The VCLT’s textual focus, with an eye to coherence and respect for the treaty’s object, is mirrored in the Guiding Principles’ own interpretive guidelines:

These Guiding Principles should be understood as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and

human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization.<sup>157</sup>

Drawing on this guidance, and in line with international law, we have relied on the following interpretive maxims to develop the assessment's indicators:

1. *Treat the text of each Principle and the Commentary as equally authoritative.* This maxim is derived from the suggestion that the Guiding Principles "should be understood as a coherent whole".
2. *Strive for consistency with the Guiding Principles' overarching structure and objectives.* This maxim is drawn from the encouragement to read the Principles, "individually and collectively, in terms of their objective".
3. *With an eye to ensuring voluntary respect for human rights, endeavor to practical, context-sensitive results.* We derive this maxim from two elements of the General Principles: (i) the Guiding Principles' end is "enhancing standards and practices

with regard to business and human rights so as to achieve tangible results for affected individuals and communities"; and, (ii) "[n]othing in these Guiding Principles should be read as creating new international law obligations".<sup>158</sup>

4. *Privilege consistency with international human rights law.* This is drawn from the injunction that "[n]othing in these Guiding Principles should be read ... as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights."<sup>159</sup>
5. *Seek practical guidance from authoritative corporate responsibility sources.* We derive this maxim from the Guiding Principles' aim of "contributing to a socially sustainable globalization."<sup>160</sup> That is, the Guiding Principles recognize that they are part of a greater whole in the pursuit of sustainable business.

We adopt these interpretive maxims to ensure methodological transparency, not with any pretense of setting definitive rules with respect to the Guiding Principles.

<sup>150</sup> John Tobin, "Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation" (2010) 23 Harvard Human Rights Journal 1 at 2.

<sup>151</sup> *Id.* at 4 (Interpretation is "an attempt to persuade the relevant interpretive community that a particular interpretation is the most appropriate meaning to adopt." This "interpretive community has moved beyond states and their agents toward a more communitarian model in which the interests and expertise of a much wider range of parties and actors must be taken into account in the interpretive exercise.").

<sup>152</sup> United Nations [UN], *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, Art. 31 [VCLT].

<sup>153</sup> *Case Concerning the Dispute Regarding Navigational and Related Rights* (Costa Rica v. Nicaragua), Judgment of 13 July 2009, General List No 133, ¶47; *Phoenix Action, Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶75.

<sup>154</sup> *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, 1999 Inter-Am. Ct. H.R. (ser. A) No. 16, ¶¶114-115 ("This guidance is particularly relevant in the case of international human rights law, which has made great headway thanks to an evolutive interpretation of international instruments of protection. That evolutive interpretation is consistent with the general rules of treaty interpretation established in the 1969 Vienna Convention. ... human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions."); Tobin at 19 (noting that the VCLT principles constitute the accepted norms of interpretation for international human rights treaties).

<sup>155</sup> International Law Commission [ILC], *Draft Articles on the Laws of Treaties with Commentaries in Report of the International Law Commission on the Work of its Eighteenth Session*, UN Doc. A/CN.4/191 (1966) at 220 ("the text [of a treaty] must be presumed to be the authentic expression of the intentions of the parties.").

<sup>156</sup> Tobin at 23 (quoting from a speech by Judge Pierre Pescatore).

<sup>157</sup> Guiding Principles, "General Principles" (emphasis added).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

## 6. INTEGRATED ASSESSMENT

The Integrated Assessment is structured to minimize analytical discretion and ensure methodological transparency. To those ends, narrative flow is necessarily sacrificed. We have aspired instead to precision. This is not a report about our impressions of the Framework. Rather, we seek to assess whether the Framework aligned with the Guiding Principles, informed as appropriate by international law. We also seek to identify exactly how and why the Framework did or did not align with the Guiding Principles. The assessment therefore tracks the order and structure suggested by the Guiding Principles themselves—GPs 22, 29, and 31. For each of these principles, we have developed practical indicators by applying the interpretive maxims discussed in Section 5. We have endeavored to indicators that can be universalized. Those indicators are thus conceived to apply to all OGMs of the Framework’s type: i.e. historically oriented, adjudicative OGMs administered by an independent institution. The indicators would be different for dialogue-based OGMs.

### *i. Design and Implementation*

We assess the Framework against each of these discrete indicators on two dimensions: design and implementation. Design refers to the Framework’s blueprint in its foundational documents, specifically the *Framework of Remediation Initiatives* and the *Manual*. In assessing design, we seek to determine whether the Framework would have aligned with the Guiding Principles had everything been implemented exactly as conceived. Implementation captures the actions of those

who received and processed grievances and the experience of relevant stakeholders. On this dimension we seek to assess the Framework’s practical alignment with the Guiding Principles independently of its design. This division allows us to determine the precise cause of any failings.

Analyzing design and implementation separately is critical in the Framework’s case because distinct institutions were responsible at different stages. As discussed under GP 31(h), the Framework was largely designed by Barrick, drawing on the insight of a range of national and international experts. A critical part of that design, however, was adjudicative independence. To preserve independence, the Framework was implemented by the PRFA and administered by Cardno. Barrick’s role in implementation was tightly circumscribed to ensure that claimant grievances were processed by “a legitimate, independent third-party mechanism.”<sup>161</sup> The institutional division between design and implementation runs through most of the assessment, save in relation to stakeholder engagement, transparency and continuous learning, where implementation responsibility could reasonably rest on Barrick without compromising the Framework’s independence.

### *ii. Reasonableness*

We have relied on “reasonableness” to check two threats to a fair assessment. The first of these is our knowledge of how events played out. By virtue of timing alone, we have a much clearer understanding of the implications of Framework

decisions than responsible decision-makers did. It would not be fair to those who designed or implemented the Framework to impugn their decisions with reference to unforeseeable outcomes. We have therefore sought to consider all Framework decisions with reference to alternatives that a similarly situated decision-maker would have considered given the decision-making constraints (“reasonable alternatives”). The second threat to fairness is deifying perception, particularly of idiosyncratic observers. Where possible, we have focused our assessment on actions under Barrick’s, the PRFA’s or Cardno’s control; we have considered these actions from the perspective of an observer who is willing to accept that Framework decision-makers were acting in good faith—even if imperfectly—and willing to trust the veracity of Framework representations (“reasonable observer”).

### ***iii. Assessment Limitations***

This assessment is founded on a wide array of interviews and research. We have reached conclusions based on the best evidence we were able to gather. But that evidence was limited by availability of witnesses and documents and by the unwillingness of certain stakeholders to participate. We did not have the ability to compel document production or witness testimony. Our conclusions should be treated carefully as *assessment* findings. They should not be confused with factual findings produced through a robust adversarial process in a court of law.

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<sup>161</sup> GP 31(h), Commentary (“Where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism.”).

## 6.A: GUIDING PRINCIPLE 22

Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.

### Relevant Commentary:

Even with the best policies and practices, a business enterprise may cause or contribute to an adverse human rights impact that it has not foreseen or been able to prevent.

Where a business enterprise identifies such a situation, whether through its human rights due diligence process or other means, its responsibility to respect human rights requires active engagement in remediation, by itself or in cooperation with other actors. Operational-level grievance mechanisms for those potentially impacted by the business enterprise's activities can be one effective means of enabling remediation when they meet certain core criteria, as set out in Principle 31.

**INDICATOR 1:** WAS THE FRAMEWORK DESIGNED TO ADDRESS ADVERSE HUMAN RIGHTS IMPACTS CAUSED OR CONTRIBUTED TO BY BARRICK OR THE PJV?

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### 6.A.1: INTERPRETATION

We begin the assessment with GP 22 to address an issue raised early in our engagement with business and human rights experts: whether the Framework can be considered a conventional OGM as envisioned by GPs 29 and 31.<sup>162</sup> The source of doubt is, in large part, that the Framework was expressly designed to address past wrongs, rather than to provide continuous grievance processing.<sup>163</sup> Early on, the Clinics pointed to the limited, historical ambit of the Framework as a design failing.<sup>164</sup> More recently, Sarah Knuckey and Eleanor Jenkin have adverted to the “time-bound, retrospective” nature of the Framework as bases on which to distinguish it from conventional OGMs, preferring the term “‘company-created human rights abuse remedy mechanism’ (CHRM).”<sup>165</sup>

The Guiding Principles experts we consulted did not go so far.<sup>166</sup> Rather, they noted that the use of the Framework to provide remedy for such severe and widespread historical human rights abuses made it a novel application of the Guiding Principles. In the words of one of the Guiding Principles’ drafters: “[The Framework] was never a direct application of what we had in mind, though it was a legitimate use of an operational-level grievance mechanism. But, for that reason, it was always going to be hard.”<sup>167</sup> Because it is not a preventative, forward-looking OGM, it is best to consider the Framework through the lens of GP 22, which recognizes OGMs as one type of legitimate process through which companies can remediate adverse human rights impacts that they have caused or to which they have contributed.<sup>168</sup>

The launching point of our Guiding Principles’ assessment is thus to ask whether the Framework aligned with GP 22 in terms of the past wrongs it sought to address.<sup>169</sup>

*“Where a business enterprise identifies [a situation where it has caused or contributed to an adverse human rights impact], whether through its human rights due diligence process or other means, its responsibility to respect human rights requires active engagement in remediation, by itself or in cooperation with other actors.”<sup>170</sup>*

The relevance of GP 22 is in specifying one legitimate objective and use of OGMs under the Guiding Principles. Our indicator at

this stage is, therefore, to assess the narrow issue of whether the Framework’s objectives were legitimate under GP 22.

### INDICATOR 1: WAS THE FRAMEWORK DESIGNED TO ADDRESS ADVERSE HUMAN RIGHTS IMPACTS CAUSED OR CONTRIBUTED TO BY BARRICK OR THE PJV?

#### 6.A.2: ASSESSMENT OF INDICATOR 1

##### 6.A.2(A): DESIGN

###### *i. Adverse human rights impacts*

The Framework was designed to address “historical cases” implicating issues of sexual violence as defined by the World Health Organization: “Sexual Violence is any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed against a person’s sexuality using coercion, by any person regardless of their relationship to the victim, in any setting.”<sup>171</sup> This definition aligns with the definition of sexual violence under international law.<sup>172</sup> In the international human rights context, sexual violence implicates a range of fundamental rights, including (i) the right to “security of the person”<sup>173</sup>, (ii) the right not to be “subjected to torture or to cruel, inhuman or degrading treatment or punishment”<sup>174</sup>, and (iii) the right to be free from “arbitrary interference with [her] privacy, family, home or correspondence, nor to attacks upon [her] honour and reputation”<sup>175</sup>.<sup>176</sup> The Framework was thus clearly designed to address one type of serious adverse human rights impact, which bears on a number of fundamental human rights.

Some stakeholders have raised the narrow focus of the Framework on sexual violence, at the expense of other alleged human rights abuses, as a design flaw.<sup>177</sup> We disagree. While a narrow focus on particular rights impacts may pose implementation challenges<sup>178</sup>, the narrow focus does not of itself undermine the mechanism’s legitimacy as an OGM under the Guiding Principles.<sup>179</sup> That is particularly true in this case as, parallel to the Framework’s development, Barrick designed and implemented a formalized OGM to respond to all stakeholder grievances, including all human rights concerns.<sup>180</sup> Our mandate does not extend to assessing that mechanism directly or in-depth.<sup>181</sup> While it is not determinative of whether the Framework was an OGM, we find that the Framework’s focus on sexual violence was reasonably justified by (i) the need to respond to

a particularly complex and pervasive human rights challenge, which a broader mechanism may have proved ill-equipped to address, and by (ii) the interests of claimants, particularly in confidentiality and security.<sup>182</sup>

### ii. “Cause or contribute to”

The Framework was designed primarily to capture incidents of sexual violence involving “one or more current or former PJV employees ... where the assault took place while those employees were performing their duties for the Porgera mine, regardless of where the assault took place.”<sup>183</sup> Women who alleged sexual violence committed by a Barrick contractor could not make a claim under the Framework.<sup>184</sup> Such claims, though, would not be dismissed out of hand. If contractors had provided assurances to the PJV that they would “take appropriate action” for claims involving their employees, the “CAT and/or Barrick” would refer such claims to them for remediation.<sup>185</sup> But women claiming sexual violence by contractors could not access Framework remedies directly. Nor could women who alleged sexual violence by police forces.<sup>186</sup>

We have been unable to determine how Barrick drew a bright-line distinction between employees and non-employees. One individual who was closely involved with the Framework’s design noted that the decision was based on Barrick’s level of control, and that the company’s “principal responsibilities lay with those cases which had been perpetrated by persons over whom it has a clear supervisory authority.”<sup>187</sup> Senior personnel responsible for Barrick’s overarching human rights policy and procedures disagree. They explain that the distinction between employees and non-employees was based on a considered analysis of levels of involvement under the Guiding Principles.<sup>188</sup> The Framework focused on employees because Human Rights Watch’s investigation—the Framework’s reason for being—raised the particular specter of sexual violence by PJV employees, which on its face implicated “cause or contribute to” involvement and Barrick’s responsibility to remedy.<sup>189</sup> The Framework’s scope was thus driven by the evidence of adverse human rights impacts rather than any restrictive assumptions about Barrick’s involvement with such impacts.<sup>190</sup>

Three initiatives launched by Barrick contemporaneously with the Framework evidence the corporate policy to remedy adverse human rights impacts committed by non-employees in appropriate

circumstances. First, the company’s *Human Rights Policy* provides that Barrick will consider mitigation and remediation measures when “employees, affiliates or third parties acting on its behalf have caused adverse human rights impacts”.<sup>191</sup> Second, the scope of Barrick’s *Guidelines for Remediation of Human Rights Impacts* extends to “negative human rights impacts ... directly or indirectly attributable to actions undertaken by Barrick or its employees, or third party contractors.”<sup>192</sup> Third, a remedy framework developed at African Barrick Gold’s<sup>193</sup> North Mara mine to respond to allegations of sexual violence, we have been told, expressly extends to employees and police operating on the mine site.<sup>194</sup>

We have not been provided, however, with any written records of Barrick’s internal definition of “cause or contribute to” or how it was applied to the Framework’s design. In the absence of such a definition, it is difficult to determine whether the Framework’s scope was defined by involvement or control.<sup>195</sup> Barrick personnel note, in this regard, that neither the OHCHR, nor the Guiding Principles experts they consulted when designing the Framework, nor BSR—the respected consulting firm they hired to conduct a mid-program assessment—raised the Framework’s focus on employees as a design flaw.<sup>196</sup> And we recognize that, from the perspective of corporate practice, the failure expressly to adopt a transparent and consistent definition of “cause or contribute to” is common even among leading sustainable businesses. But this assessment is with reference to best practice as defined by the Guiding Principles.

Taking Human Rights Watch’s investigation as the Framework’s launching point was certainly legitimate. Tailoring the Framework exclusively to the particular incidents of sexual violence identified by Human Rights Watch, however, may have been unduly narrow with reference to the remedial objectives of GP 22. Indeed, the Framework was built on the premise that the Human Rights Watch investigation suggested more sexual violence claims, which had yet to be reported. From the perspective of the Guiding Principles, historical claims of sexual violence warranting a remedy may have included actions by non-employees. Over the period relevant to the Framework, Barrick retained contractors and cooperated with public authorities to provide security in Porgera.<sup>197</sup> There is nothing inherently inappropriate about either of these—particularly where the latter is mandated by the Police Act of 1998<sup>198</sup>—and

certainly not for this assessment. Our concern is that we are unable to determine whether there was a principled basis to exclude sexual violence committed by such authorities from the Framework *ex ante*.

## 6.A.2(B): IMPLEMENTATION

### *i. Adverse human rights impacts*

The Framework fell short in implementation in addressing historical cases of sexual violence as defined by the World Health Organization. We found that the CAT officers did not understand the scope of “sexual violence”, focusing instead only on “rape”.<sup>199</sup> When asked to explain what they told claimants about eligible harms, each of the CAT members we interviewed referred to forcible sexual intercourse to the exclusion of all other dimensions of sexual violence.<sup>200</sup> In the words of one CAT officer: “we looked at sexual violence as penetration, possibly with other components.”<sup>201</sup> A second officer stated: “it has to be a rape incident to qualify.”<sup>202</sup> Most of the successful claimants we interviewed—46 of the 57 to whom this question was posed—said that they were not provided any explanation of what constitutes sexual violence; 13 of the 15 unsuccessful claimants agreed.<sup>203</sup> One of the few we interviewed who did recall an explanation confirmed what the CAT members said: “Rape was explained. She told me that force would be used to have sex against my will.”<sup>204</sup> This understanding of “sexual violence” is far narrower than that under international human rights law. As the Inter-American Court of Human Rights (IACHR) has recently noted: “sexual violence ... may include acts which do not involve penetration or even any physical contact.”<sup>205</sup>

We understand that applying the broadest possible definition of sexual violence may have proved unmanageable in light of the Framework’s decision-making process and lack of evidentiary thresholds.<sup>206</sup> Even with this practical consideration in mind, however, the CAT’s conflation of “rape” and “sexual violence” was unreasonably narrow. It likely denied Framework access to a number of claimants who ought to have been eligible for a remedy. We cannot know how many such claimants there are. We have only been provided a total number of claims lodged (253) and claims deemed eligible (137).<sup>207</sup> The reasons for deeming 116 ineligible are known only to the CAT officers, as these were not formally recorded.<sup>208</sup> But one CAT officer stated that there were “many” claimants they turned away because “there was no rape element” to the assault.<sup>209</sup>

The CAT’s failure to record the reasons for deeming claimants ineligible is a serious procedural failing, with reference both to the Framework’s design and with reference to transparency and accountability under the Guiding Principles. The *Manual* expressly provides that every claim must be given the opportunity to complete a Statement of Claim *before* an assessment of eligibility is made: “A Statement of Claim *must* be completed by *all* Claimants ... The CAT project officer must record the details of each Claim in a secure database. The project officer will *then* complete an initial review of the Claim to determine the eligibility and legitimacy of the Claim.”<sup>210</sup> In practice, however, it appears that assessments of eligibility were made *before* any claim was formally lodged. That is, the 253 total claimants were not claimants *per se*, but all individuals who “approached” the CAT.<sup>211</sup> Indeed, it seems that the only claims that were formally recorded were those that were deemed eligible *and* legitimate: “No claims were recorded as illegitimate as these were dealt with during initial contact with the program.”<sup>212</sup>

We understand that the decision not to record ineligible and illegitimate claims was made with noble intentions: “It was important not to discredit or embarrass women who may be making false claims, or to create community tensions between legitimate and illegitimate claimants.”<sup>213</sup> But these ends would not have been compromised by the CAT simply noting down reasons why a particular claim was deemed ineligible or illegitimate without putting the claimant herself through any more demanding or public process than she had already freely chosen. The absence of records relating to the potential claimants who were turned away before they could file a formal claim makes it impossible to assess the full impact of the CAT’s poor understanding of sexual violence—or, for that matter, the impact of any other critical implementation errors that may have been made. From a practical perspective, it is difficult to see how the PRFA or Cardno could have tracked or corrected the CAT’s performance without such records.

### *ii. “Cause or contribute to”*

The Framework’s threshold eligibility requirement of an act committed by a PJV employee appears to have been largely followed by CAT officers.<sup>214</sup> We understand that the requirement was applied flexibly to claimants represented by EarthRights. Barrick advised us of one case where a claimant who alleged sexual violence by a non-PJV employee, in that case a police

officer, was offered a remedy under the Framework.<sup>215</sup> EarthRights informed us of at least two clients assaulted by mobile police and one client who was assaulted by “a non-security employee of a mine contractor” who were offered, but declined, Framework remedies.<sup>216</sup> Nonetheless, as this restriction exists in the very design of the Framework, it is difficult to assess the impact on potential claimants not represented by EarthRights—particularly those who may never have come forward. The CAT’s failure to record reasons for deeming claims ineligible exacerbates the challenge. In light of the Papua New Guinea police’s reputation for “violent abuses”<sup>217</sup> and the informal constitution of security contractors<sup>218</sup>, we believe that the Framework may have attracted a broader array of claimants if the eligibility criteria were not limited to PJV employees.

We remain sensitive to the challenge that extending the Framework to non-employees would pose to practical and principled implementation.<sup>219</sup> In particular, we note Dr. Ganster-Breidler’s finding that sexual violence is endemic in Porgera.<sup>220</sup> Against this backdrop, distinguishing cases with which Barrick was involved from those which it was not, practically and consistently, would have been difficult without a bright-line rule. But we believe such a rule could have been developed on a considered and reasonable basis. For instance, the Framework’s eligibility and legitimacy criteria could have been framed to capture incidents of sexual violence “involving one or more individuals acting in their capacity as PJV employees or in service of PJV objectives.” The CAT could have been provided indicia to determine the latter, including the location of the incident, the timing of the incident, and any other relevant contextual

factors. The PJV might have facilitated such determinations by sharing with the PRFA sufficient detail regarding PJV-related operations involving contractors or police for the CAT to assess claim eligibility and legitimacy. Such an approach may not have been perfect. At the very least, though, it would have sent a clear message that the Framework aspired to remedy all acts of sexual violence caused or contributed to by Barrick.

### 6.A.3: CONCLUSION ON GP 22

The Framework’s historical focus and limitation to one type of adverse human rights impact are legitimate parameters for an OGM as contemplated by GP 22. But, possibly in design and certainly in implementation, it appears that the Framework did not align precisely with the parameters of an OGM conceived under GP 22. First, we have been unable to determine whether the scope of the Framework was established with reference to involvement or control. This is a common corporate error. The result, however, was an OGM that may have provided remedy to a narrower class of claimants than GP 22 would envision. Second, while the Framework was appropriately designed to address a specific type of adverse human rights impact defined with reference to international law, the CAT’s overly narrow interpretation of sexual violence likely denied access to otherwise-eligible claimants. This implementation error was compounded by the CAT’s failure—contrary to the express terms of the *Manual*—to record reasons for deeming claims considered ineligible or illegitimate. From an assessment perspective, we are therefore unable to identify precisely how many potential claimants were impacted by implementation errors.

<sup>162</sup> Enodo Interview with Guiding Principles Expert (#1); Enodo Interview with Guiding Principles Expert (#2).

<sup>163</sup> Enodo Interview with Senior Barrick Personnel (#4); Enodo Interview with Barrick Counsel (noting that the historical focus with a cut-off date was, in large part, to ensure the existence of the Framework did not create an incentive for men to commit sexual violence).

<sup>164</sup> Clinics, “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,” 14 May 2012, shared by Barrick, at 6 (“The remedial mechanism should remain in place to handle meritorious claims, including violence that may happen after the launch of the program, to avoid arbitrary treatment of those harmed.”)[Clinics, Comments on Framework].

<sup>165</sup> Sarah Knuckey and Eleanor Jenkin, “Company-created remedy mechanisms for serious human rights abuses: a promising new frontier for the right to remedy?,” 20 August 2015, *The International Journal of Human Rights* at 2.

<sup>166</sup> Enodo Interview with Guiding Principles Expert (#1); Enodo Interview with Guiding Principles Expert (#2); Enodo Interview with Guiding Principles Expert (#3).

<sup>167</sup> Enodo Interview with Guiding Principles Expert (#3).

<sup>168</sup> Enodo Interview with Guiding Principles Expert (#1); Enodo Interview with Guiding Principles Expert (#3); GP 22 (“Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.”); and Commentary (“Operational-level grievance mechanisms for those potentially impacted by the business enterprise’s activities can be one effective means of enabling remediation when they meet certain core criteria, as set out in Principle 31.”).

<sup>169</sup> GP 22, Commentary.

<sup>170</sup> *Id.*

<sup>171</sup> *Framework of Remediation Initiatives* at 7 (quoting from UN. Fact Sheet N239 (September 2011)); Enodo Interview with Senior Barrick Personnel (#4).

<sup>172</sup> *Case of Rosendo Cantu, et al v. Mexico*, Judgment of Inter-American Court of Human Rights [IACHR], 31 August 2010, ¶109 (“In accordance with international case law and taking into account the provisions of the Convention, the Court has previously considered that sexual violence involves acts of a sexual nature, committed against a person without their consent, and that in addition to the physical invasion of the human body, they may include acts which do not involve penetration or even any physical contact.”) [*Rosendo Cantu*]; see also, *Case of Miguel Castro-Castro Prison v. Peru*, Reparations and Costs, Judgment of IACHR, 25 November 2006, Series C No. 160, ¶306; *Case of Prosecutor v. Jean-Paul Akayesu*, Judgment of International Criminal Tribunal of Rwanda, 2 September 1998, Case No. ICTR-96-4-T, ¶688.

<sup>173</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Art. 3 [UDHR].

<sup>174</sup> UDHR, Art. 5.

<sup>175</sup> UDHR, Art. 12.

<sup>176</sup> See *Rosendo Cantu*, ¶121.

<sup>177</sup> EarthRights International, “Factsheet: Abuse by Barrick Gold Corporation”, earthrights.org, at 5 (“Barrick’s Remedial Framework was limited to claims of sexual violence. Relatives of men killed by security guards have tried to lodge complaints with Barrick’s local community relations grievance office; none have apparently resulted in reparations”); Clinics, Comments on Framework at 1 (“The exclusive focus on sexual assault is arbitrary and does not provide reparation for other documented allegations of human rights violations.”); Knuckey and Jenkin at 7-8 (“[T]he Barrick mechanism’s design limitations presented practical difficulties to ensuring that all eligible claimants could access the mechanism, and meant that a wide range of alleged abuses, even those closely connected in cause and form to the types of claims accepted in the mechanism, remain unaddressed and un-remedied.”).

<sup>178</sup> Discussed below under GP 31(b) and in Section 7: Conclusions and Recommendations.

<sup>179</sup> OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, 2012, HR/PUB/12/02, ohchr.org, at 65 (“Some enterprises may have formalized processes for [a] specific adverse impact that is a particular risk for their operations ... It is therefore generally preferable to have in place agreed processes for the remediation of adverse human rights impact arising in any area of operations, even if this requires more than one type of process.”)[emphasis added][OHCHR, *Interpretive Guide*].

<sup>180</sup> Enodo Interview with Senior Barrick Personnel (#1); Enodo Interview with Senior Barrick Personnel (#2); Enodo Interview with Senior Barrick Personnel (#4); Enodo Interview with Senior Barrick Personnel (#3); Enodo Interview with Human Rights Watch (#1); Enodo Interview with Human Rights Watch (#2); Enodo Interview with PJV Corporate Responsibility Personnel; Enodo interview with APD Personnel (#1); Enodo Interview with APD Personnel (#2); Enodo Interview with APD Personnel (#3); Enodo Interview with APD Personnel (#4).

<sup>181</sup> We consider some of these changes in assessing the “rights-compatibility” of the Framework’s outcomes (GP 31(f)) and the “continuous learning” from the Framework (GP 31(g)).

<sup>182</sup> Enodo Interview with Senior Barrick Personnel (#1); Enodo Interview with Senior Barrick Personnel (#2); Enodo Interview with Senior Barrick Personnel (#3); Enodo Interview with Senior Barrick Personnel (#4); Enodo Interview with Human Rights Watch (#1); Enodo Interview with Human Rights Watch (#2); Enodo Interview with PJV Corporate Responsibility Personnel.

<sup>183</sup> *Manual* at 1.

<sup>184</sup> *Id.* (“A woman who has been the subject of sexual violence allegedly involving current or former employees of companies which are or have been contracted to perform work for the PJV (the **PJV Contractors**), can not make a Claim against Barrick under this Program”).

<sup>185</sup> *Id.* at 2 (“if the PJV Contractors give those assurances, the CAT and/or Barrick will give a report of the Claim to a Contractor if the staff of that Contractor are alleged to have engaged in inappropriate conduct on the Project lease area.”).

<sup>186</sup> *Id.* (“Only Claims which meet the eligibility and legitimacy requirements described in this Manual will be assessed as part of the Program.”). According to one Barrick representative, the PRFA still had the discretion to accept claims based on sexual violence committed by police or contractors, and did exercise this discretion to accept “the one case that was brought forward involving an external perpetrator (police officer)”. (Enodo Interview with Senior Barrick Personnel (#4).)

<sup>187</sup> Enodo Interview with Senior Barrick Personnel (#4).

<sup>188</sup> Enodo Interview with Senior Barrick Personnel (#1).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> Barrick, *Human Rights Policy*, issued on 27 July 2011, revised on 31 August 2011, barrick.com, at 5.

<sup>192</sup> Barrick, *Guidelines for Remediation of Human Rights Impacts*, 12 December 2012, made available to Enodo in confidence.

<sup>193</sup> Now known as “Acacia Mining” (acaciaming.com).

<sup>194</sup> Enodo Interview with Senior Barrick Personnel (#1). The North Mara remedy framework has not been as widely publicized as the Framework, and we have not seen its foundational documents (African Barrick Gold, “Update on the North Mara Sexual Assault Allegations”, 20 December 2013, acaciaming.com (“ABG and the mine have not previously publicized the remediation program at the request of, and to physically protect, the women themselves ... it should not be anticipated that additional details about the program will be forthcoming from ABG or the mine.”)).

- <sup>195</sup> Yousuf Aftab, “The Intersection of Law and Corporate Social Responsibility: Human Rights Strategy and Litigation Readiness for Extractive-Sector Companies, (2014) 60 *Rocky Mountain Mineral Law Institute* 19-1, at 19-14 (“The causal terms are not defined in the Guiding Principles. And, as jurists have long noted, there is nothing obvious about cause and effect. Determining the relevance of particular impacts to a company under the Guiding Principles depends on adopting some definition of the causal links. For instance, a ‘but for’ definition of ‘cause or contribute to’ might capture de minimis connections between corporate operations and rights impacts while ignoring more significant links in the context of multi-cause impacts. Given the complex context of human rights impacts, particularly in countries without entrenched institutional rights protections, a more viable definition might draw from the jurisprudence of multi-party torts to ask whether a company’s actions materially increase the risk of an impact.”) (citations omitted).
- <sup>196</sup> Enodo Interview with Senior Barrick Personnel (#1).
- <sup>197</sup> Enodo Interview with APD Personnel (#1); Enodo Interview with APD Personnel (#2); *Manual* at 1 (“A woman who has been the subject of sexual violence allegedly involving current or former employees of companies which are or have been contracted to perform work for the PJV (the PJV Contractors), can not make a Claim against Barrick under this Program”).
- <sup>198</sup> *Police Act 1998*, peacefoundationmelanesia.org.pg (Art. 123 provides that “a reservist, when acting as such, is deemed to be an employee of the State”).
- <sup>199</sup> Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#2); Enodo Interview with CAT Officer (#3).
- <sup>200</sup> Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#2); Enodo Interview with CAT Officer (#3).
- <sup>201</sup> Enodo Interview with CAT Officer (#1).
- <sup>202</sup> Enodo Interview with CAT Officer (#3).
- <sup>203</sup> Interview Results, Appendix 1 (Question 11—“Did she explain to you the meaning of sexual violence and the requirements to obtain a remedy?”; recorded as two separate answers.)
- <sup>204</sup> Enodo Claimant Interview (#13).
- <sup>205</sup> *Rosendo Cantu* at ¶109 (“In accordance with international case law and taking into account the provisions of the Convention, the Court has previously considered that sexual violence involves acts of a sexual nature, committed against a person without their consent, and that in addition to the physical invasion of the human body, they may include acts which do not involve penetration or even any physical contact.”); *see also, Case of Miguel Castro-Castro Prison v. Peru*, Reparations and Costs, Judgment of IACHR, 25 November 2006, Series C No. 160, ¶306; *Case of Prosecutor v. Jean-Paul Akayesu*, Judgment of International Criminal Tribunal of Rwanda, 2 September 1998, Case No. ICTR-96-4-T, ¶688.
- <sup>206</sup> Enodo Interview with Senior Barrick Personnel (#1).
- <sup>207</sup> Enodo Interview with Senior Barrick Personnel (#4).
- <sup>208</sup> Enodo Interview with Cardno Personnel (#1).
- <sup>209</sup> Enodo Interview with CAT Officer (#1).
- <sup>210</sup> *Manual* at 4 (emphasis added).
- <sup>211</sup> Enodo Interview with Cardno Personnel (#1).
- <sup>212</sup> *Id.*
- <sup>213</sup> *Id.*
- <sup>214</sup> Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#2); Enodo Interview with CAT Officer (#3).
- <sup>215</sup> Enodo Interview with Senior Barrick Personnel (#4). If this discretion was exercised, we find that it was the rare exception (Enodo Interview with PRFA Leadership (#1) (“Some of the cases were police cases—they were rejected.”)).
- <sup>216</sup> Enodo Interview with EarthRights International.
- <sup>217</sup> *Gold’s Costly Dividend* at 9.
- <sup>218</sup> Enodo Interview with APD Personnel (#1) (when security contractors were used, they were informal groupings of men from certain communities neighboring mine property; they have not been used since 2009 or 2010.).
- <sup>219</sup> Enodo Interview with Senior Barrick Personnel (#1).
- <sup>220</sup> Ganster-Breidler at 4.

## 6.B: GUIDING PRINCIPLE 29

To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.

### Relevant commentary:

Operational-level grievance mechanisms are accessible directly to individuals and communities who may be adversely impacted by a business enterprise. They are typically administered by enterprises, alone or in collaboration with others, including relevant stakeholders. They may also be provided through recourse to a mutually acceptable external expert or body.

**INDICATOR 2:** WERE SURVIVORS OF SEXUAL VIOLENCE ADVERSELY IMPACTED BY BARRICK ABLE TO ACCESS THE FRAMEWORK DIRECTLY , WITHOUT FIRST TURNING TO OTHER MEANS OF RECOURSE?

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**INDICATOR 3:** WAS THE PRFA ACCEPTABLE TO CLAIMANTS?

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**INDICATOR 4:** WAS THE FRAMEWORK'S EXISTENCE USED TO PRECLUDE ACCESS TO OTHER JUDICIAL OR NON-JUDICIAL GRIEVANCE MECHANISMS?

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### 6.B.1: INTERPRETATION

While the effectiveness criteria in GP 31 will provide the precise parameters to assess the Framework, GP 29 is important for three reasons. First, it identifies the defining elements of OGMs: (i) they are directly accessible by those adversely impacted by a company; (ii) they are administered by the business or mutually acceptable party; and (iii) they can serve as a first resort for affected stakeholders. Second, GP 29 addresses the relationship between such mechanisms and judicial or other non-judicial grievance mechanisms, which was a concern for a number of stakeholders. Third, GP 29 provides guidance on the objectives of OGMs, i.e. “for grievances to be addressed early and remediated directly”.<sup>221</sup> The purpose of OGMs does not create a free-standing assessment criterion, but it should inform the interpretation of the other elements of GP 29 and 31.<sup>222</sup>

The defining elements of an OGM established by GP 29 provide for fairly straightforward interpretation:

*“Operational-level grievance mechanisms are accessible directly to individuals and communities who may be adversely impacted by a business enterprise. They are typically administered by enterprises, alone or in collaboration with others, including relevant stakeholders. They may also be provided through recourse to a mutually acceptable external expert or body. They do not require that those bringing a complaint first access other means of recourse. They can engage the business directly in assessing the issues and seeking remediation of any harm.”<sup>223</sup>*

From this we can derive two criteria, adapted to apply specifically to the Framework’s historical orientation:

**INDICATOR 2: WERE SURVIVORS OF SEXUAL VIOLENCE ADVERSELY IMPACTED BY BARRICK ABLE TO ACCESS THE FRAMEWORK DIRECTLY<sup>224</sup>, WITHOUT FIRST TURNING TO OTHER MEANS OF RECOURSE?<sup>225</sup>**

We interpret relevant adverse impacts as synonymous, in this context, with impacts “caused or contributed to” by Barrick or the PJV. That interpretation is based on GPs 15 and 22, both of which

speak to the corporate obligation to remedy only in the context of “cause or contribute to” involvement.<sup>226</sup>

### INDICATOR 3: WAS THE PRFA ACCEPTABLE TO CLAIMANTS?

As the Framework was governed by an “external body” chosen by Barrick, this indicator is to determine how that administering body, the PRFA, was perceived by potential claimants when the Framework was launched.

#### i. Waiver

The most contentious interpretive question in GP 29 is the meaning of the following phrase: “Operational-level grievance mechanisms ... should not be used to ... preclude access to judicial or other non-judicial grievance mechanisms.”<sup>227</sup> A number of observers argued from the outset of the Framework that this phrase means that an OGM cannot lead to a final and binding civil settlement between the company and claimants.<sup>228</sup> The OHCHR disagreed: “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 be required from claimants at the end of a remediation process.”<sup>229</sup>

The OHCHR’s interpretation aligns with the views of every one of the Guiding Principles’ experts we consulted.<sup>230</sup> It is also supported by a consideration of GP 29 in context and in light of the Guiding Principles’ purpose. First, the Guiding Principles envision that businesses may “remediate” adverse human rights impacts: GP 22 (“Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.”) and GP 15 (“In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including: ... (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.”). Second, GP 22 explicitly envisions an OGM as a process by which a business can remediate adverse human rights impacts “by itself”. Third, GP 29’s purpose is expressly to allow for grievances to be “remediated directly” by the business.

If a business is entitled by the Guiding Principles to “provide for ... remediation”, “by itself” and “directly”, then by necessary implication there are circumstances in which a business can provide a complete remedy for an adverse human rights impact.<sup>231</sup> So empowered, and obligated, the company must be able to agree with those to whom it is providing the remedy that a complete remedy has been provided. As the OHCHR *Interpretive Guide* notes, if parties to a grievance “freely” agree on a solution, they “are free to agree also that it will be binding on them.”<sup>232</sup> In other words, construing this text as providing that an OGM may *not* result in an agreement specifying that the grievance as against the company has been finally and completely resolved would, in effect, mean that a business could not “provide for ... remediation” “by itself” or “directly”. Such a reading would be anathema to the express aims and provisions of the Guiding Principles. As one Guiding Principles expert noted, rhetorically: “If [the business and the claimant] are not able to arrive at a settlement through a mediated process, why bother having it?”<sup>233</sup>

This conclusion is buttressed by the nature of the Guiding Principles as voluntary norms: “Nothing in these Guiding Principles should be read as creating new international law obligations.”<sup>234</sup> Nonetheless, the Guiding Principles’ overarching objective is “enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities”.<sup>235</sup> The only way that the voluntariness of the Guiding Principles and their objective of “enhancing” business’s human rights practices can be reconciled is by providing incentives for business to respect human rights, including through the creation of effective OGMs. Denying a business the ability to settle grievances finally outside of a court setting through an OGM would severely undermine the incentives for the business to create such a mechanism in the first place. Thus, any claim that allowing for a waiver “holds no value whatsoever for the victims” is specious.<sup>236</sup> The waiver can offer the very “predictability and finality”<sup>237</sup> that may move a business to invest the time and resources to develop an OGM in a context where “the justice system has historically responded poorly to these issues.”<sup>238</sup>

This is not to say that a waiving of all civil claims in order to receive benefits under an OGM is always acceptable. Nor is it necessarily advisable even when permitted. Rather, our

conclusion at this point is narrow. Under GP 29, the appropriate indicator to assess the waiver is:

**INDICATOR 4: WAS THE FRAMEWORK’S EXISTENCE USED TO PRECLUDE ACCESS TO OTHER JUDICIAL OR NON-JUDICIAL GRIEVANCE MECHANISMS?**

We will consider the appropriateness of the waiver as implemented in more detail under GP 31(d) and (f).

**6.B.2: ASSESSMENT OF INDICATOR 2**

*WERE SURVIVORS OF SEXUAL VIOLENCE ADVERSELY IMPACTED BY BARRICK ABLE TO ACCESS THE FRAMEWORK DIRECTLY, WITHOUT FIRST TURNING TO OTHER MEANS OF RECOURSE?*

**6.B.2(A): DESIGN**

As discussed under GP 22, the Framework’s design limited eligibility to survivors of sexual violence at the hands of PJV personnel. For these claimants, however, the Framework was directly accessible. There was a ‘fast-track’ for those who had previously had their claims investigated by Ila Geno, the Clinics or Human Rights Watch; their claims would be deemed legitimate without further assessment.<sup>239</sup> But that had no bearing on access to those who were reporting sexual violence for the first time. The *Manual* does not at any point ask for any threshold reporting before accessing the Framework.

**6.B.2(B): IMPLEMENTATION**

The only limitations on direct accessibility to survivors of sexual violence adversely impacted by Barrick are discussed under GP 22. For claimants who met CAT’s overly narrow interpretation of “sexual violence”, the Framework remained directly accessible in implementation.

**6.B.3: ASSESSMENT OF INDICATOR 3**

*WAS THE PRFA ACCEPTABLE TO CLAIMANTS?*

**6.B.3(A): DESIGN**

The design element of “mutually acceptable” turns on good faith efforts to ensure that the Framework would be trusted by potential claimants. In addition to consultation directly with claimants, where possible, the good faith of these efforts depends on the types of stakeholders and experts consulted in designing the Framework. See GP 18, Commentary

“In situations where [direct consultation with potentially affected stakeholders] is not possible, business enterprises should consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders and others from civil society.”) and GP 19, Commentary (“The more complex the situation and its implications for human rights, the stronger is the case for the enterprise to draw on independent expert advice in deciding how to respond.”). For analytical parsimony, we consider all of these efforts under GP 31(h), “Stakeholder Engagement”. We conclude in that section that, out of necessity, Barrick did engage with the right credible stakeholders in good faith to ensure that the Framework would be “acceptable” to claimants.<sup>240</sup>

### 6.B.3(B): IMPLEMENTATION

By and large, it does seem that the PRFA was, at the outset of the process, trusted by the claimants. To assess this criterion, we asked claimants the following: (1) “When you first heard about the Remedy Framework, had you heard of Ume Wainetti, Dame Carol Kidu or John Numapo? (2) Did you trust them to protect and represent you?”<sup>241</sup> 43 of 62 successful claimants and 7 of 15 unsuccessful claimants had heard of at least one of them, generally Dame Kidu; of these 40 of 43 and 7 of 7 did trust the PRFA leadership.<sup>242</sup> We then asked: “When you first heard about the Remedy Framework, did you trust that you would be treated fairly?”<sup>243</sup> 58 of 62 successful claimants and 12 of 15 unsuccessful claimants said ‘yes’.<sup>244</sup> These answers suggest that the PRFA was, at the very least, “acceptable”, in the sense that its leadership was known and the institution was trusted, to potential claimants when the process was launched.

### 6.B.4: ASSESSMENT OF INDICATOR 4

*WAS THE FRAMEWORK'S EXISTENCE USED TO PRECLUDE ACCESS TO OTHER JUDICIAL OR NON-JUDICIAL GRIEVANCE MECHANISMS?*

#### 6.B.4(A): DESIGN

There is nothing in the Framework’s design to suggest its existence precludes access to other grievance mechanisms. And the Framework’s foundational documents expressly seek to ensure that claimants do not believe the Framework is taking exclusive jurisdiction over sexual violence allegations against PJV employees:

- “The project officer must explain that the role of the Independent Legal Advisor is to provide advice on different legal options, explain the process and consequences of resolving the claim, and to discuss whether it is in the best interests of the Claimant to accept any offer made to her under this Program.”<sup>245</sup>
- “The project officer must then explain the following to the Claimant ... the Claimant’s rights under the Program, including the right to leave the Program at any time and take other action, such as using the site grievance mechanism or to institute formal legal processes against individual perpetrators or their employer.”<sup>246</sup>

#### 6.B.4(B): IMPLEMENTATION

As we elaborate under GP 31(d), there were serious discrepancies between the design and the implementation of the Framework in terms of the advice claimants received from the CAT and the ILA. These discrepancies do not bear on the claimants’ perception of whether the Framework was the only forum for them to bring a claim based on sexual violence committed by PJV personnel.

Our claimant interviews suggest that claimants were largely aware they had other legal options even after going through the Framework. We asked claimants the following question regarding their understanding after signing a settlement agreement: “Did you understand that you could still pursue criminal action against the security guards responsible?”<sup>247</sup> 37 of 57 said ‘yes’; only 9 said ‘no’. Even if claimants were loath to turn to another forum, this response suggests that they remained aware that the Framework did not have exclusive jurisdiction over their sexual violence claims.

### 6.B.5: CONCLUSION ON GP 29

The Framework’s design and implementation largely aligned with the formal requirements of an OGM under GP 29. Potential claimants were able to access the Framework directly. The PRFA, which oversaw the Framework, was largely trusted by the claimants when the Framework was launched. As discussed under GP 31(h), below, there were also substantial, good faith efforts by Barrick to ensure that the Framework would be trusted. And, the Framework itself did not claim—and was not believed to claim—exclusive jurisdiction over any claimant grievances.

- <sup>221</sup> GP 29, Commentary (“Operational-level grievance mechanisms are accessible directly to individuals and communities who may be adversely impacted by a business enterprise. They are typically administered by enterprises, alone or in collaboration with others, including relevant stakeholders. They may also be provided through recourse to a mutually acceptable external expert or body.”).
- <sup>222</sup> VCLT, Art. 31(1) (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”); Guiding Principles, “General Principles” (“These Guiding Principles should be understood as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization.”).
- <sup>223</sup> GP 29.
- <sup>224</sup> We will not expressly assess whether survivors could engage Barrick directly under the Framework, because it was plainly designed as an adjudicative body, with an “independent third-party mechanism” as the intermediary—as is envisioned by GP 31(h) (“Where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism.”).
- <sup>225</sup> This is simply a question of formal accessibility. We examine substantive accessibility under GP31(b).
- <sup>226</sup> GP 22 (“Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.”) and GP 15 (“In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including: ... (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.”); Enodo Interview with Guiding Principles Expert (#1); Enodo Interview with Guiding Principles Expert (#2).
- <sup>227</sup> GP 29, Commentary (“Operational-level grievance mechanisms can be important complements to wider stakeholder engagement and collective bargaining processes, but cannot substitute for either. They should not be used to undermine the role of legitimate trade unions in addressing labor-related disputes, nor to preclude access to judicial or other non-judicial grievance mechanisms.”).
- <sup>228</sup> MiningWatch, “Rape Victims Must Sign Away Rights to Get Remedy from Barrick”, 30 January 2013, miningwatch.ca (“We do not believe women should have to sign away rights to possible future legal action in order to access the types of remedy Barrick is offering [...] this requirement is not best practice in cases on non-judicial remedy”); Catherine Coumans, “Letter to Navanethem Pillay, UN High Commissioner for Human Rights”, 19 March 2013, miningwatch.ca, at 3 (“By making the provision of remedy a transaction of value that unnecessarily benefits the company, Barrick is once again undermining the rights of the rape victims in Porgera and setting a dangerous precedent for project-level grievance mechanisms at other mines around the world”)[Coumans Letter of 19 March 2013]; Jonathan G Kaufman, “Letter to Navanetham Pillay, UN High Commissioner for Human Rights”, 1 October 2013, business-humanrights.org, at 3 (“We fundamentally believe that given the general lack of judicial oversight in countries where grievance mechanisms are most critical, legal waivers are never appropriate as a precondition for receiving benefits through a grievance mechanism for gross human rights abuses. Rather, they are yet another avenue through which victims of human rights abuse can be taken advantage of. At most, the value of benefits received through a grievance mechanism could be applied as an offset against any civil damage award that might be obtained through the courts.”)[Kaufman Letter of 1 October 2013]; Acción Ecologica et al., “Letter to Navanetham Pillay, UN High Commissioner for Human Rights”, 14 May 2013, miningwatch.ca, at 1 (“If this model is followed widely by other mining companies it is unreasonable to assume that civil society will be able to provide the scrutiny and accountability necessary to hold global mining companies to account.”)[Acción Letter of 14 May 2013].
- <sup>229</sup> OHCHR Opinion at 8.
- <sup>230</sup> Guiding Principles Expert (#1); Guiding Principles Expert (#2); Guiding Principles Expert (#3).
- <sup>231</sup> In this we demur with Catherine Coumans’ assertion that “[n]owhere do the Guiding Principles state or envisage or imply that project level mechanisms would fully satisfy victims’ access to remedy.” (Coumans Letter of 19 March 2013 at 3.) In fact, they do all of those things.
- <sup>232</sup> OHCHR, *Interpretive Guide* at 66.
- <sup>233</sup> Enodo Interview with Guiding Principles Expert (#1).
- <sup>234</sup> Guiding Principles, “General Principles”.
- <sup>235</sup> *Id.*
- <sup>236</sup> Catherine Coumans, Letter to Navanethem Pillay, UN High Commissioner for Human Rights (4 September 2013) at 2 (“[T]he waiver holds no value whatsoever for the victims. It is clearly not ‘victim-oriented’ as set out in the ‘Basic Principles and Guidelines on the Right to Remedy.”)[Coumans Letter of 4 September 2013].
- <sup>237</sup> OHCHR Opinion at 8.
- <sup>238</sup> Knuckey and Jenkin at 10 [citations omitted].
- <sup>239</sup> *Manual* at 5.
- <sup>240</sup> See Section 6.C.2, below.
- <sup>241</sup> Interview Results, Appendix 1, Question 6.
- <sup>242</sup> *Id.*
- <sup>243</sup> *Id.*, Question 7.
- <sup>244</sup> *Id.*
- <sup>245</sup> *Manual* at 3; *Framework of Remediation Initiatives* at 21.
- <sup>246</sup> *Id.*
- <sup>247</sup> Interview Results, Appendix 1, Question 26.

## 6.C: GUIDING PRINCIPLE 31(H)

In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

...

Operational-level mechanisms should also be:

(h) Based on engagement and dialogue: 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.

### Relevant commentary:

For an operational-level grievance mechanism, 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. Since a business enterprise cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome, these mechanisms should focus on reaching agreed solutions through dialogue. Where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism.

**INDICATOR 5:** WERE POTENTIAL CLAIMANTS CONSULTED ABOUT THE DESIGN AND PERFORMANCE OF THE FRAMEWORK, INCLUDING THE RANGE OF AVAILABLE REMEDIES?

**INDICATOR 5A:** TO THE EXTENT POTENTIAL CLAIMANTS WERE NOT CONSULTED DIRECTLY ABOUT THE DESIGN AND PERFORMANCE OF THE FRAMEWORK, WAS THAT DECISION REASONABLY NECESSARY TO PROTECT THEIR LEGITIMATE INTERESTS?

**INDICATOR 5B:** TO THE EXTENT POTENTIAL CLAIMANTS WERE NOT CONSULTED DIRECTLY, WERE CREDIBLE, INDEPENDENT EXPERT RESOURCES, INCLUDING HUMAN RIGHTS DEFENDERS, CONSULTED REGARDING THE DESIGN AND PERFORMANCE OF THE FRAMEWORK?

**INDICATOR 6:** WAS THE STAKEHOLDER ENGAGEMENT CONDUCTED IN GOOD FAITH, WITH STAKEHOLDER FEEDBACK REASONABLY WEIGHED AND REFLECTED IN THE FRAMEWORK'S DESIGN AND PERFORMANCE?

### 6.C.1: INTERPRETATION

We lead the assessment of GP 31 with stakeholder engagement as it is the one element that applies exclusively to OGMs (as opposed to both state-based and non-state based non-judicial grievance mechanisms). The criterion is difficult to assess because stakeholder engagement can continue *ad infinitum*. But GP 31(h), to be practical, must have reasonable parameters—a threshold beyond which a company can be said to have done enough. That threshold can be identified based on the purpose of GP 31(h).

We can understand the importance of stakeholder engagement in light of OGMs' overarching legitimacy concern. A state is presumed to enjoy a certain public legitimacy—under national and international law—to address grievances within its jurisdiction. As private entities, businesses are afforded no such presumption. OGMs derive their legitimate authority from consent. In this, they resemble private dispute resolution through arbitration: “There can be no doubt that arbitrations, whether international or between subjects of private law, derive their mandate and competence from the consent and agreement of the parties”.<sup>248</sup> In the context of adjudicative OGMs, the OHCHR *Interpretive Guide* supports this point, noting that adjudication can be provided by a non-public body that “is agreed upon by the enterprise and those affected.”<sup>249</sup>

The essential question we seek to answer under GP 31(h) is whether the requisite consent existed to, as it were, empower and authorize the Framework as an OGM. It is a far more fluid issue than under arbitration. We are not looking for a discrete point in time or a particular agreement to identify consenting individuals or the range of issues over which they granted the OGM “jurisdiction”. In almost all cases, it would be impossible to delineate precisely, before an OGM is created, whether those for whose use it is intended have consented to its formation. Rather, the focus of GP 31(h) is on the process of “engaging with affected stakeholder groups about its design and performance”.<sup>250</sup> The right process defines consent.

A process-focused understanding of consent to OGMs aligns with guidance on free, prior, and informed consent under International Labor Organization Convention 169 (ILO 169).<sup>251</sup> As the UN Special Rapporteur on the Situation of Human Rights and Fundamental

Freedoms of Indigenous Peoples has noted regarding consent to development or resource projects: “The principle that indigenous consent should be the objective of consultation does not mean that obtaining consent is an absolute requirement for all situations. In all cases, what fundamentally matters is that a good faith effort by the State is made to achieve agreement.”<sup>252</sup> We apply an analogous principle to OGMs, which, unlike the projects envisioned by ILO 169, are designed to *address* grievances rather than expecting to *inspire* them.

Our focus under GP 31(h) is therefore to assess the good faith of the efforts to obtain potential claimants' consent to the Framework. That, in turn, depends on the type of OGM created. GP 31(h) envisions two broad types of OGM. The first aims to reach “agreed solutions through dialogue.”<sup>253</sup> The second aims to adjudicate disputes through a “legitimate, independent third-party mechanism.”<sup>254</sup> They are distinct and arguably incompatible. Indeed, the dialogue-based approach is advanced as an *alternative* to adjudication because “a business enterprise cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome”.<sup>255</sup>

The Framework was a third-party mechanism with an adjudicative function. Its aim was to receive, assess, and process complaints to arrive at remedies which, if agreed to by the claimant, would bind Barrick and the PJV. It was not designed to encourage dialogue-based solutions between the claimant and the company. Rather, the company's express aim was to remove itself from the decision-making process and consent instead to the decisions of an independent entity.<sup>256</sup> (In light of the Framework's structure, we find Barrick's claim in the *Framework of Remediation Initiatives* that the Framework embraced the Guiding Principles' recommendation to focus on dialogue improvidently made.<sup>257</sup>)

This distinction is important because it informs the reasonable scope of good faith efforts to obtain stakeholder consent. Under a dialogue-based approach, the company exerts a continuous influence over the process and its outcomes, and can constantly seek to engage with stakeholders and incorporate their feedback. With an adjudicative approach, by its very design, decision-making authority is delegated to a “mutually acceptable external expert or body” that administers the

“legitimate, independent third-party mechanism”.<sup>258</sup> Good faith engagement efforts to seek consent are structurally limited in time and scope. The limit on the former is the launch of the OGM: a company cannot materially alter the OGM once it begins operating without seriously undermining the independence of the third party or the OGM’s predictability. For these reasons, and to preserve the OGM’s legitimacy, the limitations on the scope of engagement after the OGM’s launch include material procedural changes and remedial options.

The gravity of the offences the Framework was designed to address imposes another structural constraint on stakeholder engagement: expeditiousness. GP 28 explicitly references the “speed of access and remediation” as a signature virtue of OGMs.<sup>259</sup> And the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* highlights the importance of victims’ ability to “obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible.”<sup>260</sup> The Framework was created to respond to historical abuses of fundamental human rights. Survivors were particularly vulnerable and legitimately afraid of seeking remedy. In these circumstances, expeditiousness in the Framework’s design and implementation ought to have been an important consideration even at the stakeholder engagement stage.

To assess good faith efforts to obtain stakeholder consent within these reasonable constraints, we seek to answer three questions. First, whose consent was needed? Second, which parties were legitimately able to provide that consent? Third, were reasonable, good faith efforts undertaken to obtain that consent? Drawing on the guidance in GP 31(h), we consider two indicators (the first with two sub-indicators) in this regard:

**INDICATOR 5: WERE POTENTIAL CLAIMANTS CONSULTED ABOUT THE DESIGN AND PERFORMANCE OF THE FRAMEWORK, INCLUDING THE RANGE OF AVAILABLE REMEDIES?**

The Commentary to GP 31(h) provides that “affected stakeholders” should be consulted about the OGM’s design and performance.<sup>261</sup> And GP 31(a) speaks to legitimacy in the eyes of “[s]takeholders for whose use a mechanism is intended.”<sup>262</sup> This delineates a narrower category than “stakeholders” in general, particularly as used elsewhere in the Guiding Principles.<sup>263</sup> For the purposes of an OGM, “affected

stakeholders” are a particular type of critical stakeholder for engagement. In this case, the Framework was designed to provide a remedy to survivors of sexual violence at the hands of PJV personnel. These survivors—the potential claimants under the Framework—constituted the “affected stakeholders”.<sup>264</sup>

**INDICATOR 5A: TO THE EXTENT POTENTIAL CLAIMANTS WERE NOT CONSULTED DIRECTLY ABOUT THE DESIGN AND PERFORMANCE OF THE FRAMEWORK, WAS THAT DECISION REASONABLY<sup>265</sup> NECESSARY TO PROTECT THEIR LEGITIMATE INTERESTS?**

The Guiding Principles recognize that there are circumstances where a business will not consult “affected stakeholders” directly. The possibility is expressly anticipated by GP 18 in the context of human rights due diligence. The justification for not consulting such groups directly is necessity, i.e. “where such consultation is not possible”.<sup>266</sup> As a sub-indicator, we therefore ask whether any decision not to consult directly with potential claimants was the product of practical or principled necessity.

**INDICATOR 5B: TO THE EXTENT POTENTIAL CLAIMANTS WERE NOT CONSULTED DIRECTLY, WERE CREDIBLE, INDEPENDENT EXPERT RESOURCES, INCLUDING HUMAN RIGHTS DEFENDERS, CONSULTED REGARDING THE DESIGN AND PERFORMANCE OF THE FRAMEWORK?<sup>267</sup>**

The second sub-indicator is derived from GPs 18 and 19, as both indicate appropriate alternatives for stakeholder engagement when necessity requires. GP 18 provides that, where affected stakeholders cannot be consulted directly, companies should seek the input of “credible, independent expert resources”.<sup>268</sup> GP 19 provides that the more complex the situation for human rights “the stronger is the case for the enterprise to draw on independent expert advice in deciding how to respond.”<sup>269</sup> We therefore consider the breadth of credible, independent expertise relied on to stand in for direct solicitation of views from potential claimants.

**INDICATOR 6: WAS THE STAKEHOLDER ENGAGEMENT CONDUCTED IN GOOD FAITH, WITH STAKEHOLDER FEEDBACK REASONABLY WEIGHED AND REFLECTED IN THE FRAMEWORK’S DESIGN AND PERFORMANCE?**

The last element of stakeholder engagement is its good faith, which turns on “meaningful consultation”.<sup>270</sup> An important part of meaningfulness is an authentic opportunity for stakeholders to shape the decisions being made.<sup>271</sup> As one authoritative guide on stakeholder engagement notes: “This does not mean that every issue or request must be acted upon, but it does mean being clear with people about which aspects of the project are still open to modification based on their input, and which are not.”<sup>272</sup> Reasonable practical and commercial limits on the extent to which stakeholder input shapes decisions do not undermine the good faith of stakeholder engagement.<sup>273</sup>

#### *i. A Note on the Structure of the GP 31(h) Analysis*

The section below does not track the temporal design and implementation division of the rest of the Integrated Assessment for three reasons. First, the nature of the Guiding Principles’ stakeholder engagement expectation is continuous, extending from design to performance, such that fixed temporal divisions for analysis would be artificial. Second, because of the nature of the Framework as an independent, adjudicative mechanism, the institutional responsibility for stakeholder engagement was layered and fluid: the primary responsibility for engagement, particularly with affected stakeholders, shifted to the PRFA once the Framework was launched. Third, the scope of the engagement is inextricable from its substance. A conclusion regarding whether the right stakeholders were consulted is empty without understanding the good faith of that consultation. We therefore consider 31(h) in two phases bridging design and implementation: (i) engagement with credible experts; and (ii) engagement with claimants.

### **6.C.2: ASSESSMENT OF INDICATORS 5 & 6**

#### **6.C.2(A): ENGAGEMENT WITH CREDIBLE EXPERTS**

**INDICATOR 5: WERE POTENTIAL CLAIMANTS CONSULTED ABOUT THE DESIGN AND PERFORMANCE OF THE FRAMEWORK, INCLUDING THE RANGE OF AVAILABLE REMEDIES?**

One criticism repeatedly lobbed against Barrick regarding the design of the Framework is that the company did not consult directly with survivors of sexual assault at the hands of PJV employees.<sup>274</sup> Barrick does not contest this fact: “It needs to be understood that during the development stage, Barrick/PJV did not know the identities or have direct contact with

any actual survivors of assault allegedly perpetrated by mine employees.”<sup>275</sup> From the perspective of consent, the first relevant question is whether that decision was justifiable under GP 31(h) by a need to protect legitimate claimant interests.

**INDICATOR 5A: TO THE EXTENT POTENTIAL CLAIMANTS WERE NOT CONSULTED ABOUT THE DESIGN AND PERFORMANCE OF THE FRAMEWORK, WAS THAT DECISION REASONABLY NECESSARY TO PROTECT THEIR LEGITIMATE INTERESTS?**

#### *i. Legitimate interest*

Barrick’s explanation for not consulting potential claimants in designing the Framework is a desire to avoid any breach of confidentiality. This is a legitimate and compelling claimant interest. Its importance was recognized and highlighted during the design process by some of the very stakeholders who raised concerns about Barrick’s failure to consult potential claimants: “If the Framework does not ensure complete confidentiality and/or security precautions for victims, they may be deterred from presenting their claims for fear of reprisal. This outcome will lead to the Framework being ineffective at fulfilling the right to a remedy.”<sup>276</sup> The importance of protecting confidentiality of potential claimants from Barrick—and being seen to protect such confidentiality—is particularly important in Porgera due to the well-recognized “power asymmetry between the company and the community.”<sup>277</sup> Indeed, fears about confidentiality and reprisal may have been the very reasons why potential claimants had not come forward before to the existing OGM in Porgera.

#### *ii. “Reasonable necessity”*

The legitimate objective is necessary but not sufficient to justify a decision not to consult with potential claimants regarding the Framework’s design. The decision also needs to have been reasonably necessary in pursuit of that end. On balance, we find that it was. We understand that there were a few potential claimants whose identities were relatively well known in the community, and thus were not concerned about confidentiality, before the Framework was launched.<sup>278</sup> It is therefore conceivable that such women could have been consulted directly, assuming appropriate intermediaries shared their identities with Barrick. We do not believe, however, that such an approach would have been reasonable in practice. First,

those survivors of a horrific trauma would have had to reveal their identities expressly to the company allegedly responsible for it in a context where there is a well-recognized “power asymmetry”<sup>279</sup> and legitimate fears of reprisal. Second, the women of Porgera are socio-economically vulnerable, which would have made effective engagement without intermediaries or significant procedural protections suspect on its face; both of these were provided by the Framework itself. Third, given the virtual impossibility of maintaining confidentiality in Porgera<sup>280</sup>, any pre-Framework consultation with potential claimants would likely have sowed discord in the community by suggesting preferential treatment.<sup>281</sup>

**INDICATOR 5B: TO THE EXTENT POTENTIAL CLAIMANTS WERE NOT CONSULTED DIRECTLY, WERE CREDIBLE, INDEPENDENT EXPERT RESOURCES, INCLUDING HUMAN RIGHTS DEFENDERS, CONSULTED REGARDING THE DESIGN AND PERFORMANCE OF THE FRAMEWORK?**

In the human rights due diligence context, where potentially affected stakeholders cannot be consulted directly, the Guiding Principles ask businesses to engage with credible experts to understand stakeholder perspectives. While the consent-seeking aims of 31(h) are distinct from the assessment ends of GP 18, the logic of ‘the next-best alternative’ holds constant: in both cases, the expectation of the business is to find independent parties who can speak authoritatively as fiduciaries for the “affected stakeholders”.

The preliminary issue posed by this indicator is how a company can exercise its discretion to identify “credible, independent expert resources” with whom to engage. As a matter of stakeholder engagement practice, it is well accepted that such discretion will need to be exercised: “It is not practical, and usually not necessary, to engage with all stakeholder groups with the same level of intensity all of the time. Being strategic and clear as to whom you are engaging with and why, *before* jumping in, can help save both time and money.”<sup>282</sup> The issue is how to be strategic and principled.

On this front, Barrick has been criticized for being overly selective: “Barrick has cherry-picked the stakeholders with whom it decided to consult. This is not a legitimate way to do stakeholder consultation and it has led to a seriously flawed

process.”<sup>283</sup> A few observers have been particularly exercised by Barrick’s decision not to engage with the ATA and the PLOA regarding the Framework’s design.<sup>284</sup> The OHCHR Opinion considered this allegation, noting that “doubts have been raised, including by Human Rights Watch, as to the legitimacy and role of these two organizations.”<sup>285</sup> On this basis and the “fact that both organizations had an opportunity to review the framework”, the OHCHR found no breach of GP 31(h).<sup>286</sup>

Barrick contests the allegation of non-engagement with the ATA and the PLOA on factual grounds, citing a mediation process facilitated by Canada’s OECD National Contact Point.<sup>287</sup> The process included MiningWatch, the ATA, the PLOA and Barrick; it took place between 5 June 2012 and 30 June 2013.<sup>288</sup> The resulting public report specifically mentions both a “Grievance Mechanism” and the “Remedial Framework for Violence Against Women (VAW)” as Action Items on which some (confidential) agreement was reached.<sup>289</sup> Nonetheless, as the content of the mediation process is confidential, for the purpose of this assessment we will assume the allegations of non-engagement are true.

**iii. “Credible” representatives**

The first question is whether the ATA and the PLOA were “credible” representatives of potential claimants. In other words, were they “true advocates” for survivors of sexual violence?<sup>290</sup> This question is particularly important when the human rights lens is applied to stakeholder engagement, because survivors of sexual violence are likely to be among the most vulnerable stakeholder groups—subject to significant rights impacts but with low influence<sup>291</sup>—and engaging with a non-credible group as their representatives may exacerbate existing community power dynamics.<sup>292</sup> Thus, before engaging with the ATA, the PLOA or other NGOs to understand potential claimants’ concerns, Barrick was behooved to conduct preliminary research to determine whether those putative stakeholder groups were “truly representative of and accountable to the community interests they claim to support and represent.”<sup>293</sup>

Human Rights Watch provided some independent guidance on the credibility of both these organizations in *Gold’s Costly Dividend*. Regarding the PLOA, Human Rights Watch noted that the organization’s relationship with Barrick was highly

contentious, and that both Barrick and some Porgeran landowners saw the organization as seeking to act as an intermediary in resettlement negotiations with the aim of “steering cash payments” through its (non-transparent) hands.<sup>294</sup> As for the ATA, Human Rights Watch noted that, in pursuing prior grievances based on allegations of human rights abuse by PJV security officers, the organization had negotiated agreements with victims that “gave ATA officials the right to divide any eventual payments between the families and the organization however they saw fit.”<sup>295</sup> Its stewardship of those grievances had left a number of victims “highly disgruntled”.<sup>296</sup>

#### **iv. The PLOA**

The PLOA refused to engage with us because of concerns that we “had not been transparent about our assessment methodology.”<sup>297</sup> Absent their participation, we were left to assess their credibility as best we could from our engagements with local community leaders and other local stakeholders. Based on those discussions, we have no reason to believe that the PLOA could credibly claim to represent the interests of survivors of sexual violence. It is an organization run exclusively by men. No one we asked could speak to any initiatives—before seeking compensation for Barrick for sexual violence—that the organization has taken on behalf of women. Moreover, everyone we spoke to, including landowners, expressed serious doubts about the organization’s bona fides as a champion of the vulnerable.<sup>298</sup> Indeed, during our visit, even the ATA sought to distance itself from the PLOA, noting that the ATA’s name was sullied by its association with the PLOA.<sup>299</sup> We therefore conclude that it would have been a reasonable exercise of discretion for Barrick not to engage with the PLOA about the Framework.<sup>300</sup>

#### **v. The ATA**

The ATA was willing to engage with us cordially and candidly. As with the PLOA, it is a male-dominated organization. According to the ATA’s official and current structure of “Office Bearers”—shared with us the day before our meeting as the definitive guide to ATA leadership—there are 10 office-holders.<sup>301</sup> Nine of them are men.<sup>302</sup> When asked what initiatives the ATA had led on behalf of Porgeran women before the Framework was launched, none of the eight people in the room—including two women—could identify any.<sup>303</sup> When asked what their concerns were about the Framework, they noted that their chief concern at this point was remedy for the killings they allege PJV security guards committed

before Barrick controlled the PJV.<sup>304</sup> They emphasized, despite our suggestion that it would be imprudent to publish, that, if Barrick does not compensate them, “killings will be the final remedy.”<sup>305</sup>

When pressed specifically on their concerns regarding the Framework, they identified two issues. First, the ATA should have been retained to manage the Framework and deliver the associated services, including the business training, as the ATA’s understanding of Engan culture made it a “better custodian of human rights” than the PRFA.<sup>306</sup> They emphasized here that they have gone through a recent reorganization and now have “the dispute resolution capacity” to administer the Framework going forward.<sup>307</sup> Second, there should not be any discrepancy between the amounts obtained by the women who settled with Barrick outside of the Framework (known in the community as the “ATA claimants”) and those who signed settlement agreements through the Framework.<sup>308</sup> To emphasize the inequity of this point, one representative laughingly repeated, twice: “What, were these other women raped by dogs that they deserve more?”<sup>309</sup>

Soon after our meeting, at which we had asked the ATA to encourage claimants who had been unable to access the Framework to participate in interviews, we received the following e-mail<sup>310</sup>:

*“As per our verbal discussion over the Porgera Remedial Framework Mechanism, find attached the list of the names of women who have missed out in the previous remedy under PRFA.*

*ATA believes that this is the final list and that no other names be entertained by PRFA. Other names apart from this list are illegal and the PRFA and its management shall not alter the names.*

*Moreover, ATA proposes to have all these women interviewed by PRFA & Enodo Rights as a group interview tomorrow, Saturday, 29 August 2015, at Porgera District Women’s Office.*

*With these ATA would like to appreciate your cohesive working relations.”<sup>311</sup>*

Attached to that message was a letter purporting to contain names of women that the “ATA have verified through interviews ... have surely been raped and sexually assaulted by Barrick’s Security Personnel.”<sup>312</sup> From the signatures to certify the names of the alleged victims, it appears that their interviews were conducted by three men on the ATA’s board.<sup>313</sup> The e-mail and attached letter—including the names and ages of 76 Porgeran women alleged to be survivors of sexual violence at the hands of Barrick employees—were sent to a range of individuals beyond the Assessment Team, including Barrick itself. This public dissemination was in a context where “the pervasive shaming and harm to sexual assault victims” has been well documented, and raised as a crucial concern by those most supportive of the ATA.<sup>314</sup>

On 7 October 2015, the ATA sent another message, calling out “WORLD ZION BARRICK COMPANY from CANADA”, about the dangers of engaging with any other Porgeran group about human rights issues.<sup>315</sup> The message warns that a number of pretender organizations claiming to fight for human rights are now seeking to make money from local human rights issues related to the Porgera mine.<sup>316</sup> It then closes with what appears an unambiguous threat to each such putative stakeholder: “The organization or group ... will be tolerated under our Engan customary law, sending all the body (deceased) bags to your organization to meet their compensation payment and this is the final notice to all.”<sup>317</sup>

On 16 October 2015, in response to a request for clarification sent by Barrick to MiningWatch, the ATA sent an immaculately composed follow-up message.<sup>318</sup> In the letter, James Jimmy Wangia, the ATA’s Chief Executive Officer, explains that he was “wrong to type the word ‘zion’ instead of giant.”<sup>319</sup> He further explains that the quotation above, regarding “body (deceased) bags”, actually meant that the ATA would *help* those pretender organizations by giving them the “body bags of the deceased through violence at the PJV mine” so that those organizations could seek compensation on behalf of the victims.<sup>320</sup> He does not explain whether such sharing of body bags is mandated by “Engan customary law”. Mr. Wangia continues that, rather than discrediting other organizations—which he had previously described as “all about bullshit” and as seeking “to manipulate the ATAs [*sic*] idea to make money from ATAs [*sic*] Overseas partners” by taking “revenge for the Human Rights being abused”<sup>321</sup>—the ATA was actually “calling for help” from the other stakeholders in Porgera Valley.<sup>322</sup>

We find these last two communiqués impossible to reconcile in style or substance. But they certainly do not advance the critique that Barrick erred by not engaging with the ATA about the Framework. Based on the organization’s repeated homicidal threats, dearth of female representatives, absence of women’s initiatives, and complete insensitivity to the extreme vulnerability of survivors of sexual violence, we see no principled basis to suggest that the ATA approximates credibility as representatives or fiduciaries for the rights of survivors of sexual violence in Porgera. In the context of the Framework, the only justification we see to engage with the organization would have been one of politics, not principle.<sup>323</sup>

#### ***vi. Credible experts who were consulted***

We have thus far focused on Barrick’s exercise of discretion *not* to engage with certain groups regarding the Framework’s design. But the positive dimension of this indicator is to ensure that “credible, independent experts, including human rights defenders” were, in fact, consulted about the Framework’s design. During the 18-month design phase, Barrick consulted a wide array of credible, independent experts on the Guiding Principles and sexual violence in Papua New Guinea, and Porgera in particular, including<sup>324</sup>:

- (i) John Ruggie, the lead drafter of the Guiding Principles.
- (ii) Rachel Nicolson, a senior lawyer with specific expertise in the Guiding Principles and grievance mechanism design, including in Papua New Guinea.
- (iii) A range of international experts in sexual violence in Papua New Guinea, including those who had conducted sexual violence research in Porgera.
- (iv) Representatives of UN Women and Human Rights Watch.
- (v) The Human Rights Clinics of Harvard Law School and New York University School of Law.
- (vi) Papua New Guinean government officials, including Dame Kidu, the sole female Parliamentarian at the time, the Department of Justice and the National Ombudsman’s Commission.
- (vii) Representatives from the leading organization for the

advancement of women’s rights in Porgera, the Porgera District Women’s Association (PDWA).

- The PDWA has long been supported by the PJV.<sup>325</sup> This support has been raised as a criticism by certain stakeholders in the context of Barrick’s pre-Framework engagement.<sup>326</sup> We find that critique misplaced. As with many mining communities, the PJV supports a number of public-service providers in the community, including the Paiam Hospital and the police’s Family and Sexual Violence Unit.<sup>327</sup> The critique also ignores the fact that the PDWA, unlike the ATA and the PLOA, has been engaged in grassroots women’s initiatives in Porgera since 1990.<sup>328</sup> We understand that these initiatives include: vocational training for women, marches and educational campaigns against sexual violence, support for HIV/AIDS patients, and business funding for women entrepreneurs.<sup>329</sup>

(viii) And, Ume Wainetti, the National Director of Papua New Guinea’s Family and Sexual Violence Action Committee, one of the lead champions of women’s rights in the country.

The Framework’s design was also presented in person to members of Barrick’s CSR Advisory Board. The members present included: Aron Cramer, President of BSR; Elizabeth Dowdeswell, President and CEO of the Council of Canadian Academies; Robert Fowler, Canada’s former Ambassador to the United Nations; Ed Liebow, an expert in public health research and evaluations; Gare Smith, a leading corporate responsibility expert from Foley Hoag LLP; and John Ruggie.<sup>330</sup> This engagement by Barrick was supplemented by multiple rounds of “ground-truthing” engagement with local organizations in Porgera by the Framework administrator, Cardno, under the direction of the PRFA.<sup>331</sup>

We are not in a position to comment on the credibility and independence of each of these experts. Nor do we need to. For the purposes of Indicator 5, the relevant finding is that this was a diverse array of individuals with a range of relevant expertise. Based on their backgrounds and responsibilities, it was reasonable for Barrick to engage with them both to understand the practical implementation of the Guiding Principles and to understand the concerns of potential claimants, whom the company could not consult directly.

When considering the reasonableness of consulting this particular range of experts, we bear in mind the “expeditiousness” imperative when it comes to providing remedies for victims of severe human rights abuses. It is of course true that Barrick could have engaged with even more credible experts. Specialists in the Guiding Principles may not be legion, but their ranks are swelling. Experts in sexual violence—sadly, based on what it reflects about reality—are ubiquitous. In Papua New Guinea alone, the number of organizations and individuals who devote their lives to fighting gender-based violence is source of both hope and despair. But we cannot forget that further engagement would itself have exacted a toll on survivors of sexual violence, delaying remedies that may already have been long overdue.

Reasonable stakeholder engagement cannot overwhelm the end being pursued by ignoring the finitude of time and resources. That would be anathema to the Guiding Principles’ overriding pursuit of “tangible results for affected individuals and communities”.<sup>332</sup> To paraphrase a sentiment expressed by Barrick, the PRFA leadership, and Cardno: practical solutions mean that, at some point, one must act.<sup>333</sup>

***INDICATOR 6: WAS THE STAKEHOLDER ENGAGEMENT CONDUCTED IN GOOD FAITH, WITH STAKEHOLDER FEEDBACK REASONABLY WEIGHED AND REFLECTED IN THE FRAMEWORK’S DESIGN AND PERFORMANCE?***

It is not enough for a wide array of experts simply to have been consulted about the Framework’s design and performance. That consultation must have been meaningful, based on a good faith desire to incorporate the feedback in the Framework. With the mild caveat that better records would have been preferable, we find that it was.

We faced one important limitation in understanding the substantive scope of stakeholder engagement: there were very few written records documenting issues discussed and stakeholder feedback. This is inadvisable in pursuit of meaningful engagement. As the IFC has noted: “Documenting consultation activities and their outcomes is critical to effectively managing the stakeholder engagement process. When and where did such meetings take place? With whom?”

Around what topics and themes? And with what results?”<sup>334</sup>

The absence of such documentation means that we do not have a comprehensive or detailed picture of when experts were consulted during the process or how their feedback shaped the Framework’s design.

We have therefore relied on a blend of written documents and stakeholder recollection to understand the stakeholder engagement in each phase. On balance, we find that the engagement was conducted in good faith, with experts given a meaningful opportunity to shape the Framework. The Framework was largely designed internally by a Barrick team comprised of lawyers and sustainability specialists.<sup>335</sup> The drafters consulted with credible experts—both those who were independent and those engaged as advisors to the company—throughout the design process. But the scope and nature of engagement was phased to meet two ends: (i) alignment with the Guiding Principles; and (ii) tailoring to the specific context of sexual violence in Porgera. In the first stage, Barrick focused on engaging with international experts to ensure that the overarching structure of the Framework aligned with the Guiding Principles.<sup>336</sup> In the second stage, Barrick focused on engaging with experts in sexual violence in Papua New Guinea, and Porgera in particular, to understand how best to implement the Framework with a sensitivity to the risks faced by survivors of sexual violence.<sup>337</sup>

In the first phase, ensuring Guiding Principles’ alignment, the experts Barrick consulted in person each spoke to the seriousness with which their advice was considered in the Framework’s design:

- John Ruggie recalled that he was consulted at least twice, with detailed Framework drafts, and given the opportunity to provide substantial feedback. He remembers that most of his comments were integrated in the Framework.<sup>338</sup>
- Nisha Varia, of Human Rights Watch, recalled that Barrick had a couple of detailed conversations with the organization about the Framework’s design and functioning, specifically around issues of confidentiality, women’s rights, engagement with local actors, and the content of remedy packages.<sup>339</sup> She recalls that the “tone and manner of the consultations suggested that [Barrick] took the advice seriously.”<sup>340</sup>

- Rachel Nicolson—who led the Allens Linklaters team that advised John Ruggie when developing the Guiding Principles—counseled Barrick throughout the design of the Framework.<sup>341</sup> Her mandate was to help structure the Framework to align with the Guiding Principles and to provide guidance on best practice, including how to ensure the PRFA’s independence from Barrick.<sup>342</sup> To the best of her recollection, virtually all of her advice was incorporated in the Framework’s design.<sup>343</sup>

In addition to the accounts of these experts, we understand that the Framework was shaped in part by the feedback of the Clinics. Their representatives were unwilling to share insight for this assessment. We have, however, reviewed some written feedback they provided to Barrick in May 2012, before the Framework’s launch.<sup>344</sup> In a response to the Clinic’s submissions, Barrick noted that it was “willing to adopt or otherwise accommodate over two-thirds” of their recommendations.<sup>345</sup> These accepted recommendations included:

- Changing the definition of eligible harms from “sexual assault” to “sexual violence” as defined under international law.<sup>346</sup>
- Eliminating location as a factor in determining eligible harms.<sup>347</sup>
- Ensuring that potential claimants were informed of the Framework’s independence.<sup>348</sup>
- Ensuring that the PRFA has “adequate funds to cover potential claims and administrative expenses”.<sup>349</sup>
- Ensuring that the Framework provides assurance regarding the “minimum level and/or range of financial compensation and other remedies”.<sup>350</sup>

We have also seen contemporaneous records of Barrick’s engagement with the Clinics following the Framework’s launch.<sup>351</sup> The internal notes reflect a serious consideration of each of the Clinics’ concerns, including regarding those issues—such as the failure to consult the ATA—that Barrick believed had been well canvassed before.<sup>352</sup> Barrick also welcomed the Clinics’ offer to share in writing a list of proposed reforms to

the Framework.<sup>353</sup> We understand that the Clinics did not.<sup>354</sup> Nonetheless, a detailed explanation of how Barrick would address the verbally expressed concerns was communicated to the Clinics within a week.<sup>355</sup> The letter closed with an invitation to further engagement as the Clinics deemed fit:

*“Can I please ask that if you feel we have not accurately understood the concerns you have raised, and as a consequence you feel that the improvements proposed do not satisfy those concerns, that you advise us of that, so that we may more accurately respond.”<sup>356</sup>*

In the second phase of engagement, to tailor the Framework’s design to the specific context of sexual violence in Porgera, there was one large gathering of stakeholders in Port Moresby, Papua New Guinea, in November 2011. The notes of this session are perfectly aligned with the recollection of every expert in sexual violence in Papua New Guinea we interviewed, as well as the recollection of everyone who participated in the workshop: there was a consensus that the Framework should avoid paying cash compensation and should focus instead on developing sustainable and empowering programs for survivors of sexual violence.<sup>357</sup> As one sexual violence expert with extensive experience advocating for women’s rights in Papua New Guinea framed it: “Once cash compensation is introduced, there is a very good chance that the victim will be forgotten about. Everyone experienced in Papua New Guinea would know this.”<sup>358</sup> A second sexual violence expert who participated in the consultation noted that everyone in the room recognized that it was essential to “understand the setting and cultural psychology [around cash] if you really want to help the women.”<sup>359</sup> It was this shared recognition that gave her hope that the Framework could provide lasting remedies: “If Barrick was going to pay cash, there was no point going through this elaborate process of setting up the Remedy Framework, with all its great intention.”<sup>360</sup>

International stakeholders who did not participate in the local consultations held a different view. The Clinics criticized Barrick before the Framework’s launch for noting that “any awards of cash need to be carefully considered.”<sup>361</sup> Rather, they asserted, “a scheme that does not guarantee cash compensation as an option is unlikely to be accepted by the community, and risks further aggrieving victims.”<sup>362</sup> MiningWatch echoed

these concerns in its complaint to the UN Office of the High Commissioner for Human Rights.<sup>363</sup>

Barrick appears to have taken the concerns of both groups of stakeholders seriously. Thus, the *Framework of Remediation Initiatives* notes the concerns expressed about the dangers of cash compensation, but concludes that “there are compelling reasons for including awards of cash among the potential remedies”.<sup>364</sup> To mitigate the attendant risks, CAT officers were encouraged to seek alternatives to cash where possible; in all cases, the CAT would also discuss the potential remedy with the claimant to “minimize any risk that [an award of cash] would present”.<sup>365</sup>

This type of responsive engagement continued throughout the implementation process. In the words of two of the Clinics lead researchers: “Importantly, and as an example of continuous learning, Barrick made a number of positive changes to the mechanism during implementation, following (frequently unsolicited) feedback and concerns raised by local and international groups (including ourselves) which have had sustained engagement with victims, community members, and other stakeholders.”<sup>366</sup>

#### **vii. Structural limits on good faith engagement**

Barrick did not integrate all stakeholder comments into the Framework. This is to be expected as a matter of practical necessity: “Inevitably there will be limitations, both commercial and practical, in the degree to which stakeholder demands can be met.”<sup>367</sup> But it is important to note that the Guiding Principles also impose limitations of *principle* on the scope of stakeholder engagement. In particular, GP 23 provides:

“In all contexts, business enterprises should:

- (a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;
- (b) Seek ways to honour principles of internationally recognized human rights when faced with conflicting requirements;

- (c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.”<sup>368</sup>

One particular stakeholder concern that implicates the limits of integrating stakeholder comments is “culturally appropriate” remedies. The issue united MiningWatch, EarthRights, and the Clinics (as well as the PLOA and the ATA). As Catherine Coumans of MiningWatch noted: “Women told me that a culturally appropriate remedy would be mature pigs and cash with values considerably higher than those of the items being offered by Barrick.”<sup>369</sup> That reference to “culturally appropriate” remedies adverts to the compensation offered by Papua New Guinean village courts in cases of sexual violence.<sup>370</sup> But it is not tied to any fixed precedent or referent.

In the case of the Framework, the measure of a “culturally appropriate” remedy varied massively. One community leader suggested that it would be 40 to 50 pigs, worth between K4000 and 5000 each.<sup>371</sup> The ATA and PLOA submitted to the OHCHR that the appropriate remedy should be 100 pigs worth approximately K29,000 each.<sup>372</sup> That position appears to have evolved since 2013. In our recent meeting, the ATA suggested that a “culturally appropriate” remedy would be 300 to 400 pigs, worth approximately K29,000 each.<sup>373</sup> And Mr. Mal, a former member of the ATA and a liaison with the ATA Claimants, claimed that a “culturally appropriate” remedy would be 500 pigs worth between K1.45 million and 5.8 million (total).<sup>374</sup> In short, there is no measure of “culturally appropriate” remedy that we can discern.<sup>375</sup> Indeed, none of the claimants we interviewed mentioned any particular remedy quantum that they would have considered culturally appropriate, referring instead only to the relative amounts received by other survivors of sexual violence under the Framework.

Beyond the absence of any measure of appropriateness, the push for the Framework to adopt the village court compensation model was flawed under all three elements of GP 23. First, it would have been contrary to national law. Papua New Guinea law disfavors the award of customary remedies as a matter of public policy.<sup>376</sup> That is in large part because one of the purposes of such compensation is “to avoid ‘payback’ or retribution from the victim’s clan.”<sup>377</sup> The compensation is also largely independent of fault or severity of injury.<sup>378</sup> Rather than any

fixed precedent of justice, Highlands customary compensation is tethered only to the offending clan’s ability to pay to deter violent reprisals. Papua New Guinea’s National Court of Justice has held that the deterrence aspect of Highlands customary awards “offends against the Constitution, various statutes and is repugnant to the general principles of humanity.”<sup>379</sup> The Court has therefore sought to “discourage customary payments in situations where common law damages can be obtained”.<sup>380</sup> Embracing the village court compensation model in lieu of the common law model would have put the Framework at odds with Papua New Guinea’s law.

Second, the customary approach is in any event contrary to international human rights norms. The UN Development Program has recently noted that the customary principles applied by village courts “may discriminate against women”.<sup>381</sup> In the context of sexual violence, the justification for customary payments is driven by the commodification of women and the need for survivors of sexual violence to purchase their freedom: “Buying wives is common, and elevates male status, while dramatically diminishing the rights and possibilities of young brides to escape violent marriages. Bride price and polygamy combined enables men with money to ‘purchase’ and control multiple wives in many different locations.”<sup>382</sup> In our interviews with claimants and other stakeholders, the commodification of women often underpinned the claim for customary compensation. The ATA was explicit about this justification, noting that survivors of sexual violence are “spoiled”, and will therefore have to pay their husbands the bride price to release themselves from the marriage.<sup>383</sup> Sadly, many of the survivors we interviewed echoed this perspective. A recent gender assessment of Papua New Guinea commissioned by a range of international organizations highlights the tension between custom and international human rights: “It is clear that PNG’s legal environment accepts customary laws that may be discriminatory or oppressive in the light of modern thinking on human, and especially women’s, rights.”<sup>384</sup> Barrick would therefore also have risked contravening GP 23(b) were it to have embraced the customary approach to compensation.

Third, as discussed above, every expert knowledgeable about sexual violence in Porgera identified the risk that cash compensation would pose to claimants’ physical security. Under GP 23(c) Barrick was behooved to treat this risk as a “legal

compliance issue”.<sup>385</sup> No matter the preference of claimants and certain international stakeholders, Barrick’s overriding responsibility under the Guiding Principles is to “avoid infringing on the human rights of others and [to] address adverse human rights impact with which [it is] involved.”<sup>386</sup> In that sense, it was tasked with a responsibility to identify and mitigate human rights risks even if certain stakeholders did not recognize them. Designing the Framework to be circumspect about awarding cash compensation and careful in seeking ways to mitigate the risk to the claimants was not only advisable. It was required.

### 6.C.2(B): ENGAGEMENT WITH POTENTIAL CLAIMANTS

**INDICATOR 5: WERE POTENTIAL CLAIMANTS CONSULTED ABOUT THE DESIGN AND PERFORMANCE OF THE FRAMEWORK, INCLUDING THE RANGE OF AVAILABLE REMEDIES?**

**INDICATOR 6: WAS THE STAKEHOLDER ENGAGEMENT CONDUCTED IN GOOD FAITH, WITH STAKEHOLDER FEEDBACK REASONABLY WEIGHED AND REFLECTED IN THE FRAMEWORK’S DESIGN AND PERFORMANCE?**

Once the Framework was launched, the barriers to engaging with potential claimants dissipated. The PRFA could act as an intermediary to ensure claimant confidentiality, thereby obviating the need to find alternate sources of consent. The question is whether potential claimants, the “affected stakeholders”, were then consulted by the PRFA regarding the Framework. We would expect two elements to this engagement: (i) consultation regarding the process; and (ii) consultation regarding the remedies.

#### *i. Claimant consultation regarding process*

We have received divergent accounts from the PRFA representatives and the claimants regarding process-related consultation. Each of the CAT officers said that they solicited input from claimants regarding the Framework during their initial meetings.<sup>387</sup> This direct engagement was supplemented by four visits to Porgera by the PRFA Leadership, Dame Kidu and Ume Wainetti, to observe the CAT and engage with claimants.<sup>388</sup> While the CAT would engage directly with claimants, the PRFA leadership dealt largely with an informal group of “Senior Women” who came to form an advocacy group from among the claimants.<sup>389</sup> In addition, claimants apparently provided

consistent feedback to Everlyne Sap, who was initially part of the Women’s Welfare Office before joining the PRFA as a Community Liaison Officer in September 2013.<sup>390</sup>

Potential claimants’ first opportunity to comment on the Framework was during their in-take meeting with the CAT. This flowed from the PRFA’s decision to pursue a discreet awareness campaign to protect claimant confidentiality (discussed in detail under GP 31(b), below). At this first meeting, however, a substantial number of the claimants we interviewed do not recall being given an opportunity to ask questions or comment on the Framework. In fact, 28 of 62 successful claimants and 9 of 15 unsuccessful claimants did not understand the Framework’s process after their first meeting with the CAT officer.<sup>391</sup> And only 6 out of the 28 successful claimants who were unclear about the Framework’s process felt that the CAT officers adequately answered their questions after the first meeting.<sup>392</sup> The typical recollection of this group was that the CAT officers rushed them out of the session and said that they should just come back when they were told.

We do not doubt the honesty of the CAT officers or the PRFA leadership about their efforts to engage with claimants about the Framework’s process. But we cannot ignore claimants’ common perception that they did not have the opportunity to understand, let alone comment on, the Framework’s process. While Cardno, the CAT, and the PRFA leadership all state that claimant feedback on process was solicited and incorporated in the Framework’s operations, we do not know what the concerns were or how they were addressed.

#### *ii. Claimant consultation regarding remedies*

The Framework was designed to provide “individualized reparations, support and services ... developed in consultation with the Claimant.”<sup>393</sup> The *Manual* thus enjoins CAT officers to record the remedies they recommend “in consultation” with the claimants.<sup>394</sup> This design was only partly respected in implementation.

We understand from the CAT officers that there was individualization when it came to the support services they discussed with claimants. The specifics of healthcare, counseling, school fees and the business that the PRFA would support were identified in consultation with claimants.<sup>395</sup> Our

interviews with claimants confirm diversity in the non-financial component of the remedy. While everyone received some business training, the specifics of healthcare, counseling and school fees differed between the claimants.<sup>396</sup>

That individualization ended, however, when it came to financial compensation. This appears to have been a decision taken by the PRFA leadership out of an interest in fairness.<sup>397</sup> The remedy packages were thus “fairly standard”, with no differentiation in financial compensation based on severity of injury.<sup>398</sup> The standardization is borne out in the official information published by Barrick at the Framework’s completion: the “lowest value package” was worth K23,040; the “average value package” was worth Kina K23,630; the “highest value package” was worth K32,740.<sup>399</sup> With 119 successful claimants, the proximity of the “lowest” and “average” values suggests that variation was quite limited, and that the “highest value package” was an aberration. Indeed, all 62 successful claimants we interviewed recalled getting K20,000 as their financial compensation.<sup>400</sup>

### ***iii. No reasonable alternative***

The standardization of remedies under the Framework has been raised as a criticism of the Framework by a number of international observers.<sup>401</sup> This criticism is unfair. No matter Barrick’s ambitions in its design, the Framework could not have provided individualized compensation without sacrificing its effectiveness as an OGM. First, legitimate individualization would have required the CAT to find a principled way to distinguish between claimant requests. Claimants all requested cash or pigs.<sup>402</sup> The requests, however, varied significantly. One claimant, for instance, requested an “aircraft or heavy truck”, a “trade store with a car”, and a “taxi service contract” with the PJV in addition to unspecified cash compensation.<sup>403</sup> Another asked for “employment with Barrick in another community or country” or business assistance and a taxi-service contract in addition to K1,000,000 in cash.<sup>404</sup> Others requested one twentieth that amount.<sup>405</sup> Without evidence of harm, differentiation in remedies based on claimants’ expressed preferences would have been arbitrary.

Requesting evidence before awarding remedies, however, would have come at the expense of the Framework’s accessibility. The Framework was expressly designed to avoid such evidentiary hurdles. Neither the CAT nor the Independent Expert was

allowed make an assessment “by reference to civil or criminal law standards of evidence.”<sup>406</sup> Even a relaxed evidentiary threshold would have been onerous on claimants in an environment where survivors are stigmatized and claims may have been festering for many years.

Second, any material differentiation would have undermined the Framework’s legitimacy in the eyes of stakeholders. Our claimant interviews uniformly revealed dissatisfaction with the remedies received—but that dissatisfaction was just as uniformly tied to the amounts received by the ATA Claimants.<sup>407</sup> That is, the legitimacy of the Framework was tied to the claimants’ perception of *relative* equity. Claimants did not distinguish between the facts underlying their cases. They saw them all as rape cases. As discussed under GP 31(b), this issue could not reasonably have been addressed through confidentiality protections: the fact is, no matter the discretion of the CAT or the confidentiality agreements signed with the ATA Claimants, the claimants in Porgera inevitably learned about remedies received by others. This knowledge, beyond all else, appeared to shape their perception of the Framework.

Third, individualizing remedy would have required significant discretion to be placed in the CAT’s hands. This is precisely what the Clinics advised against before the Framework’s launch: “The Framework leaves too much discretion in the award of remedies. To ensure the fair and equal treatment of all victims, detailed procedural rules and substantive guidelines regarding the award of remedies should be developed.”<sup>408</sup> Their concern implicates GP 31’s legitimacy and predictability criteria. A thoroughly individualized approach is sustainable in a judicial context where standards of evidence and transparency of reasons ensure a degree of fairness and predictability. In the absence of such a judicial construct, however, individualization of remedy could only have been incorporated by accepting the risk of arbitrariness.

In short, the error in this case was the Framework’s ambition, not its implementation. The “dialogue-based” and “individualized” approach was always going to be difficult, if not impossible, under the Framework’s structure. It was an adjudicative OGM designed to be independent, legitimate, accessible and predictable. Individualized remedies in the Porgeran context would inevitably have come at the cost of one of these pillars.

**6.C.3: CONCLUSION ON GP 31(H)**

The Framework aligned with GP 31(h) in most material respects. The stakeholder engagement in designing the Framework and tailoring it to the particular context of sexual violence in Porgera was well considered and informed by appropriate expertise. While potential claimants were not consulted until the Framework's launch, that decision was based on a legitimate concern for their confidentiality. In their stead, Barrick consulted a wide array of credible experts in the Guiding Principles, international human rights, Papua New Guinean law and governance, and sexual violence in Porgera. We also understand from multiple accounts that Barrick sought the insight of other international stakeholders, who demurred for reasons of capacity or will. To the extent certain local, self-styled human rights organizations were not consulted about the Framework, that decision was entirely legitimate: these organizations could not credibly claim to represent the interests of survivors of sexual violence.

By all accounts—even those most critical of the Framework—this consultation was conducted in good faith, with stakeholder suggestions incorporated in the Framework's original design and as appropriate to improve the Framework's implementation. While

Barrick could have maintained better records of its engagement efforts, every stakeholder we interviewed felt that their suggestions had been taken seriously. The good faith of Barrick's engagement is evident in the changes made to the scope of the Framework and in the considered acceptance of cash compensation as a component of the remedies offered.

The failing in the stakeholder engagement process related to the PRFA's consultation with claimants after the Framework's launch. A substantial minority of claimants felt that they did not understand the process and were unable to ask questions, let alone provide feedback, to the CAT. In addition, claimants and the PRFA agreed that the stakeholder engagement around individual remedies was extremely limited, with most packages closely resembling each other. Individualization of remedies was limited to the non-financial remedy components. The failure to engage with claimants about the Framework's process was an implementation error. The failure to individualize packages, however, was not. Notwithstanding the Framework's ambitions, in practical terms the PRFA could not individualize the remedies without critically wounding the Framework itself. To the extent there was an error, it was in setting an unrealistic target.

<sup>248</sup> Gary Born, *International Commercial Arbitration* (2009), Kluwer Law International at 200 (citing *Watkins-Johnson v. Bank Saderat Iran*, Award No. 429-370-1 (28 July 1989), 22 Iran-US C.T.R. 218, 296 (1989); and Judgment of 3 July 1975, 1976 NJW 109, 110 [German Bundesgerichtshof] (“While the citizen is subject to the jurisdiction of the state courts by virtue of public law set by the state, the arbitral proceedings ... are always the consequence of a private legal act, be it—as here—an agreement, be it a final will or the articles of an association.”)).

<sup>249</sup> OHCHR, *Interpretive Guide* at 66.

<sup>250</sup> GP 31(h), Commentary.

<sup>251</sup> International Labour Organization, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Doc. 169), adopted 27 June 1989, entered into force 5 September 1991, 28 I.L.M. 1382, [“ILO 169”].

<sup>252</sup> S. James Anaya, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, 15 July 2015, A/HRC/12/34, ¶66.

<sup>253</sup> GP 31(h), Commentary (“Since a business enterprise cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome, these mechanisms should focus on reaching agreed solutions through dialogue.”).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Framework of Remediation Initiatives* at 15 (“It is considered crucial to the success of the program that Barrick and the PJV should not be involved in the determination of any application made by Claimants.”).

<sup>257</sup> *Id.* at 12, fn. 22 (“In developing the individual reparations program, Barrick has adopted the approach recommended by Professor Ruggie that any remedy process should be based on engagement and dialogue and focus “on dialogue as the means to address and resolve grievances.”)[citations omitted].

<sup>258</sup> See GP 29, Commentary (“[OGMs] may also be provided through recourse to a mutually acceptable external expert or body.”), and GP 31(h), Commentary (“Where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism.”).

<sup>259</sup> GP 28, Commentary (“These mechanisms may offer particular benefits such as speed of access and remediation, reduced costs and/or transnational reach.”).

<sup>260</sup> UN General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, 29 November 1985, A/RES/40/34, Art. 5 (“Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible.”)[*Basic Principles*].

<sup>261</sup> GP 31(h), Commentary.

<sup>262</sup> GP 31(a), Commentary; *see also*, GP 31(h) (“...consulting the stakeholder groups for whose use they are intended on their design and performance...”).

<sup>263</sup> *See*, e.g., GP 10, Commentary (“Cooperation between States, multilateral institutions and other stakeholders can also play an important role.”); and, GP 18(b) (“Involve meaningful consultation with potentially affected groups and other relevant stakeholders...”).

<sup>264</sup> Any suggestion that the “affected stakeholders” included male relatives or men in the community is absurd, for these were the very people that all the survivors feared, and who were prone to re-victimizing the survivors for having been raped.

<sup>265</sup> The “reasonableness” qualifier is important to recognize the practical context in which such decisions are made. It may be possible that an innovative solution could be developed to overcome what seems an insuperable hurdle, but if a reasonable business in similar operating circumstances would not have arrived at it, that solution does not obviate necessity.

<sup>266</sup> *See* GP 18, Commentary (“To enable business enterprises to assess their human rights impacts accurately, they should seek to understand the concerns of potentially affected stakeholders by consulting them directly in a manner that takes into account language and other potential barriers to effective engagement. In situations where such consultation is not possible, business enterprises should consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders and others from civil society.”).

<sup>267</sup> *See* GP 18, Commentary (“To enable business enterprises to assess their human rights impacts accurately, they should seek to understand the concerns of potentially affected stakeholders by consulting them directly in a manner that takes into account language and other potential barriers to effective engagement. In situations where such consultation is not possible, business enterprises should consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders and others from civil society.”).

<sup>268</sup> *Id.*

<sup>269</sup> GP 19, Commentary.

<sup>270</sup> GP 18(b).

<sup>271</sup> International Finance Corporation [IFC], *Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets*, 2007, ifc.org, at 40.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> Clinics, Comments on Framework at 8 (“Crucially, there was no apparent consultation with alleged victims.”); Knuckey and Jenkin at 6 (“Importantly, the failure to engage rights-holders in the design phase limited the designers’ access to local expertise about what would make the mechanism effective, and led to skepticism about and a lack of confidence in the mechanism among numerous potential claimants.”); EarthRights International at 3 (“The Guiding Principles state that operational grievance mechanisms should be ‘Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance....’ Barrick did not consult the women or their local advocates in designing the Framework”); Kaufman Letter of 1 October 2013 at 1 (“Barrick does not appear to have consulted with *any* affected women; the only local stakeholders that were involved in consultation were two groups in Porgera that Barrick substantially funds and supports.”).

<sup>275</sup> Enodo Interview with Senior Barrick Personnel (#4).

<sup>276</sup> Clinics, Comments on Framework at 11.

<sup>277</sup> Knuckey and Jenkin at 17 (“Such a mechanism should also, in cognizance of the risks associated with the direct remediation of human rights violations and the power asymmetry between the company and community, incorporate external oversight and the highest possible levels of transparency, and should generally forego the finalization of claims through legal waiver in cases concerning human rights abuses.”); Enodo Interview with Sexual Violence Expert (#3) (“Stakeholders in general do fear Barrick, because it is the reason for the existence of this community at all, particularly in the state it is. Few people dare to oppose Barrick.”).

<sup>278</sup> Enodo Interview with Human Rights Watch (#1).

<sup>279</sup> Knuckey and Jenkin at 17.

<sup>280</sup> *See* discussion under GP 31(b), Section 6.E.2.

<sup>281</sup> *See* discussion in this section, below, regarding claimants’ focus on relative equity in treatment. We witnessed how claimants may perceive inequity based on who is consulted, and when they are consulted, when we conducted our interviews. We understood that the large group of claimants who were agitated on the first day of our interviews feared that the first women interviewed were going to receive preferential treatment in receiving remedies (discussed in Section 4).

<sup>282</sup> IFC at 16 [emphasis in original]; *see also*, OHCHR, *Interpretive Guide* at 60 (“There may be times when an enterprise concludes that an external party raising a concern lacks legitimacy and that it is not necessary or appropriate to respond. In the absence of any legal requirements, that is a judgment for the enterprise to make.”).

<sup>283</sup> Catherine Coumans, Letter to Navanethem Pillay, UN High Commissioner for Human Rights (2 April 2013) at 4, miningwatch.ca [Coumans Letter of 2 April 2013].

<sup>284</sup> Clinics, Comments on Framework at 8-9 (“The lack of comprehensive and in-depth consultation with alleged victims, representatives, and landowners from the community, and several different organizations who have investigated allegations of abuses by Barrick security personnel (including the Clinics, Akali Tange Association (ATA), the Porgera Alliance, and MiningWatch Canada) raises concerns that Barrick has been selective with its consultation process instead of providing opportunities to hear from all major stakeholders during the development of the remedial program.”); Knuckey and Jenkin at 6 (“In addition, the local voices in Porgera who had been vocally condemning the security guard violence and who were most engaged on the issue of remedy, were not brought substantively into the consultation process.”); Coumans Letter of 19 March 2013 at 2 (“In particular Barrick explicitly excluded from consultation the leadership of a grass roots human rights organization in Porgera, the Akali Tange Association (ATA), and the Porgera Landowners Association (PLOA).”).

<sup>285</sup> OHCHR Opinion at 13; *see also*, Section 2, above.

- <sup>286</sup> *Id.*
- <sup>287</sup> Enodo Interview with Senior Barrick Personnel (#4); Canadian National Contact Point Pursuant to the OECD Guidelines for Multinational Enterprises, *Specific Instance Regarding: 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*, 1 March 2011, miningwatch.ca [OECD Specific Instance].
- <sup>288</sup> OECD Specific Instance, Section 1, "Executive Summary".
- <sup>289</sup> *Id.*, Section 7, "Mediation".
- <sup>290</sup> IFC at 20 ("First, try to ensure that these individuals are indeed true advocates of the views of their constituents, and can be relied upon to faithfully communicate the results of engagement with the project company back to their constituents.").
- <sup>291</sup> Shift, "Bringing a Human Rights Lens to Stakeholder Engagement", 2013, shift.org, at 6 ("Applying the human rights lens to stakeholder engagement requires that companies address whether and how they have effectively engaged with [stakeholders who may be subject to significant impacts but have low influence].").
- <sup>292</sup> IFC at 20 ("In addition, be aware that the very act of establishing certain people as the 'liaison' between the local population and the project confers upon them a certain degree of power and influence.").
- <sup>293</sup> *Id.* at 24 ("Non-governmental organizations (NGOs) and community-based organizations (CBOs), particularly those who represent communities directly affected by a project, can be important stakeholders for companies to identify and engage on a proactive basis. ... However, it is important to carry out initial research regarding the local power dynamics and existence of special interest groups to ensure that any intermediary organizations, such as NGOs, are truly representative of and accountable to the community interests they claim to support and represent.").
- <sup>294</sup> *Gold's Costly Dividend* at 35.
- <sup>295</sup> *Id.* at 45.
- <sup>296</sup> *Id.* ("By 2010, some families whose agreements had also required them to provide a 'non-refundable sum' of K2000 (US\$780) to the ATA so the organization could pursue their claims were highly disgruntled because, years later, they had received nothing in return.")(citations omitted).
- <sup>297</sup> Everlyne Sap Telephone Conversation with Senior PLOA Representative, 13 August 2015 (in Enodo's presence).
- <sup>298</sup> One particularly detailed account was provided by a landowner who was quite frustrated with publicity about the Framework, and concerned that women in his community had been deprived of a chance to obtain a remedy for sexual violence, but who nonetheless reserved most of his ire for the PLOA, which he repeated did not care for his community let alone for the women.
- <sup>299</sup> Enodo Interview with ATA Leadership, 14 August 2015.
- <sup>300</sup> The PLOA's exclusively male composition alone itself would have raised security risks for potential claimants. As Knuckey and Jenkin note, it was "an important concern" to ensure that men did not know about the Framework given that this could have "endangered women or prevented them from making claims due to fear." (Knuckey and Jenkin at fn. 49.)
- <sup>301</sup> ATA, "Akali Tange Association Inc. Office Bearers re Structure 2015", Appendix 3.
- <sup>302</sup> *Id.* When we asked to confirm, during our interview, that there was only one woman on the leadership, we were told that there were definitely at least a couple of others, and that we would receive an updated organizational chart shortly. We have not.
- <sup>303</sup> Enodo Interview with ATA Leadership, 14 August 2015.
- <sup>304</sup> *Id.*
- <sup>305</sup> *Id.*
- <sup>306</sup> *Id.*
- <sup>307</sup> *Id.*
- <sup>308</sup> *Id.*
- <sup>309</sup> *Id.*
- <sup>310</sup> Edited mildly for grammar.
- <sup>311</sup> E-mail from James Wangia, 28 August 2015.
- <sup>312</sup> ATA Letter of 25 August 2015, Appendix 3.
- <sup>313</sup> *Id.*
- <sup>314</sup> Knuckey and Jenkin at 24, fn. 49.
- <sup>315</sup> ATA E-mail of 7 October 2015 to Peter Sinclair, et al, Appendix 3 (capitalization as in original).
- <sup>316</sup> *Id.* The ATA warned us about such groups prior to, and during, our meeting.
- <sup>317</sup> *Id.* ("If anyone or group in Porgera collecting any form of money on promise or from outside Porgera like [sic], International Partners than [sic] you are now kindly asked to immediately stop. The organization or group, who is found doing so, will be tolerated under our Engan customary law, sending all the body (deceased) bags to your organization to meet their compensation payment and this is the final notice to all.").

- <sup>318</sup> Letter from James Wangia to Peter Sinclair, 16 October 2015, Appendix 3. We have received a number of messages from the ATA in the last two months, including some formally crafted letters (see, e.g. ATA Letter of 25 August 2015, Appendix 3). The 16 October 2015 letter is the only one we could describe as immaculately composed.
- <sup>319</sup> *Id.*
- <sup>320</sup> *Id.*
- <sup>321</sup> ATA E-mail of 7 October 2015.
- <sup>322</sup> Letter from James Wangia to Peter Sinclair, 16 October 2015.
- <sup>323</sup> To be clear, this conclusion is related to the Framework alone. We take no position on the advisability or importance of engaging with the ATA regarding other mine-related issues.
- <sup>324</sup> Enodo Interview with Senior Barrick Personnel (#4); Enodo Interview with Cardno Personnel (#3).
- <sup>325</sup> Enodo Interview with PDWA Personnel.
- <sup>326</sup> Knuckey and Jenkin at 22, fn. 35.
- <sup>327</sup> Enodo Interview with Dr. Moises Granada, Paiam Hospital; Enodo Interview with Family and Sexual Violence Unit Representative.
- <sup>328</sup> Enodo Interview with PDWA Personnel.
- <sup>329</sup> *Id.*
- <sup>330</sup> Minutes of Barrick CSR Advisory Board Meeting, 5 October 2012, made available in confidence to Enodo.
- <sup>331</sup> Enodo Interview with Cardno Personnel (#3).
- <sup>332</sup> Guiding Principles, "General Principles".
- <sup>333</sup> Enodo Interview with Senior Barrick Personnel (#4); Enodo Interview with Senior Barrick Personnel (#5); Enodo Interview with Cardno Personnel (#1); Enodo Interview with PRFA Leadership (#1).
- <sup>334</sup> IFC at 40.
- <sup>335</sup> Enodo Interview with Senior Barrick Personnel (#1); Enodo Interview with Senior Barrick Personnel (#3); Enodo Interview with Senior Barrick Personnel (#4); Enodo Interview with Senior Barrick Personnel (#5).
- <sup>336</sup> The experts we have confirmed participated in this process are: John Ruggie, Human Rights Watch, Rachel Nicolson of Allens Linklaters (a leading legal expert on the Guiding Principles), and the Clinics. We understand from our discussions with Barrick personnel and international experts that Barrick sought deeper engagement from other international experts in women's rights; these efforts were rebuffed due to an institutional inability or unwillingness to assist. (Enodo Interview with Senior Barrick Personnel (#5), 1 October 2015; Enodo Interview with Human Rights Watch (#1).)
- <sup>337</sup> The experts we have confirmed participated in this process are: Dame Carol Kidu, then a Member of Parliament for Papua New Guinea; Ume Wainetti, National Director of the Family and Sexual Violence Committee; Dr. Elizabeth Cox, then Chief Technical Advisor to UN Women Asia-Pacific; Dr. Lesley Bennett of the Women in Mining Program at the Papua New Guinea Chamber of Mines and Petroleum; Everlyne Sap of the Porgera Women's Welfare Office; and, Dr. Margit Ganster-Breidler, a psychotherapist who had conducted sexual violence research in Porgera on behalf of Barrick ("Gender-based violence in Porgera district and the traumatic impact on women's lives" [2011]).
- <sup>338</sup> Enodo Interview with John Ruggie.
- <sup>339</sup> Enodo Interview with Nisha Varia.
- <sup>340</sup> *Id.*
- <sup>341</sup> Enodo Interview with Rachel Nicolson.
- <sup>342</sup> *Id.*
- <sup>343</sup> *Id.*
- <sup>344</sup> Clinics, Comments on Framework at 1.
- <sup>345</sup> Barrick, "Letter to the Clinics of 15 June 2012", made available to Enodo by Barrick in confidence.
- <sup>346</sup> *Id.* at 5.
- <sup>347</sup> *Id.* at 6.
- <sup>348</sup> *Id.* at 12.
- <sup>349</sup> *Id.* at 15.
- <sup>350</sup> *Id.* at 16.
- <sup>351</sup> Internal Barrick E-mails of 19 March 2013, made available in confidence to Enodo.
- <sup>352</sup> *Id.*

- <sup>353</sup> Jonathan Drimmer, E-mail to the Clinics of 20 March 2013, made available in confidence to Enodo (“As you hope, we are pursuing the concerns that you expressed internally and with Cardno, and I am certainly happy to see your written list.”); Tyler Giannini, E-mail to Jonathan Drimmer of 20 March 2013, made available in confidence to Enodo (“If it would be useful, we would also be happy to send you in writing a list of the reforms that we believe are necessary to begin to bring the framework into line with human rights principles.”).
- <sup>354</sup> Enodo Interview with Jonathan Drimmer.
- <sup>355</sup> Patrick Bindon, Letter to the Clinics of 26 March 2013, made available in confidence to Enodo.
- <sup>356</sup> *Id.*
- <sup>357</sup> Enodo Interview with Sexual Violence Expert (#1); Enodo Interview with Sexual Violence Expert (#2); Enodo Interview with Sexual Violence Expert (#3); Enodo Interview with PRFA Leadership (#1); Enodo Interview with PRFA Leadership (#2); Enodo Interview with Senior Cardno Personnel (#1); Enodo Interview with Senior Cardno Personnel (#3); Enodo Interview with Barrick Counsel (#3).
- <sup>358</sup> Enodo Interview with Sexual Violence Expert (#2).
- <sup>359</sup> Enodo Interview with Sexual Violence Expert (#3).
- <sup>360</sup> *Id.*
- <sup>361</sup> Clinics, Comments on Framework at 17.
- <sup>362</sup> *Id.*
- <sup>363</sup> Coumans Letter of 19 March 2013 at 2 (noting “serious concerns” about the Framework, including that the “remedy is not culturally appropriate” because it has no cash component.).
- <sup>364</sup> *Framework of Remediation Initiatives* at 12.
- <sup>365</sup> *Id.* at 13.
- <sup>366</sup> Knuckey and Jenkin at 13.
- <sup>367</sup> IFC at 40.
- <sup>368</sup> GP 23.
- <sup>369</sup> MiningWatch, “Barrick Ignores UN High Commissioner for Human Rights Recommendation Regarding Papua New Guinea Rapes”, 28 October 2013, miningwatch.ca. *See also*, EarthRights at 3 (“Although the Panel recognized that ‘compensation is a traditional form of redress,’ it suggested that this culturally appropriate remedy – well-enshrined in international human rights law – was inconsistent with the ‘dignity’ of the women, as protected by Papua New Guinea’s Constitution.”).
- <sup>370</sup> Knuckey and Jenkin at 9 (see, in particular, fn. 56).
- <sup>371</sup> Enodo Interview with Community Leader (#2).
- <sup>372</sup> Mark Tony Ekepa, “Letter to Navanethem Pillay, UN High Commissioner for Human Rights”, 29 August 2013, at 2, business-humanrights.org [Ekepa Letter of 29 August 2013].
- <sup>373</sup> Enodo Interview with ATA Leadership, 14 August 2015.
- <sup>374</sup> Enodo Interview with Karath Mal, 14 August 2015.
- <sup>375</sup> Notably, neither EarthRights nor the Clinics appear to have taken a position on what would constitute a culturally appropriate remedy, save that it would involve cash or pigs.
- <sup>376</sup> Douglas Tennent, “Award of Damages to Part-Subsistence Villagers in Papua New Guinea”, (2002) 10 *Waikato Law Review* 91 at 22.
- <sup>377</sup> *Id.*
- <sup>378</sup> *Aundak Kupil and Kauke Kensi v. Independent State of Papua New Guinea* [1983] PNGLR 350, paclii.org.
- <sup>379</sup> *Id.*
- <sup>380</sup> *Id.*
- <sup>381</sup> UNDP, *Human Development Report* at 54 (“Village courts typically apply customary principles, which may discriminate against women, while the formal justice system is often difficult to access, particularly for rural people and especially rural women.”).
- <sup>382</sup> Lilly Be’Soer, “Leveraging Rural Women’s Leadership and Agency”, UN Commission on the Status of Women, 56th Session (27 February to 9 March 2012); *see also*, World Bank et al., *Papua New Guinea Country Gender Assessment 2011-2012*, worldbank.org at 10 (“Many people today believe the payment of bride price entitles the husband to a woman’s labour, sexual services and full obedience. Bride price payments encourage the notion that a man ‘owns’ his wife and facilitates the belief that he therefore has the right to discipline her.”)(citations omitted) [World Bank, *Gender Assessment*]; *see also*, Human Rights Watch, “Bashed Up” at 5 (“Bride price sends a message that women are property, and cuts women off from their family’s help, as custom dictates that bride price must be repaid if the wife leaves her husband—even in the event of abuse, and many families cannot afford to return the funds.”).
- <sup>383</sup> Enodo Interview with ATA Leadership, 14 August 2015.
- <sup>384</sup> World Bank, *Gender Assessment* at 83.
- <sup>385</sup> GP 23(c) (“In all contexts, businesses should ... Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.”).

<sup>386</sup> GP 11 (“Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”).

<sup>387</sup> Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#2); Enodo Interview with CAT Officer (#3).

<sup>388</sup> Enodo Interview with Senior Barrick Personnel (#5); confirmed in interviews with PRFA Leadership (#1) and (#2).

<sup>389</sup> Enodo Interview with Barrick Personnel (#4); Enodo Interview with Cardno Personnel (#1); Enodo Interview with PRFA Leadership (#1); Enodo Interview with PRFA Leadership (#2).

<sup>390</sup> Enodo Interview with CAT Officer (#1); Enodo Interview with Everlyne Sap.

<sup>391</sup> Interview Results, Appendix 1 (Question 12—“After your first meeting with the Remedy Framework team, did you feel that the process was clear? If no, why?”).

<sup>392</sup> *Id.* (Question 18—“Did the Remedy Framework representatives adequately answer any questions you had about the process?”).

<sup>393</sup> *Framework of Remediation Initiatives* at 11-12; *see also, Manual* at 1 (“Support programs and services will be chosen in consultation with the affected women, to help meet their specific needs.”).

<sup>394</sup> *Manual* at 37.

<sup>395</sup> Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#2); Enodo Interview with CAT Officer (#3).

<sup>396</sup> Interview Results, Appendix 1 (Question 21—“What remedies did you receive before the most recent top-up payment?”). Only 44 successful claimants mentioned that they received business training, but we have received a number of independent accounts from the PRFA and Cardno that all successful claimants attended the training. (Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#2); Enodo Interview with CAT Officer (#3); Enodo Interview with PRFA Leadership (#2); Enodo Interview with Everlyne Sap; Enodo Interview with Maya Peipul.)

<sup>397</sup> Enodo Interview with PRFA Leadership (#2).

<sup>398</sup> *Id.*

<sup>399</sup> These values reflect remedies before the top-up payment of K30,000 was paid out to all legitimate claimants in the spring of 2015. *Framework Summary* at 13. Certain stakeholders have contested the accuracy of these numbers, but we do not find the differences to be material, and we have not seen sufficient evidence to doubt the veracity of Barrick’s representations.

<sup>400</sup> Interview Results, Appendix 1 (Question 21—“What remedies did you receive before the most recent top-up payment?”).

<sup>401</sup> MiningWatch, “Privatized Remedy and Human Rights: Re-thinking Project-Level Grievance Mechanisms”, 1 December 2014, miningwatch.ca, at 6 (“The remedy provided was largely uniform, not individually tailored, and still considered inadequate by many women, including women who nonetheless accepted the offer.”); EarthRights International at 3 (“Nearly all of ERI’s clients were offered benefits packages that were calculated to amount to exactly the same value”); Knuckey and Jenkin at 10 (“Because of the near-uniformity of the packages, it is not clear whether or how the specific nature of each claimant’s harm was a factor in the determination of their compensation.”).

<sup>402</sup> Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#2); Enodo Interview with CAT Officer (#3); Enodo Interview with PRFA Leadership (#1); Enodo Interview with PRFA Leadership (#2); Enodo Interview with Maya Peipul.

<sup>403</sup> Joshua de Bruin, E-mail to EarthRights International, 10 September 2014, made available to Enodo in redacted form.

<sup>404</sup> *Id.*

<sup>405</sup> *Id.*

<sup>406</sup> *Framework of Remediation Initiatives* at 23 and 25.

<sup>407</sup> Interview Results, Appendix 1 (Question 27—“Did you feel that you were treated fairly by the Remedy Framework?” 59 of 62 successful claimants said ‘No’. Virtually every one of them referred to the remedies awarded to the “ATA Claimants” in explaining why they felt that way.).

<sup>408</sup> Clinics, Comments on Framework at 2.

## 6.D: GUIDING PRINCIPLE 31(A)

(a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes.

### Relevant commentary:

Stakeholders for whose use a mechanism is intended must trust it if they are to choose to use it. Accountability for ensuring that the parties to a grievance process cannot interfere with its fair conduct is typically one important factor in building stakeholder trust.

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**INDICATOR 7:** DO THE FOUNDATIONAL DOCUMENTS OF THE FRAMEWORK GUARANTEE THE INDEPENDENCE OF THE PRFA TO REACH CONCLUSIONS ABOUT INDIVIDUAL CLAIMANTS WITHIN THE PARAMETERS ESTABLISHED BY THE FRAMEWORK?

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**INDICATOR 8:** DID THE FRAMEWORK DECISION-MAKERS DECIDE ON CLAIMS IMPARTIALLY, ON THE BASIS OF FACTS, WITHOUT ANY RESTRICTIONS, IMPROPER INFLUENCES, INDUCEMENTS, PRESSURES, THREATS OR INTERFERENCES, DIRECT OR INDIRECT, FROM ANY QUARTER FOR ANY REASON?

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**INDICATOR 9:** DID BARRICK PROVIDE THE PRFA WITH SUFFICIENT FUNDING TO ENSURE THAT IT COULD PROPERLY PERFORM ITS FUNCTIONS INDEPENDENTLY WITH RESPECT TO THE FRAMEWORK?

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**INDICATOR 10:** DID THE FRAMEWORK'S DECISION-MAKERS HAVE THE APPROPRIATE TRAINING AND QUALIFICATIONS TO ENGAGE WITH SURVIVORS OF SEXUAL VIOLENCE AND MAKE DECISIONS BASED ON THEIR UNDERSTANDING OF WOMEN'S RIGHTS IN A CULTURALLY APPROPRIATE WAY?

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**INDICATOR 11:** WAS THERE A MECHANISM TO ENSURE THE PRFA'S ACCOUNTABILITY FOR ISSUES OF SUBSTANTIVE OR PROCEDURAL FAIRNESS?

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### 6.D.1: INTERPRETATION

Interpreting the remainder of GP 31 requires an appropriate consideration of international law regarding procedural due process and substantive human rights. This obligation is clear from two provisions of the Guiding Principles. First, GP 31 provides that its requirements apply to “State-based and non-State-based”<sup>409</sup> grievance mechanisms; in other words, the effectiveness criteria are equivalent for public and private actors (aside from GP 31(h), which applies only to OGMs). Second, the General Principles at the outset of the Guiding Principles provide that they do not empower states to derogate from the minimum expected of them under international law: “Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.”<sup>410</sup> The combination of these two provisions suggests that OGMs should take as their referent the minimum due process expectations of public authorities addressing human rights concerns.<sup>411</sup> Where the meaning of the effectiveness criteria is not self-contained in the Guiding Principles, therefore, we consider them through the lens of international legal instruments—with appropriate modifications to apply to the private sector.

“Legitimate” is defined in the GP 31 as “enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes.”<sup>412</sup> Operationalizing this requirement turns on a few elements: (i) stakeholder trust; (ii) fair conduct; and (iii) accountability. These elements are linked: “Accountability for ensuring that the parties to a grievance process cannot interfere with its fair conduct is typically one important factor in building stakeholder trust.”<sup>413</sup> We have considered stakeholder trust and the consultations to attain it, respectively, under GP 29 and GP 31(h). Together they indicate that Barrick had reasonably endeavored to acquire that trust through consultation before the Framework was launched, and that potential claimants trusted the Framework once it was launched. At this stage, then, we consider the institutional protections in place to ‘enable’ ongoing trust in the Framework once it was operational.

The cornerstone of those efforts is “fair conduct”. To assess it appropriately, we need to adapt our criteria to the Framework’s adjudicative approach: “Where adjudication is needed, this

should be provided by a legitimate, independent third-party mechanism.”<sup>414</sup> We therefore consider fairness through the proxy of independence. In particular, we have derived the indicators of “fair conduct” from the UN *Basic Principles on the Independence of the Judiciary* (“*Judicial Principles*”)<sup>415</sup>. These set the standard for judicial conduct, which is not covered by GP 31. The high bar is nonetheless helpful as the most rigorous benchmark for procedural “fairness” of any adjudicative mechanism. (The other elements of procedural fairness, including accessibility and transparency, will be considered under specific sub-headings of GP 31.)

#### INDICATOR 7: DO THE FOUNDATIONAL DOCUMENTS OF THE FRAMEWORK GUARANTEE THE INDEPENDENCE OF THE PRFA TO REACH CONCLUSIONS ABOUT INDIVIDUAL CLAIMANTS WITHIN THE PARAMETERS ESTABLISHED BY THE FRAMEWORK?

This indicator is derived from Article 1 of the *Judicial Principles*: “The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.”<sup>416</sup> As the voluntary creation of a private enterprise, the guarantee of the Framework’s independence should be in its foundational internal and public documents.

#### INDICATOR 8: DID THE FRAMEWORK DECISION-MAKERS DECIDE ON CLAIMS IMPARTIALLY, ON THE BASIS OF FACTS, WITHOUT ANY RESTRICTIONS, IMPROPER INFLUENCES, INDUCEMENTS, PRESSURES, THREATS OR INTERFERENCES, DIRECT OR INDIRECT, FROM ANY QUARTER FOR ANY REASON?

This indicator is derived from Article 2 of the *Judicial Principles*: “The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter for any reason.”<sup>417</sup> The Framework was not designed to apply legal evidentiary standards to determine facts. Still, the CAT, the Independent Expert and the Appeal Panel were tasked with making decisions based on their perceptions of claims’ veracity. That process needed to be impartial.

**INDICATOR 9: DID BARRICK PROVIDE THE PRFA WITH SUFFICIENT FUNDING TO ENSURE THAT IT COULD PROPERLY PERFORM ITS FUNCTIONS INDEPENDENTLY WITH RESPECT TO THE FRAMEWORK?**

This indicator is derived from Article 7 of the *Judicial Principles*: “It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.”<sup>418</sup> The Framework was conceived of and funded by Barrick, just as judges are funded by the State. The source of funding does not itself compromise independence.<sup>419</sup> But it is important that the availability of funding not be subject to the whims of the funder, for that could allow the funder to exert an implicit and inappropriate pressure on the decision-makers to reach a particular conclusion.

**INDICATOR 10: DID THE FRAMEWORK’S DECISION-MAKERS HAVE THE APPROPRIATE TRAINING AND QUALIFICATIONS TO ENGAGE WITH SURVIVORS OF SEXUAL VIOLENCE AND MAKE DECISIONS BASED ON THEIR UNDERSTANDING OF WOMEN’S RIGHTS IN A CULTURALLY APPROPRIATE WAY?**

This indicator is derived from Article 10 of the *Judicial Principles*: “Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives.”<sup>420</sup> The cornerstone of fairness for claimants is properly qualified decision-making. Independence of such decision-makers is in part assured by their selection based on qualifications alone.<sup>421</sup> In the Framework’s case, legal training was not essential, but an understanding of women’s rights and an ability to engage with survivors of sexual violence were critical qualifications.

**INDICATOR 11: WAS THERE A MECHANISM TO ENSURE THE PRFA’S ACCOUNTABILITY FOR ISSUES OF SUBSTANTIVE OR PROCEDURAL FAIRNESS?**

This indicator is derived from the text of GP 31(a): “being accountable for the fair conduct of grievance processes.” When it comes to accountability, we seek to understand whether claimants had a means to ensure that the Framework operated as it was designed.<sup>422</sup> The accountability mechanism does not have to be external to the Framework.<sup>423</sup> From the legitimacy perspective it must provide assurance to claimants and potential claimants that their concerns are being considered in good faith.

**6.D.2: ASSESSMENT OF INDICATOR 7**

*DO THE FOUNDATIONAL DOCUMENTS OF THE FRAMEWORK GUARANTEE THE INDEPENDENCE OF THE PRFA TO REACH CONCLUSIONS ABOUT INDIVIDUAL CLAIMANTS WITHIN THE PARAMETERS ESTABLISHED BY THE FRAMEWORK?*

**6.D.2(A): DESIGN**

The independence of the PRFA from Barrick and the PJV was specified in all the Framework’s foundational documents:

- The project officers processing the claims and experts determining them will be independent of Barrick and the PJV.”<sup>424</sup>
- “The process for making individual claims within the reparations framework ... will be independent of Barrick and the PJV to ensure the privacy and confidentiality of those submitting claims.”<sup>425</sup>
- “The Program is run by the Porgera Remediation Framework Association Inc (PRFA) an association incorporated under the law of Papua New Guinea and independent of Barrick, the PJV or the PJV Contractors.”<sup>426</sup>

The PRFA’s incorporation documents empower the organization to provide, inter alia, “an individual support program, which seeks to provide individualized support and services to women who have been the subject of sexual violence or abuse attributable to former employees of the PJV” and “do all such things as are necessary, incidental or conducive to the attainment of the objects or any of them.”<sup>427</sup> The PRFA Board of Directors includes one Barrick representative, Ila Temu, and two independent members, Dame Kidu and Ume Wainetti. To ensure independence, the Barrick representative abstains from participating “on any matters involving individual claims under the individual reparations program.”<sup>428</sup>

**6.D.2(B): IMPLEMENTATION**

The *Manual* specifies that the CAT officers were expected, at their first meeting with the claimants, to “explain that assessments made under the Program are made independently of Barrick, the PJV and PJV Contractors.”<sup>429</sup> The claimants, by and large, do not believe the Framework was independent of Barrick: only 22 of 62 successful claimants and 4 of 15

unsuccessful claimants understood after meeting with the CAT that the Framework is governed by an independent organization.<sup>430</sup> This was confirmed in our interviews with CAT members, PRFA leadership and community leaders, each of whom expected that none of the claimants understood or accepted the Framework's independence.<sup>431</sup>

There appears to have been a clear gap in communicating the Framework's structure, and the independence of the PRFA, to claimants. That responsibility lay largely with the CAT, who were claimants' first point of contact with the Framework and were obliged to explain its independence under the *Manual*. (Certain stakeholders have mentioned that the concept of 'independence' may not have translated comfortably into Tok Pisin or Ipi, thus posing inherent communication challenges.) As a practical matter, this gap in explanation did not seem to affect claimants' initial trust in the Framework: at the outset, 58 of 62 successful claimants said that they trusted they would be treated fairly under the Framework.<sup>432</sup> Over the life of the Framework, however, trust in it has dissipated: 59 of 62 claimants now believe they were treated unfairly by the Framework.<sup>433</sup> It is impossible to come to definitive conclusions with counterfactuals, but an entrenched understanding of the Framework's independence may have helped mitigate some of that loss of trust.

### 6.D.3: ASSESSMENT OF INDICATOR 8

*DID THE PRFA DECISION-MAKERS, INCLUDING THE CAT OFFICERS, DECIDE ON CLAIMS IMPARTIALLY, ON THE BASIS OF FACTS, WITHOUT ANY RESTRICTIONS, IMPROPER INFLUENCES, INDUCEMENTS, PRESSURES, THREATS OR INTERFERENCES, DIRECT OR INDIRECT, FROM ANY QUARTER FOR ANY REASON?*

#### 6.D.3(A): DESIGN

The design element of this indicator is similar to that under Indicator 7, above. The decision-makers were assured independence in the Framework's foundational documents: "The process for making individual claims within the reparations framework ... will be independent of Barrick and the PJV to ensure the privacy and confidentiality of those submitting claims."<sup>434</sup> The *Manual* also enjoins CAT officers to make their assessments "objectively" and "based on the information available to [them] and their expertise."<sup>435</sup>

#### 6.D.3(B): IMPLEMENTATION

We find that the CAT and the Review Panel decided on the eligibility and legitimacy of individual claims impartially and without any "improper influence".<sup>436</sup> The CAT and the Review Panel were unanimous in affirming that they never felt any pressure from Barrick to make individual determinations in any particular way.<sup>437</sup> In fact, two of the CAT officers mentioned that they believed they were being over-inclusive in their determinations—deeming as eligible and legitimate a number of claims that were not authentic—but were advised by the PRFA leadership that, as long as valid claims are being captured, they should not look to be more restrictive.<sup>438</sup> The sense that the Framework was expansive enough to find as eligible and legitimate a number of inauthentic claims was confirmed by Dr. Moises Granada, head of the Paiam Hospital where a number of the claimants were treated: "Most of the women I saw who had been referred by the Framework were not actually victims of sexual violence."<sup>439</sup> (It is also a view expressed by the ATA during our interview and in their letter of 25 August 2015.<sup>440</sup>)

Our finding regarding the specific remedies offered, however, is more nuanced. We do not find evidence of "improper influence". But we are unable to find a satisfactory explanation for why the PRFA changed its general stance on the award of cash compensation. All of the CAT officers and PRFA leadership continue to express serious qualms about the decision to pay cash compensation.<sup>441</sup> The concern they unanimously express is that payment of cash compensation, especially as a lump sum, would (i) subject the women to a severe risk of re-victimization at the hands of their families, and (ii) ultimately leave the women in no better position vis-à-vis their families and communities because the money would very quickly be disbursed to others at the expense of the claimants themselves.<sup>442</sup> These concerns were shared by each of the experts in sexual violence in Papua New Guinea we interviewed.<sup>443</sup> According to every account we have of the pre-Framework stakeholder engagement, this apprehension and resistance to cash compensation was shared by virtually every expert in sexual violence in Papua New Guinea consulted.<sup>444</sup>

The Framework was thus initially designed with the idea of limited straight "compensation", with a focus instead on non-pecuniary remedies, including business grants and training as well medical care and counseling.<sup>445</sup> Cash compensation was not off the table, but the Framework leadership sought to limit it as much

as possible.<sup>446</sup> The Framework’s preliminary determinations, however, were for a far lower value than the benchmark of K20,000 to 25,000 suggested by Barrick’s counsel, Allens Linklaters, for any individual award for rape under Papua New Guinea law.<sup>447</sup> In the wake of these preliminary determinations, several stakeholders published critiques arguing that “a culturally appropriate remedy” should include cash or pigs.<sup>448</sup> And Barrick, noting these low values and the attendant international pressure, emphasized to the PRFA that cash should be an option and that the remedy packages should respect the Framework’s threshold value.<sup>449</sup> That international pressure appears to have changed the Framework’s formal posture.<sup>450</sup>

To be clear, the ultimate decision to increase the cash<sup>451</sup> amounts was still taken by the PRFA Board.<sup>452</sup> In the words of one member: “As a Board, we had never taken cash off the table; so, when women kept asking for it, we gave it to them.”<sup>453</sup> From a practical perspective, respecting the Framework’s threshold award values may have been insuperably difficult without substantial cash or other fungible remedies. Our conclusion is nuanced because, on balance, we believe some external pressure led the PRFA to give cash compensation in a way that its leadership did not intend or favor. The request for cash from claimants was a constant, so that alone does not explain the change in posture. It seems clear from our interviews with PRFA leadership that the pressure did not actually change their minds about the virtues (and dangers) of cash compensation.<sup>454</sup> Indeed, the PRFA leadership and the CAT officers share a strong and continued aversion to cash compensation because of the inherent risks it carries to claimants. For that reason, it is difficult to understand the change in policy save as a result of external “pressures”.

#### 6.D.4: ASSESSMENT OF INDICATOR 9

*DID BARRICK PROVIDE THE PRFA WITH SUFFICIENT FUNDING TO ENSURE THAT IT COULD PROPERLY PERFORM ITS FUNCTIONS INDEPENDENTLY WITH RESPECT TO THE FRAMEWORK?*

##### 6.D.4(A): DESIGN

Lack of secure funding or arbitrariness or conditionality regarding fund provision can seriously undermine institutional independence. As one Guiding Principles expert framed it, corporate funding of a grievance mechanism does not necessarily undermine its independence, “as long as there are firewalls in place.”<sup>455</sup> In the Framework’s case, these “firewalls” were in

place. Funding for the PRFA was secured in a trust managed by Deloitte’s Port Moresby office.<sup>456</sup> Deloitte would release the funds on an “as-required basis” under the direction of the PRFA Board of Directors, provided that the PRFA was in compliance with organizational formalities, primarily reporting requirements.<sup>457</sup>

##### 6.D.4(B): IMPLEMENTATION

Sufficient funding was available to the PRFA to ensure that it could properly perform its functions independently with respect to the Framework. The Framework has spent approximately K14.1 million since its inception.<sup>458</sup> That amount includes the “top-up” payment of K30,000 made to the 119 claimants who signed settlement agreements under the Framework following Barrick’s settlement with the 11 ATA Claimants. Interviews with both Cardno and the PRFA leadership confirm that there were sufficient funds provided at the outset of the program to carry out all of the elements of individual remedy framework.<sup>459</sup> The only time additional funds were requested was to complete the unforeseen “top-up” payment.<sup>460</sup>

The fact that those funds were available through a trustee does not appear to have affected the PRFA’s decision-making or discretion in any way regarding the resolution of individual claims. The only budgetary constraint raised by PRFA leadership was with respect to the community programs envisioned in the *Framework for Remediation Initiatives*, as the PRFA had to spend more than anticipated on the Framework.<sup>461</sup> We understand from our interviews with Cardno that, while there were sometimes delays in disbursement, there were no instances when Deloitte refused to provide funds requested by the PRFA.<sup>462</sup>

#### 6.D.5: ASSESSMENT OF INDICATOR 10

*DID THE FRAMEWORK’S DECISION-MAKERS HAVE THE APPROPRIATE TRAINING AND QUALIFICATIONS TO ENGAGE WITH SURVIVORS OF SEXUAL VIOLENCE AND MAKE DECISIONS BASED ON THEIR UNDERSTANDING OF WOMEN’S RIGHTS IN A CULTURALLY APPROPRIATE WAY?*

##### 6.D.5(A): DESIGN

The Framework’s design only explicitly anticipates the qualifications of the CAT: “The CAT would be staffed by project officers who have some experience with the issues surrounding gender-based violence and training in the area and in this process, and who are able to assist Claimants’

objectively in preparing and lodging their claim.”<sup>463</sup> We find some supplementary guidance on the intent at the outset of the Framework in Cardno’s implementation outline, which proposes to identify PRFA decision-makers with “suitable qualifications and stature” who have been screened “for possible conflict of interest.”<sup>464</sup> That outline also speaks to the importance of effective training on Framework processes for the CAT and PRFA decision-makers.<sup>465</sup> The Framework’s design thus appears to have envisioned a search for appropriately qualified decision-makers.

#### 6.D.5(B): IMPLEMENTATION

At an institutional level, the PRFA was well staffed to engage with survivors of sexual violence and make decisions in a culturally appropriate and gender-sensitive manner. That is not to say, however, that each of the decision-makers was equally qualified. Fortunately, the internal checks provided by the appeal structure ensured that protections were in place for erroneous decisions. We consider below each of the responsible institutional sub-structures separately.

##### *i. Cardno: Administering Agency*

We find that the administering agency was qualified to provide logistical and administrative support to the PRFA. Cardno was not a decision-maker with respect to individual claims under the Framework. It nonetheless played a critical role as the administrator responsible for the day-to-day operation of the Framework, including the oversight of CAT rotations in Porgera.<sup>466</sup> Cardno was initially selected by Barrick, but ultimately reported to the PRFA, once the association was incorporated under Papua New Guinea law.<sup>467</sup> The organization was selected based on its “substantial experience working on justice matters in Papua New Guinea”, particularly the PNG-Australia Law and Justice Partnership funded by AusAID.<sup>468</sup> Cardno’s involvement was initially managed by Melissa Wells, who had previously served as a civilian monitor for the Peace Monitoring Group in Bougainville and advised on performance monitoring in the PNG-Australia Law and Justice Partnership.<sup>469</sup> When Ms. Wells left the company, Joshua de Bruin took over program management.<sup>470</sup> His experience in Papua New Guinea prior to the Framework included: (i) working on the PNG-Australia Law and Justice Partnership; (ii) managing a program to mitigate HIV/AIDS; and (iii) conducting social impact studies for the resource sector to address issues of sexual violence.<sup>471</sup>

##### *ii. CAT Officers*

Each of the three CAT members we interviewed had prior, on-the-ground experience engaging directly with survivors of sexual violence from vulnerable populations.<sup>472</sup> The degree of this experience varied between the three. One had spent 40 years doing social work, largely with survivors of sexual violence; she had also started an NGO devoted to supporting survivors of sexual violence, and worked as a community liaison for the government’s Law and Justice Sector Secretariat. A second had worked on women’s rights issues in the Papua New Guinea Highlands, Sri Lanka and Thailand. In those capacities, she had engaged with, and advocated on behalf of, survivors of sexual violence. The third had more policy experience in government as a gender advisor, with her most recent experience involving on-the-ground engagement with vulnerable women.

We also found that each of the CAT officers had sincere regard for the claimants under their charge. This finding was confirmed by the claimants’ themselves. We asked each claimant the following question: “Did [your CAT officer] treat you with respect and make you feel comfortable explaining your case?”<sup>473</sup> 51 of 62 successful claimants said ‘yes’, with a number of claimants speaking effusively about their CAT officer. The unsuccessful claimants shared this sentiment: 11 of 15 answered ‘yes’.

We find, however, that the training these CAT officers received was insufficient given the complexity of their charge and the fundamental human rights at issue. Each of the CAT officers received two days of training in trauma counseling, engaging with survivors of sexual violence, and the Framework’s processes.<sup>474</sup> This proved insufficient at two levels. First, as discussed under GP 22, there was a significant implementation gap when it came to assessing and processing allegations of “sexual violence”, because the CAT officers did not seem to understand its scope.<sup>475</sup> Second, as discussed under GP 31(d), below, critical procedural safeguards were not respected by the CAT officers when it came to ensuring that claimants’ participation in the Framework was properly informed.<sup>476</sup>

##### *iii. Independent Expert: John Numapo*

We have not been able to speak to the Independent Expert, John Numapo. As the former Chief Magistrate of Papua New Guinea, he is certainly well qualified in local law. There were

concerns raised by all of his colleagues, however, about his sensitivity to claims of sexual violence and his openness to providing the remedies claimants sought. In particular, CAT and Review Panel members noted that Mr. Numapo was inclined to apply a standard of “implied consent” to overturn findings of legitimacy by the CAT.<sup>477</sup> When it came to remedies, Mr. Numapo was also averse to granting school fees, which were requested by a number of claimants.<sup>478</sup> In one (overturned) decision we have seen, Mr. Numapo explained that the reason for rejecting school fees was because the remedy should be tied to effects caused by the incident itself: “The remedy given must be directly connected to the incident for the purposes of restitution. It must be aimed at restoring the victim back to her former position before the incident happened. ... There is nothing to show that the incident has affected [the claimant’s] ability and/or capacity to pay school fees. In addition, such remedy is unsustainable in a long-term.”<sup>479</sup> While arguably accurate as a matter of law, this reasoning did not reflect the stakeholder-focused determination of remedy envisioned by the Framework. As one Review Panel member concluded, Mr. Numapo’s experience as a magistrate did not translate well into the sexual violence context, for which he had not been properly trained.<sup>480</sup> Given the procedural protections built into the Framework, however, any errors by the Independent Expert do not appear to have had a material impact on claimants (see discussion under Indicator 11, below).

#### *iv. Review Panel: Dame Kidu and Ume Wainetti*

Dame Kidu and Ms. Wainetti served in a different role, with different functions, than the Independent Expert or the CAT members. In addition to providing quality control for the CAT and Independent Expert’s decisions, Dame Kidu and Ms. Wainetti served as the public face of the Framework. Their qualifications needed to be commensurate with that role. We find that they were. According to the sexual violence experts with whom we engaged, they are two of the most respected advocates for women’s rights in Papua New Guinea.<sup>481</sup> Dame Kidu is a former Papua New Guinean Member of Parliament, in which capacity she was an advocate for women’s rights and “a raft of social development policy”.<sup>482</sup> She is also the recipient of the 2012 Pacific Regional Rights Award and the Republic of France Legion D’Honneur for commitment to rights of marginalized peoples.<sup>483</sup> Ms. Wainetti is herself an extremely accomplished women’s rights advocate, and the National Director of the Papua

New Guinea Family and Sexual Violence Action Committee.<sup>484</sup>

In addition to her national stature, she brought on-the-ground experience engaging with survivors of sexual violence throughout Papua New Guinea, including in Porgera.<sup>485</sup>

### **6.D.6: ASSESSMENT OF INDICATOR 11**

*WAS THERE A MECHANISM TO ENSURE THE PRFA’S ACCOUNTABILITY FOR ISSUES OF SUBSTANTIVE AND PROCEDURAL FAIRNESS?*

#### **6.D.6(A): DESIGN**

Accountability is an important component of legitimacy, particularly in an adjudicative context where significant individual interests are at stake.<sup>486</sup> Stakeholders must believe that the OGM’s parameters and procedures will be respected by the decision-makers if they are going to consider it to be legitimate. That accountability is provided by ensuring that an individual or body is empowered to check failures of process or abuses of discretion by decision-makers. The role does not need to be performed by an independent or unaffiliated entity—but it should have clear supervisory parameters and be directly accessible to claimants.

The Framework’s design built in accountability for CAT and Independent Expert substantive determinations. Thus, for instance, CAT determinations of eligibility that were overturned by the Independent Expert could be (and were successfully) appealed to the Review Panel. We understand from Barrick that there were a total of 31 Appeals from the Independent Expert’s determinations, of which 19 were accepted, 1 was rejected, and 11 were withdrawn.<sup>487</sup> This substantive appeal process provided a measure of accountability to ensure that Framework decisions were reached on the right bases.

This accountability mechanism, however, was limited to substantive findings. The Framework lacked a mechanism to ensure procedural accountability, which was particularly important with regard to the CAT and the ILA. The CAT officers were claimants’ first point of contact, serving as both intermediary and advocate for extremely vulnerable women who had suffered great trauma. Their role was arguably far more important than that of the Independent Expert or the Appeal Panel, because they would actually engage directly with the claimants.<sup>488</sup> They needed both to reach appropriate decisions

with the Framework’s context and comport themselves in a way that was sensitive to claimants’ vulnerability. The ILA was similarly in direct contact with the claimants and was critical to ensuring the equitability of the Framework’s process. Even where the possibility of appeal existed within Framework, claimants were largely dependent on the effective support and guidance of at least one of the CAT or the ILA.

But there was no clear mechanism within the Framework to ensure that the CAT and the ILA were fulfilling their mandate. (As we will discuss under 31(d) below, that ended up being a serious implementation flaw.) As one person intimately familiar with its implementation noted, the Framework would have benefited from a “quality-control person”. That would not necessarily have involved another procedural layer akin to the Review Panel. It may have been sufficient to have an onsite ombudsperson with whom process questions and concerns could be lodged, and who would be empowered to escalate issues to the Review Panel for consideration. That may have helped avoid, or at least mitigate, the serious concerns around equity raised by the Framework’s implementation.

#### 6.D.6(B): IMPLEMENTATION

The procedural accountability mechanism for the CAT and the ILA is notable for its absence, so does not lend itself directly to an implementation assessment. But its import is demonstrated

by the actions of the CAT and the ILA. With respect to the CAT, we note in particular the discussion under GP 22, where we found they applied an overly narrow definition of “sexual violence”.<sup>489</sup> We will discuss the implications for the ILA’s performance of her duties under GP 31(d).<sup>490</sup>

#### 6.D.7: CONCLUSION ON GP 31(A)

The Framework was clearly designed with great regard for its legitimacy as an adjudicative OGM. When we consider it against the most rigorous standards of judicial independence—the cornerstone of procedural fairness under international law—the Framework’s design shows meticulous alignment with GP 31(a). The only design flaw was in the absence of a procedural accountability mechanism, whose need was demonstrated by implementation failings.

The measures to ensure legitimacy were compromised to some degree in implementation. First, while the CAT and Review Panel made decisions on eligibility and legitimacy based on their own expertise and free from outside influence, external pressure once the Framework was launched seems to have led to the adoption of cash compensation. Second, the qualifications of the Independent Expert may be questioned given the Framework’s objective of remedying sexual violence. Third, the training of the PRFA decision-makers regarding crucial elements of the Framework, particularly its scope and procedural protections for claimants, proved insufficient in practice.

<sup>409</sup> GP 31 (“In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be ...”).

<sup>410</sup> Guiding Principles, “General Principles”.

<sup>411</sup> Enodo Interview with Guiding Principles Expert (#2) (adverting to the conscious alignment of GP 31(h) with principles of due process).

<sup>412</sup> GP 31(a).

<sup>413</sup> *Id.*, Commentary.

<sup>414</sup> GP 31(f), Commentary.

<sup>415</sup> UN General Assembly, *Basic Principles on the Independence of the Judiciary*, 13 December 1985, A/RES/40/146 [*Judicial Principles*].

<sup>416</sup> *Id.*, Art. 1.

<sup>417</sup> *Id.*, Art. 2.

<sup>418</sup> *Id.*, Art. 7.

<sup>419</sup> Enodo Interview with Guiding Principles Expert (#2).

<sup>420</sup> *Judicial Principles*, Art. 10.

<sup>421</sup> This indicator also captures the essential elements of conflicts of interest as they apply to the Framework.

<sup>422</sup> Caroline Rees, *Piloting Principles for Effective Company-Stakeholder Grievance Mechanisms: A Report of Lessons Learned*, 2011, CSR Initiative, Harvard Kennedy School, Cambridge, at 15 (“[T]he provision of accountability—internal and, where appropriate, external—for the mechanism’s performance remains important and relates also to the other principles, including predictability and transparency.”).

<sup>423</sup> *Id.*

<sup>424</sup> *Framework of Remediation Initiatives* at 7.

<sup>425</sup> *Id.* at 8.

<sup>426</sup> *Manual* at 2.

<sup>427</sup> PRFA Articles of Incorporation, 25 October 2012, "Notice of Intention to Apply for the Incorporation of an Association", Art. 1(a)(i) and 1(d); and "Rules of Association", Art. 3(a)(i) and 3d.

<sup>428</sup> Enodo Interview with Senior Barrick Personnel (#4); *Framework of Remediation Initiatives* at 17.

<sup>429</sup> *Manual* at 3.

<sup>430</sup> Interview Results, Appendix 1 (Question 19—"Did you believe that the Remedy Framework team is independent of Barrick and the PJV?").

<sup>431</sup> Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#2); Enodo Interview with CAT Officer (#3); Enodo Interview with PRFA Leadership (#1); Enodo Interview with PRFA Leadership (#2); Enodo Interview with Sexual Violence Expert (#3).

<sup>432</sup> Interview Results, Appendix 1 (Question 7—"When you first heard about the Remedy Framework, did you trust that you would be treated fairly?").

<sup>433</sup> *Id.* (Question 27—"Did you feel that you were treated fairly by the Remedy Framework?").

<sup>434</sup> *Framework of Remediation Initiatives* at 8.

<sup>435</sup> *Manual* at 5.

<sup>436</sup> We have not been able to speak to the Independent Expert, John Numapo.

<sup>437</sup> Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#2); Enodo Interview with CAT Officer (#3); Enodo Interview with PRFA Leadership (#1); Enodo Interview with PRFA Leadership (#2).

<sup>438</sup> Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#3).

<sup>439</sup> Enodo Interview with Dr. Moises Granada.

<sup>440</sup> ATA Letter of 25 August 2015 ("ATA also condemns the practice in which PRFA officials are processing the claimants as PRFA is promoting false claimants without proper consultations and verification processes.").

<sup>441</sup> Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#2); Enodo Interview with CAT Officer (#3); Enodo Interview with PRFA Leadership (#1); Enodo Interview with PRFA Leadership (#2).

<sup>442</sup> Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#2); Enodo Interview with CAT Officer (#3); Enodo Interview with PRFA Leadership (#1); Enodo Interview with PRFA Leadership (#2).

<sup>443</sup> Enodo Interview with Sexual Violence Expert (#1); Enodo Interview with Sexual Violence Expert (#2).

<sup>444</sup> Enodo Interview with Senior Barrick Personnel (#4); Enodo Interview with PRFA Leadership (#1); Enodo Interview with PRFA Leadership (#2); Enodo Interview with Sexual Violence Expert (#1); Enodo Interview with Sexual Violence Expert (#2); Enodo Interview with Sexual Violence Expert (#3); Enodo Interview with Barrick Counsel (#3); Enodo Interview with Cardno Personnel (#3). Agreement on this recommendation is also recorded in Barrick's notes regarding a pre-Framework stakeholder engagement session in Port Moresby, Papua New Guinea, on 17 November 2011.

<sup>445</sup> Enodo Interview with PRFA Leadership (#1); Enodo Interview with PRFA Leadership (#2); Dame Kidu, "Letter to Navanethem Pillay, UN High Commissioner for Human Rights", 24 March 2013, barrick.com [Dame Kidu Letter of 24 March 2013]; Ume Wainetti, "Letter to Navanethem Pillay, UN High Commissioner for Human Rights." Undated, barrick.com [Wainetti Letter to OHCHR].

<sup>446</sup> Enodo Interview with PRFA Leadership (#2); Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#3).

<sup>447</sup> Enodo Interview with Senior Barrick Personnel (#1); *Manual* at 6 ("According to the international law firm Allens Linklaters, published case law in PNG reflects that in the civil justice system in Papua New Guinea, damage awards for proven instances of rape, similar to those experienced at Porgera, have fallen within an upper range of between 20,000 to 25,000 Kina. In designing a tailored remediation package in conjunction with the Claimant, that range of civil damages awarded by PNG courts for proven instances of rape, similar to those experienced at Porgera, should be considered as a point of reference for the total value of the remediation package in cases where the CAT determines a claimant is eligible and legitimate, with appropriate values placed on any in-kind support that is provided [exclusive of programs open to all members of the community].").

<sup>448</sup> MiningWatch, "Barrick Ignores UN High Commissioner for Human Rights Recommendation Regarding Papua New Guinea Rapes", 28 October 2013, miningwatch.ca ("MiningWatch discovered that the rape victims themselves had not been consulted as to the remedy they might receive from Barrick. The women told MiningWatch that the items they had been offered, such as baby chicks to raise or second hand clothes to sell, did not meet their expectations or needs. 'Women told me that a culturally appropriate remedy would be mature pigs and cash with values considerably higher than those of the items being offered by Barrick,' says Catherine Coumans of MiningWatch Canada. 'Some women also sought remedies that would address the consequences of their rapes, such as loss of housing due to being ostracized'); Ekepa Letter of 29 August 2013 at 2 ("[W]e want to tell you what is really happening here in Porgera with the remedy program. First of all, women who have entered the program tell us that the things they are offered are always young chickens to raise and second hand clothes to sell. Many feel insulted because in our culture compensation for rape should be pigs about 100 or cash US\$ 100,000.00."); Acción et al Letter of 14 May 2013 at 1 ("The benefits offered to rape victims to date include livelihood projects, training, and medical treatment but do not reflect remedy that victims of rape may receive in traditional courts or through the Papua New Guinea civil justice system.").

<sup>449</sup> Enodo Interview with Senior Barrick Personnel (#1).

<sup>450</sup> Enodo Interview with Human Rights Watch (#1). Enodo Interview with Senior Barrick Personnel (#1).

<sup>451</sup> We use the term “cash” in its colloquial sense to denote monetary amounts. Claimants under the Framework received such amounts through direct deposit into bank accounts, not physical currency.

<sup>452</sup> Enodo Interview with PRFA Leadership (#1); Enodo Interview with PRFA Leadership (#2).

<sup>453</sup> Enodo Interview with PRFA Leadership (#2).

<sup>454</sup> Enodo Interview with PRFA Leadership (#1); Enodo Interview with PRFA Leadership (#2).

<sup>455</sup> Enodo Interview with Guiding Principles Expert (#2).

<sup>456</sup> *Framework of Remediation Initiatives* at 19; Enodo Interview with Cardno Personnel (#1); Enodo Interview with Senior Barrick Personnel (#4).

<sup>457</sup> Enodo Interview with Cardno Personnel (#1); Enodo Interview with Senior Barrick Personnel (#4).

<sup>458</sup> Enodo Interview with Senior Barrick Personnel (#4).

<sup>459</sup> Enodo Interview with Cardno Personnel (#2); Enodo Interview with PRFA Leadership (#2).

<sup>460</sup> Enodo Interview with Cardno Personnel (#2).

<sup>461</sup> Enodo Interview with PRFA Leadership (#2).

<sup>462</sup> Enodo Interview with Cardno Personnel (#2).

<sup>463</sup> *Framework of Remediation Initiatives* at 20 (citations omitted).

<sup>464</sup> Cardno, “Remedy Framework Implementation Outline”, 22 September 2011, made available to Enodo in confidence, at 6.

<sup>465</sup> *Id.* at 8.

<sup>466</sup> Enodo Interview with Senior Barrick Personnel (#4); Enodo Interview with Cardno Personnel (#1).

<sup>467</sup> Enodo Interview with Cardno Personnel (#2) (“Cardno did not take any instructions from Barrick. Reporting was always to the PRFA.”).

<sup>468</sup> Enodo Interview with Senior Barrick Personnel (#4).

<sup>469</sup> Cardno, “Remedy Framework Implementation Outline” at 6.

<sup>470</sup> Enodo Interview with Cardno Personnel (#2).

<sup>471</sup> *Id.*

<sup>472</sup> Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#2); Enodo Interview with CAT Officer (#3).

<sup>473</sup> Interview Results, Appendix 1, Question 10.

<sup>474</sup> *Id.*

<sup>475</sup> See Section 6.A.2, above.

<sup>476</sup> See Section 6.G.2, below.

<sup>477</sup> Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#3); Enodo Interview with PRFA Leadership (#2).

<sup>478</sup> Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#3).

<sup>479</sup> Redacted claimant files made available to Enodo by Cardno in confidence.

<sup>480</sup> Enodo Interview with PRFA Leadership (#2).

<sup>481</sup> Enodo Interview with Sexual Violence Expert (#2); Enodo Interview with Sexual Violence Expert (#3).

<sup>482</sup> “PNG Farewells a Great Dame”, 16 May 2012, The Sydney Morning Herald, smh.com.

<sup>483</sup> Dame Kidu Letter of 24 March 2013.

<sup>484</sup> *Framework Backgrounder* at 2.

<sup>485</sup> Enodo Interview with Ume Wainetti.

<sup>486</sup> Rees at 15 (“[T]he provision of accountability—internal and, where appropriate, external—for the mechanism’s performance remains important and relates also to the other principles, including predictability and transparency.”).

<sup>487</sup> Enodo Interview with Senior Barrick Personnel (#4).

<sup>488</sup> Enodo Interview with Senior Barrick Personnel (#4\*) (noting that concerns about the Independent Expert being male were alleviated by the knowledge that the CAT officers would be the ones doing most of the “heavy lifting” from an engagement standpoint).

<sup>489</sup> Section 6.A.2.

<sup>490</sup> Section 6.G.2.

## 6.E: GUIDING PRINCIPLE 31(B)

(b) Accessible: 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.

### Relevant commentary:

Barriers to access may include a lack of awareness of the mechanism, language, literacy, costs, physical location and fears of reprisal.

**INDICATOR 12:** WAS INFORMATION ABOUT THE FRAMEWORK DISSEMINATED TO ALL POTENTIAL CLAIMANTS?

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**INDICATOR 12A:** WERE ANY LIMITATIONS ON PUBLIC DISSEMINATION REASONABLY NECESSARY TO PROTECT POTENTIAL CLAIMANTS' LEGITIMATE INTERESTS?

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**INDICATOR 13:** WERE ALL REASONABLE EFFORTS MADE TO OVERCOME ANY POTENTIAL LANGUAGE (AND LITERACY) BARRIERS POTENTIAL CLAIMANTS WOULD FACE?

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**INDICATOR 14:** WERE ALL REASONABLE EFFORTS MADE TO OVERCOME BARRIERS BASED ON THE FRAMEWORK'S PHYSICAL LOCATION?

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**INDICATOR 15:** WERE ALL REASONABLE EFFORTS MADE TO OVERCOME BARRIERS BASED ON THE FRAMEWORK'S OPERATING HOURS?

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**INDICATOR 16:** WERE ALL REASONABLE EFFORTS MADE TO ENSURE THE SECURITY OF CLAIMANTS WHO PARTICIPATED IN THE FRAMEWORK?

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### 6.E.1: INTERPRETATION

The interpretation of GP 31(b) is relatively straightforward. We have derived the following indicators by applying the text of the Principle and the Commentary<sup>491</sup>:

#### **INDICATOR 12: WAS INFORMATION ABOUT THE FRAMEWORK DISSEMINATED TO ALL POTENTIAL CLAIMANTS?**

This indicator is derived from the first clause of the Principle: “being known to all stakeholder groups for whose use they are intended.” It is also supported by the Commentary’s identification of “lack of awareness of the mechanism” as a potential barrier to access.

#### **INDICATOR 12A: WERE ANY LIMITATIONS ON PUBLIC DISSEMINATION REASONABLY NECESSARY TO PROTECT POTENTIAL CLAIMANTS’ LEGITIMATE INTERESTS?**

Indicator 12A is conceived to reflect the reality that public dissemination of a mechanism may not always be appropriate. But there ought to be reasonable limits on a business’s discretion not to disclose information about the mechanism publicly. For guidance on these limits, we looked to international law on access to justice. The UN Human Rights Committee has noted that courts may exclude the public from hearings only in the most limited of circumstances:

*“[C]ourts have the power to exclude all or part of the public for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice. Apart from such exceptional circumstances, a hearing must be open to the general public, including members of the media, and must not, for instance, be limited to a particular category of persons.”<sup>492</sup>*

Each of these exceptional grounds is justified by necessity in pursuit of a legitimate end. The purpose of public notice about forums for remedy is inextricable from the purpose of public access to specific hearings. The limit on discretion is accordingly strict and focused only on claimant interests rather than more amorphous public policy ends.

#### **INDICATOR 13: WERE ALL REASONABLE EFFORTS MADE TO OVERCOME ANY POTENTIAL LANGUAGE (AND LITERACY) BARRIERS POTENTIAL CLAIMANTS WOULD FACE?**

Indicator 13 is derived from the Commentary: “Barriers to access may include ... language, literacy ...”. We consider literacy under language because we understand that the vast majority of claimants were not literate. Explanations about the Framework were provided orally. To the extent a barrier exists, it is one and the same.

#### **INDICATOR 14: WERE ALL REASONABLE EFFORTS MADE TO OVERCOME BARRIERS BASED ON THE FRAMEWORK’S PHYSICAL LOCATION?**

Indicator 14 is derived from the Commentary: “Barriers to access may include ... physical location ...”.

#### **INDICATOR 15: WERE ALL REASONABLE EFFORTS MADE TO OVERCOME BARRIERS BASED ON THE FRAMEWORK’S OPERATING HOURS?**

Indicator 15 is not expressly called for in GP 31(b). The list of potential barriers, however, is not closed, and operating hours are a crucial element of accessibility, particularly in a community with limited transport infrastructure.

#### **INDICATOR 16: WERE ALL REASONABLE EFFORTS MADE TO ENSURE THE SECURITY OF CLAIMANTS WHO PARTICIPATED IN THE FRAMEWORK?**

Indicator 16 is derived from the Commentary: “Barriers to access may include ... fears of reprisal.” We have broadened it to capture the legitimate concerns that existed not only about reprisal from the PJV or its employees, but also from survivors’ families.<sup>493</sup>

### 6.E.2: ASSESSMENT OF INDICATOR 12

#### **WAS INFORMATION ABOUT THE FRAMEWORK DISSEMINATED TO ALL POTENTIAL CLAIMANTS?**

##### **6.E.2(A): DESIGN**

The Framework was not widely and publicly advertised in Porgera. Rather, the PRFA “relied on more targeted and grassroots engagement to inform victims of the existence of the Framework.”<sup>494</sup> That process involved representatives of

the PDWA reaching out directly and through their networks to women in the community; we understand that it also involved contact with organizations such as the Clinics and Human Rights Watch to identify eligible survivors.<sup>495</sup>

**INDICATOR 12A: WERE ANY LIMITATIONS ON PUBLIC DISSEMINATION REASONABLY NECESSARY TO PROTECT CLAIMANTS' LEGITIMATE INTERESTS?**

***i. Legitimate interest***

A “targeted and grassroots engagement” suffers clear deficiencies from the accessibility perspective: (i) it is difficult, if not impossible, to know if the information is getting to the right people; and (ii) for the eligible and legitimate claimants to learn of the Framework, save by chance, they would need to reveal a traumatic and private experience to the “right” person, without any protections of confidentiality, and with the full gamut of risks that exist for survivors of sexual violence in Porgera. The scale of this challenge was highlighted by the accounts we received in our CAT interviews and our review of Framework documents. Claimants often had no witnesses and had not told anyone of their suffering before meeting a CAT officer.

Notwithstanding these limitations, lack of public advertising may be justifiable in narrow circumstances. The threshold issue is the interest being protected. The decision not to publicize the Framework widely was based on the advice of the PDWA, experts in women’s issues in Porgera.<sup>496</sup> The concern they raised was that publicity would expose potential claimants to significant risk of revictimization at the hands of their families and others in the community.<sup>497</sup> In light of the well-recognized prevalence of domestic violence in Porgera, this was a reasonable and justifiable concern.<sup>498</sup> Notably, it was supported by two of the Framework’s prominent critics, Knuckey and Jenkin: “The mechanism’s implementers had legitimate concerns (which the authors share) about creating a broad, media-driven, and very public awareness campaign for the mechanism.”<sup>499</sup>

***ii. Justified by necessity***

That this course was recommended by credible local experts and supported by international experts, however, is not sufficient to justify the decision under the Guiding Principles. Given the importance of accessibility, any limitation on public dissemination should be *necessary* to protect claimants’

legitimate interests. Local and international experts noted that a public campaign would create security risks for claimants. The PRFA thus acted reasonably in heeding this advice and seeking an alternate strategy. But the issue was not binary: just because a public campaign would have been a mistake (which we do not question), it does not mean that a discreet campaign was the right or best answer. Before proceeding with the discreet awareness campaign, the PRFA should have considered whether it was reasonable to believe that public awareness of the Framework—and the concomitant risks to claimants—could be avoided at all in Porgera. If not, the cost in accessibility would bring only illusory benefits.

We find no reasonable basis for the PRFA to have believed that the existence of the Framework would remain confidential beyond claimants. First, information about the Framework was being posted online from at least 22 October 2012, when Barrick published the *Framework Backgrounder*.<sup>500</sup> The publication of further information—and thus the erosion of any institutional confidentiality—was accelerated by MiningWatch, which apparently did not accept the PRFA’s claimant-focused reason for discretion.<sup>501</sup> Second, for all its growth in the last 25 years, all experts we consulted maintain that Porgera remains an intimate community where news travels widely and fast. There was every reason to believe that individuals in the community would quickly start questioning the arrivals and departures—of the CAT and claimants—around the Women’s Welfare Office, which is just off Porgera Station’s main thoroughfare. Third, many of the staff within the Women’s Welfare Office were locals; they were likely to reveal to others in the community what they were doing, even if they did not reveal any confidential claimant information.

In short, while the claimant interest the PRFA sought to protect was entirely legitimate, the discreet approach to publicity was unlikely to advance or protect it. Institutional confidentiality was virtually certain to be breached, particularly once MiningWatch became involved. This is not to say that a widespread, public campaign was the answer. The finding is narrower. Given the importance of accessibility and the dangers to claimants of publicity, the PRFA should have taken the time to evaluate carefully other means of avoiding the risk of harm without compromising accessibility. Chief among these would have been expanding the Framework’s ambit to include *all* violence against women by PJV employees. That would at least have avoided the

public shame that every claimant said went along with making a claim. It would also have given each claimant the ability to explain her participation in the Framework to men in her family. As one of the few claimants who avoided abuse at the hands of her family explained: “My husband and relatives thought I was beaten by securities; I never mentioned rape.”<sup>502</sup>

The power to make this change did not necessarily lie with the PRFA, which was tasked with implementing the Framework as designed by Barrick. And it is impossible, in any event, to say with certainty that the same result would not have obtained if a broader Framework was implemented. The shortcoming in design, however, was one of process. The significance of the limitation and the magnitude of the harm posed to potential claimants warranted deeper consideration. As we discuss in Section 7: Conclusions and Recommendations, we believe that a Framework designed to address a broader array of harms would have been better able to ensure accessibility, predictability and equitability by allowing the PRFA to educate the public at large about the Framework’s processes.

### 6.E.2(B): IMPLEMENTATION

As a result of the decision to engage in a targeted and grassroots awareness campaign, there are good reasons to believe that a number of eligible and legitimate potential claimants never heard about the Framework. This likelihood was conceded by virtually every PRFA decision-maker we interviewed.<sup>503</sup> Indeed, our interviews revealed 13 claimants in just one community, Apalaka, in the Special Mining Lease area who had either never heard of the Framework or only heard of it relatively recently, and who believed they had legitimate claims. Our findings align with Knuckey and Jenkin’s recently published paper: “information spread very unevenly across villages, clans, and networks, was sometimes quite inaccurate ... and did not reach numerous potential claimants, in particular those who had moved away from Porgera.”<sup>504</sup>

Due to the inability to protect the Framework’s confidentiality, particularly in the wake of international stakeholder involvement, claimants themselves were exposed to serious risks for participating in the Framework. 52 of 62 successful claimants and 7 of 15 unsuccessful claimants raised fears of abuse by family members and of “shame” in the community as

barriers to accessing the Framework.<sup>505</sup> 44 of the 62 claimants we interviewed reported physical abuse or threats of such abuse at the hands of family members as a result of their participation in the Framework.<sup>506</sup> In the end, the discreet approach to publicizing the Framework offered only a cost in accessibility without any benefit in terms of claimant safety.

### 6.E.3: ASSESSMENT OF INDICATOR 13

*WERE ALL REASONABLE EFFORTS MADE TO OVERCOME ANY POTENTIAL LANGUAGE (AND LITERACY) BARRIERS POTENTIAL CLAIMANTS WOULD FACE?*

#### 6.F.3(A): DESIGN

The Framework’s design anticipated and addressed translation as important, repeatedly specifying: “At every step of the process, every claimant will be offered the services of a translator in a language of their choosing.”<sup>507</sup> During a mid-program review conducted by BSR in 2013, concerns were raised that some claimants were “unsure about processes or terms being used during their interviews with claims staff.”<sup>508</sup> As a result, we understand that protocols in the Framework documents, including in particular the *Manual*, were modified to ensure claimants knew of their right to translation services.<sup>509</sup>

#### 6.E.3(B): IMPLEMENTATION

The CAT officers and Cardno stated that these services were implemented as designed, with translation support consistently available to claimants by representatives of the PDWA.<sup>510</sup> We were unable to speak to any of the translators, as none were available during the Assessment Team’s visit to Porgera. We thus have no basis to judge their language abilities or training.

Our interviews with claimants, however, raised a few concerns about the translation quality. 44 of 62 successful claimants used a translator in their CAT meetings.<sup>511</sup> 13 of these claimants expressed dissatisfaction or discomfort with the translator; 12 claimed it was because the translator spoke too fast or did not properly explain the process. One claimant expressed concern that the translator would breach confidentiality. Nonetheless, a clear majority of successful claimants who used a translator, 31 of 44, expressed no concern about the services. Only 3 of the 15 unsuccessful claimants used a translator; each of these individuals said they were happy with the services. In any event,

given the diversity of languages spoken in Papua New Guinea and the fact that many claimants were not Engan<sup>512</sup>, it may have been impossible to alleviate translation concerns entirely.

#### 6.E.4: ASSESSMENT OF INDICATOR 14

*WERE ALL REASONABLE EFFORTS MADE TO OVERCOME BARRIERS BASED ON THE FRAMEWORK'S PHYSICAL LOCATION?*

##### 6.E.4(A): DESIGN

The CAT office was located in Porgera Station, one of the two main towns in Porgera (the other being Paiam), in an existing Women's Welfare Office close to public transportation and the town's main thoroughfare and market. We understand that the location was chosen for four reasons: (i) it provided "functional infrastructure"; (ii) it was "relatively secure"; (iii) it was outside of the mine and independent of the PJV; and (iv) because it was part of the Women's Welfare Office, which provided a host of other services, claimants could plausibly enter without compromising confidentiality.<sup>513</sup>

We find no reason to believe that another location would have mitigated claimant accessibility challenges. All the PRFA personnel and Porgeran community leaders we spoke to thought that, while the location was not perfect, it was the best possible option.<sup>514</sup> One of the accessibility challenges they acknowledged was the ethnic tension that made it difficult for some potential claimants to travel to Porgera Station.<sup>515</sup> But that challenge would have, at best, remained the same, and more likely been exacerbated, with any other location. A mobile office may have helped with physical accessibility, but only at a steep price in terms of functionality and security for claimants and CAT officers.<sup>516</sup>

##### 6.E.4(B): IMPLEMENTATION

Only one of the claimants and non-claimants we interviewed mentioned physical accessibility of the PRFA office as a challenge.<sup>517</sup> Rather, to the extent the location posed claimants' accessibility challenges, it was because it was on a public thoroughfare, and thus unable to protect confidentiality. A number of claimants identified the "shame" in the community and the security risks vis-à-vis their families as the real barriers to access.<sup>518</sup> While these are critical accessibility challenges that ought to have been addressed, they are properly considered under Indicator 16, dealing with security.

#### 6.E.5: ASSESSMENT OF INDICATOR 15

*WERE ALL REASONABLE EFFORTS MADE TO OVERCOME BARRIERS BASED ON THE FRAMEWORK'S OPERATING HOURS?*

##### 6.E.5(A): DESIGN

The challenge for the PRFA was to ensure that the Framework was staffed with appropriately qualified personnel while also being accessible to claimants in remote areas around the Porgera mine. As all sexual violence experts familiar with Papua New Guinea, and Porgera in particular, mentioned to us, finding appropriately qualified Porgerans to serve as CAT officers would have been a tall order.<sup>519</sup> (It may, in any event, have been counterproductive by heightening claimant fears about confidentiality.<sup>520</sup>) Thus, it was not possible for the Framework to establish a permanent presence in Porgera.<sup>521</sup> Instead, the CAT officers and PRFA leadership would have "rotations" in Porgera to meet with claimants, before returning to Port Moresby to process the claims.<sup>522</sup>

##### 6.E.5(B): IMPLEMENTATION

There were 15 rotations between 20 October 2012 and 26 November 2013 that involved the CAT team meeting with claimants.<sup>523</sup> Initially, these were two-week rotations, once per month.<sup>524</sup> After the first four rotations, however, the PRFA concluded that two weeks were not necessary, as they were noticing a steep drop-off in claims after the first week.<sup>525</sup> We understand that this was because all the new claimants who had learned of the Framework while the CAT was away from Porgera would arrive in the first week.<sup>526</sup> Given the discreet, word-of-mouth strategy to advertise the Framework, further claimants would then learn of the Framework from peers. From then on, each rotation was approximately one week. Importantly, claimants did not perceive the Framework's hours as posing an accessibility challenge. Of the 62 successful claimants and 15 unsuccessful claimants we asked, only 4—of which only 1 was unsuccessful—identified operating hours as a barrier to access.<sup>527</sup>

#### 6.E.6: ASSESSMENT OF INDICATOR 16

*WERE ALL REASONABLE EFFORTS MADE TO ENSURE THE SECURITY OF CLAIMANTS WHO PARTICIPATED IN THE FRAMEWORK?*

**6.E.6(A): DESIGN**

The chief security challenge facing claimants was the risk of abuse by family members. Security and confidentiality were thus inextricably interwoven. As discussed above, confidentiality considerations played a key role in the Framework's physical location in the Women's Welfare Office, so that claimants would not be marked simply for approaching the Framework.<sup>528</sup> We understand that measures to ensure confidentiality of interviews, to the extent physically possible in the Women's Welfare Office, were also put in place, including segregation of spaces for interviews.<sup>529</sup> These were the best measures the Framework could reasonably have put in place in Porgera to ensure claimant confidentiality and security without compromising other elements of accessibility.

These measures, however, were counterbalanced by a few threats to confidentiality. First, all claimants had to register with an administrator, who was a community member and a representative of the PDWA. Second, the translators were also community members, whose background in engaging with survivors of sexual violence is unclear. Third, the physical space—while reasonably advanced in Porgera—could not offer any guarantee of confidentiality when claimants were telling their stories. Fourth, as is common, there were private security guards from the community manning the gates, who would both see people entering and, we have been told, wander in and out of the interview area. Fifth, the central location of the Women's Welfare Office ultimately meant that all entering and exiting could be easily identified by those on the main thoroughfare.

The threats to confidentiality would likely have existed no matter the physical location or design of the space. Porgera's intimacy and lack of infrastructure are inescapable realities. The threats to confidentiality were not material in and of themselves. They were material because the Framework focused on sexual violence and survivors legitimately fear opprobrium and abuse in Porgera.

**6.E.6(B): IMPLEMENTATION**

The risks to confidentiality ultimately materialized. Everyone involved with the Framework admitted that the claimants all knew one another and that they were well known in the community.<sup>530</sup> And the lack of confidentiality may have subjected

the claimants to serious security risks: 44 of 62 successful claimants reported physical abuse or threats of such abuse at the hands of family members as a result of their participation in the Framework.<sup>531</sup> While the claimants do not blame the Framework for the information becoming public—52 of 62 claimants said they believed the PRFA kept their information confidential<sup>532</sup>—it is reasonable to believe that credible security concerns proved a barrier to access for potential claimants. 52 of 62 successful claimants and 7 of 15 unsuccessful claimants raised fears of abuse by family members and of “shame” in the community as barriers to accessing the Framework.<sup>533</sup> The PRFA leadership, Porgeran community leaders, the Framework's Community Liaison Officer, and the CAT officers all accept that legitimate and eligible claimants likely did not have come forward because of these security concerns.<sup>534</sup>

**6.E.7: CONCLUSION ON GP 31(B)**

In general, the PRFA took all reasonable measures to ensure the Framework's accessibility. Claimants confirm that there were no barriers to access based on the Framework's physical location or operating hours. While it is of concern that a substantial minority of claimants cited difficulties with the translation services, that seems to be an inevitable operating constraint in Porgera. The one notable barrier to access was related to security (and confidentiality). It is tempting to think that a more remote location would have obviated, if not avoided, these difficulties. But as a practical matter in Porgera that seems unlikely—both because of the community's intimacy and the lack of infrastructure—and certainly not without imposing a steep cost on the other dimensions of accessibility.

Arguably the most problematic element of accessibility was awareness amongst potential claimants. This was limited by design to protect claimant confidentiality. Given how foundational awareness of an OGM is to ensuring accessibility, however, public awareness-raising should only be disregarded if necessary to protect affected stakeholders' interests. That was not the case here. With or without public outreach, confidentiality of the Framework was always a chimera. So while the interest in protecting claimants was legitimate and sincere, the outreach strategy chosen was not reasonably necessary to protect them, because it was doomed from the outset.

When these accessibility challenges are distilled, what emerges is that the Framework was its own barrier to access. That is, the Framework's greatest accessibility challenge was latent and inherent in its design. Claimant concerns about location, confidentiality and security largely flowed from the Framework's exclusive focus on sexual violence. Claimants legitimately

feared community stigma and physical harm for approaching the Framework and being branded survivors of sexual violence. The risk to claimants thus increased in direct proportion to the public awareness and physical accessibility of the Framework. This created a Gordian knot: the distinct dimensions of accessibility were in constant tension.

<sup>491</sup> We are not expressly considering "cost" in this assessment because access to the Framework was free and cost was a non-issue according to all our claimant interviews.

<sup>492</sup> UN Human Rights Committee, General Comment 32: ICCPR 14, Right to equality before courts and tribunals and to a fair trial, 23 August 2007, CCPR/C/GC/32, ¶129 [General Comment 32].

<sup>493</sup> Knuckey and Jenkin, fn. 49 "[I]n Porgera, an important concern was that if the entire Porgeran community (that is, including men) knew about the mechanism and where its complaint office was located, this could have—given the pervasive shaming and harm to sexual assault victims in the area—endangered women or prevented them from making claims due to fear.”].

<sup>494</sup> Enodo Interview with Cardno Personnel (#1).

<sup>495</sup> *Id.*

<sup>496</sup> Enodo Interview with PRFA Leadership (#2); Enodo Interview with Cardno Personnel (#1); Enodo Interview with Senior Barrick Personnel (#4); Enodo Interview with Barrick Counsel (#3); Enodo Interview with Sexual Violence Expert (#3).

<sup>497</sup> *Id.*

<sup>498</sup> *Gold's Costly Dividend* at 38 (“Porgera, like many other parts of Papua New Guinea’s notoriously restive Enga province, is plagued by diverse forms of violence ranging from tribal warfare and armed robbery to widespread domestic violence.”).

<sup>499</sup> Knuckey and Jenkin, fn. 49.

<sup>500</sup> *Framework Backgrounder*.

<sup>501</sup> MiningWatch started publicly disseminating criticisms of the Framework from at least 30 January 2013. In response to what it believed were false allegations, Barrick was then forced to publish detailed information, including the *Framework of Remediation Initiatives*, the *Manual*, and various news releases on the Framework starting on 1 February 2013.

<sup>502</sup> Enodo Claimant Interview (#39).

<sup>503</sup> Enodo Interview with PRFA Leadership (#1); Enodo Interview PRFA Leadership (#2); Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#2); Enodo Interview with CAT Officer (#3).

<sup>504</sup> Knuckey and Jenkin at 8.

<sup>505</sup> Interview Results, Appendix 1 (Question 8—“Did you find it difficult to access the Remedy Framework? If yes, please tell me why: (i) location of the office; (ii) hours of operation; (iii) language; (iv) security; (v) other difficulties?”).

<sup>506</sup> Interview Results, Appendix 1 (Question 28—“Have you suffered any threats or injury as a result of participating in the Remedy Framework or receiving any remedies?”).

<sup>507</sup> *Manual* at 2; *see also, id.* at 21 (“You will also be offered translation services.”); and *Framework of Remediation Initiatives* at 21 (“Every Claimant will be offered services of a translator”).

<sup>508</sup> Barrick, “A Summary of Recent Changes to the Porgera Remediation Framework”, 7 June 2013, barrick.com.

<sup>509</sup> Enodo Interview with Senior Barrick Personnel (#4); Enodo Interview with Cardno Personnel (#1).

<sup>510</sup> Enodo Interview with Cardno Personnel (#1).

<sup>511</sup> Interview Results, Appendix 1 (Question 16—“Did you feel comfortable with the translator used in your meetings with the Claims Assessment Team?”).

<sup>512</sup> Enodo Interview with PRFA Leadership (#1) (noting that “most claimants” were not from the community); Enodo Interview with CAT Officer (#1); Enodo Interview with Community Leader (#1); Enodo Interview with Community Leader (#2); Enodo Interview with ATA Leadership.

<sup>513</sup> Enodo Interview with Cardno Personnel (#1); Enodo Interview with Senior Barrick Personnel (#4).

<sup>514</sup> Enodo Interview with PRFA Leadership (#2); Enodo Interview with Porgera Community Leader (#1); Enodo Interview with Porgera Community Leader (#2); Enodo Interview with Sexual Violence Expert (#3); Enodo Interview with PDWA Leadership.

<sup>515</sup> Enodo Interview with PRFA Leadership (#2); Enodo Interview with Porgera Community Leader (#1); Enodo Interview with Porgera Community Leader (#2).

<sup>516</sup> Enodo Interview with PRFA Leadership (#2). On our first visit to one remote community, Apalaka, we were greeted by a group of very cordial men wielding machetes. They treated us with the utmost respect and consideration, but there were those in our party who genuinely feared for their safety to the extent that they refused to leave the vehicle. We understand from conversations with a number of community members and PJV personnel that tensions with certain communities have at times reached the

point where vehicles associated with Barrick have been attacked.

<sup>517</sup> Interview Results, Appendix 1 (Question 8—“Did you find it difficult to access the Remedy Framework? If yes, please tell me why: (i) location of the office; (ii) hours of operation; (iii) language; (iv) security; (v) other difficulties?”).

<sup>518</sup> *Id.* (39 of 62 successful claimants and 6 of 15 unsuccessful claimants pointed to “shame” as an accessibility challenge).

<sup>519</sup> Enodo Interview with Sexual Violence Expert (#2); Enodo Interview with Sexual Violence Expert (#3).

<sup>520</sup> Enodo Interview with Cardno Personnel (#2).

<sup>521</sup> From September 2013, the PRFA did maintain a permanent presence in Porgera by hiring Everlyne Sap, formerly of the Women’s Welfare Office, as a Community Liaison Officer (Enodo Interview with Cardno Personnel (#2); Enodo Interview with Everlyne Sap).

<sup>522</sup> Enodo Interview with Cardno Personnel (#1); Enodo Interview with Senior Barrick Personnel (#4).

<sup>523</sup> Enodo Interview with Senior Barrick Personnel (#5); Enodo Interview with CAT Officer (#1).

<sup>524</sup> *Id.*

<sup>525</sup> Enodo Interview with Cardno Personnel (#1); Enodo Interview with Cardno Personnel (#2); Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#2); Enodo Interview with CAT Officer (#3).

<sup>526</sup> Enodo Interview with CAT Officer (#1); Enodo Interview with Cardno Personnel (#2).

<sup>527</sup> Interview Results, Appendix 1 (Question 8—“Did you find it difficult to access the Remedy Framework? If yes, please tell me why: (i) location of the office; (ii) hours of operation; (iii) language; (iv) security; (v) other difficulties?”).

<sup>528</sup> Enodo Interview with Cardno Personnel (#1); Enodo Interview with Senior Barrick Personnel (#4).

<sup>529</sup> Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#2); Enodo Interview with CAT Officer (#3).

<sup>530</sup> Enodo Interview with Senior Barrick Personnel (#4); Enodo Interview with Cardno Personnel (#1); Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#2); Enodo Interview with CAT Officer (#3); Enodo Interview with Everlyne Sap.

<sup>531</sup> Interview Results, Appendix 1, Question 28.

<sup>532</sup> *Id.* (Question 20—“Do you believe that all the information you shared was kept private and confidential?”).

<sup>533</sup> Interview Results, Appendix 1 (Question 8—“Did you find it difficult to access the Remedy Framework? If yes, please tell me why: (i) location of the office; (ii) hours of operation; (iii) language; (iv) security; (v) other difficulties?”).

<sup>534</sup> Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#2); Enodo Interview with CAT Officer (#3); Enodo Interview with Everlyne Sap; Enodo Interview with PRFA Leadership (#1); Enodo Interview with PRFA Leadership (#2); Enodo Interview with Porgera Community Leader (#1); Enodo Interview with Porgera Community Leader (#2).

## 6.F: GUIDING PRINCIPLE 31(C)

(c) Predictable: 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.

### Relevant commentary:

In order for a mechanism to be trusted and used, it should provide public information about the procedure it offers. Time frames for each stage should be respected wherever possible, while allowing that flexibility may sometimes be needed.

**INDICATOR 17:** WAS INFORMATION ABOUT THE FRAMEWORK'S PROCESS DISSEMINATED IN A WAY THAT CLAIMANT'S COULD UNDERSTAND?

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**INDICATOR 18:** WAS INFORMATION ABOUT THE FRAMEWORK'S REMEDY OPTIONS DISSEMINATED IN A WAY THAT CLAIMANTS COULD UNDERSTAND?

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**INDICATOR 19:** DID THE PROCESS FOLLOW THE TIMELINES PREVIEWED IN THE FOUNDATIONAL DOCUMENTS?

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### 6.F.1: INTERPRETATION

Predictability is a core element of legitimacy and equitability. An OGM needs to provide a clear decision-making process to ground claimants' legitimate expectations. That decision-making process must be respected to meet those legitimate expectations. Otherwise, the Framework risks eroding stakeholder trust and undermining legitimacy: claimants cannot reasonably consent to an OGM when processes and outcomes are arbitrary. The foundation of predictability is claimants' reasonable understanding, without which there is nothing that they can predict.

There are two dimensions to assessing the claimants' reasonable understanding of the Framework. The first considers Barrick's efforts to disseminate sufficient information about the Framework for stakeholders to understand the procedure and possible outcomes. That is, was the procedure "clear"?<sup>535</sup> The second considers claimants' actual understanding of the information disseminated. That is, was the process "known"?<sup>536</sup> These two elements together ground claimants' legitimate expectations regarding the Framework.<sup>537</sup> They fit well into the model of this assessment, design and implementation. That last element of predictability is a determination of whether the "clear and known" procedure was respected in fact.

From these parameters, we derive three indicators:

**INDICATOR 17: WAS INFORMATION ABOUT THE FRAMEWORK'S PROCESS DISSEMINATED IN A WAY THAT CLAIMANTS COULD UNDERSTAND?**

**INDICATOR 18: WAS INFORMATION ABOUT THE FRAMEWORK'S REMEDY OPTIONS DISSEMINATED IN A WAY THAT CLAIMANTS COULD UNDERSTAND?**

**INDICATOR 19: DID THE PROCESS FOLLOW THE TIMELINES PREVIEWED IN THE FOUNDATIONAL DOCUMENTS?**

### 6.F.2: ASSESSMENT OF INDICATOR 17

#### 6.F.2(A): DESIGN

The Framework's foundational documents are detailed and specific regarding the process for resolving a claim and the range of possible outcomes. They are also complex. In the words

of one Guiding Principles expert, they read "as if they were drafted by lawyers for lawyers."<sup>538</sup> Indeed, given the prevalent illiteracy in Porgera, the documents themselves are unhelpful in assessing Barrick's efforts to disseminate the information about the Framework in a way that claimants could understand.

Barrick understood this reality. The *Manual* thus places a great onus on the CAT to convey the Framework procedure to claimants during their first meeting.<sup>539</sup> During the initial meeting, the CAT was expected to explain:

- the program's process—including the eligibility and legitimacy criteria and confidentiality protections—"in a language the Claimant can understand".<sup>540</sup>
- the Framework's independence of Barrick and the PJV.<sup>541</sup>
- that a "support person" can join the claimant, and that the Framework can arrange for one if necessary.<sup>542</sup>
- the claimant's obligation to obtain independent legal advice, funded if necessary by the Framework.<sup>543</sup>
- the claimant's alternative grievance options, including the site-level OGM and "formal legal processes".<sup>544</sup>
- the claimant's right to bring criminal actions against the perpetrators.<sup>545</sup>

The Framework was thus designed to ensure predictability through the initial meeting, which would also establish the foundation for equitability. It was critical that the CAT convey all the requisite information clearly and accurately. The importance of this first meeting was heightened by the "targeted and grassroots" outreach strategy for the Framework: for all intents and purposes, it was the exclusive venue for potential claimants to receive clear and comprehensive information about the Framework.

#### 6.F.2(B): IMPLEMENTATION

In practice, the CAT seems to have been unable to bear the burden of clearly communicating the Framework's process. Aspects of this have already been discussed, particularly the CAT's conflation of sexual violence with rape.<sup>546</sup> In addition, the CAT failed to tell

claimants that they could retain their own lawyer at the PRFA's expense; none of the CAT officers realized claimants had that right.<sup>547</sup> Nor, for that matter did they explain to claimants the role of the ILA as their advisor during the process; rather, the CAT uniformly viewed the ILA's role as assuring the claimants told the truth.<sup>548</sup> Beyond these procedural protections, a substantial minority of claimants—23 of 57 successful; 5 of 15 unsuccessful—say they were never told about the requirements to receive a remedy under the Framework.<sup>549</sup> 29 of 62 successful claimants and 8 of 15 unsuccessful claimants left their first meeting with the CAT without understanding the Framework's process.<sup>550</sup> In the words of one claimant: "they would never talk to me and explain the process, so for me it was never clear."<sup>551</sup> According to another: "they only got our story and told us to leave."<sup>552</sup> This lack of understanding significantly compromised the Framework's predictability: there was no foundation for claimants' legitimate expectations.

We do not attribute this implementation error to the CAT alone. That critical misunderstandings about the rights of claimants and role of the ILA were shared by all CAT officers suggests an *institutional* weakness in administering the Framework. Given the consistent misapprehensions, the CAT appears to have been insufficiently trained in the Framework's core substantive and procedural elements. They were also insufficiently monitored. With fairly complex information to be communicated to socio-economically and psychologically vulnerable claimants orally and in person, we believe that a reasonable administrator would have implemented quality controls at this point of contact. That should have involved some verification scheme. The modalities of the precise scheme are flexible, and need not be onerous in terms of cost or time. It could, for instance, have involved recording certain interviews (with claimants' consent) for diagnostic purposes. Alternatively, it could have involved having an observer sit in on random interviews or meet with certain claimants immediately after their first session to confirm their understanding. The important element is simply quality assurance. We understand that no such measure was undertaken.<sup>553</sup> (As we will discuss under GP 31(d), the need for such assurance was equally critical, if not more so, with the ILA.) The failure to do so meant that the Framework was unpredictable to claimants from the moment it was launched.

### 6.F.3: ASSESSMENT OF INDICATOR 18

*WAS INFORMATION ABOUT THE FRAMEWORK'S REMEDY OPTIONS DISSEMINATED IN A WAY THAT CLAIMANTS COULD UNDERSTAND?*

#### 6.F.3(A): DESIGN

We have addressed under GP 31(h), above, the dissonance between the promised "individualized" approach to determining remedy and the standardized approach that was actually implemented under the Framework.<sup>554</sup> That discussion is relevant to the predictability of the Framework's remedy options and process for determining them as it relates to international and educated stakeholders. The written documents are less relevant when it comes to claimant expectations. In terms of design, then, the discussion under Indicator 17 applies equally here: that is, predictability turns on the information the *Manual* expected the CAT to share during meetings with claimant.

In this regard, once the Statement of Claim was lodged after the first meeting, the CAT was to have a follow-up meeting with each claimant to explain the range of remedial options available to her, and to discuss which ones were appropriate.<sup>555</sup> The Framework's design thus specifically accounted for outcome predictability in a format claimants could understand.

#### 6.F.3(B): IMPLEMENTATION

The relevant concern under implementation is what was communicated about the remedy process and options by the CAT officers to claimants in person. Our interviews with CAT officers suggest their understanding of available remedy options differed substantially. One officer continued to think that no cash compensation would be available until the day cash was actually disbursed, believing instead that there would just be "in-kind" small business support.<sup>556</sup> Another felt that she had to make every package worth K20,000, no matter the specific facts.<sup>557</sup> A third was aware that cash compensation was available and believed there was flexibility regarding the amount. But she was also committed never to letting the claimants know that cash compensation was available, "because then the men get involved".<sup>558</sup>

The three CAT officers all shared two fundamental beliefs relevant to the predictability of remedy options. First, in terms of process, the CAT officers uniformly felt they had very little discretion when it came to remedies.<sup>559</sup> As a result, the discussion with claimants was rather limited in scope. In the words of one officer: “the claimants did not really have input into the remedies.”<sup>560</sup> Second, they all understood, until the very end, that any compensation in cash or resources would be tied to ongoing business support and training for the claimants to develop independent businesses.<sup>561</sup>

The CAT’s misunderstanding, or unwillingness to express, the remedies claimants should expect resulted in claimant disappointment. When asked whether the remedies they received under the Framework were what they expected, 60 of 62 successful claimants said ‘no’.<sup>562</sup> And 59 of 62 felt that they were not treated fairly by the Framework.<sup>563</sup> While the numbers are almost identical, the explanations for the two answers differed in important ways. When it came to fairness, most claimants referred to the relative amounts received by the ATA Claimants. But when it came to expectations, most claimants referred to the failure to provide the remedies they believed they had been promised. Poultry and pig farms were the most commonly mentioned of these projects. The other most common claimant grievances were that they did not receive the promised school fees or fees for medical care.

From our claimant and CAT interviews, it seems that, in addition to the omnipresent settlement with the ATA claimants, the source of much claimant dissatisfaction is expectation dissonance. The CAT led claimants to believe that they would receive small-business support, not cash. Claimants reasonably did not expect cash. As a result, when they actually received cash compensation, they did not associate it with the agreed remedy. The one self-identified ATA claimant we interviewed—who had withdrawn from the Framework process—adds support for this view: “I left because I never heard them mention anything about money. I only heard them talk about chickens, a piggery and second-hand clothes.”<sup>564</sup> While arguably a boon—all claimants wanted cash from the beginning<sup>565</sup>—because it was unexpected, the money payment did not meet the claimants’ expectation of small-business support.

The lack of substantive predictability about the remedy options was premised on shifting PRFA policy and noble CAT intentions. As discussed under GP 31(a), the policy on monetary compensation changed over the course of Framework’s operation, driven by international stakeholder concerns and Barrick’s pressure to ensure that the remedies were of the right quantum. Despite this shift (and in one case seemingly unaware of it) the CAT officers did their best not to discuss monetary compensation, focusing instead only on the medical care, school fees and business-support elements of the remedy. By all accounts, the CAT’s reticence to discuss money was driven by a sincere (and, sadly, justified) desire to protect claimants from abuse at the hands of their families.

The PRFA’s decision to start awarding remedy packages with substantial cash components—every successful claimant received K20,000 in cash (of the K23,630 average-value package)<sup>566</sup>—seems to have affected the Framework’s business-support ambitions. We understand from the PRFA leadership, the CAT, and a sexual violence expert consulted early in the process that the Framework’s initial objective was to provide ongoing business support to all successful claimants.<sup>567</sup> We have not been able to determine exactly what the PRFA had planned logistically in this regard, only a shared wistfulness that it could not be fulfilled.<sup>568</sup> Detailed plan development may have better grounded claimant expectations and buttressed the Framework’s initial, empowering ambition. Ultimately, before receiving compensation, all successful claimants attended a five-day workshop with training on financial literacy and HIV/AIDS.<sup>569</sup> Compensation was disbursed by Deloitte directly into claimant accounts soon afterwards.<sup>570</sup>

One person with intimate knowledge of the Framework’s implementation noted that s/he believed the workshop was the moment sentiment turned against the Framework: whereas there had been great hope that the business support would be meaningful before that point, the workshop itself was not tailored in any way to specific projects and proved difficult for claimants to follow, due both to content and language difficulties. In his or her view, soon after that, claimants, CAT officers and community leaders who had been supportive of the Framework became disillusioned with its ability to provide the novel and empowering remedies that it had promised.

As we will discuss in more detail under 31(f), however, it is not clear to us that the failure here is one of communication. The PRFA's initial resistance towards monetary compensation proved prescient. The claimants we interviewed shared horrifying accounts of their abuse by family members seeking their "cut" of the money:

- "I was beaten and abused by my husband. He stills does. I was left with nothing."<sup>571</sup>
- "When cashing the money my relatives and family were there with bush knives to get it."<sup>572</sup>
- "My children and husband attacked me and got all the money."<sup>573</sup>
- "My husband cut me with a bush knife, removed me from the house and took all the money as his compensation for my bride price."<sup>574</sup>
- "My hands are swollen because my son and my husband beat me for the money."<sup>575</sup>

Rather than the lack of consistent transparency regarding the cash component of regarding remedy packages, it may be that the lack of constancy in policy was the Framework's vice.

#### 6.F.4: ASSESSMENT OF INDICATOR 19

*DID THE PROCESS FOLLOW THE TIMELINES PREVIEWED IN THE FOUNDATIONAL DOCUMENTS?*

##### 6.F.4(A): DESIGN

In accordance with GP 31(c), the Framework's design was very detailed about expected timelines. The *Manual* provides clear and precise expectations regarding decision timing: (i) following the preparation of the Statement of Claim, the CAT should "make every reasonable effort to prepare the Preliminary Report within 14 days"<sup>576</sup>; (ii) the Full Report—including the CAT's remedy recommendations—should be prepared "within 28 days of completion of the Preliminary Report"<sup>577</sup>; (iii) the Independent Expert should then "make every reasonable effort" to review the Full Report and complete his assessment within 14 days<sup>578</sup>; (iv) should the Independent Expert's determination be appealed, the Review Panel is expected to complete its assessment within

seven days of receiving a Statement of Arguments for Appeal<sup>579</sup>. There is no fixed date set in the *Manual* for the signing of the settlement agreement or the provision of remedies.<sup>580</sup>

##### 6.F.4(B): IMPLEMENTATION

We do not have definitive information on how well the timelines were followed in practice, as we have only seen four complete (redacted) case files. These files closely followed the *Manual's* expectations. The CAT officers generally believed that timelines were followed, and their accounts are consistent about the long hours worked to ensure that claims were processed according to the set timelines.<sup>581</sup> We understand that the process for signing the settlement agreement was on a staggered basis, to ensure availability of the appropriate Barrick representative.<sup>582</sup> The financial component of remedies were paid to all claimants at the same time, no matter when they lodged their claim.<sup>583</sup> The timeline for disbursement of remedies was necessary to ensure that claimants had received the financial literacy and HIV/AIDS training that the Framework wanted to provide to empower survivors and minimize the risk that claimants would be harmed.<sup>584</sup> Based on the lack of clarity in the initial meetings, however, we believe that actually following timelines may not have been material from a predictability standpoint, as claimants did not know what to expect.

##### 6.F.5: CONCLUSION ON GP 31(C)

The Framework provided for the shaping of claimants' legitimate expectations through individual meetings with the CAT. The initial meeting was critical in this regard, as a tremendous amount of complex information was to be shared with socio-economically disadvantaged survivors of sexual violence at a particularly vulnerable moment. If all that information had, in fact, been communicated as envisioned, every claimant would have had a basis for her legitimate expectations. Unfortunately, based on the claimants' confusion about the Framework's process and the CAT's divergent understandings of likely remedies, it does not seem that the information was clear, consistent or accurate.

The CAT officers shared critical misunderstandings about the Framework's process, leaving claimants largely unsure of how it would proceed. Better CAT training and some basic elements of quality control by the administrator could have mitigated the risk

of these misunderstandings. When it came to remedy options, the Framework’s institutional ambivalence towards monetary compensation crippled any hope of predictability, particularly since CAT officers retained the original, anti-compensation

posture even as the PRFA’s policy towards compensation shifted. The result was a universal dissatisfaction by the claimants, whose legitimate expectations were left unmet.

<sup>535</sup> GP 31(c) (“Predictable: providing a clear and known procedure ...”).

<sup>536</sup> *Id.*

<sup>537</sup> Actual understanding is an insufficient barometer for two reasons. First, how information is interpreted by stakeholders is to a great extent outside the OGM’s control. Second, it is impossible to conceive of a practically applicable concept of predictability around idiosyncratic or unreasonable expectations.

<sup>538</sup> Enodo Interview with Guiding Principles Expert (#2). When conducting our assessment, we were told a number of times that there were no Tok Pisin words for the concepts relevant to the Framework—let alone Iplili translations.

<sup>539</sup> *Manual* at 3-4.

<sup>540</sup> *Id.* at 3.

<sup>541</sup> *Id.*

<sup>542</sup> *Id.*

<sup>543</sup> *Id.*

<sup>544</sup> *Id.*

<sup>545</sup> *Id.*

<sup>546</sup> See Section 6.A.2.

<sup>547</sup> Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#2); Enodo Interview with CAT Officer (#3).

<sup>548</sup> *Id.*

<sup>549</sup> Interview Results, Appendix 1 (Question 11—“Did she explain to you the meaning of sexual violence and the requirements to obtain a remedy?” Answers recorded as two separate questions.).

<sup>550</sup> *Id.* (Question 12—“After your first meeting with the Remedy Framework team, did you feel that the process was clear?”).

<sup>551</sup> Enodo Claimant Interview (#20).

<sup>552</sup> Enodo Claimant Interview (#28).

<sup>553</sup> Enodo Interview with Cardno Personnel (#2).

<sup>554</sup> Section 6.C.2(B).

<sup>555</sup> *Id.* at 6.

<sup>556</sup> Enodo Interview with CAT Officer (#1).

<sup>557</sup> Enodo Interview with CAT Officer (#2). The CAT would recommend, not determine, remedies; the Independent Expert would make the ultimate determination.

<sup>558</sup> Enodo Interview with CAT Officer (#3).

<sup>559</sup> Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#2); Enodo Interview with CAT Officer (#3).

<sup>560</sup> Enodo Interview with CAT Officer (#1).

<sup>561</sup> Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#2); Enodo Interview with CAT Officer (#3).

<sup>562</sup> Interview Results, Appendix 1 (Question 23—“Were these the remedies you wanted and expected?”).

<sup>563</sup> *Id.* (Question 27—“Did you feel that you were treated fairly by the Remedy Framework?”).

<sup>564</sup> Enodo Claimant Interview (#53).

<sup>565</sup> Enodo Interview with PRFA Leadership (#1); Enodo Interview with PRFA Leadership (#2); Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#2); Enodo Interview with CAT Officer (#3); Enodo Interview with Senior Barrick Personnel (#1); Enodo Interview with Senior Barrick Personnel (#4).

<sup>566</sup> Interview Results, Appendix 1 (Question 23—“Were these the remedies you wanted and expected?”).

<sup>567</sup> Enodo Interview with PRFA Leadership (#1); Enodo Interview with PRFA Leadership (#2); Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#2); Enodo Interview with CAT Officer (#3); Enodo Interview with PDWA; Enodo Interview with Sexual Violence Expert (#3).

<sup>568</sup> *Id.*

<sup>569</sup> Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#2); Enodo Interview with CAT Officer (#3).

<sup>570</sup> Enodo Interview with PRFA Leadership (#1); Enodo Interview with PRFA Leadership (#2); Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#2); Enodo Interview with CAT Officer (#3); Enodo Interview with PDWA; Enodo Interview with Sexual Violence Expert (#3).

<sup>571</sup> Enodo Claimant Interview (#7).

<sup>572</sup> Enodo Claimant Interview (#8).

<sup>573</sup> Enodo Claimant Interview (#9).

<sup>574</sup> Enodo Claimant Interview (#12).

<sup>575</sup> Enodo Claimant Interview (#20).

<sup>576</sup> *Manual* at 6.

<sup>577</sup> *Id.* at 7. The same timeline holds for a finding that the claim is illegitimate or ineligible.

<sup>578</sup> *Id.* at 9.

<sup>579</sup> *Id.* at 10.

<sup>580</sup> *Id.* at 11.

<sup>581</sup> Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#2); Enodo Interview with CAT Officer (#3).

<sup>582</sup> Enodo Interview with CAT Officer (#1).

<sup>583</sup> Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#2); Enodo Interview with CAT Officer (#3); Enodo Interview with PRFA Leadership (#1); Enodo Interview with PRFA Leadership (#2).

<sup>584</sup> *Id.*

## 6.G: GUIDING PRINCIPLE 31(D)

(d) Equitable: 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.

### Relevant Commentary:

In grievances or disputes 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 and make it harder to arrive at durable solutions.

**INDICATOR 20:** WERE CLAIMANTS GIVEN ACCESS TO INDEPENDENT, EXPERT ADVICE TO HELP THEM UNDERSTAND THEIR RIGHTS AND PARTICIPATE IN THE FRAMEWORK ON AN INFORMED BASIS?

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### 6.G.1: INTERPRETATION

Equitability is focused on equal access to information with the end of ensuring a fair process. As Caroline Rees has noted: “If individuals accept the outcome of a grievance process because they are ignorant of key information, that outcome is unlikely to be sustainable and may lead to even greater grievances and protest in the future.”<sup>585</sup> Companies should therefore, within reason, seek to ensure claimants have access to sufficient information to engage with the OGM on a “fair” basis.<sup>586</sup>

The inherent threat to equitability lies in unequal bargaining power between parties to an agreement, which can undermine any notion that they have entered into the agreement of their own free will. Equitability of agreements is an established concept in the common and civil law traditions.<sup>587</sup> In a well-known English decision, Lord Denning held that courts should seek to protect parties to “very unfair” contracts that result from “inequality of bargaining power”:<sup>588</sup>

*“English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair ... when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.”*<sup>589</sup>

The chief procedural protection Lord Denning suggested against the risk of a “very unfair” agreement born of great power disparities is independent advice.<sup>590</sup> Such advice functions as a balancer of power and informational inequalities.<sup>591</sup> Canadian courts have thus held that the more powerful party should seek to ensure that the weaker party is acting “with full knowledge of the probable consequences.”<sup>592</sup> That can be through advice or complete (and understandable) information.<sup>593</sup> If it is the former, that advice must be independent—focused on the weaker party’s interests—no matter who pays for it.<sup>594</sup>

These legal principles help to understand GP 31(d) in the Framework’s context because the entire process was designed to result in a binding agreement between Barrick and Porgeran survivors of sexual violence—parties of vastly unequal bargaining power. Equitability in process would require that

potential claimants were able to obtain sufficient information or independent advice regarding the Framework’s process and outcomes to decide to engage in it free of the influence of “ignorance, need or distress”.<sup>595</sup> (Note that equitability of the final agreement itself is a distinct and relevant question for fairness: in the common law, an agreement will only be deemed “unconscionable” if there is (i) an inequality of bargaining power between the parties *and* (ii) a “substantially unfair” agreement.<sup>596</sup> In this assessment we interpret “rights-compatibility” under GP 31(f) as setting the parameters of a fair agreement.)

To assess whether the Framework ensured that claimants could participate “on fair, informed and respectful terms” we consider whether they had access to the right kind of advice and information to redress power imbalances. Given that the Framework sought to address procedural equitability with independent legal advice, we consider whether that was independent and sufficient in scope and expertise.

**INDICATOR 20: WERE CLAIMANTS GIVEN ACCESS TO INDEPENDENT, EXPERT ADVICE TO HELP THEM UNDERSTAND THEIR RIGHTS AND PARTICIPATE IN THE FRAMEWORK ON AN INFORMED BASIS?**

### 6.G.2: ASSESSMENT OF INDICATOR 20

#### 6.G.1(A): DESIGN

The Framework was clearly designed to ensure that all claimants received the benefit of independent, expert advice. The *Framework of Remediation Initiatives* provides: “A Claimant must obtain independent legal advice, including advice in relation to the Claimant’s legal options and the consequences of resolving a claim, to participate in the Program. ... Every Claimant will be offered ... the services of an independent lawyer if they do not have one.”<sup>597</sup> The *Manual* specifically identifies the information that the CAT must share with every claimant about the availability of such advice, including the option for the PRFA to fund the claimant’s retention of her own lawyer.<sup>598</sup> The ILA is enjoined to advise every claimant on the “merits of her claim”, the civil and legal options she has against the individual perpetrator or the PJV, and the terms of the settlement agreement.<sup>599</sup> The ILA is also expected to maintain a substantive independence by not discussing “the merits of individual Claims” with the CAT.<sup>600</sup>

We understand that, in response to concerns expressed by the Clinics, the *Manual* was modified in March 2013 to ensure that the ILA certified the scope of advice she had given to each claimant.<sup>601</sup> After meeting with the claimant, the ILA was to provide the CAT with a signed statement attesting that she has:

1. Met the claimant in person.
2. And advised the claimant on:
  - a. “the merits of her claim”;
  - b. the Framework’s process and decision-makers;
  - c. the right to a translator;
  - d. the remedy options available;
  - e. the “legal consequences” of signing a settlement agreement, including specifically the waiver of further civil claims against Barrick and the PJV;
  - f. the “legal options available”, including (i) the right to opt out of the Framework at any time to pursue “formal legal processes” and (ii) how to launch such processes against the company or individual perpetrators, as well as the “potential outcomes and likely timeframes of such actions”.
  - g. the legal risks faced by the claimant under local law for making any false claims under the Framework.<sup>602</sup>

The role of the ILA was thus conceived as claimant-focused and substantively comprehensive. She was to ensure that every claimant had as complete a picture as possible of the Framework’s procedure and possible outcomes, as well as the legal implications of accepting any settlement agreement.

To these ends, the ILA needed three baseline qualifications: (i) the ability to understand and explain the Framework’s processes in detail; (ii) a sufficient understanding of Papua New Guinea law to explain the claimant’s local legal options; and (iii) a sufficient understanding of legal options before courts outside of Papua New Guinea to explain the legal implications of the waiver. Maya Peipul, the ILA selected by Cardno and Barrick, met these qualifications. We understand from a number of different sources that Ms. Peipul is a very well-respected member of the Papua New Guinea bar.<sup>603</sup> She has degrees in law from the University of Papua New Guinea and Victoria University of Wellington in New Zealand.<sup>604</sup> Her professional experience

includes work with leading local and international law firms, Transparency International, the national government, and the Family and Sexual Violence Action Committee.<sup>605</sup> At the formal level of design, therefore, we find that Ms. Peipul was sufficiently qualified to serve as the ILA.

### 6.G.1(B): IMPLEMENTATION

We have serious doubts about whether the assurance of independent, expert advice was respected in implementation. First, none of the claimants we interviewed was informed that she could retain her own lawyer at the PRFA’s expense.<sup>606</sup> The CAT officers confirmed this account: they did not realize that claimants even had that option.<sup>607</sup> Second, by her own admission, the ILA found it very difficult to separate her role from that of the CAT and would sometimes act as an auxiliary CAT officer to confirm claimant accounts rather than as an independent advisor to the claimants.<sup>608</sup> She considered that her responsibility was to determine the “truth” of their claims.<sup>609</sup> At times, she would note on claimant files to be shared with the CAT and the Independent Expert that she thought they were lying.<sup>610</sup> All the CAT officers we interviewed confirmed this account of her role. They each saw the ILA’s role as one of truth assurance, and thus had no qualms discussing the merits of claims with her and taking into account her perception of claimant honesty.<sup>611</sup> (The *Manual* specifically proscribes the CAT and the ILA from discussing the merits of individual claims.<sup>612</sup>)

In any event, it seems that the claimants themselves did not see the ILA as their advisor. 50 of 62 successful claimants recalled spending fewer than 5 minutes with her.<sup>613</sup> Each of these 50 claimants stated that the ILA gave them no advice.<sup>614</sup> Many recall that, at the first meeting, the ILA only asked them to swear on the Bible and sign a paper. When it came to signing the settlement agreement, 52 of 62 claimants said that the ILA did not explain its terms.<sup>615</sup> The only advice many of them remember is that they would not be able to sue Barrick once they signed. A number of these claimants stated that they felt scared and that the ILA pressured them to sign the settlement agreements by telling them that they had virtually no chance of suing Barrick successfully. One of these claimants, who generally believed the process was clear from the outset, recalls that the ILA told her to sign the agreement because “Barrick has big hands and legs and you have short hands and legs” and “no lawyer will help you” to

sue the company.<sup>616</sup> Another recalls: “She never explained what was in the paper. She only asked me if I wanted to sue Barrick. She said you will not sue Barrick so sign the paper.”<sup>617</sup>

We understand from Cardno that each unsuccessful claimant also had access to the ILA.<sup>618</sup> Only 5 of 15 we interviewed recall meeting her; of these, only one said she was afforded “good time” with the ILA.<sup>619</sup> As the Framework did not keep written records of claims deemed ineligible or illegitimate, we gather that no certifications were signed by the ILA in such cases.<sup>620</sup> This record-keeping failing makes it impossible to know if unsuccessful claimants made their decision not to “formally lodge a claim and therefore not to lose face” freely and on an informed basis.<sup>621</sup>

We should highlight one critical methodological limitation in our interview results regarding claimant understanding of the settlement agreement, including the waiver. We fear that claimant memory on this point is particularly unreliable. As discussed in Section 4.B (“Survivor Interview Protocol”), we have good reason to believe that local actors are agitating to get further compensation in the wake of Barrick’s settlement with the ATA/ERI Claimants. We suspect that Framework claimants may have been getting specific advice, informed or not, about how to get

beyond the waiver: a number of claimants who gathered outside the PDWA office on our first day stated that, since we were unable to help them get further compensation, they were going to turn to the ATA (one claimant also mentioned that she was being advised by Ms. Knuckey). Such advice may have colored interview responses. For instance, when asked whether the settlement agreement was explained, a number of claimants who said ‘no’ explained that they were told only about the waiver.<sup>622</sup> When specifically asked whether the waiver was explained to them, however, some of these same claimants said ‘no’.<sup>623</sup>

### 6.G.3: CONCLUSION ON GP 31(D)

Barrick designed the Framework with assiduous care to ensure procedural equitability. Unfortunately, it appears that equitability was largely lost in implementation. First, neither the CAT nor the ILA herself respected her role as an independent advisor to the claimants. She acted instead as an auxiliary CAT officer to assess claimant veracity, largely just by asking claimants to swear on the Bible that they had told the truth. Second, while we have our doubts about recollection on this point, the claimants themselves do not recall receiving tailored advice regarding the merits of their claim, the Framework’s processes, or their other options.

<sup>585</sup> Rees at 19.

<sup>586</sup> *Id.* at 21.

<sup>587</sup> See, e.g., *Post et al. v. Jones et al.* (1856), 60 U.S. 150 (concerning an onerous contract to salvage a ship on the cusp of destruction: “The contrivance of an auction sale, under such circumstances, where the master of the Richmond was hopeless, helpless, and passive—where there was no market, no money, no competition—where one party had absolute power, and the other no choice but submission—where the vendor must take what is offered or get nothing—is a transaction which has no characteristic of a valid contract.”); see also, A.H. Angelo and E.P. Ellinger, “Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States”, (July 1992) 14 *Loyola of Los Angeles International and Comparative Law Review* 455, digitalcommons.lmu.edu.

<sup>588</sup> *Lloyds Bank Limited v. Bundy*, [1975] 1 Q.B. 326 (England & Wales).

<sup>589</sup> *Id.* (emphasis added).

<sup>590</sup> *Id.*

<sup>591</sup> *Credit Lyonnais Bank Nederland NV. Burch*, [1997] 1 All E.R. 144 (England & Wales Court of Appeal).

<sup>592</sup> S.M. Waddams, M.J. Trebilcock, and M.A. Waldron, *Cases and Materials on Contracts* (2nd Edition), 2000, Toronto: Emond Montgomery Publications Ltd., at 622.

<sup>593</sup> *Id.*

<sup>594</sup> *Id.*

<sup>595</sup> *Woods v. Hubley* (1995), 130 D.L.R. (4th) 119 (Nova Scotia Court of Appeal).

<sup>596</sup> Angelo and Ellinger at 469 (citing a Privy Council decision for the proposition that English courts disapprove “of an unconscionability doctrine based merely on the inequality of the parties’ bargaining powers of the ‘contractual imbalance’ reflected in the terms.”). This dual procedural and substantive requirement for unconscionability can also be found in the German Civil Code (*id.* at 483) and in the Swiss Civil Code (Franco Taisch, “Unconscionability in a Civil Law System: An Overview of Swiss Law”, (July 1992) 14 *Loyola of Los Angeles International and Comparative Law Review* 529, digitalcommons.lmu.edu, at 529).

<sup>597</sup> *Framework of Remediation Initiatives* at 21.

<sup>598</sup> *Manual* at 3.

<sup>599</sup> *Id.* at 8.

<sup>600</sup> *Id.* at 11.

<sup>601</sup> Enodo Interview with Senior Barrick Personnel (#1). We have seen, in confidence, contemporaneous notes of this call as well as Barrick's subsequent exchange with the Clinics.

<sup>602</sup> *Manual* at 12-13 and 48.

<sup>603</sup> Enodo Interview with Cardno Personnel (#1); Enodo Interview with Senior Barrick Personnel (#1); Enodo Interview with Senior Barrick Personnel (#4); Enodo Interview with Sexual Violence Expert (#2).

<sup>604</sup> Maya Peipul Curriculum Vitae.

<sup>605</sup> *Id.*

<sup>606</sup> Interview Results, Appendix 1 (Question 15—"Did the Claims Assessment Team explain that you could hire an independent lawyer that they would pay for if you wanted?").

<sup>607</sup> Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#2); Enodo Interview with CAT Officer (#3).

<sup>608</sup> Enodo Interview with Maya Peipul.

<sup>609</sup> *Id.*

<sup>610</sup> *Id.*

<sup>611</sup> Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#2); Enodo Interview with CAT Officer (#3).

<sup>612</sup> *Manual* at 11.

<sup>613</sup> Interview Results, Appendix 1 (Question 13—"How much time did you spend with Maya Peipul, the Independent Legal Advisor?").

<sup>614</sup> *Id.* (Question 14—"Did she make you feel comfortable and give you advice focused on your particular situation?").

<sup>615</sup> *Id.* (Question 24—"Were all the terms of the settlement agreement properly explained to you by the Independent Legal Advisor?").

<sup>616</sup> Enodo Claimant Interview (#31).

<sup>617</sup> Enodo Claimant Interview (#56).

<sup>618</sup> Enodo Interview with Cardno Personnel (#1).

<sup>619</sup> Interview Results, Appendix 1 (Question 13—"How much time did you spend with Maya Peipul, the Independent Legal Advisor?").

<sup>620</sup> Enodo Interview with Cardno Personnel (#1) ("It was important not to discredit or embarrass women who may be making false claims, or to create community tensions between legitimate and illegitimate claimants. Therefore they were given the opportunity, at first instance, not to formally lodge a claim and therefore not to lose face.").

<sup>621</sup> *Id.*

<sup>622</sup> Interview Results, Appendix 1 (Question 24—"Were all the terms of the settlement agreement properly explained to you by the Independent Legal Advisor?").

<sup>623</sup> *Id.* (Question 25—"Did you understand that you would give up your right to sue Barrick and the PJV in courts in Canada and the United States?").

## 6.H: GUIDING PRINCIPLE 31(E)

(e) Transparent: 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.

### Relevant commentary:

Communicating regularly with parties about the progress of individual grievances can be essential to retaining confidence in the process. 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. At the same time, confidentiality of the dialogue between parties and of individuals' identities should be provided where necessary.

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**INDICATOR 21:** WAS SUFFICIENT INFORMATION REGARDING THE PROCESS AND OUTCOMES REGULARLY AVAILABLE TO CLAIMANTS, IN A MEDIUM SENSITIVE TO THEIR BARRIERS TO ACCESS, TO ENABLE THEIR TRUST IN THE FRAMEWORK'S FAIRNESS?

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**INDICATOR 22:** WAS SUFFICIENT INFORMATION ABOUT THE FRAMEWORK'S PROCESS AND OUTCOMES AVAILABLE TO WIDER STAKEHOLDERS TO ENABLE BROADER UNDERSTANDING OF THE FRAMEWORK'S ALIGNMENT WITH GP 31?

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### 6.H.1: INTERPRETATION

Transparency about an OGM's operations is critical to its legitimacy. To this end, the Framework was tasked with transparency at two levels: with claimants and with "wider stakeholders". The communication expected with each of these groups differs according to the specific interests at stake.<sup>624</sup> Communication with claimants is to the end of "retaining confidence in the process."<sup>625</sup> They should therefore have sufficient information about their specific claims to enable their trust in the mechanism.<sup>626</sup> Communication with wider stakeholders about the Framework, by contrast, is with a different end: to "demonstrate its legitimacy".<sup>627</sup> They should have access to sufficient information to understand that the Framework is operating fairly at a macro level. In other words, the focus is on the mechanism in general rather than the resolution of specific claims. The indicators we have developed aim to recognize these distinct functions of transparency under GP 31(e).

#### **INDICATOR 21: WAS SUFFICIENT INFORMATION REGARDING THE PROCESS AND OUTCOMES REGULARLY AVAILABLE TO CLAIMANTS, IN A MEDIUM SENSITIVE TO THEIR BARRIERS TO ACCESS, TO ENABLE THEIR TRUST IN THE FRAMEWORK'S FAIRNESS?**

We have derived Indicator 21 from GP 31(e)'s requirement to keep "parties to a grievance informed", and to communicate "regularly", about the progress of individual grievances.<sup>628</sup> We have interpreted "informed" as integrating an element of accessibility to ensure that any information disseminated can actually be received and understood. To ensure analytical consistency, we have imported as the objective of communicating with claimants the definition of "legitimate" discussed under GP 31(a). That is, we interpret "retaining confidence in the process" as retaining "legitimacy", which is understood as "trust in the Framework's fairness".<sup>629</sup>

#### **INDICATOR 22: WAS SUFFICIENT INFORMATION ABOUT THE FRAMEWORK'S PROCESS AND OUTCOMES AVAILABLE TO WIDER STAKEHOLDERS TO ENABLE BROADER UNDERSTANDING OF THE FRAMEWORK'S ALIGNMENT WITH GP 31?**

We have derived Indicator 22 from GP 31(e)'s injunction to provide "sufficient information about the mechanism's

performance to build confidence in its effectiveness."<sup>630</sup> Given that GP 31 identifies the "effectiveness criteria" for OGMs, we interpret "effectiveness" in terms of this principle. That is, the goal of transparency to wider stakeholders is to demonstrate the Framework's overall alignment with GP 31. "Sufficiency" of information is judged with reference to this end. We need to be careful, however, not to imbue the transparency requirement with an implicit burden of proof. Transparency to wider stakeholders is important so that they can judge for themselves the effectiveness of the Framework; the requirement is not breached simply by failing to prove alignment with all of GP 31's criteria (otherwise transparency would render the other criteria redundant). We have therefore focused on enabling "understanding" rather than "demonstrating" alignment. Implicit in this metric is a reasonable stakeholder as the audience reviewing the public disclosure.

The Guiding Principles' commitment to transparency finds its international law analogue in Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR)<sup>631</sup>, which the UN Human Rights Committee has interpreted as enjoining states to "proactively put in the public domain Government information of public interest."<sup>632</sup> Even against this backdrop, however, states are entitled to a certain discretion.<sup>633</sup> By extension, so too are businesses. Sufficiency is distinct from completeness. Indeed, Caroline Rees recognized the legitimate limitations to transparency in conducting a grievance mechanism pilot project before the Guiding Principles were endorsed. She noted that such reasons could include protecting individuals from retaliation, enabling dialogue, protecting privacy, or avoiding the compromise of "legitimate processes."<sup>634</sup>

### 6.H.2: ASSESSMENT OF INDICATOR 21

*WAS SUFFICIENT INFORMATION REGARDING THE PROCESS AND OUTCOMES REGULARLY AVAILABLE TO CLAIMANTS, IN A MEDIUM SENSITIVE TO THEIR BARRIERS TO ACCESS, TO ENABLE THEIR TRUST IN THE FRAMEWORK'S FAIRNESS?*

#### 6.H.2(A): DESIGN

The Framework was designed with great attention to providing claimants information about the process on a regular basis. As discussed under GP 31(c), the Framework's design included detailed guidelines on the communication of all material

information about the process in person by the CAT.<sup>635</sup> The initial meeting, which would lay out the entire process in some detail, was to be followed by consistent subsequent meetings at every step of the process:

- After the preparation of the Preliminary Report, the CAT was expected to organize a follow-up meeting with the claimant, “whether the Claim is accepted or rejected by the CAT.”<sup>636</sup>
- If the claim was accepted, the CAT officer and the claimant were to discuss appropriate remedies.<sup>637</sup>
- If the claim was deemed ineligible or illegitimate, the CAT officer was to explain the reasons for this determination to the claimant and let her know about the appeal process as well as relevant support services.<sup>638</sup>
- If the CAT’s determination was appealed, the CAT officer was to communicate the Appeal Assessment—successful or not—to the claimant “in a language or format that the Claimant can understand”.<sup>639</sup>
- If the Independent Expert’s determination was appealed, the CAT officer was to communicate the Review Panel’s assessment—successful or not—to the claimant “in a language or form which she can understand”.<sup>640</sup>
- At the conclusion of the process, the claimant, the CAT and the ILA were to meet to sign the settlement agreement detailing the agreed remedies.

Thus designed, the Framework met all elements of Indicator 21. It was committed to sharing all material information about the program, from process to substantive conclusions, on a regular basis with all claimants. The manner of dissemination remained sensitive to claimants’ barriers to access, such as literacy, by ensuring that the CAT was to provide it in person “in a language or format that the Claimant can understand.”

### 6.H.2(B): IMPLEMENTATION

Our claimant interviews suggest that the Framework’s commitment to transparency in design did not translate in

implementation. As discussed under GP 31(c), after their initial meeting with the CAT, 29 of 62 successful claimants and 8 of 15 unsuccessful claimants said that the Framework’s process was not clear;<sup>641</sup> 39 of 62 successful claimants stated that the process did not subsequently proceed as they expected.<sup>642</sup> From the perspective of transparency, these findings suggest that the initial CAT meeting did not provide “sufficient information” to claimants to ensure their trust in the Framework’s fairness. The lack of “sufficient information” remained an ongoing issue for a substantial minority of claimants: of the 29 successful claimants who subsequently posed questions about the Framework’s process to the CAT, 23 said that they did not receive adequate responses.<sup>643</sup>

It would be unfair to place the responsibility for this gap in understanding entirely on the PRFA. There are limits on what an institution can reasonably do to “enable” trust. For instance, a few claimants mentioned that, when they sought information from the CAT, they were “chased away by the police”. But the consistent recollection of those from the PRFA (including security guards)—expressed to us without prompting and independently of each other—was that the police were called a few times in response to threats of imminent violence against PRFA staff<sup>644</sup>. Similarly, while a number of claimants said that the CAT and the Community Liaison Officer, Ms. Sap, never responded to their questions, the consistent accounts we received from PRFA officers was that claimants were often unwilling to accept answers they did not like. We find these PRFA accounts credible in large part because the Enodo team witnessed both types of encounter while in Porgera, first with an unwillingness to accept our limited mandate, and then with three separate threats of violence.

### 6.H.3: ASSESSMENT OF INDICATOR 22

*WAS SUFFICIENT INFORMATION ABOUT THE FRAMEWORK’S PROCESS AND OUTCOMES AVAILABLE TO WIDER STAKEHOLDERS TO ENABLE BROADER UNDERSTANDING OF THE FRAMEWORK’S ALIGNMENT WITH GP 31?*

#### 6.H.3(A): DESIGN

The “sufficiency” of information provided to wider stakeholders is determined by both its content and its frequency. The content element of sufficiency is tied to the objective of transparency, to enable broader understanding of the Framework’s alignment

with GP 31. To be sufficient, the information provided should cater to the effectiveness criteria. With respect to frequency, reasonable limits will flow from the Framework's particular institutional constraints. The Framework was a transitional OGM, designed to address a limited range of grave historical wrongs expeditiously before shutting down. It was also, as all experts have recognized, novel.<sup>645</sup> And, as Human Rights Watch found in *Gold's Costly Dividend*, it was established in an environment of charged and frequently violent company-community relations.<sup>646</sup> In this context, reasonable transparency would have necessary limits, so as not to compromise the Framework's ability to deliver the remedies for which it was designed. That is to say, it would be anathema to the Guiding Principles to interpret transparency in a way that undermines the Framework's effectiveness.

The Framework's foundational documents do not contain guidance on Barrick's or the PRFA's intentions for ongoing public disclosure. We understand, however, that the PRFA's initial intention was not to disclose too much information publicly in order to preserve the Framework's institutional confidentiality.<sup>647</sup> As discussed under GP 31(b), there were legitimate security reasons for the Framework to refrain from letting the public at large—and particularly men in Porgera—know about the Framework's existence.<sup>648</sup>

### 6.H.3(B): IMPLEMENTATION

There appear to be two phases to wider stakeholder transparency in implementation: (i) from the Framework's launch in October 2012 to the end of January 2013; and (ii) from the February 2013 onwards. The first phase involved limited public disclosure about the Framework to preserve its confidentiality. To strike a balance between transparency and protecting legitimate claimant interests, we understand that Barrick and Cardno engaged in private outreach about the Framework to key stakeholders, particularly the Clinics and MiningWatch.<sup>649</sup> Unfortunately, neither MiningWatch nor the Clinics were willing to share their insight for this assessment. We are therefore unable to assess the sufficiency of the information they were provided.

The second phase was one of extensive public disclosure about the Framework. It began in February 2013 after

MiningWatch's public release of accusations regarding the Framework's unfairness.<sup>650</sup> From that moment, and particularly once the OHCHR complaint involving the ATA and PLOA was launched, any hope of preserving the Framework's institutional confidentiality was extinguished. Barrick was then assiduous in its transparency to wider stakeholders. The list below provides a timeline of material public disclosures regarding the Framework's design and implementation:

- **22 October 2012**—*Background: A Framework of Remediation Initiatives in Response to Violence Against Women in the Porgera Valley*.<sup>651</sup> This contained a brief summary of the Framework's process and structure.
- **22 March 2013**—"Letter from Barrick to the UN High Commissioner for Human Rights."<sup>652</sup> This letter, which was made publicly available on or before 16 April 2013, explains in depth the structure of the Framework and the process for resolving claims.
- **24 March 2013**—"Letter from Ume Wainetti to the UN High Commissioner for Human Rights."<sup>653</sup> Ms. Wainetti, part of the PRFA leadership, explains the decision-making process behind the Framework's grassroots publicity methods, the scope of remedies, and the justification for not engaging with the ATA and the PLOA.
- **24 March 2013**—"Letter from Dame Carol Kidu to the UN High Commissioner for Human Rights."<sup>654</sup> Dame Kidu, part of the PRFA leadership, justifies the Framework's grassroots publicity methods and explains why the Framework is not offering the "culturally appropriate" remedies suggested by MiningWatch Canada.
- **5 April 2013**—"Letter from Human Rights Watch to the UN High Commissioner for Human Rights."<sup>655</sup> This letter and accompanying extract from *Gold's Costly Dividend* explains Human Rights Watch's circumspection about engaging with the ATA and PLOA.
- **16 May 2013**—*Framework of Remediation Initiatives*. This document provided a comprehensive explanation of the Framework's genesis, structure, processes and remedies.

- **16 May 2013—*Manual*.** This document provided intricate guidance on the Framework’s process, including all relevant timelines.
- **7 June 2013—**“A Summary of Recent Changes to the Framework.”<sup>656</sup> This document summarized the findings of BSR, a respected consulting firm that had conducted a review of the Framework soon after its launch to recommend improvements. It also explained what changes Barrick was making to the Framework in response to stakeholder feedback.
- **22 August 2013—*Opinion of the UN Office of the High Commissioner for Human Rights regarding the Framework*.**<sup>657</sup> In response to the allegations of MiningWatch and various other groups, this opinion takes a comprehensive look at the Framework’s design and concludes that it aligns with the Guiding Principles.
- **1 November 2013—**“Continued Progress of Claims under the Framework.”<sup>658</sup> This document provides a brief and general update regarding the Framework’s progress and the range of remedy values.
- **3 December 2013—**“Clarification of the Framework.” This document provides clarification on changes made regarding the Framework’s provision of healthcare to all eligible claimants, irrespective of their willingness to sign settlement agreements.
- **27 November 2014—**“Response to EarthRights International.”<sup>659</sup> This document clarifies the Framework’s structure and process, including how compensation is determined. It also identifies specific community initiatives being supported by Barrick and the PJV in Porgera.
- **1 December 2014—*Framework Summary*.** This document provides a comprehensive overview of the Framework from conception to implementation, including: the stakeholder engagement process; the Framework’s governance; the claims process; the alignment with Guiding Principles 29 and 31; and the summary of outcomes.

As this list demonstrates, the release of public information regarding the Framework throughout the bulk of its operating period, from October 2012 to December 2013, was constant and comprehensive. It was more than sufficient to enable wider stakeholder understanding of the Framework’s alignment with GP 31. First, Barrick provided detailed public information on the Framework’s formation, governance structure, scope, procedures, remedial options, and ultimate outcomes.<sup>660</sup> Second, Barrick consistently released public information on changes made to the Framework in response to stakeholder feedback and investigations the company commissioned. Third, the public information included explanations of the Framework’s remedial options from leading Papua New Guinean women’s rights advocates. Fourth, eminent human rights experts, notably Human Rights Watch and the OHCHR, publicly supported Barrick’s decisions regarding stakeholder engagement and the Framework’s design, respectively. Fifth, at the end of the process, Barrick commissioned this comprehensive, independent and public assessment to examine all the Framework’s operations and impacts.

#### *i. Extent of disclosure limits*

Admittedly, aside from the *Framework Summary* (and this assessment), these disclosures were not individually comprehensive in capturing all material elements of the Framework’s design and performance. Knuckey and Jenkin note in this regard that, while Barrick did release updates on the Framework, “outside reviewers and local stakeholders found it difficult at various points in the life of the mechanism to obtain clear details on the progress of its implementation, or on the status of changes.”<sup>661</sup> This may be accurate. But it does not undermine our finding that Barrick met the transparency expectations under GP 31(e).

From a practical perspective, it would have been unreasonable to expect outcome disclosures before the Framework had finalized remedies. As the Framework’s critics have recognized, and Barrick’s public disclosures demonstrate, the Framework evolved in response to stakeholder comments and BSR’s independent investigation.<sup>662</sup> These changes included substantive modifications to the remedies claimants would ultimately receive.<sup>663</sup> Thus, of necessity, the bulk of public information about the Framework related to its design rather than its outcomes. Until the Framework had run its course, and the outcomes had

been analyzed, this process information was all that Barrick could reasonably provide to wider stakeholders to enable their understanding of the Framework's alignment with GP 31.

To the extent there were limits on the scope of disclosure of information that Barrick or the Framework possessed during the Framework's operation, these were reasonably necessary to protect legitimate claimant or institutional interests. From the claimant perspective, the chief concern was confidentiality: the Framework had to be circumspect about how much detail was revealed about individual cases because Porgera is intimate and claimants could have been identified even if not named.<sup>624</sup> From the public policy perspective, the Framework had a legitimate interest in acting, and being perceived to act, fairly to all claimants. That depended in part on preserving flexibility to evolve in the wake of stakeholder concerns. Revealing final determinations of certain claims before all claims were finalized risked prematurely crystallizing remedies. And Barrick's decision not to publicize BSR's mid-program review is justifiable on public policy grounds: a company that did not feel it could complete confidential examinations of its own policies and procedures would reasonably find institutional willingness to be self-critical in short supply.<sup>625</sup> That rationale is strengthened in situations, as in Porgera, where the risk of litigation is substantial.

#### 6.H.4: CONCLUSION ON GP 31(E)

GP 31(e) expects transparency of the Framework with claimants and with wider stakeholders. With claimants, the Framework was meticulously designed to ensure communications were consistent and in a format they understood. When implemented, though, a substantial minority of claimants did not appear to understand the Framework's process after meeting with the CAT. Among them, many claimants felt that, when they did ask questions about the process, they were not provided adequate explanations. These responses should be understood against the complicated, and sometimes tense, context of PRFA-community relations. Given that communication channels were limited to in-person, verbal explanations, it is far from clear whether the PRFA could have done more to bridge the transparency divide.

Transparency with wider stakeholders was not an express component of the Framework's design. The initial limitations in transparency were justified by the protection of claimant security. Once claimant security had already been compromised, however, Barrick provided more than sufficient information for (reasonable) wider stakeholders to understand the Framework's alignment with GP 31. To be sure, Barrick's public disclosure to enable understanding cannot guarantee trust: stakeholders who implacably distrust the company or its motives are unlikely to be satisfied by any level of disclosure, no matter how comprehensive. But it would be unreasonable for the metric of transparency to be the response of idiosyncratic observers.

<sup>624</sup> See Rees at 22 ("In the case of transparency, there are two issues in play: first, the provision of information to aggrieved parties about how their complaint is being handled; and second, the provision of information to affected stakeholder groups more widely, and sometimes to other stakeholders, about how well the mechanism is working.").

<sup>625</sup> GP 31(e), Commentary.

<sup>626</sup> *Id.*

<sup>627</sup> *Id.*

<sup>628</sup> GP 31(e).

<sup>629</sup> Section 6.D.1.

<sup>630</sup> *Id.*

<sup>631</sup> *International Covenant on Civil and Political Rights*, adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171, Article 19(2) ("Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.") [ICCPR].

<sup>632</sup> UN Human Rights Committee, General Comment 34: Article 19, Freedoms of opinion and expression, (July 2011) CCPR/C/GC/34, ¶19 [General Comment 34].

<sup>633</sup> General Comment 32 at ¶29 ("courts have the power to exclude all or part of the public for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice.").

<sup>634</sup> Rees at 22 ("At the same time, the provision of confidentiality can be essential to protect an individual from retaliation. It is also important in enabling dialogue between the company and complainants in an atmosphere of sufficient mutual confidence for real interests to be raised and options for solutions discussed. It can also be inappropriate

to provide transparency about the specific detail of some outcomes; for instance, where doing so can lead to the identification of complainants who wish to remain anonymous, or when revealing levels of financial compensation would compromise individuals and legitimate processes.”).

<sup>635</sup> Section 6.F.2(a). *See also*, *Manual* at 3.

<sup>636</sup> *Manual* at 6.

<sup>637</sup> *Id.*

<sup>638</sup> *Id.* at 7.

<sup>639</sup> *Id.* at 9.

<sup>640</sup> *Id.* at 10.

<sup>641</sup> Interview Results, Appendix 1 (Question 12—“After your first meeting with the Remedy Framework team, did you feel that the process was clear?”).

<sup>642</sup> *Id.* (Question 17—“Did the process proceed as you expected after your first meeting?”). This question was not relevant to unsuccessful claimants, who only interacted briefly with the Framework, generally just with the initial meeting.

<sup>643</sup> *Id.* (Question 18—“Did the Remedy Framework representatives adequately answer any questions you had about the process?”).

<sup>644</sup> We use the term ‘PRFA staff’ to include the CAT and support staff.

<sup>645</sup> Enodo Interview with Guiding Principles Expert (#1); Enodo Interview with Guiding Principles Expert (#2); Enodo Interview with Guiding Principles Expert (#3); Knuckey and Jenkin at 14.

<sup>646</sup> *See*, generally, *Gold’s Costly Dividend*.

<sup>647</sup> Enodo Interview with Senior Barrick Personnel (#4); Enodo Interview with Cardno Personnel (#1); Enodo Interview with PRFA Leadership (#1); Enodo Interview with PRFA Leadership (#2).

<sup>648</sup> Section 6.E.2.

<sup>649</sup> Enodo Interview with Senior Barrick Personnel (#4); Enodo Interview with Cardno Personnel (#1).

<sup>650</sup> MiningWatch, “Rape Victims Must Sign Away Rights to Get Remedy from Barrick”, 30 January 2013, miningwatch.ca.

<sup>651</sup> *Framework Background*.

<sup>652</sup> Barrick, “Letter from Barrick Gold to Navanethem Pillay, UN High Commissioner for Human Rights”, 22 March 2013, barrick.com [Barrick Letter of 22 March 2013].

<sup>653</sup> Wainetti Letter to OHCHR.

<sup>654</sup> Dame Kidu Letter of 24 March 2013.

<sup>655</sup> Arvind Ganesan, “Letter from Arvind Ganesan to Navanethem Pillay, UN High Commissioner for Human Rights”, 5 April 2013, barrick.com [Ganesan Letter of 5 April 2013].

<sup>656</sup> Barrick, “A Summary of Recent Changes to the Porgera Remediation Framework”, 7 June 2013, barrick.com.

<sup>657</sup> OHCHR Opinion.

<sup>658</sup> Barrick, “Continued Progress of Claims under the Porgera Remediation Framework”, 1 November 2013, barrick.com.

<sup>659</sup> Barrick, “Response to EarthRights International”, 27 November 2014, barrick.com.

<sup>660</sup> *See*, in particular, the *Manual* and the *Framework of Remediation Initiatives*.

<sup>661</sup> Knuckey and Jenkin at 13.

<sup>662</sup> Discussed in more detail under GP 31[g]. *See* Knuckey and Jenkin at 13 (“Importantly, and as an example of continuous learning, Barrick made a number of positive changes to the mechanism during implementation, following [frequently unsolicited] feedback and concerns raised by local and international groups (including ourselves) which have had sustained engagement with victims, community members, and other stakeholders.”)[citations omitted]; *see also*, Catherine Coumans, *Brief on Concerns Related to Project-Level Non-Judicial Grievance Mechanisms: Data derived from field assessments by MiningWatch Canada and partners at the Porgera Joint Venture mine, Papua New Guinea, and by MiningWatch Canada and Rights and Accountability in Development (RAID) at the North Mara gold mine, Tanzania*, 25 September 2014, miningwatch.ca, at 5 (“Changes were made to the mechanism, sometimes in response to concerns raised by MiningWatch and others, even as victims were being processed through the program.”).

<sup>663</sup> Barrick, “Summary of Recent Changes to the Porgera Remediation Framework” at 2 (“Clarifications have been made to the Framework to underscore that the types of remedies available are not limited to the examples provided in the Framework documentation.”).

<sup>664</sup> Rees at 22 (“It can also be inappropriate to provide transparency about the specific detail of some outcomes; for instance, where doing so can lead to the identification of complainants who wish to remain anonymous, or when revealing levels of financial compensation would compromise individuals and legitimate processes.”).

<sup>665</sup> *See* Aftab at 19-28 (“While being strategic about disclosing due diligence information is anathema to CSR practitioners, from a practical perspective, privilege is an inevitable consideration in potentially litigious settings and is valuable for even the most well-meaning business to implement an effective CSR program. Businesses manifest their respect for human rights by adopting policies, conducting due diligence, and implementing effective responses. Done well, that due diligence will often reveal vulnerabilities in company processes and potential rights impacts on stakeholders. Companies need a safe space in which to explore adverse impacts and design effective remedies without fearing that the due diligence itself will expose them to additional risk.”).

## 6.1: GUIDING PRINCIPLE 31(F)

(f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights.

### Relevant commentary:

Grievances are frequently not framed in terms of human rights and many do not initially raise human rights concerns. Regardless, where outcomes have implications for human rights, care should be taken to ensure that they are in line with internationally recognized human rights.

**INDICATOR 23:** DID THE RANGE OF OUTCOMES AND REMEDIES UNDER THE FRAMEWORK ACCORD WITH INTERNATIONAL LAW ON THE RIGHT TO REMEDY FOR SEXUAL VIOLENCE AS ADAPTED TO THE PRIVATE SECTOR?

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**INDICATOR 24:** IN PROVIDING THESE OUTCOMES AND REMEDIES, DID THE FRAMEWORK CAUSE OR CONTRIBUTE TO, OR BECOME DIRECTLY LINKED TO, ADVERSE HUMAN RIGHTS IMPACTS?

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### 6.1.1: INTERPRETATION

Under GP 31, “rights-compatibility” provides a measure of substantive equitability, i.e. assurance of a fair agreement. It is thus related to GP 31(d)’s focus on procedural fairness. In the context of the Framework, “rights-compatibility” is arguably the most complex criterion to assess. That is partly tied to the substance of rights. The Framework was expressly designed to respond to human rights abuses.<sup>666</sup> Under GP 31(f), the right to remedy for such abuses is automatically implicated in assessing the Framework’s outcomes.<sup>667</sup> As we will discuss below, the substance of the right to remedy for sexual violence is not precisely defined. The issue becomes exponentially more complex when we consider right to remedy as against private enterprises, because international law does not impose any direct obligations on businesses.<sup>668</sup> As a private actor, a business may not enjoy the police powers to provide a complete remedy as understood under international law (e.g., imposing criminal sanctions). Delineating the legitimate expectations of the Framework as a remedy-providing institution under the Guiding Principles therefore requires adapting the right to remedy to the private-sector context.

In assessing alignment with GP 31(f), specifically against the right to remedy, we seek to answer two questions. First, did the Framework’s outcomes accord with the private-sector-adapted right to remedy. This flows from the Commentary to GP 31(f): “where outcomes have implications for human rights, care should be taken to ensure that they are in line with internationally recognized human rights.”<sup>669</sup> In other words, because the right to remedy includes a minimum standard of conduct—not simply avoidance of harm—GP 31(f) requires us to consider whether the Framework did enough to align with that standard. The second question is whether the Framework’s outcomes *adversely impact* the right to remedy for sexual violence under international law. This question flows from the Guiding Principles’ overarching expectation that businesses respect human rights.<sup>670</sup> As applied to the Framework, the duty to respect imposes a restraint on what kinds of outcomes are acceptable. Beyond the right to remedy, the duty to respect animating the second question implicates adverse impacts on *all* human rights.

### INDICATOR 23: DID THE RANGE OF OUTCOMES AND REMEDIES UNDER THE FRAMEWORK ACCORD WITH INTERNATIONAL LAW ON THE RIGHT TO REMEDY FOR SEXUAL VIOLENCE AS ADAPTED TO THE PRIVATE SECTOR?

As foreshadowed above, Indicator 23 is somewhat indeterminate on its face because of the absence of definitive guidance on private actors’ positive obligations for remedying human rights impacts under international law. We have framed the indicator in this way to capture two pillars of the Guiding Principles. First, international human rights deserve respect “over and above national laws and regulations”.<sup>671</sup> That is, adverse impacts on human rights<sup>672</sup> should not simply be considered through the narrow lens of civil wrongs under national law.<sup>673</sup> Second, the definition of these human rights should be understood through the prism of international law.<sup>674</sup> These two elements inform business’s positive obligations to remedy. Given how right-specific the indicator is, we will elaborate on the particular expectations of the Framework below.

### INDICATOR 24: IN PROVIDING THESE OUTCOMES AND REMEDIES, DID THE FRAMEWORK CAUSE OR CONTRIBUTE TO, OR BECOME DIRECTLY LINKED TO, ADVERSE HUMAN RIGHTS IMPACTS?

Indicator 24 frames the limits on the types of legitimate outcomes under the Framework. The first of these is defined by an adverse impact on the right to remedy itself. The second type of limit is on outcomes that might cause or contribute to, or be directly linked to, adverse impacts on other human rights, beyond those derived from the rights impact the Framework was designed to address.<sup>675</sup>

### 6.1.2: ASSESSMENT OF INDICATOR 23

*DID THE RANGE OF OUTCOMES AND REMEDIES UNDER THE FRAMEWORK ACCORD WITH INTERNATIONAL LAW ON THE RIGHT TO REMEDY FOR SEXUAL VIOLENCE AS ADAPTED TO THE PRIVATE SECTOR?*

#### 6.1.2(A): DESIGN

The right to remedy for international human rights violations differs markedly from the right to remedy for civil wrongs. In both contexts the law seeks to restore the victim, as far as possible, to the situation prior to the harm.<sup>676</sup> For civil personal injury cases, however, the limit in the pursuit of restitution is money: “the purpose of awarding damages in tort is to put the injured

person in the same position as he or she would have been in had the tort not been committed, *insofar as money can do so*.<sup>677</sup> By contrast, the right to remedy under international law considers a variety of measures to restore, to the extent possible, the victim of a human rights violation to the position she enjoyed before the violation.<sup>678</sup> Beyond financial compensation, appropriate remedies for human rights violations may include restitution, rehabilitation, satisfaction (such as public apologies), and guarantees of non-repetition.<sup>679</sup> This list is permissive: states are not necessarily expected to provide each type of remedy for every human rights violation.<sup>680</sup> Indeed, restitution in the sense of restoring the victim to her pre-violation circumstances may often be impossible, as in situations of sexual violence. But two elements—compensation and guarantees of non-repetition—are generally expected of states for an effective remedy.<sup>681</sup>

The Framework was designed with an array of remedies in mind, including, without limitation:

- Counseling;
- Health care;
- Education and training;
- Financial compensation;
- Livelihood assistance (such as livestock, cooking utensils, clothing);
- Micro-credit or economic development grants;
- School fees;
- Repatriation assistance;
- Assistance in filing a police complaint.<sup>682</sup>

The OHCHR directly considered whether these remedies aligned with GP 31(f) and the right to remedy under international law, concluding: “As described in the Manual, it appears that many of the possible outcomes and remedies offered by the Porgera remediation framework are ‘rights-compatible’”.<sup>683</sup> That conclusion is supported by the fact that remedies included elements of restitution (repatriation assistance); rehabilitation (counseling, health care); compensation (including livelihood assistance, micro-credit or economic development grants, and school fees); and satisfaction (assistance in filing a police complaint). In addition, as discussed under implementation, Barrick’s broader policy and procedure changes beyond the Framework were geared towards guarantees of non-repetition.

### *i. Value of remedies*

One design concern raised by these remedies is their valuation. That raises two related issues: method and quantum. The right method should lead to the right quantum. As we will elaborate below, however, the Framework is an example of an instance where the wrong method led to the right quantum. The Framework was designed to result in an individually “tailored remediation package”.<sup>684</sup> Papua New Guinea’s civil awards for “proven instances of rape” would serve as the referent for the total value of each package.<sup>685</sup> Based on the advice of Allens Linklaters, the Framework thus set K20,000 to K25,000 as the lower value-range of expected remedy packages; no upper range or limit was set.<sup>686</sup>

The Guiding Principles and human rights experts we interviewed expressed concerns about using Papua New Guinea civil awards as a value referent for the remedy packages.<sup>687</sup> Their concern was that benchmarking remedy value exclusively against such awards was insufficient without any consideration of the relative fairness of the legal regime. (We should note that certain of these experts admit that, when Barrick consulted them in designing the Framework, they did not raise this concern; it is nonetheless relevant to current best practice.) We cannot evaluate the equity of Papua New Guinea’s courts; but there are good reasons to doubt legal institutions’ protection for women’s rights. As the UN Development Program noted in a recent report:

*“[L]evels of gender inequality in Papua New Guinea continue to be a pervasive problem ... Women victims of crime continue to struggle with the police and prosecution authorities, as there is often insufficient policing and inadequate application of the law, and in many cases the predominately male law enforcement officers do not treat women victims of crime with adequate level of seriousness due to their own cultural perceptions. ... Institutional responses for prevention of gender-based violence and support for victims are insufficient and inadequate.”<sup>688</sup>*

Relying exclusive on domestic law was also wanting as a matter of human rights law.<sup>689</sup> While the Framework could legitimately set guidance on the lower and higher values of remedy packages<sup>690</sup>, international tribunals have consistently held that compensation for human rights violations should be determined

with reference to international law.<sup>691</sup> The compensation should include components for economic losses, related costs, and non-economic losses such as emotional harm.<sup>692</sup> The last of these is generally determined using principles of fairness or equity, as precise assessment is impossible.<sup>693</sup>

Rather than simply treating the claims of sexual violence as civil wrongs under Papua New Guinea law, the Framework ought to have considered analogous wrongs under international human rights law.<sup>694</sup> GP 31's application to public institutions strengthens this conclusion. One instructive case in this regard is *Rosendo Cantu v. Mexico*, which concerned horrific rape by Mexican military personnel and was decided by the IACHR in 2010, just before the Framework was designed.<sup>695</sup> In addition to specific economic harms, Mrs. Rosendo Cantu was found to have suffered an array of non-economic harms, including “her constant state of pain, sadness, guilt and anxiety by the rape itself [and] her stigmatization and abandonment by her husband and her community”.<sup>696</sup> Based on principles of equity—and with reference to other harm attributed to the state, particularly the denial of justice, which is not relevant to the grievances before the Framework—the Court therefore awarded her US\$60,000 for her injuries (it awarded a further \$10,000 for her daughter).<sup>697</sup>

The IACHR decision is instructive to understand the right to remedy for sexual violence under international law. It would be unreasonable, however, to consider its finding determinative for the Framework. First, while the underlying rights violation is similar to the sexual violence claims under the Framework, the case concerned a series of rights violations perpetrated over a number of years by Mexican military, judicial and administrative authorities. Second, international human rights tribunals apply evidentiary thresholds to determine compensation with reference to causation.<sup>698</sup> The claimant bears the burden “to prove harm was suffered and that the harm was caused by the violation.”<sup>699</sup> No such evidentiary burden applied under the Framework. Third, the value of the compensation ought to be context sensitive, i.e. “what amount of damages would reasonably suffice for someone in the place of the victim”.<sup>700</sup> The actual metric would therefore depend on the economic context in Papua New Guinea.

### **ii. Valuing non-financial aspects of remedy**

The principles above speak to appropriate valuation of the financial (or equivalent) components of remedy. There remains a separate issue of what can legitimately be counted in calculating the total value of the remedy package. In this regard, two experts raised concerns about the Framework's valuation of all elements of the remedy with reference to one global metric.<sup>701</sup> The decision in *Rosendo Cantu* is helpful to illustrate the concern. Beyond financial compensation, the IACHR ordered a range of remedies as measures of “satisfaction, rehabilitation, and guarantees of non-repetition.”<sup>702</sup> These included changes in national policies, public apologies, and individual health care.<sup>703</sup> No value was attached to them, and they did not comprise aspects of the financial reparations owed to the victims. That is, the value of financial reparations should be independent of the cost of measures of satisfaction, rehabilitation and guarantees of non-repetition.

Given that Barrick and the PJV are private entities, this reasoning cannot apply directly and as-is to the Framework. Neither the Framework nor the company can, for instance, simply order hospitals to provide medical care to claimants.<sup>704</sup> But the underlying concept does hold: to the extent remedies are benchmarked to a financial value derived from international law, that value should be independent of the cost of measures of rehabilitation, satisfaction and guarantees of non-repetition.

### **iii. Rights-compatible private-sector remedies**

Adapting international human rights norms to the Framework as a private-sector OGM under the Guiding Principles results in the following broad principles:

- (1) The remedy should seek to address the wrong as a human rights violation, focusing on the ends of restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition.
- (2) The referent for the remedy's financial component should be principles of equity under international law rather than civil awards under national law; this value should be independent of the costs of rehabilitation, satisfaction and guarantees of non-repetition.
- (3) To the extent consistent with law and international human rights, the remedy should be “culturally appropriate”.<sup>705</sup>

As recognized by the OHCHR, the Framework was clearly designed to align with the first principle.<sup>706</sup> Based on the stakeholder engagement process discussed under GP 31(h), we also find that the Framework's remedies were designed to be "culturally appropriate", in the sense that credible experts acting as fiduciaries for claimants deemed them appropriate.<sup>707</sup> The valuation of those remedy packages, however, did not align with international human rights norms. First, the referent was civil awards under Papua New Guinea law rather than human rights awards under international law. Second, the financial referent was for the total value of the package, including rehabilitation measures. (Notably, and appropriately, measures to guarantee non-repetition were not factored into the Framework's valuation of individual remedies.)

### 6.1.2(B): IMPLEMENTATION

In assessing the implementation of the Framework's remedies for rights-compatibility, we consider the three principles developed above on the right to remedy adapted for OGMs.

#### ***i. Did the range of remedies treat sexual violence as a human rights violation?***

We have considered the implementation of the Framework remedies in some detail under GP 31(h).<sup>708</sup> As discussed in that section, the remedy was largely standardized: successful claimants all seemed to receive a cash component of K20,000. They also received additional remedies, including school fees, counseling and health care, worth, on average, K3,630. As the OHCHR noted, these types of remedy are consistent with international law on the right to remedy.

The vast majority of successful claimants believe they have not received the remedies to which they are entitled: 55 of the 57 claimed that they had not yet received all the remedies.<sup>709</sup> We cannot say definitively whether all remedies were received as agreed. The PRFA and Cardno, however, claim that all remedies under the settlement agreements have been awarded.<sup>710</sup> We suspect that any discrepancy between what claimants believed they were entitled to and what they ultimately received was a function of poorly managed expectations, as discussed under GP 31(c), rather than an implementation failure in itself. When asked what remedies they received before the top-up payment, 60 of 62 claimants mentioned the K20,000; 44 mentioned small-business and HIV

training; 21 mentioned counseling; 8 mentioned school fees; and 10 mentioned medical assistance.<sup>711</sup> Rather than not receiving the claimants agreed under the settlement agreement, it appears that many claimants did not receive the remedies they wanted and expected.<sup>712</sup> We have discussed the reason for this expectation dissonance under GP 31(c).

In addition to the individual remedies under the Framework, Barrick and the PJV also implemented measures to guarantee non-repetition, a critical component of the right to remedy under international law. Assessing the efficacy of these measures is beyond the scope of this assessment. But we highlight some of the measures we understand Barrick implemented specifically at Porgera to prevent a repetition of the sexual violence that led to the Framework.

- (1) *Reformed grievance mechanism*: One cause identified by international experts and Barrick itself for the failure to recognize the sexual violence in Porgera before *Gold's Costly Dividend* was the failure of the existing OGM.<sup>713</sup> The largely informal OGM proved unable to capture reports of sexual violence. In response, the PJV implemented a much more formal grievance mechanism structure, including for all human rights complaints, located at a mine facility with relatively low security (Yoko 1).<sup>714</sup> There are five permanent grievance officers. A "second-order mechanism" to address more complex issues is comprised of the head of Corporate Responsibility, the head of the Grievance Mechanism, and an independent party.<sup>715</sup> The process is also formalized, with a grievance database in which every step of the process is recorded. Once a complaint is received, it will be allocated to a specific group (e.g. security) to investigate and respond.<sup>716</sup> But any human rights complaints are automatically escalated through management.<sup>717</sup>
- (2) *Security policy and procedure changes*: Human Rights Watch identified failures in protocol for APD guards as a critical factor in the incidents of sexual violence and recommended a number of security changes.<sup>718</sup> The changes below are those we were able to confirm through multiple independent accounts in Porgera. (We understand that there are far more comprehensive changes that have been undertaken company-wide.)

- Barrick has implemented human rights training for all security personnel at regular intervals. The initial training is part of a two-week induction course, which is driven by the Barrick Use of Force Policy and covers the use of force, conflict of interests, community engagement and security officers' responsibility to the community.<sup>719</sup> This is supplemented by a one-day refresher course every year, which also includes a validation process.<sup>720</sup> In addition, there is consistent "toolboxing" of use-of-force incidents in daily APD meetings, in which the APD's embedded and permanent human rights trainers participate.<sup>721</sup>
- Cameras have been placed in all parts of the site, including previously remote areas, like waste dumps.<sup>722</sup> A full-time surveillance team constantly observes the feed from those cameras.<sup>723</sup> In addition, there are also cameras installed in every vehicle, whose footage is reviewed every month.<sup>724</sup> As one APD officer noted: "Control always has eyes on the site."<sup>725</sup>
- Monitoring of each security guard's movements has been enhanced, with specific tasks assigned every morning, vehicles registered before being taken out; and tracking of odometers to confirm where the vehicle has traveled.<sup>726</sup>
- Protocols for arrest and detention, particularly of women, have been revamped to protect against any opportunity for abuse. The five APD personnel of different levels of seniority we interviewed—all but two individually—confirmed the protocol. As soon as there is an arrest on the site, there is a call to the surveillance center, detailing the location and odometer reading. If the detainee is a woman, the surveillance team will send a female officer to the point of arrest. She will remain with the detainee until she is transported to the Paiam police station. Another call follows as soon as the vehicle arrives at the detention center.<sup>727</sup> The APD personnel all demonstrated a strong and consistent understanding of the rights of detainees and the right to security of the person.<sup>728</sup>

***ii. Did the quantum of remedy align with international law on the right to remedy for sexual violence?***

Under international law, the appropriate measure of compensation for non-economic harm (or economic harm with scant evidence) flowing from a human rights violation is equity. The concept is notoriously ill-defined and highly individualized.<sup>729</sup> Nonetheless, resort to international legal precedent may offer guidance on an appropriate quantum. In particular, the IACHR's decision in *Rosendo Cantu* is instructive regarding equity's demands in cases of sexual violence by armed forces. The court awarded Mrs. Cantu US\$60,000 in moral damages for her suffering related to the sexual violence.<sup>730</sup> This amount was in recognition of Mexico's myriad violations of Mrs. Cantu's rights beyond security of the person, including: conducting the rape hearing before a military tribunal<sup>731</sup>; failures of public authorities, including medical personnel, to act with due diligence in response to the rape<sup>732</sup>; failure to respect due process<sup>733</sup>; and failure to respect the state's fiduciary duty to minors<sup>734</sup>. In a more recent case, resolved after the Framework had run its course, the IACHR awarded US\$60,000 in equity<sup>735</sup> for Peruvian authorities' repeated acts of torture and sexual violence against Ms. Espinoza Gonzales "including being beaten on all parts of her body, suspended by her hands and immersed in fetid water, and receiving death threats against herself and her family".<sup>736</sup>

These IACHR decisions provide a baseline for equity regarding the grievances before the Framework. As Dinah Shelton has noted, "the Court's judgments have provided the most wide-reaching remedies afforded in international human rights law to date, both in compensatory and noncompensatory forms."<sup>737</sup> *Rosendo Cantu*, in particular, is relevant because it immediately preceded the Framework's design. But it must be adapted to the Papua New Guinean context. Applying the World Bank's measures of comparative purchasing power, US\$60,000 in Mexico is the equivalent of approximately US\$9,804 in Papua New Guinea.<sup>738</sup> The Framework generally awarded claimants compensation of K20,000, excluding costs of rehabilitation measures.<sup>739</sup> That translated to approximately US\$7,998 at prevailing exchange rate when the award was disbursed in late 2013; it would have been US\$9,716 at the prevailing exchange rate when the Framework was designed.<sup>740</sup> (While this was a standardized amount, as discussed under GP 31(h), we believe that the Framework could not reasonably have offered individualized compensation amounts without compromising the other effectiveness criteria.<sup>741</sup>)

Comparing these outcomes we find that, while the Framework ultimately offered claimants US\$1,806 less than the IACHR in *Rosendo Cantu*, the amount of financial compensation awarded was equitable—and certainly not inequitable—under international law. The difference in quantum is justifiable by the distinct circumstances of the claimants and Mrs. Cantu. First, the Framework implicated a far narrower range of human rights impacts than those suffered by Mrs. Cantu. Second, the Framework set no evidentiary thresholds. Thus, the PRFA was dealing almost exclusively in the realm of presumed, rather than proven, harm. By contrast, Mrs. Cantu was subject to strict evidentiary standards: “This Court has established that reparations must have a causal nexus with the facts of the case, the violations declared, the damage proven and the measures requested to repair the respective damage.”<sup>742</sup> It was therefore entirely reasonable that the total value of compensation received by the claimants would differ from that offered to Mrs. Cantu. (With the top-up payment of K30,000 in 2015, claimants ultimately received compensation of far higher value than the *Rosendo Cantu* or the *Espinoza Gonzales* precedents would suggest.<sup>743</sup>)

### ***iii. Was the remedy “culturally appropriate”?***

We have considered the limits on “culturally appropriate” remedies in Porgera—as advocated by MiningWatch, EarthRights, and the Clinics—under GP 31(h).<sup>744</sup> That discussion focused on the inherent constraints under the Guiding Principles in offering “culturally appropriate” remedies that are contrary to national law or international human rights norms. In the context of rights-compatibility, the issue is whether the remedies actually offered by the Framework were “culturally appropriate”.

We are unable to answer this question definitively. It raises a critical tension underlying the provision of rights-compatible remedies. Are “culturally appropriate” remedies only those considered appropriate and sufficient by the claimants, no matter the consequences? Or, is it possible for remedies independent experts deem appropriate in light of cultural circumstances to be “culturally appropriate”—even if they are not considered so by the intended recipients?

As discussed under GP 31(h), Barrick sought the insight of credible experts in sexual violence in Papua New Guinea, and Porgera in particular, when designing the Framework’s remedies.

These experts were unanimous in their conviction that cash awards would *not* provide claimants with an effective remedy. As Dame Kidu noted in her letter to the OHCHR: “In a ‘culturally appropriate’ response the victims’ rights are rarely paramount.”<sup>745</sup> Ms. Wainetti, the National Director of the Family and Sexual Violence Action Committee, echoed this point: “If cash or pigs were given to women, this will be taken and shared by their families, especially by male relatives. We would also witness a lot more abuse of the women so that men get access to the cash.”<sup>746</sup>

Everyone we interviewed who was invested in the Framework highlighted its ambition to provide lasting remedies, to “empower” impoverished women.<sup>747</sup> We would submit that progressive, novel and rights-focused remedies for the long-term benefit of women who live in the most desperate and vulnerable circumstances is surely permissible—indeed welcome—under the Guiding Principles. But it is hard to dub such an approach “culturally appropriate”. Dame Kidu, in the quotation above, seemed to admit as much. The challenge is that a “culturally appropriate” remedy is by its nature traditional. And while elements of tradition should be cherished, it is difficult not to aspire to unshackle vulnerable women from sexist and disempowering traditions.

In the event, it seems that the Framework satisfied neither the hopeful progressives nor the traditionalists. Everyone invested in the Framework on the ground, including all representatives of the PRFA, expressed heartfelt sorrow that the Framework ultimately did not deliver the empowering and sustainable remedies for which they had hoped.<sup>748</sup> In the words of one, echoing a sentiment held by all: “If Barrick was just going to pay in cash, there was no point going through this elaborate process of setting up the Remedy Framework, with all its great intention.”<sup>749</sup> And successful claimants expressed near universal dissatisfaction with the remedies<sup>750</sup>: 60 of 62 claim that the remedies they received were not the ones they wanted and expected<sup>751</sup>; 59 out of 62 believe that they were not treated fairly by the Framework.<sup>752</sup> These dissatisfied claimants advert to both the relative value of ATA Claimants’ awards and the failure to receive the empowering small-business remedies that the Framework was originally designed to provide. In short, both the expectation of traditional remedies and the hope for novel ones were ultimately dashed.

### 6.1.3: ASSESSMENT OF INDICATOR 24

*IN PROVIDING THESE OUTCOMES AND REMEDIES, DID THE FRAMEWORK CAUSE OR CONTRIBUTE TO, OR BECOME DIRECTLY LINKED TO, ADVERSE HUMAN RIGHTS IMPACTS?*

#### 6.1.3(A): DESIGN

##### *i. Right to remedy*

The second design element of rights-compatibility is to ensure that the Framework's outcomes do not create risks of adverse human rights impacts. The chief right raised by certain stakeholders in this context was the right to remedy itself. They alleged that the waiver clause in the settlement agreement, in effect, adversely impacted claimants' right to remedy by asking them to agree not to pursue further civil claims against Barrick or the PJV.<sup>753</sup> The final version of the clause provides:

*"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 [underlying the grievance], 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. This agreement may be pleaded and tendered by Barrick, the PJV and the 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 PJV or PRFA in any form of dispute resolution process connected to such a legal proceeding."*<sup>754</sup>

The OHCHR concluded that the inclusion of the waiver clause in the settlement agreement did not infringe on the right to remedy under international law.<sup>755</sup> That conclusion was driven in by the waiver's narrow scope, with its express exclusion of criminal actions.<sup>756</sup>

##### *ii. Other international human rights*

The Framework's design is also sensitive to the possibility of creating additional risks for claimants in the provision of remedies. Of these, the most significant was the risk that claimants might be abused by their family members if they were given cash.<sup>757</sup> All of the participants we interviewed from the pre-launch workshop to discuss appropriate remedies shared

the view that cash awards would create risks for claimants.<sup>758</sup>

The Framework was thus designed to privilege alternatives to cash, such as in-kind small-business support and vouchers for school fees or medical care.<sup>759</sup> And the Framework's design took pains to emphasize that the CAT should be alive to the risk of cash compensation: "Any award of cash to the Claimant must be carefully considered and discussed with the Claimant to minimize any risk that this would present to the Claimant."<sup>760</sup>

#### 6.1.3(B): IMPLEMENTATION

##### *i. Right to remedy*

The waiver's impact on the right to remedy in implementation turns on the completeness of the remedy ultimately offered under the Framework. In particular, because the waiver was drafted to preclude further *civil* claims, the relevant question is whether the compensation offered was complete with reference to international human rights law. If so, the waiver did not adversely impact claimants' right to remedy; if not, it might have.<sup>761</sup> As discussed under Indicator 23, the Framework's remedy was complete with regard to compensation, aligning with IACHR's application of equity. Indeed, with the top-up payment, the amount awarded far exceeded what the IACHR had offered in *Rosendo Cantu*, and, more recently, in *Espinoza Gonzales* for a wider array of serious human rights violations by Mexico and Peru, respectively. We therefore find that the waiver did not adversely impact the right to remedy in implementation.

##### *ii. Other international human rights*

We are not in a position definitively to assess whether the Framework's remedies caused or contributed to, or were directly linked to, other adverse human rights impacts on claimants.<sup>762</sup> Nonetheless, accounts of brutal abuse by male family members in pursuit of cash remedies are appallingly common and consistent. We highlight below some representative claimant answers to the question: "Have you suffered any threats or injury as a result of participating in the Remedy Framework or receiving any remedies?"<sup>763</sup>

- "I had a big fight with my family because they all wanted a share of the K20,000 as compensation. I was beaten by my brother and chased out of my home; I am now living like a nomad."<sup>764</sup>
- "My husband physically assaulted me. He wanted to remove my eye with timber, and he scarred my face."<sup>765</sup>

- “My six children assaulted me and got the money. I was left with nothing.”<sup>666</sup>
- “I was beaten by my brother because he claims I didn’t give him any money—and he got K10,000. My uncle and mother also attacked me for the money.”<sup>667</sup>
- “My husband wanted the compensation money and tried to cut me. I gave him all the money.”<sup>668</sup>
- “My stepfather hit me with a stick, and cut my head with a bush knife. He wanted half the compensation money.”<sup>669</sup>

Similar accounts were provided by the vast majority of successful claimants: 44 of 62 reported that they had been abused as a result of participating in the Framework.<sup>770</sup> The claimants who were not abused avoided it by sharing the money (willingly or not) with their families. As elaborated in Section 7: Conclusions and Recommendations, to the extent cash remedies did expose claimants to security risks, we believe that these risks would have been similar with any fungible award, such as pigs.

#### 6.1.4: CONCLUSION ON GUIDING PRINCIPLE 31(F)

As the OHCHR found, the Framework was largely designed to be rights-compatible. The range of remedies it offered aligned with the right to remedy for sexual violence; and the waiver was narrow enough not to compromise the right to remedy itself. In addition, Barrick took care in designing the Framework to identify and minimize the risk that the award of remedies themselves would pose to claimants.

From a strict perspective of adherence to GPs, the process to value the remedies was wanting in two regards: (1) it took civil awards in Papua New Guinea as the referent; and (2) it captured rehabilitation costs in the valuation.<sup>771</sup> (It was entirely understandable that Barrick set the valuation this way in light of the opinions of leading Guiding Principles experts consulted.) In practice, however, application of this metric did not result in an inequitable award under principles of international human rights law. When compared to the most directly applicable precedents, the Framework’s remedies were in line with—and ultimately exceeded—what an international human rights tribunal would order in similar circumstances. As a result, the compensation offered was complete, and the waiver did not adversely impact claimants’ right to remedy.

Our rights-compatibility assessment remains indeterminate on two fronts. First, we cannot say definitively whether the remedies provided were “culturally appropriate”. While they were recommended by leading sexual violence experts in Papua New Guinea, that was based on a progressive view of women’s rights and development that did not necessarily align with the dominant conception or tradition in Porgera. Second, we cannot say definitively whether the Framework’s remedies, particularly the cash compensation, exposed claimants to an increased risk of abuse by their families. Based only on our interviews, however, it does seem that the precise risks anticipated by sexual violence experts in Papua New Guinea did materialize once the claimants received cash compensation. The devastating impression left is that virtually none of the successful claimants was able to benefit from the remedies she was offered, no matter how generous as a matter of international human rights law.

<sup>666</sup> For a discussion of the implicated rights, see discussion under GP 22.

<sup>667</sup> OHCHR Opinion at 6 (“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.”).

<sup>668</sup> UN Human Rights Committee, “General Comment No. 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant,” 26 May 2004, CCPR/C/21/Rev. 1/Add. 13, at ¶8 (noting that the obligations under the ICCPR do not have “direct horizontal effect [to private actors] as matter of international law.”) and ¶15 (“States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights.”) (emphasis added) [General Comment 31].

<sup>669</sup> GP 31(f), Commentary.

<sup>670</sup> GP 11 (“Business enterprise should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”).

<sup>671</sup> GP 11, Commentary (“The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States’ abilities and/or willingness to fulfill their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national law and regulations protecting human rights.”).

<sup>672</sup> For the purposes of this assessment, we take as given that the human rights pertaining to sexual violence, as defined under international law, can coherently apply without further adaptation to private security forces.

- <sup>673</sup> Enodo Interview with Guiding Principles Expert (#1); Enodo Interview with Guiding Principles Expert (#2); Enodo Interview with Guiding Principles Expert (#3); Enodo Interview with Dinah Shelton.
- <sup>674</sup> GP 12 (“The responsibility of business enterprises to respect human rights refers to internationally recognized human rights ...”).
- <sup>675</sup> We flag this as a relevant concern when designing and implementing an OGM, but one which, for reasons of scope and evidence, we cannot definitively assess here. That would have required, in effect, a human rights impact assessment of the Framework itself. While our claimant interviews did reveal allegations of human rights impacts based on participation in the Framework, we did not conduct any independent investigation of those allegations.
- <sup>676</sup> See, e.g., *Athey v. Leonati*, [1996] 3 S.C.R. 458 (Canada) (“The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position that he or she would have been in absent the defendant’s negligence”). This discussion is focused on civil wrongs in the common law tradition, as that is the legal tradition followed in Papua New Guinea.
- <sup>677</sup> *Ratyck v. Bloomer*, [1990] 1 S.C.R. 940 at 962 (Canada).
- <sup>678</sup> *Velasquez-Rodriguez Case (Merits)* (1988) 4 Inter-Am. Ct. H.R. (ser. C) at 300, fn. 63 (“Reparation of harm brought about by the violation of an international obligation consists in full restitution (*restitutio in integrum*), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm.”).
- <sup>679</sup> OHCHR Opinion at 11; see also, UN General Comment 31 at ¶16 (“The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bring to justice the perpetrators of human rights violations.”).
- <sup>680</sup> UN General Comment 31 at ¶16.
- <sup>681</sup> *Id.* (“In addition to the explicit reparation ... the Committee considers that the Covenant generally entails appropriate compensation.”) and ¶17 (“[I]t has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party’s laws or practices.”).
- <sup>682</sup> *Manual* at 6.
- <sup>683</sup> OHCHR Opinion at 12.
- <sup>684</sup> *Framework of Remediation Initiatives* at 12.
- <sup>685</sup> *Id.*
- <sup>686</sup> *Manual* at 6; Enodo Interview with Senior Barrick Personnel (#4); Enodo Interview with Cardno Personnel (#1).
- <sup>687</sup> Enodo Interview with Guiding Principles Expert (#1); Enodo Interview with Guiding Principles Expert (#2); Enodo Interview with Guiding Principles Expert (#3); Enodo Interview with Human Rights Watch (#2).
- <sup>688</sup> *Human Development Report* at 54-55.
- <sup>689</sup> Enodo Interview with Dinah Shelton.
- <sup>690</sup> Council of Europe, *European Convention on the Compensation of Victims of Violent Crimes*, 1 February 1988, CETS No. 116, Art. 5 (“The compensation scheme may, if necessary, set for any or all elements of compensation an upper limit above which and a minimum threshold below which such compensation shall not be granted.”).
- <sup>691</sup> Dinah Shelton, *Remedies in International Human Rights Law* (2006), Oxford Scholarship Online, at 294 and 301 (citing the IACHR in *Velasquez-Rodriguez v. Honduras* for the proposition that “reparations generally are to be effective and independent of the limitations of national law.”).
- <sup>692</sup> *Basic Principles*, Art. 20 (“Compensation should include—(a) Physical or mental harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Moral damage; (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.”).
- <sup>693</sup> Shelton at 343 (“There are few developed principles for calculating awards of non-monetary injuries like pain and suffering, fright, nervousness, grief, anxiety, and indignity. While these injuries constitute recognized elements of damages, they are particularly personal and therefore difficult to measure. ... The guiding principle in most courts for calculating damages for non-monetary injury as an intangible loss is ‘fair compensation’ or equitable assessment.”) (citations omitted).
- <sup>694</sup> Enodo Interview with Dinah Shelton.
- <sup>695</sup> *Rosendo Cantu*. We are indebted to Dinah Shelton for suggesting this precedent.
- <sup>696</sup> *Id.* at ¶277.
- <sup>697</sup> *Id.* at ¶279.
- <sup>698</sup> *Id.* at ¶274 (for lack of evidence, the Court ordered payment of only approximately one eighth of the compensation Mrs. Cantu sought for economic harm).
- <sup>699</sup> Shelton at 319.
- <sup>700</sup> *Id.* at 318.
- <sup>701</sup> Enodo Interview with Guiding Principles Expert (#3); Enodo Interview with Dinah Shelton.
- <sup>702</sup> *Rosendo Cantu* at ¶¶208-269.
- <sup>703</sup> *Id.*

- <sup>704</sup> See *id.* at ¶252 (“[T]he Court rules that the State shall provide, immediately and free of charge, the medical and psychological care they require.”).
- <sup>705</sup> OHCHR Opinion at 12 (“As mentioned above, the remedy offered should be agreed with the claimant based on their wishes, and be in line with what is considered a culturally appropriate form of civil or mediated remedy for violations of the same nature, i.e. rape and sexual violence.”); Enodo Interview with Dinah Shelton (noting that, in considering the appropriate remedies, international human rights tribunals increasingly look to what would be “culturally appropriate”).
- <sup>706</sup> OHCHR Opinion at 12.
- <sup>707</sup> See Section 6.C.2.
- <sup>708</sup> Section 6.C.2(B).
- <sup>709</sup> Interview Results, Appendix 1 (Question 22—“Have you now received all those remedies?”).
- <sup>710</sup> Enodo Interview with PRFA Leadership (#2); Enodo Interview with Cardno Personnel (#1).
- <sup>711</sup> *Id.* (Question 21—“What remedies did you receive before the most recent top-up payment?”).
- <sup>712</sup> *Id.* (Question 23—“Were these the remedies you wanted and expected?”).
- <sup>713</sup> Enodo Interview with Human Rights Watch (#1); Enodo Interview with Human Rights Watch (#2); Enodo Interview with Senior Barrick Personnel (#2).
- <sup>714</sup> Enodo interview with Porgera Corporate Responsibility Personnel.
- <sup>715</sup> *Id.*
- <sup>716</sup> *Id.*
- <sup>717</sup> *Id.*
- <sup>718</sup> *Gold’s Costly Dividend* at 24.
- <sup>719</sup> Enodo interview with APD Personnel (#1); Enodo Interview with APD Personnel (#4).
- <sup>720</sup> *Id.*
- <sup>721</sup> Enodo Interview with APD Personnel (#1); Enodo Interview with APD Personnel (#2).
- <sup>722</sup> Enodo Interview with APD Personnel (#1); Enodo Interview with APD Personnel (#2); Enodo Interview with APD Personnel (#3).
- <sup>723</sup> *Id.*
- <sup>724</sup> Enodo Interview with APD Personnel (#1).
- <sup>725</sup> Enodo Interview with APD Personnel (#3).
- <sup>726</sup> Enodo Interview with APD Personnel (#1); Enodo Interview with APD Personnel (#2); Enodo Interview with APD Personnel (#3).
- <sup>727</sup> Enodo Interview with APD Personnel (#1); Enodo Interview with APD Personnel (#2); Enodo Interview with APD Personnel (#3); Enodo Interview with APD Personnel (#4).
- <sup>728</sup> *Id.*
- <sup>729</sup> Shelton at 332 (“In practice, litigation may centre on the choice of valuation methodology. Tribunals tend to emphasize abstract legal concepts and equity considerations resulting in standards of compensation that are economically invalid or unclear because the tribunal provides no clear explanation of its methodology.”).
- <sup>730</sup> *Rosendo Cantu* at ¶279. We consider only the moral damages as a referent for the Framework, because there was no Framework evidentiary mechanism to establish the extent of claimant damages—as would be expected for any other head of compensation.
- <sup>731</sup> *Id.* at ¶167.
- <sup>732</sup> *Id.* at ¶182.
- <sup>733</sup> *Id.* at ¶185.
- <sup>734</sup> *Id.* at ¶201.
- <sup>735</sup> *Case of Espinoza Gonzalez v. Peru*, Judgment of IACHR, 20 November 2014 at ¶334.
- <sup>736</sup> *Id.* at ¶189.
- <sup>737</sup> Shelton at 299.
- <sup>738</sup> World Bank, “GDP per capita, PPP (current international \$)”, data.worldbank.org (in 2013, Mexico’s GDP per capita at purchasing power parity was US\$16,200.60; in 2013, Papua New Guinea’s was US\$2647.30).
- <sup>739</sup> We would ordinarily include unconventional remedies, such as business training and school fees, under this head. We understand that the value of business training under the Framework was negligible; and school fees were offered to a small proportion of the claimants we interviewed. We therefore discount them for the purposes of this assessment.
- <sup>740</sup> The prevailing rate on 31 December 2013 was K1=US\$0.3990 (xe.com). The prevailing rate when the Framework was launched, however, was K1= US\$0.4858 (rates on 31 October 2012, xe.com). At that exchange, the total value of the package was to range, at a minimum, between US\$9,716 and 12,145.

<sup>741</sup> See Section 6.C.2(B): “No reasonable alternative”.

<sup>742</sup> *Rosendo Cantu* at ¶204.

<sup>743</sup> Under the *Espinoza Gonzales* precedent, the award of US\$60,000 in Peru was the equivalent of approximately US\$13,576.48 in Papua New Guinea. See World Bank, “GDP per capita, PPP (current international \$)”, data.worldbank.org (in 2013, Peru’s GDP per capita at purchasing power parity was US\$11,699.50; in 2013, Papua New Guinea’s was US\$2647.30). We have used 2013 because that is the latest year for which data on Papua New Guinea is available. Even at today’s depressed exchange rate, K50,000 is equal to US\$16,753.22 (rates on 9 December 2015, xe.com).

<sup>744</sup> Section 6.C.2(A): “Limits of good faith engagement”.

<sup>745</sup> Dame Kidu Letter of 24 March 2013.

<sup>746</sup> Wainetti Letter to OHCHR.

<sup>747</sup> *Id.* Enodo Interview with CAT Officer (#1); Enodo Interview with CAT Officer (#2); Enodo Interview with CAT Officer (#3); Enodo Interview with PRFA Leadership (#1); Enodo Interview with PRFA Leadership (#2); Enodo Interview with Community Leader (#1); Enodo Interview with Community Leader (#2); Enodo Interview with PDWA Leadership; Enodo Interview with Sexual Violence Expert (#2); Enodo Interview with Sexual Violence Expert (#3).

<sup>748</sup> *Id.*

<sup>749</sup> Enodo Interview with Sexual Violence Expert (#3).

<sup>750</sup> It is possible that successful claimants were largely satisfied with their remedies until they learned what claimants who left the Framework received. (Dame Carol Kidu and Ume Wainetti, “Report of Visit to Porgera by PRFA Board Members, 18-21 January 2015”, and “Notes on 11 Claimant Responses Regarding Use of the Financial Components of Remedy Packages, January 2015”.)

<sup>751</sup> Interview Results, Appendix 1 (Question 23—“Were these the remedies you wanted and expected?”).

<sup>752</sup> *Id.* (Question 27—“Did you feel that you were treated fairly by the Remedy Framework?”).

<sup>753</sup> MiningWatch, “Rape Victims Must Sign Away Rights to Get Remedy from Barrick” (“We do not believe women should have to sign away rights to possible future legal action in order to access the types of remedy Barrick is offering [...] this requirement is not best practice in cases on non-judicial remedy”).

<sup>754</sup> *Manual* at 48.

<sup>755</sup> *Id.* at 7-9.

<sup>756</sup> *Id.* at 8 (“In such instances, the legal waiver should be as narrowly construed as possible, and preserve the right of claimants to seek judicial recourse for any criminal conduct.”).

<sup>757</sup> *Framework of Remediation Initiatives* at 12 (“Some participants [in the stakeholder engagement workshop] 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.”).

<sup>758</sup> See Section 6.C.2.

<sup>759</sup> *Framework of Remediation Initiatives* at 13.

<sup>760</sup> *Manual* at 6. See also, *id.* at 38, Form 4 (“If a cash award is recommended, comment on how any risk to Claimant will be minimized”).

<sup>761</sup> Addressing the issue appropriately would require a case-specific analysis of the divergence between right to compensation under international human rights law and the compensation actually offered, with some allowance for divergence based on expeditiousness and lower evidentiary thresholds.

<sup>762</sup> First, we did not conduct any independent investigation to verify claimant accounts. Second, because we cannot test the counterfactual, it is impossible to know if any harms suffered by claimants flowed from the specific remedies they received. This is particularly complex in Porgera as gender-based violence is a horrifying fact of life for the vast majority of women (Ganster-Breidler at 4).

<sup>763</sup> Interview Results, Appendix 1, Question 28.

<sup>764</sup> Enodo Claimant Interview (#1).

<sup>765</sup> Enodo Claimant Interview (#56).

<sup>766</sup> Enodo Claimant Interview (#59).

<sup>767</sup> Enodo Claimant Interview (#43).

<sup>768</sup> Enodo Claimant Interview (#35).

<sup>769</sup> Enodo Claimant Interview (#33).

<sup>770</sup> Interview Results, Appendix 1, Question 28.

<sup>771</sup> This was justified based on the expert advice Barrick received at the time from BSR and Allens Linklaters. See Barrick, “A Summary of Recent Changes to the Porgera Remediation Framework”.

## 6.J: GUIDING PRINCIPLE 31(G)

(g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms.

### Relevant commentary:

Regular analysis of the frequency, patterns and causes of grievances can enable the institution administering the mechanism to identify and influence policies, procedures or practices that should be altered to prevent future harm.<sup>772</sup>

**INDICATOR 25:** WERE REGULAR ANALYSES CONDUCTED BY BARRICK OR THE PRFA TO IMPROVE THE FRAMEWORK'S DESIGN AND IMPLEMENTATION?

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**INDICATOR 26:** WERE LESSONS LEARNED FROM THE FRAMEWORK INCORPORATED IN BARRICK OPERATIONS IN PORGERA AND ELSEWHERE?

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### 6.J.1: INTERPRETATION

To ensure the Framework was a source of continuous learning, Barrick was expected to learn lessons (i) relevant to the Framework itself and (ii) those relevant to the company's operations more generally, so as to "identify and influence policies, procedures or practices that should be altered to prevent future harm."<sup>773</sup> The indicators below seek to operationalize both elements:

**INDICATOR 25: WERE REGULAR ANALYSES CONDUCTED BY BARRICK OR THE PRFA TO IMPROVE THE FRAMEWORK'S DESIGN AND IMPLEMENTATION?**

**INDICATOR 26: WERE LESSONS LEARNED FROM THE FRAMEWORK INCORPORATED IN BARRICK OPERATIONS IN PORGERA AND ELSEWHERE?**

In assessing both of these indicators, it is critical to bear in mind the Framework's operating context. As discussed under GP 22, the Framework was a transitional and finite OGM focused on historical incidents of sexual violence by PJV security guards—incidents that had been thoroughly investigated by independent human rights experts and by Barrick itself. That context frames the possible lessons to be learned in two ways. First, the Framework's finite duration and intensity of task would reasonably limit the regularity of analyses. Second, the causes of the particular grievances before the Framework were well understood by the company. Indeed, as discussed under GP 31(f), Barrick had implemented comprehensive policy and procedural changes to minimize the risk of such grievances arising in the future.

### 6.J.2: ASSESSMENT OF INDICATOR 25

*WERE REGULAR ANALYSES CONDUCTED BY BARRICK OR THE PRFA TO IMPROVE THE FRAMEWORK'S DESIGN AND IMPLEMENTATION?*

#### 6.J.2(A): DESIGN

The Framework's design does not expressly contemplate the nature or regularity of analyses. In practice, as discussed below, these analyses were one of the Framework's defining features.

### 6.J.2(B): IMPLEMENTATION

Barrick proactively analyzed (and accepted unsolicited feedback on how to improve) the Framework throughout its operation. BSR's mid-program review best demonstrates Barrick's commitment to improving the Framework. The review itself is privileged, and we have not seen it.<sup>774</sup> A summary of the findings and recommendations, however, was made public.<sup>775</sup> These recommendations included:

- (a) Better involving claimant representatives in key decisions.<sup>776</sup>
- (b) Ensuring effective engagement with claimants regarding remedy.<sup>777</sup>
- (c) Considering the value of published civil awards in Papua New Guinea as a referent for remedy.<sup>778</sup>
- (d) Including cash compensation as part of the remedy.<sup>779</sup>
- (e) Ensuring that the waiver aligned with Guiding Principles and Papua New Guinea law.<sup>780</sup>

In addition to this self-commissioned review, Barrick cooperated in the OHCHR's external review of the Framework's design.<sup>781</sup> Barrick complemented this analysis with resort to leading international experts on the Guiding Principles to revisit discrete elements of the Framework, including the quantum of remedy<sup>782</sup> and the scope of the waiver.<sup>783</sup>

To complement analyses undertaken on its own initiative, or in which it willingly cooperated, Barrick also remained open to unsolicited feedback from international observers. As two of the Framework's more outspoken critics recently conceded: "Importantly, and as an example of continuous learning, Barrick made a number of positive changes to the mechanism during implementation, following (frequently unsolicited) feedback and concerns raised by local and international groups (including ourselves) which have had sustained engagement with victims, community members, and other stakeholders."<sup>784</sup>

The changes made by Barrick and the PRFA in response to stakeholder concerns notably included a reframing of the waiver and increased emphasis on the remedy's financial component

and metric. As the OHCHR recognized, the waiver’s language evolved (i) to ensure that it was narrowly tailored to the specific harm addressed by the Framework and (ii) expressly to permit criminal and civil action against the individual perpetrators.<sup>785</sup> In terms of remedy, as discussed above, the award of cash as “culturally appropriate”, was strongly encouraged by MiningWatch, the Clinics and EarthRights.<sup>786</sup> The OHCHR echoed that recommendation: “the remedy offered should be agreed with the claimant based on their wishes, and be in line with what is considered a culturally appropriate form of civil or mediated remedy for violations of the same nature, i.e. rape and sexual violence.”<sup>787</sup> To this end, and as recommended by BSR, the PRFA ultimately adopted the metric of Papua New Guinea civil awards with a substantial cash component.<sup>788</sup> Our claimant interviews and the *Framework Summary* confirm that this metric was implemented in practice.<sup>789</sup>

### 6.J.3: ASSESSMENT OF INDICATOR 26

*WERE LESSONS LEARNED FROM THE FRAMEWORK’S OPERATION INCORPORATED IN BARRICK OPERATIONS IN PORGERA AND ELSEWHERE?*

#### 6.J.3(A): DESIGN

The Framework’s design does not expressly contemplate how information from reported grievances will inform Barrick operations more generally. This statement comes with important caveats. First, because the Framework was focused on historical violations, much of the possible systemic learning had been completed before its launch. As discussed under GP 31(f), the Framework was implemented as part of a much broader response to the risk of Barrick private security forces causing or contributing to adverse human rights impacts. That is, Barrick’s investigations to improve its policies and procedures were largely independent of the Framework itself. Second, the Framework does provide for reporting of relevant (redacted) facts to the PJV “to enable the PJV to carry out their internal investigation and consider whether any action should be taken in respect of any PJV employee implicated in the Claim.”<sup>790</sup> The Framework’s operational context thus anticipated learning against the backdrop of limited marginal lessons to be learned at a systemic level.

#### 6.J.3(B): IMPLEMENTATION

We have discussed Barrick’s efforts to reform its security practices in Porgera under GP 31(f). In terms of specific, additional lessons from the Framework’s operation, our interviews with Barrick personnel suggest that, while general information was constantly communicated to regional and global leadership, that did not necessarily relate to reshaping Barrick policies and procedures. Notably, none of the senior PJV security personnel we interviewed had been provided updates on the Framework’s findings at a general level or in specific instances.<sup>791</sup> We understand that information about specific cases or fact patterns was passed on to Barrick’s regional leadership, for follow-up investigations by national legal counsel under privilege.<sup>792</sup> But it does not appear that the Framework’s specific findings are being analyzed to improve Barrick’s operations in Porgera or elsewhere.<sup>793</sup>

This learning gap is explainable, if not entirely justifiable, with reference to both Barrick’s prior investigations and the nature of the grievances the Framework addressed. With respect to the latter, it is critical to bear in mind that the Framework involved very serious allegations with very little evidence. As discussed under GP 31(b), the Framework was expressly designed not to impose evidentiary burdens on claimants so as to ensure accessibility. Everyone involved with the Framework’s implementation—including the ATA, CAT, PRFA leadership, community leaders, and the head of the Paiam Hospital— noted that many claimants had likely falsified accounts.<sup>794</sup> The claimant files we have seen do not reference any medical evidence or witness testimony. Against this backdrop, it was essential that any disciplining of PJV security guards be premised on adequate supplementary investigation in order to protect those employees’ rights. At a systemic level, it was also prudent and practical for Barrick to be circumspect about the value of lessons based on a limited evidentiary foundation.

This assessment—commissioned by Barrick to be independent and comprehensive—should also be considered an integral component of Barrick’s efforts to learn from the Framework for its broader operations. As the company recently noted in a letter to the OHCHR, the very purpose of the assessment is to identify lessons for future corporate efforts:

*“[T]he purpose of the final assessment is not to declare that the Framework was or was not ‘successful’. To the best of our knowledge, ours was the first corporate effort to create a grievance mechanism of this type aligned with the Guiding Principles. We thus faced unique challenges in interpreting and implementing the Guiding Principles. Based on our own perspective, we believe that there were aspects of the Framework that, despite the extensive efforts outlined above, were not as effective as they could have been. Indeed, as we have advised the assessment team, there are areas that we would adjust if we were to undertake a similar program.”<sup>795</sup>*

#### 6.J.4: CONCLUSION ON GUIDING PRINCIPLE 31(G)

The Framework’s design does not expressly provide for continuous learning for the mechanism itself or for Barrick’s operations more generally. In practice, however, the Framework was consistently analyzed and modified, including in response to unsolicited stakeholder feedback. As our discussion under

other indicators demonstrates, not all of these changes were improvements, and some of them may not have been implemented as well as expected. But the fact remains that Barrick did integrate continuous learning regarding the mechanism itself into the Framework’s design (and encouraged the PRFA to integrate such learning in implementation).

With respect to integrating lessons from the Framework in Barrick’s broader operations, the position is more nuanced. Because the Framework was established following an in-depth investigation by Barrick, Human Rights Watch and the Clinics, many of the relevant lessons to prevent future abuses were already captured before the Framework’s launch. It is thus unclear whether the Framework’s operations could provide further lessons regarding Barrick’s broader policies and procedures. The difficulty was compounded by the fact that most of the Framework’s claims were supported by little evidence. As a result, there were serious inherent challenges in translating Framework findings into individual discipline or generally applicable corporate lessons.

<sup>772</sup> Guidance here can also be found in GP 20 (“In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response. Tracking should: (a) Be based on appropriate qualitative and quantitative indicators; (b) Draw on feedback from both internal and external sources, including affected stakeholders.”).

<sup>773</sup> GP 31(g), Commentary.

<sup>774</sup> As discussed under GP 31(e), the decision to keep the review privileged is both sensible and justifiable under the Guiding Principles.

<sup>775</sup> Barrick, “A Summary of Recent Changes to the Porgera Remediation Framework”.

<sup>776</sup> *Id.*

<sup>777</sup> *Id.*

<sup>778</sup> *Id.*

<sup>779</sup> *Id.*

<sup>780</sup> *Id.*

<sup>781</sup> See Barrick’s submissions to the OHCHR, discussed under GP 31(e).

<sup>782</sup> Enodo Interview with Barrick Counsel (#3).

<sup>783</sup> Enodo Interview with Guiding Principles Expert (#2); Enodo Interview with Guiding Principles Expert (#3); Enodo Interview with Barrick Counsel (#1); Enodo Interview with Barrick Counsel (#2).

<sup>784</sup> Knuckey and Jenkin at 13.

<sup>785</sup> OHCHR Opinion at 7.

<sup>786</sup> See Section 6.C.2(A).

<sup>787</sup> OHCHR Opinion at 12.

<sup>788</sup> *Manual* at 6.

<sup>789</sup> *Framework Summary* at 13. Virtually every successful claimant we interviewed recalls receiving K20,000 in cash, as well as some supplementary services. See also, MiningWatch, *Privatized Remedy and Human Rights: Re-thinking Project-Level Grievance Mechanisms* at 6 (“Subsequent to our field assessment, Barrick publicized that it had made adjustments to the remedy it would provide (June 7, 2013), and the remedy provided in 2014 was primarily cash.”).

<sup>790</sup> *Manual* at 7.

<sup>791</sup> Enodo Interview with Senior PJV Personnel; Enodo Interview with APD Personnel (#1).

<sup>792</sup> Enodo Interview with Senior PJV Personnel.

<sup>793</sup> One senior Barrick representative involved with the Framework mentioned that s/he did not believe anyone in the organization had responsibility for analyzing the Framework's findings in general.

<sup>794</sup> See, e.g., ATA Letter of 25 August 2015, Appendix 3 ("ATA also condemns the practice in which PRFA officials are processing the claimants as PRFA is promoting false claimants without proper consultations and verification processes. ATA strongly believes (sic) that such practices by PRFA Officials is only promoting false claimants and that ATA has (sic) the initiator of the Human Rights Issues in Porgera condemns such practices with the strong (sic) possible terms."); Enodo Interview with Dr. Moises Granada (noting that most of the claimants referred to him were not actually victims of sexual violence).

<sup>795</sup> Barrick, "Letter to Zeid Ra'ad Al Hussein, UN High Commissioner for Human Rights", 21 September 2015, [business-humanrights.org](http://business-humanrights.org).

## 7. CONCLUSIONS AND RECOMMENDATIONS

This assessment has covered expansive terrain with myriad discrete conclusions. We do not propose to revisit them all here. Rather, we divide this section into three cross-cutting themes: (i) the challenges inherent in an assessment of this type; (ii) specific recommendations for Barrick in Porgera flowing from our assessment; and (iii) the lessons Barrick, other companies and stakeholders can learn from the Framework.

### 7.A: ASSESSMENT CHALLENGES

This assessment reflects our best efforts to process a wide array of information systematically and precisely. But we faced inherent constraints in that pursuit. The assessment structure itself reflects decisions—from the text-focused interpretive approach to the manner of incorporating international law—that will likely not be universally endorsed. We felt these decisions were necessary to ensure methodological transparency and to minimize our discretion as assessors. But we also expect, and hope, that they will be the source of debate as the field of business and human rights develops.

Perhaps the most significant structural challenge facing this assessment is temporality. Hindsight is immaculate. It is easy to impugn decisions based on events that actually transpired. Those results, however, may not have been foreseeable. And those decisions may have been taken under severe time constraints. We have thus endeavored to apply a reasonableness standard throughout to allow a margin of appreciation for decision-makers acting in real time. The application of this standard is inexact.

Thus, even when we find implementation errors, we cannot say definitively that a reasonable decision-maker placed in that operating context would have acted differently.

Temporality also shapes our factual findings. Our greatest empirical challenge lay in according survivor interviews their proper weight. We sought from the outset to privilege claimant experience to illuminate how the Framework was perceived *when it was operating* rather than as a result of exogenous, *post hoc* events or agitation. That proved impossible. The tension surrounding the Framework in the wake of the ERI settlement and the subsequent agitation by local actors was inescapable. We believe that all claimant interview results should be viewed through that prism. We have nonetheless generally presented claimant responses as being honest reflections of their experience. (The notable exception is with the understanding of the waiver, where we saw enough internal contradiction to view our results with suspicion.)

### 7.B: RECOMMENDATIONS FOR BARRICK

This assessment focused on how well the Framework, which had already run its course, was designed and implemented with reference to the Guiding Principles and claimant experience. Any learning was to benefit future OGMs, other companies and international stakeholders, not to improve the Framework itself. (Indeed, Barrick itself no longer controls the PJV, having sold 50 percent of its Papua New Guinean subsidiary to the Zijin Mining Group.) We cannot ignore, however, the cost of institutional

shortcomings on claimants and potential claimants. If Barrick remains committed to its original aims, we would recommend good faith efforts to seek enduring solutions for survivors of sexual violence in Porgera. We therefore advance below some preliminary recommendations. We would advise much more detailed stakeholder consultation, including the involvement of Barrick and Zijin, before finalizing any concrete and detailed courses of action.

The Framework's effectiveness with reference to GP 31 and its design was compromised in a number of ways during implementation. These errors likely undermined the Framework's legitimacy. But the most significant delegitimizing force was actually the ERI settlement, which led to persistent and consistent rumors of relative inequity. We therefore do not believe that extending or re-launching the Framework is the appropriate corrective action. In the currently charged environment, the Framework itself could only assuage stakeholder discontent if Barrick gave everyone who alleged sexual violence by PJV personnel K200,000. That is neither a reasonable expectation nor a sustainable solution.

That is not to encourage Barrick or the PJV to ignore OGMs. To the contrary, we believe that the path forward should seek to provide an enduring solution that addresses the Framework's implementation gaps while minimizing risks to claimants and advancing the Framework's original ends. That approach has three related elements. First, we would recommend taking monetary or other fungible compensation off the table for all claims of gender-based violence. Second, we would recommend ensuring that the existing OGM at the Porgera mine is able to receive and process gender-based violence claims. Third, we would recommend investing in community-based empowerment programs for women. We discuss each of these recommendations in more detail below.

***i. Emphatically take any monetary or other fungible compensation off the table for future gender-based violence claims***

The first step in developing a sustainable, long-term approach to address the Framework's implementation errors is calibrating stakeholder expectations. Taking fungible remedies off the table for future gender-based violence claims will be unpopular. We believe it is nonetheless essential. As experts in sexual violence in

Papua New Guinea predicted from the outset, fungible remedies do not benefit the female survivors of sexual violence in Porgera. Successful claimants under the Framework suffered gruesome abuse at the hands of male family members to access their monetary compensation. They were often left in a much worse position, financially and socially, than before they came forward.

The availability of monetary remedies may also have increased the risk of false claims. Sexual violence experts warned before the Framework's launch that this risk, and the related risk that men would coerce such claims, would attend the offer of monetary compensation. In the event, everyone involved locally with the Framework, including the ATA and the chief doctor at the Paiam Hospital, believed that a number of successful claimants provided false accounts. We cannot say whether they were pressured to do so. At this point, however, with the ATA and other local actors homed in on obtaining at least K200,000 for every alleged survivor, there are good reasons to fear that an expectation of fungible remedies would expose women to security risks *before* filing a claim. Moreover, without more onerous evidentiary requirements, it would remain a great challenge for an OGM to distinguish between legitimate and illegitimate claims.

Denying the possibility of fungible remedies would also make clear that any OGM is simply a complement to, and not a substitute for, existing judicial processes. Survivors who so desired could continue to seek monetary remedies from Barrick, the PJV or individual perpetrators, but only in fora legitimately equipped to assess the truth of claims and their associated damages. We recognize, of course, the reasonable apprehensions survivors might have about resort to Papua New Guinean courts. But that is an argument for strengthened public institutions. It would be unreasonable to expect that institutional deficit to be filled entirely by a private, non-judicial mechanism.

***ii. Ensure that the existing OGM at Porgera is able to handle gender-based violence claims, including those that might previously have gone through the Framework***

In addition to the Framework, Barrick developed a more formalized grievance process at the Porgera mine in the wake of *Gold's Costly Dividend*. We recommend directing all future gender-based violence claims—including those that, if filed at

the right time, would have gone through the Framework—to this non-specialized OGM, without differentiating between sexual and non-sexual violence. First, the Framework’s focus on sexual violence, with its associated social stigma, rendered the filing of a grievance a source of risk for claimants. An OGM for an array of grievances would mitigate that risk. (We doubt the risk could be eliminated entirely because of Porgera’s intimacy.) Second, the Framework’s focus limited accessibility, transparency, predictability and equitability. With the broader OGM, by contrast, the PJV could safely invest in more public education about the process and remedy options for all types of claims without compromising affected stakeholder safety. Third, the dissonance between the Framework’s design and implementation largely flowed from the distinct institutions responsible for the two functions. The PJV may better handle sensitive human rights issues directly rather than relying on an intermediary to ensure implementation of key protocols and procedural protections.

Addressing gender-based violence claims through the existing OGM would transform the process from adjudicative to dialogue-based, allowing for greater procedural flexibility and remedy individualization. These ends would be advanced by removing fungible remedies that allow for easy comparison. For certain international stakeholders, lack of comparability would likely be a drawback. As discussed in Lessons Learned, below, by virtue of institutional constraints the dialogue-based approach would inevitably heighten the risk of arbitrariness. From the perspective of social stability, however, developing non-comparable, individually tailored packages would limit the risk of stakeholder discontent based on relative award values.

The dialogue-based approach would still face the challenge of determining the truth of allegations: “If an enterprise contests an allegation that it has caused or contributed to an adverse impact, it cannot be expected to provide for remediation itself unless and until it is obliged to do so (for instance, by a court).”<sup>796</sup> To address factual doubt fairly, the OGM might be able to conduct an investigation—transparently documenting and sharing the results with the claimant—to determine the truth of allegations.

Given the likelihood that the Framework did not address all sexual violence claims against PJV personnel and the prevalence

of gender-based violence in Porgera, the existing OGM will likely need to be readied to address gender-based violence effectively. OGM personnel, for instance, would need in-depth training in engaging with survivors of gender-based violence. Awareness in the community would need to be raised about the OGM’s processes and remedies. Lastly, we would recommend, to the extent practical, against asking claimants to waive future civil actions for such claims. The OGM’s disavowal of monetary compensation would expressly quell the ambition to provide a complete remedy under international human rights law. Any waiver would unduly heighten the importance of independent advice and run the risk of adversely impacting claimants’ right to remedy.

### ***iii. Focus on community-based empowerment and sustainable development programs***

Beyond individual remedy, the Framework’s *raison d’être* was economic empowerment: it was conceived with the end of providing sustainable and enduring benefits to survivors of gender-based violence in Porgera. Regret over the failure to provide such solutions animated our interviews with each of the PRFA decision-makers. It was also the source of disappointment for the ATA and community leaders who believed in the Framework. Most importantly, it was the source of disappointment for most of the successful claimants we interviewed, whose expectations of small-business support were dashed.

The clock cannot be turned back for Framework claimants. But community-level empowerment programs geared to small-business development could help address one overriding concern about the Framework’s implementation and deliver on the Framework’s initial ambitions. The specifics of such programs would need to be determined based on local stakeholder engagement, taking account of the PJV’s available resources. They would likely need to focus on basic education, vocational or business training, and other non-monetary benefits. Ideally, they would be, or aspire to become, locally administered. To minimize the administrative burden and the possibility of social backlash, we would recommend programs accessible to all women—independently of gender-based violence claims. Such programs would complement gender-based violence initiatives that the PJV is already supporting.

## 7.C. LESSONS LEARNED

There are legion lessons, large and small, that stakeholders can learn from the Framework's operation. Indeed, the Framework's design, with its assiduous attention to claimant-focused procedural protections, should be a touchstone for every company seeking to develop an adjudicative OGM. It would add little value, however, to review every conclusion from the Integrated Assessment. Rather, we attempt to distill the key, overarching lessons from the Framework's operation:

1. Understand the virtues and limits of different OGM types.
2. Recognize the externalities of design and implementation decisions.
3. Do not rely on confidentiality.
4. Prepare always to be audited.
5. Consistently monitor implementation
6. Trust the stakeholder engagement (within limits).

### 7.C.1: UNDERSTAND THE TYPE OF MECHANISM

No OGM can be all things to all stakeholders. The OGM's institutional structure defines its virtues and limits. Depending on what the OGM seeks to accomplish, certain design decisions will be preferable to others. Even when these decisions are not necessarily superior, each carries implicit constraints. These constraints ought to inform the OGM's overall design and public representations. They should also be understood by external stakeholders, so that critiques are targeted and fair. We discuss below the overlapping effects of three different types of institutional choices faced by the Framework, each of which limited the ability to provide individually tailored remedy packages. Ignoring these inherent constraints may have led Barrick to set unrealizable objectives.

#### *i. Adjudicative vs. Dialogue-Based*

A key decision in designing the Framework was whether to be adjudicative or dialogue-based. Barrick chose the former. With an adjudicative mechanism, the company is removed from the decision-making process for individual claims. Discretion over claims is awarded to an independent institution with the power to reach binding conclusions. That discretion is necessarily constrained to minimize the risk of arbitrariness. To ensure legitimate decision-making that is (and is perceived to be) fair, an independent adjudicative body will need detailed

rules to govern claims processing and remedy options. These constraints on decision-maker discretion ensure that the company and claimants can meaningfully consent to the OGM's authority. An inevitable corollary of rules limiting discretion is a constraint on remedy individualization based on *stakeholder preference*. Privileging such preferences would carry a serious risk of arbitrariness. (There may still be the possibility of individualization based on impact, but that would require procedural mechanisms, such as evidentiary standards, fairly to distinguish impacts.)

With a dialogue-based mechanism, by contrast, the company exercises discretion throughout the process. The grievance process is, therefore, inherently more flexible. To the extent the company wishes to preserve such flexibility, detailed procedural and substantive guidelines may not be essential. The company will then be able to individualize remedies based on stakeholder preferences. Added flexibility, however, increases the risk of arbitrariness. It also carries an inherent threat to the OGM's legitimacy, particularly if claimants perceive relative inequity in how their claims are treated. In short, the mechanism's ambitions need to be cognizant of its inherent limits. A dialogue-based mechanism may be able better to cater to individual preferences; an adjudicative mechanism may be better able to ensure fairness across myriad similar claims.

#### *ii. Rolling vs. Historical*

The Framework was designed to remedy historical claims of sexual violence rather than to be a rolling OGM to take on such claims whenever they arose. An historical OGM designed to address claims dating back many years may need to compromise on individualization for two reasons. First, there may be little evidence that claimants can marshal; evidentiary thresholds would thus compromise the OGM's accessibility. Second, an historical OGM—particularly one designed to address a specific and proven harm—is more likely to face an array of claims at the same time. That imposes limitations of time and resource that may render individualized investigations impossible. These two factors increase the risk of false claims and heighten the difficulty of non-arbitrary remedy individualization. The decision-makers in such a context have to deal in the realm of presumed rather than proven harm, so will likely need to standardize remedies based on the nature of the claim.

A rolling OGM has more institutional freedom in this regard. First, as the events underlying the claim may have arisen contemporaneously with the filing of a grievance, the OGM may be able to set stricter evidentiary thresholds without materially undermining accessibility. Second, there may be less time and resource pressure on the decision-makers, and thus greater ability to conduct individualized investigations, because not all claims are being filed and resolved in a compressed period. The combination of greater evidence and more independent investigative freedom would reduce the risk of false claims and may permit greater individualization of remedies based on actual, rather than presumed, harm.

In the Framework's case, of course, Human Rights Watch's report and Barrick's own investigation revealed that a historically oriented OGM was necessary (in addition to a rolling OGM). The point of this distinction is simply to highlight how the Framework's historical focus constrained from the outset the possibility of individualized remedies.

### ***iii. Mass of Similar Claims vs. Diverse Array of Claims***

The nature of claims an OGM is designed to address also bears significantly on the OGM's structural limits because of legitimacy concerns. The Framework was designed to remedy a specific and fundamental adverse human rights impact suffered by a number of women in Porgera. The anticipated claims would therefore be largely similar. An OGM designed to address a number of similar claims, particularly when those claims will be perceived by affected stakeholders to be similar, cannot individualize remedies without compromising the OGM's perceived fairness. As claimant perception of the Framework demonstrates, relative equity of remedies is an overriding, and understandable, stakeholder concern. An OGM designed to address a diverse array of claims may have much more flexibility in this regard, because differentiated remedies can be justified to stakeholders with reference to the distinct harms suffered. The OGM may still need to be careful to treat like claims alike, but it will not be bound by legitimacy interests to treat all claims the same.

## **7.C.2: RECOGNIZE THE BUTTERFLY EFFECT**

The Framework's implementation attests forcefully to the externalities of apparently discrete decisions. Few, if any, decisions relating to the OGM's design or implementation will have only an isolated effect. Rather, even decisions that seem

of narrow scope are likely to shape the OGM's effectiveness in profound and unexpected ways. Four Framework examples illustrate this network effect clearly: (i) the decision to focus exclusively on sexual violence; (ii) the decision to pursue a discreet awareness campaign; (iii) the decision to award cash compensation; and (iv) the inclusion of the waiver in the settlement agreement.

### ***i. Focusing Exclusively on Sexual Violence***

The Framework was designed to focus on historical cases of sexual violence perpetrated by PJV employees. That decision was justified by the particular interests of survivors and the weakness of the existing OGM to address such wrongs. While legitimate under the Guiding Principles, the narrow focus fostered significant implementation hurdles. Survivors of sexual violence in Porgera are exposed to community opprobrium and a serious risk of re-victimization at the hands of male relatives. The Framework's focus on such survivors meant that the institution's existence was a source of danger for potential claimants. That is, the Framework was its own barrier to access. Indeed, it placed the elements of accessibility—awareness, physical access and security—in conflict: the more public the knowledge and location of the Framework, the greater potential claimants' fears of reprisal. The narrow focus also had more subtle practical implications. Chief among these was the burden placed on the CAT to distinguish between sexual and non-sexual violence, a fine distinction to draw even for sophisticated decision-makers with an abundance of evidence. It proved a burden that CAT could not bear.

A relatively minor expansion of the Framework's ambit to include *all* gender-based violence—sexual or not—by PJV personnel would have obviated many of these difficulties. Potential claimants would not have feared stigma or abuse simply for accessing the Framework. Even if their particular claim related to sexual violence, the broader ambit would have afforded them a colorable explanation to share with their families. And the CAT would not have been forced to wrestle with a nuanced definition of sexual violence, which may have led to denial of access to Framework benefits to a number of eligible claimants. In addition, the broader ambit may have avoided altogether the need for the discreet awareness campaign, which, as discussed below, limited the Framework's effectiveness in critical ways.

### ***ii. Adopting a Discreet Awareness Campaign***

The PRFA quickly recognized that the Framework's focus meant that its existence needed to be shrouded in secrecy. On the advice of the PDWA, it therefore implemented a discreet, word-of-mouth publicity campaign. The immediate impact of this decision was to limit awareness, which was justified by the interest in claimant security. Beyond this immediate effect, however, the lack of publicity impacted the Framework's predictability and equitability. By adopting a discreet campaign, the Framework significantly increased the pressure on the CAT and the ILA to communicate critical information during their initial claimant meetings. There was no other venue in which potential claimants could be educated about their human rights or their rights under the Framework. The result was that claimants were extremely vulnerable to CAT or ILA communication errors—the very errors that apparently materialized.

Had the PRFA adopted a more public campaign, it may have ensured broader awareness among potential claimants. Importantly, it would also have enabled the PRFA to ensure *deeper* awareness. With a public campaign, the PRFA would have been able to carry out capacity building on human rights and Framework processes to supplement and reinforce the CAT and ILA meetings. That could have helped ensure that critical information—including the definition of sexual violence, the Framework's processes, remedy options and timelines—was repeatedly communicated to claimants in multiple fora so that they had the best chance to understand it. In so doing, the PRFA may have been better able to mitigate the risks to the Framework's predictability and equitability as well as its accessibility.

This is not to suggest that the PRFA necessarily erred in heeding the PDWA's advice. The Framework's focus on sexual violence may have made this decision inevitable. Rather, the point is that, before deciding to adopt a discreet awareness campaign, the PRFA should have considered the impact of such a decision beyond accessibility or security. In fact, the decision to privilege confidentiality of the Framework's existence over accessibility had profound and omnipresent effects on the Framework's alignment with GP 31. Had these impacts been anticipated and evaluated beforehand, the virtues of the word-of-mouth campaign may have proved relatively paltry (all the more so given that their promised security benefits were unrealistic).

### ***iii. Offering Cash Compensation***

The PRFA's decision to offer cash compensation ultimately had far more wide-ranging impacts than may have initially been anticipated. On its face, the decision bore only on remedy options, including their rights-compatibility. In practice, however, the decision fundamentally reshaped the Framework. First, in light of the Framework's legitimacy constraints, the moment cash was offered to one claimant, the same amount would have to be offered to all claimants. Individualized remedies without a fungible metric were plausible; the introduction of cash rendered individualization impossible. Second, the change in remedy options compromised the Framework's predictability, because claimants had not been told by the CAT to expect such compensation. Third, according to the accounts of the CAT and the PRFA leadership, the award of cash appears to have significantly curtailed the Framework's ambitions to provide empowering and sustainable remedies. This was both because of institutional resource constraints and because the remedy itself was quickly dissipated, whether by claimants themselves or by their families. Fourth, as anticipated, the award of cash may have exposed claimants to significant risk of abuse by their families. The combination of these factors meant that the award of cash was Trojan.

The point here is not that the decision to award cash compensation was flawed from a Guiding Principles perspective. (In light of the waiver, it can legitimately be argued that the award of cash was essential for the remedy to be rights-compatible.) Rather, as with the awareness campaign, the breadth of potential impacts on the Framework ought to have been considered when the PRFA changed its compensation policy. Recognizing the externalities may not ultimately have changed the decision. But it may have led to mitigation measures, including comprehensive discussions with claimants to manage their expectations and a consideration of ways to ensure that claimants themselves benefited from the cash.

### ***iv. Including a Waiver***

The Framework's requirement that successful claimants waive future civil claims against Barrick, the PJV and the PRFA relating to the grievance was justifiable under the Guiding Principles. But it imposed serious and diffuse practical pressures on the Framework. That is not just because the (often

misrepresented) waiver was the touchstone for international and local stakeholder concern—though that is a significant concern. By asking claimants to give up a right to obtain judicial remedies, the waiver magnified the impact of any Framework error under the Guiding Principles. In particular, the waiver placed immense pressure on the ILA to explain a complex legal right to socio-economically disadvantaged women who may have had very little ability to understand it. In addition, the waiver meant that, to be “rights-compatible”, the civil component of the remedy needed to be complete under international human rights law. (Otherwise, the settlement agreement would arguably have adversely impacted claimants’ right to remedy for sexual violence.) A similar heightened sensitivity for Guiding Principles’ alignment could extend to legitimacy, transparency and predictability.

Once again, we do not mean to suggest that the waiver was flawed. To the contrary, as the OHCHR found, the Guiding Principles do not prohibit narrow waivers as used by the Framework. It is entirely reasonable for a business to seek some finality when investing the time and resources voluntarily to develop a private grievance mechanism. In any event, despite our doubts about equitability, the Framework did offer a complete remedy under international human rights law. As above, the point here is that the decision to include the waiver implicated practical issues beyond Guiding Principles-alignment alone. The waiver constrained the Framework’s margin for error. Without it, the Framework may have afforded itself more procedural freedom and the flexibility to implement novel remedial measures, even if they were not considered complete under international human rights law.

### **7.C.3: DO NOT COUNT ON CONFIDENTIALITY**

The Framework sought to preserve a level of secrecy about the institution to protect claimants from the social and physical risks of submitting a sexual violence claim. But confidentiality proved chimerical. Very little about the Framework appears to have remained secret. All the claimants know of one another. They also all know of the ERI settlement. And, by all accounts, a large portion of the community knows who the claimants are and why they submitted claims. Claimants were therefore exposed in practice to the real security risks that secrecy was designed to mitigate.

In an intimate mining community like Porgera, confidentiality may have been an unrealistic ambition. Even if not, though, the Framework’s experience suggests that OGMs should not rely on confidentiality to protect critical institutional or claimant interests. The likelihood of disclosure is simply too great. That likelihood is multiplied where, as with the Framework, certain international stakeholders are implacably suspicious of corporate intentions and thus willing to torpedo secrecy no matter the justification. OGMs (in small communities) should thus be designed as if the institution and its outcomes will be public. In short, if an OGM’s existence needs to be confidential, the company should reconsider its design.

In the Framework’s case, beyond the initial design, treating secrecy as impossible would have reshaped the calculus of two decisions with far-reaching consequences: (1) the awareness campaign; and (2) the ERI settlement. With the former, the PRFA may have been less inclined to compromise accessibility with a discreet campaign. As discussed above, that would have also permitted the PRFA to pursue educational campaigns to improve the Framework’s transparency, predictability and equitability. The ERI settlement was exogenous to the Framework; we do not know, and cannot comment on, its terms. But widely shared beliefs about the settlement ultimately bore on the Framework’s legitimacy. Barrick may have been less inclined to conclude an extra-Framework settlement on terms diverging from Framework settlement agreements had it assumed that the terms would be widely disseminated in Porgera.

### **7.C.4: DOCUMENT EVERYTHING**

The Framework is at the vanguard of a trend to develop OGMs with reference to the Guiding Principles. That trend has two broad implications. First, there are far more detailed guidelines than ever before regarding effective OGM procedures. Second, OGMs so developed can be objectively assessed for Guiding Principles-alignment. To ensure rigorous pursuit of the former and readiness for the latter, OGMs should be conceived and implemented to be auditable. All material decisions—whether regarding the OGM in general or individual grievances—should be documented contemporaneously to ensure that they can be explained to neutral observers. That does not mean that all records need to be publicly revealed. Even if transparency is to be limited for legitimate ends, the effective tracking of

decision-making processes is essential for the company's own learning and for future reporting. Contemporaneity is critical in this context to protect against the risk of staff changes, shifting recollections, and changing stakeholder perceptions (including as a result of exogenous events).

The Framework reveals the importance of documentation at two stages: stakeholder engagement and grievance processing. The entire stakeholder engagement process should be recorded to ensure its meaningfulness. Contemporaneous documentation can attest to the source of specific decisions and ensure that stakeholders know their insights have been considered in good faith, even when they are not all accepted. The importance of documentation is just as significant, perhaps more so, when it comes to addressing specific grievances. Socio-economically disadvantaged stakeholders may ultimately have to rely on international observers as assurance that their rights have been respected. An OGM should therefore be implemented with an eye to explaining decisions, either individually or on aggregate, to wider stakeholders as needed. While this should not become a straightjacket to impose unnecessary formality on a process, there should, at the very least, be a recording of reasons for decisions—particularly those that deny remedies to claimants—to protect against arbitrariness or implementation failures.

### 7.C.5: ENSURE CONSISTENT MONITORING

The Framework's chief lesson may be the risk of dissonance between design and implementation, particularly when different institutions are responsible for each stage. The Framework's design reflected great care to align with the Guiding Principles. That care filtered down into detailed instructions on the roles and responsibilities of each PRFA decision-maker. No matter how elaborate, though, that design was not self-executing. A number of these guidelines were not diligently respected in implementation. The CAT, by its own admission, misunderstood the meaning of "sexual violence" and the proper role of the ILA. The ILA herself appears to have been remiss in performing her defined duties, particularly in guarding her independence. We have no doubt that both the ILA and the CAT were acting in good faith. Nonetheless, their responsibilities for operationalizing the design were great, particularly with regard to predictability, equitability and transparency. They ought to have been subject

to supervision commensurate with their responsibility. Any OGM administrator should factor in the need for periodic performance reviews. That is all-the-more necessary when, as with the Framework, fundamental human rights are at stake and accepting remedies would foreclose certain judicial options.

### 7.C.6: TRUST THE STAKEHOLDER ENGAGEMENT

The lesson we express with most trepidation is the importance of trusting initial stakeholder engagement. But, with appropriate qualifiers, it is essential. Barrick's pre-Framework consultation with experts in sexual violence in Papua New Guinea uniformly stressed an aversion to cash compensation in the interests of survivors themselves. Local, male-dominated organizations, supported internationally by MiningWatch and the Clinics, disagreed. After the Framework's launch, the concerted pressure of these stakeholder groups, along with the consistent requests by claimants, led the PRFA to adopt cash compensation as the bulk of any remedy package. Following this change, however, many of the harms predicted by the initially consulted sexual violence experts materialized, leaving most successful claimants with little of their remedy.

There is perhaps no bright-line and universal rule for OGMs to take from the Framework's experience. Certainly OGMs should engage with stakeholders consistently with an eye to continuous improvement. And the voices of the affected stakeholders should clearly be given pride of place in the engagement process. But we believe there is a narrow and calibrated lesson to be taken from the Framework's change to remedy policy. Companies and OGM administrators should adopt a presumption against deviating from pre-OGM stakeholder advice when three circumstances obtain:

1. The OGM has been developed, as the Framework was, based on the guidance of myriad independent and credible experts.
2. Those experts arrive at a consensus regarding a critical component of the OGM, such as remedy options.
3. And, that consensus insight is at the heart of an intricately designed OGM.

This is not to say that changing fundamental elements of an OGM after launch is necessarily a mistake. Rather, there should be a presumption in such circumstances against doing away with the initial advice. That presumption should only be displaced based on compelling evidence that convincingly contravenes the initial advice. The purpose of such a presumption is twofold.

First, it may protect against precipitous reactions to the demands of vociferous, though less credible, stakeholders. Second, the presumption may ensure that the company or the OGM administrators properly weigh the externalities of decisions before risking the OGM's overall effectiveness.

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<sup>796</sup> OHCHR, *Interpretive Guide* at 66.

## 8: AUTHOR'S POSTSCRIPT

I hope, if there is one overriding impression left by this assessment, it is that the path on which Barrick embarked was arduous. The sexual violence committed by PJV security guards was despicable. But endeavoring in good faith to remedy these grave wrongs proved perilous—hauntingly, for survivors themselves.

In the wake of these findings, one question plagues me. Knowing what I know now, would I have recommended that Barrick create the Framework, with all its elaborate procedures and ambition? Given the realities of operating in Porgera, I do not know. Still, I applaud the endeavor of everyone involved in designing and implementing the Framework, for they wrestled mightily with impossible complexity.

And I hope we as a business and human rights community can applaud the Framework for its rare ambition. Our discipline rests on the recognition that companies can have, have had, and will have serious impacts on human rights. We should encourage such companies to respond sincerely, transparently and vigorously. We should encourage such companies even though they may make mistakes. We should encourage such companies *because* they risk making mistakes in pursuit of justice.

More importantly, though, we need to recognize that encouragement is not enough. There is a chasm between observing and doing. Critiquing and commenting on corporate efforts is infinitely easier than designing and practically implementing a complement to deficient public institutions of justice. Ultimately, credible human rights groups will need to help bridge that divide. They will need to support good faith corporate efforts, and risk making their own mistakes, to operationalize business respect for human rights. The costs of not doing so, I fear, will continue to be borne by the most vulnerable stakeholders.

Yousuf Aftab  
18 January 2016

# APPENDIX 1

## SURVIVOR INTERVIEW PROTOCOL AND RESULTS

### I. Interviewer Script

Thank you very much for taking the time to participate in this assessment. My name is Pauline Kenna Dee. [Brief, off-script introduction to Pauline's cultural and professional background to ensure claimant comfort.]

I am here because I am working with Enodo Rights, which is an organization that helps businesses respect human rights. Enodo Rights has been asked by Barrick to conduct an independent and public evaluation of the Remedy Framework. We are operating independently of Barrick and do not report to the company. Our work is being overseen by a group of international human rights experts. Barrick will have the chance to comment on our findings, but we have final control over the report.

The purpose of this assessment is to evaluate the Remedy Framework's design, so that we can help Barrick and other mining companies learn for the future. There will not be any new remedies flowing from our assessment, and there will not be any new grievance mechanism in Porgera. The purpose of this assessment is simply to learn how the Remedy Framework could have been better.

I want to emphasize that everything you tell me today is completely confidential. No one outside Enodo Rights will know what you have said. When we publish the report, we will include the statements of the people we interview, but we will not tell anyone who made those comments.

Do you have any questions or concerns at this point? Please know that you can ask questions or stop this interview at any time, for any reason.

I would like to focus on your personal experience with the Remedy Framework before you received any top-up payment from Barrick. This interview will take approximately one hour. Do you agree to be interviewed for this assessment?

Please let me know if any question is unclear, and take as much time as you would like.

II. CLAIMANT INTERVIEW QUESTIONS AND RESULTS

NB: We tabulate below only the responses to questions that allow for comparability.

No.	QUESTION	RESULTS	
		SUCCESSFUL (62)	UNSUCCESSFUL (15) <sup>797</sup>
1	ARE YOU COMFORTABLE TELLING ME WHERE YOU LIVE?	N/A	
2	DID YOU SUBMIT A CLAIM TO THE REMEDY FRAMEWORK? PLEASE ANSWER YES OR NO. [IF NO, GO TO NONCLAIMANT QUESTIONS]	Yes: 62	Yes: 12 No: 3
3	WERE YOU OFFERED REMEDIES THROUGH THE REMEDY FRAMEWORK? PLEASE ANSWER YES OR NO. IF NO, WHY NOT?	Yes: 62	No: 15
4	DID YOU SIGN A SETTLEMENT AGREEMENT (AN AGREEMENT AFTER THE PROCESS, WITH YOUR REMEDIES)? PLEASE ANSWER YES OR NO. IF NO, WHY NOT?	Yes: 53 No: 4 <sup>798</sup>	Yes: 2 <sup>799</sup> No: 12 N/A: 1
5	WHEN AND HOW DID YOU FIRST HEAR ABOUT THE REMEDY FRAMEWORK?	N/A	
6	WHEN YOU FIRST HEARD ABOUT THE REMEDY FRAMEWORK, (I) HAD YOU HEARD OF UME WAINETTI, DAME CAROL KIDU OR JOHN NUMAPO? (II) DID YOU TRUST THEM TO PROTECT AND REPRESENT YOU?	I	Yes: 43 (DK, 43; All, 11) No: 19
		II	Yes: 40 Unsure: 3 N/A: 19
7	WHEN YOU FIRST HEARD ABOUT THE REMEDY FRAMEWORK, DID YOU TRUST THAT YOU WOULD BE TREATED FAIRLY? PLEASE ANSWER YES OR NO. IF NO, WHY NOT?	Yes: 58 No: 4	Yes: 12 No: 0 N/A: 3
8	DID YOU FIND IT DIFFICULT TO ACCESS THE REMEDY FRAMEWORK? PLEASE ANSWER YES OR NO. IF YES, PLEASE TELL ME WHY. <ul style="list-style-type: none"> <li>• LOCATION OF THE OFFICE?</li> <li>• HOURS OF OPERATION?</li> <li>• LANGUAGE?</li> <li>• SECURITY?</li> <li>• OTHER DIFFICULTIES?</li> </ul>	Yes: 52 Security: 42 Shame: 39 Language: 7 Hours: 3 Location: 2 Other: 1 (Health) No: 10	Yes: 7 Shame: 6 Security: 5 Hours: 1 No: 8
9	WHO WAS YOUR CLAIMS ASSESSMENT OFFICER?	N/A	

<p><b>10</b></p>	<p>DID SHE TREAT YOU WITH RESPECT AND MAKE YOU FEEL COMFORTABLE EXPLAINING YOUR CASE? PLEASE ANSWER YES OR NO. IF NO, PLEASE TELL ME WHY.</p>	<p>Yes: 51 No: 11</p>	<p>Yes: 11 No: 3 N/A: 1</p>	
<p><b>11</b></p>	<p>DID SHE EXPLAIN TO YOU (I) THE MEANING OF SEXUAL VIOLENCE AND (II) THE REQUIREMENTS TO OBTAIN A REMEDY? IF YES, DO YOU REMEMBER WHAT SHE SAID?</p>	<p><b>I</b></p>	<p>Yes: 11 No: 46</p>	<p>Yes: 2 No: 12 N/A: 1</p>
		<p><b>II</b></p>	<p>Yes: 34 No: 23</p>	<p>Yes: 9 No: 5 N/A: 1</p>
<p><b>12</b></p>	<p>AFTER YOUR FIRST MEETING WITH THE REMEDY FRAMEWORK TEAM, DID YOU FEEL THAT THE PROCESS WAS CLEAR? PLEASE ANSWER YES OR NO. IF NO, PLEASE TELL ME WHY.</p>	<p>Yes: 33 No: 29</p>	<p>Yes: 4 No: 8 N/A: 3</p>	
<p><b>13</b></p>	<p>HOW MUCH TIME DID YOU SPEND WITH MAYA PEIPUL, THE INDEPENDENT LEGAL ADVISOR?</p>	<p>&gt;5 mins: 12 &lt;5 mins: 50</p>	<p>Some: 5 None: 3 N/A: 7</p>	
<p><b>14</b></p>	<p>DID SHE (I) MAKE YOU FEEL COMFORTABLE AND (II) GIVE YOU ADVICE FOCUSED ON YOUR PARTICULAR SITUATION? PLEASE ANSWER YES OR NO. IF NO, PLEASE TELL ME WHY.</p>	<p><b>I</b></p>	<p>Yes: 43 No: 16 Other: 3</p>	<p>Yes: 2 No: 3 N/A: 9</p>
		<p><b>II</b></p>	<p>Yes: 12 No: 50</p>	<p>Yes: 1 No: 5 N/A: 9</p>
<p><b>15</b></p>	<p>DID THE CLAIMS ASSESSMENT TEAM EXPLAIN THAT YOU COULD HIRE AN INDEPENDENT LAWYER THAT THEY WOULD PAY FOR IF YOU WANTED? PLEASE ANSWER YES OR NO.</p>	<p>Yes: 1 No: 60 N/A: 1</p>	<p>Yes: 0 No: 6 N/A: 9</p>	
<p><b>16</b></p>	<p>DID YOU FEEL COMFORTABLE WITH THE TRANSLATOR USED IN YOUR MEETINGS WITH THE CLAIMS ASSESSMENT TEAM? PLEASE ANSWER YES OR NO.</p>	<p>Yes: 31 No: 13 N/A: 18</p>	<p>Yes: 4 No: 0 N/A: 11</p>	
<p><b>17</b></p>	<p>DID THE PROCESS PROCEED AS YOU EXPECTED AFTER YOUR FIRST MEETING? PLEASE ANSWER YES OR NO. IF NO, PLEASE TELL ME WHY.</p>	<p>Yes: 23 No: 39</p>	<p>Yes: 0 No: 4 N/A: 11</p>	
<p><b>18</b></p>	<p>DID THE REMEDY FRAMEWORK REPRESENTATIVES ADEQUATELY ANSWER ANY QUESTIONS YOU HAD ABOUT THE PROCESS? PLEASE ANSWER YES OR NO. IF NO, PLEASE TELL ME WHY.</p>	<p>Yes: 6 No: 23 N/A: 33</p>	<p>Yes: 1 No: 2 N/A: 12</p>	

19	DO YOU BELIEVE THAT THE REMEDY FRAMEWORK TEAM IS INDEPENDENT OF BARRICK AND THE PJV? PLEASE ANSWER YES OR NO.	Yes: 22 No: 22 Unsure: 18	Yes: 4 No: 4 N/A: 6
20	DO YOU BELIEVE THAT ALL THE INFORMATION YOU SHARED WAS KEPT PRIVATE AND CONFIDENTIAL? PLEASE ANSWER YES OR NO. IF NO, PLEASE TELL ME WHY.	Yes: 52 No: 8 Unsure: 2	Yes: 12 No: 1 Unsure: 2
21	WHAT REMEDIES DID YOU RECEIVE BEFORE THE MOST RECENT TOP-UP PAYMENT?	K20,000: 60 Training: 44 Counseling: 21 School fees: 8 Medical: 10	N/A
22	HAVE YOU NOW RECEIVED ALL THOSE REMEDIES?	Yes: 1 No: 55 Unsure: 1	N/A
23	WERE THESE THE REMEDIES YOU WANTED AND EXPECTED? PLEASE ANSWER YES OR NO. IF NO, PLEASE TELL ME WHY.	Yes: 2 No: 60	N/A
24	WERE ALL THE TERMS OF THE SETTLEMENT AGREEMENT PROPERLY EXPLAINED TO YOU BY THE INDEPENDENT LEGAL ADVISOR? PLEASE ANSWER YES OR NO. IF NO, PLEASE TELL ME WHY.	Yes: 9 No: 52 Unsure: 1	N/A
25	DID YOU UNDERSTAND THAT YOU WOULD GIVE UP YOUR RIGHT TO SUE BARRICK AND THE PJV IN COURTS IN CANADA AND THE UNITED STATES? PLEASE ANSWER YES OR NO.	Yes: 17 No: 42 Unsure: 3	N/A
26	DID YOU UNDERSTAND THAT YOU COULD STILL PURSUE CRIMINAL ACTION AGAINST THE SECURITY GUARDS RESPONSIBLE? PLEASE ANSWER YES OR NO.	Yes: 37 No: 9 Unsure: 11	N/A
27	DID YOU FEEL THAT YOU WERE TREATED FAIRLY BY THE REMEDY FRAMEWORK? PLEASE ANSWER YES OR NO. IF NO, PLEASE TELL ME WHY.	Yes: 3 No: 59	Yes: 1 No: 14
28	HAVE YOU SUFFERED ANY THREATS OR INJURY AS A RESULT OF PARTICIPATING IN THE REMEDY FRAMEWORK OR RECEIVING ANY REMEDIES? PLEASE ANSWER YES OR NO. IF YES, PLEASE SHARE ANY DETAILS YOU ARE COMFORTABLE WITH.	Yes: 44 No: 18	Yes: 1 No: 9 N/A: 5

29	HOW HAS PARTICIPATING IN THE REMEDY FRAMEWORK AFFECTED YOUR LIFE AND YOUR FAMILY?	N/A	
30	OVERALL, ARE YOU HAPPY THAT YOU CHOSE TO PARTICIPATE IN THE REMEDY FRAMEWORK?	Yes: 17 No: 45	Yes: 1 No: 8 N/A: 6
31	WOULD YOU MIND TELLING ME YOUR CLAIMANT NUMBER? YOU DO NOT HAVE TO—IT IS ONLY FOR OUR OWN RECORDS, AND I PROMISE YOU WE WILL NOT SHARE ANYTHING YOU HAVE TOLD US WITH THE PRFA OR BARRICK.	N/A	

<sup>797</sup> These include those who did not submit formal claims but approached the Framework.

<sup>798</sup> We believe these responses were based on a misunderstanding of the question, as each of these four received remedies under the Framework.

<sup>799</sup> We believe these responses were based on a misunderstanding of the question, as none of these two received, or expected to receive, remedies under the Framework.

# APPENDIX 2

## STAKEHOLDERS, EXPERTS AND BARRICK PERSONNEL CONSULTED FOR ASSESSMENT

We identify below those individuals and groups we consulted directly in developing our assessment metrics and conducting our research into the Framework. This list is not comprehensive. We only identify those who were willing to be named in the report; we have also withheld the names of certain individuals to protect their physical or professional security.

The individuals and groups below played an invaluable role in the assessment. Consultation, however, does not mean endorsement. No one listed below should be assumed to agree with any of the assessment’s methodology or findings. Enodo Rights alone is responsible for the assessment.

INTERNATIONAL EXPERTS	
<b>JOHN RUGGIE</b>	Professor, Harvard Kennedy School; <i>former</i> UN Secretary-General Special Representative for Business and Human Rights
<b>CAROLINE REES</b>	President, Shift; <i>former</i> lead advisor to UN Secretary-General Special Representative for Business and Human Rights
<b>LENE WENDLAND</b>	Advisor on Business and Human Rights, Office of the High Commissioner for Human Rights; <i>former</i> advisor to UN Secretary General Special Representative for Business and Human Rights
<b>CHRIS ALBIN-LACKEY</b>	Senior Researcher, Business and Human Rights, Human Rights Watch
<b>NISHA VARIA</b>	Advocacy Director, Women’s Rights Division, Human Rights Watch
<b>DINAH SHELTON</b>	Manatt/Ahn Professor Emeritus of International Law, George Washington University Law School
<b>MARGIT GANSTER-BREIDLER</b>	Psychotherapist, Zebra Intercultural Centre of Counseling and Therapy
<b>ELIZABETH COX</b>	<i>Former</i> Regional Director, UN Women Asia-Pacific

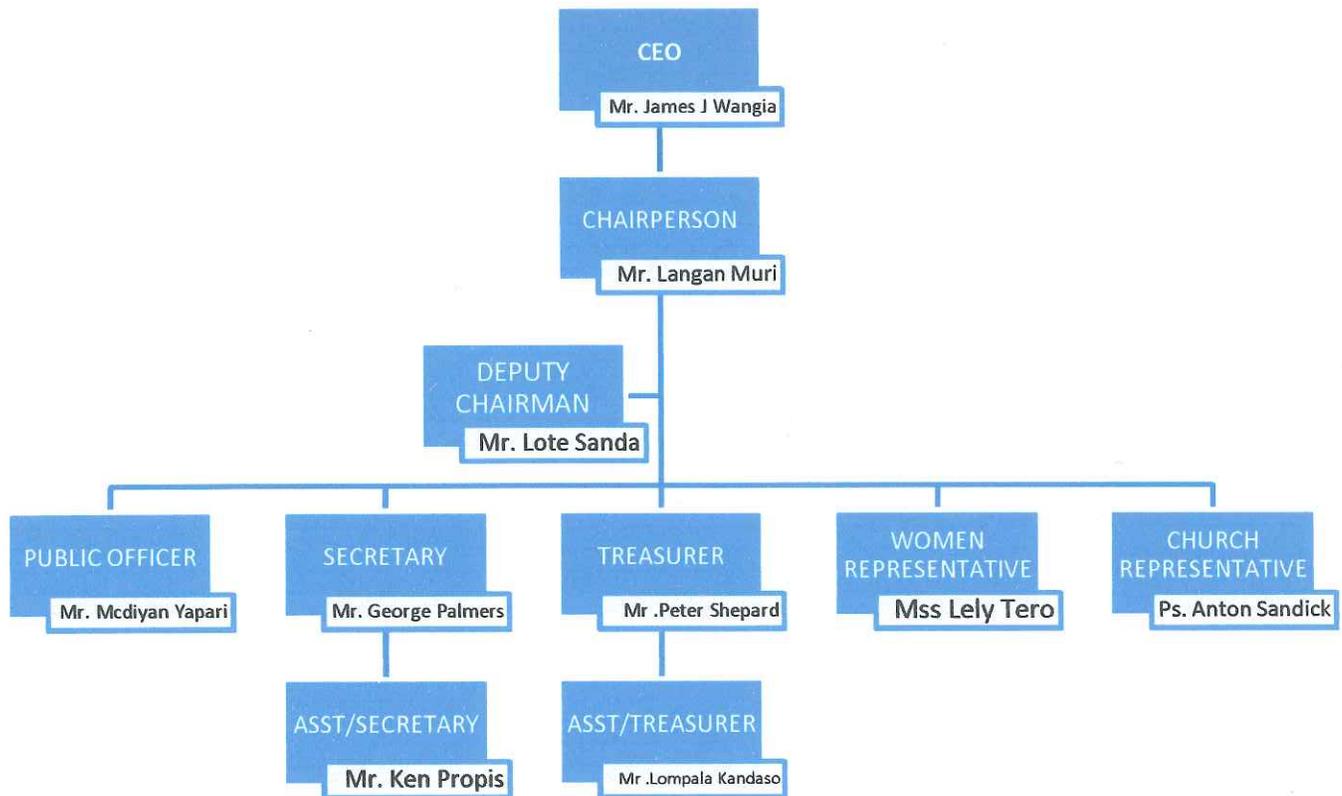
<b>ADVISORS TO BARRICK</b>	
<b>RACHEL NICOLSON</b>	Partner, Allens Linklaters
<b>PETER NESTOR</b>	Manager, Advisory Services, BSR
<b>SUZANNE SPEARS</b>	Counsel, Volterra Fietta
<b>GARE SMITH</b>	Partner, Head of CSR Practice, FoleyHoag LLP
<b>CRAIG PHILLIPS</b>	Consultant, Donaldson Whiting + Grindal
<b>CHRISTINA SABATER</b>	Principal, Avanzar
<b>BARRICK AND PJV PERSONNEL</b>	
<b>JONATHAN DRIMMER</b>	Vice President and Deputy General Counsel
<b>PATRICK BINDON</b>	Vice President, Corporate Social Responsibility
<b>PETER SINCLAIR</b>	Chief Sustainability Officer
<b>MARK FISHER</b>	President, Global Copper Business Unit
<b>SYBIL VEENMAN</b>	<i>Former</i> Senior Vice President and General Counsel
<b>BRIAN HEWSON</b>	Country Security Manager, Papua New Guinea
<b>HENRY NANGU</b>	Operations Superintendent, Asset Protection Department, PJV
<b>CARDNO EMERGING MARKETS</b>	
<b>MELISSA WELLS</b>	<i>Former</i> Senior Consultant, Cardno Emerging Markets (Australia)
<b>JOSHUA DE BRUIN</b>	Project Director, Cardno Emerging Markets (Australia)
<b>ELIZA HOVEY</b>	Consultant, Cardno Emerging Markets (Australia)
<b>PORGERA REMEDY FRAMEWORK ASSOCIATION (PRFA)</b>	
<b>DAME CAROL KIDU</b>	PRFA Board and Framework Review Panel
<b>UME WAINETTI</b>	PRFA Board and Framework Review Panel
<b>EVERLYNE SAP</b>	Framework Community Liaison Officer
<b>JOSEPHINE MANN</b>	Claims Assessment Team
<b>ONNIE TEIO</b>	Claims Assessment Team

<b>MARY TOLIMAN</b>	Claims Assessment Team
<b>MAYA PEIPUL</b>	Independent Legal Advisor
<b>KEPAS PAON</b>	PRFA Community Programs National Lead
<b>LOCAL AND INTERNATIONAL STAKEHOLDERS CRITICAL OF THE FRAMEWORK</b>	
<b>AKALI TANGE ASSOCIATION (ATA)</b>	Representatives led by: James J. Wangia, CEO; Langan Muri, Chairperson; Mcdiyan Robert Yapari, Public Officer
<b>KARATH MAL</b>	<i>Former ATA liaison with ERI Claimants</i>
<b>EARTHRIGHTS INTERNATIONAL</b>	Represented by: Marco Simons, Jonathan Kaufman, Michelle Harrison

# APPENDIX 3

## CORRESPONDENCE WITH PORGERAN STAKEHOLDERS

### AKALI TANGE ASSOCIATION INC. OFFICE BEARERS RE - STRUCTURE 2015





P. O. Box 100, PORGERA  
Enga Province, Papua New Guinea  
email: [ngc.yapari@gmail.com](mailto:ngc.yapari@gmail.com) [langannuri12@gmail.com](mailto:langannuri12@gmail.com)

14<sup>th</sup> August, 2015

Edono Rights

Dear Yousuf Aftab,

**SUBJECT: CURRENT STATUS OF HUMAN RIGHTS IN PORGERA WITH ATA AND THE EMERGENCE OF EDONO RIGHTS' ASSESSMENT.**

In reference to the above subject, the local human rights advocate known as Akali Tange Association (ATA) based in Porgera would like to thank you for sending an invitation to it to participate in your assessment.

Although ATA was only the rightful and legitimate local organization to become a party to the remedy framework mechanism as per the Guiding Principles on Business and Human Rights Principle 31, ATA was discredited by Barrick which was a breach of the guideline.

Further, ATA is very concerned on the inadequacy and ineffectiveness of mitigation and remedial activities; especially payment of victims and the kind of methodologies used at many occasions though they might report that they have followed the established processes under the Guiding Principles on Business and Human Rights guidelines.

ATA believes that the Barrick's Remedy framework Mechanism Manual was just drafted to convince the Office of High Commissioner for Human Rights (OHCHR) and was never implemented as per documented.

ATA also condemns in the strongest term possible that Papua New Guinea civil and public servants who were also parties to Porgera Remedy Framework Mechanism in failing the program miserably. Some of the so called Women Advocates and Leaders were excellent in back biting and criticizing very high profile and expert Human Rights Advocates such as Mining Watch Canada in their letters to OHCHR but, the program (Porgera Remedy Framework Mechanism) proves to themselves that they know nothing of Human Rights Issues and how best to address them. They might have for the last couple of years occupying these honorable offices through politic and not merits and qualifications.

Thus, ATA strongly believes on its own aims and objectives as stipulated under the domestic laws and its cultural norms entails compensation on the killings is of paramount importance where this is the final solution that encompass all humanitarian issues in Porgera.



Moreover, ATA as the human rights activist in Porgera has reshuffled its executive positions and is now in a better position and ATA is taking a rational course of action as previously. ATA has been seen to be under the poisonous politics of Porgera (*refer to Report of HRW- Gold Costly Dividend*) however; through the reshuffle ATA has rebirthed and is in the true ATA spirit.

ATA with its true benevolent spirit to serve the underprivileged, uneducated, poor and marginalized victims of the multinational company Barrick Gold Corp who were gang raped, tortured, killed and injured by Barrick employees would like to kindly request you and other parties to this Porgera Remedy Framework Mechanism Assessment to put this assessment on hold for an indefinite period as:

- a. ATA believes that Enodo's engagement and funding by Barrick as a sole funder of the assessment program is not adequate and strongly believes that its report will not be independent as well per the OHCHR Opinion, in facilitating an independent assessment by an individual or group considered credible not only by Barrick *but also by claimants and other stakeholders*. Assessor (Enodo) must be cofounded per 2013 directives from OHCHR regarding allegations of Porgera Remedy Framework Mechanism.
- b. Enodo must make known to the stakeholders especially, Akali Tange Association Inc, Mining Watch Canada, International Human Rights Clinic, Human Rights Institute and Earthrights International the methodologies for carrying out this difficult study. ATA is confident that sharing methods and answering questions about them helps individuals and communities make an informed choice regarding participation in the assessment
- c. All human rights projects in Porgera to be properly established and accomplished before a final assessment is engaged; and that ATA wants to be a party to the remedy framework mechanism

### Conclusion

ATA strongly believes that the current proposed assessments are premature. ATA also condemns the Porgera Remedy Framework Mechanism for failing its objectives miserably. Therefore; ATA is in a better position to notify your office of the failures of PRFA should the aforesaid points are taken into consideration.

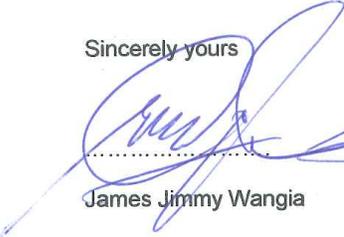
ATA also believes that without it and other stakeholders involvement in the assessment will automatically nullify the final report as not independent. In order to verify that your report of Porgera Remedy Framework Mechanism as independent must cover the aforesaid points.

Moreover, it is a privilege to have you with us to convey our message to Barrick Gold Corp to have ATA as party to the Porgera Remedy Framework, as ATA has sustainable plans for the victims and more appropriate conflict resolution mechanisms. Although some the victims have been compensated, the facilitators or the Porgera Remedy Framework and its partners have failed the remedy process miserably for instance, degradation of the very Christian faith by touching the Holy Bible giving rise to chaotic psychological torture.

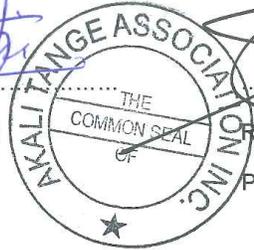


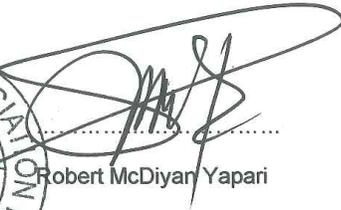
Therefore, the PJV and Barrick Niugini and other stakeholders and project partners engage ATA as party to the remedy framework mechanism to solve this Porgera Human Rights Issue once and for all. ATA has no poisonous local Politics with Barrick.

Sincerely yours

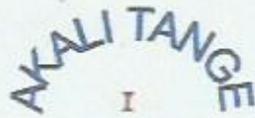
  
James Jimmy Wangia  
CEO

  
Langan Muri  
Chairman



  
Robert McDiyan Yapari  
Public Officer

- Cc: Mine Watch Canada ( Cathrine Coumans)
- Cc: Mining Policy Institute (Sarah Knuckey)
- Cc: Earth Rights International (Marco Simons)
- Cc: Peter Sinclair  
Senior Vice President, Corporate Affairs  
Barrick Gold Corporation  
[psinclair@barrick.com](mailto:psinclair@barrick.com)
- Cc: Christopher Albin-Lackey  
Member, External Committee, Barrick Gold remedy mechanism review  
Senior Researcher, Human Rights Watch  
[albinlc@hrw.org](mailto:albinlc@hrw.org)
- Cc: Lelia Mooney  
Member, External Committee, Barrick Gold remedy mechanism review  
Director for Latin America and Caribbean, Partners for Democratic Change  
[leliamooney@yahoo.com](mailto:leliamooney@yahoo.com)
- Cc: Dahlia Saibil  
Member, External Committee, Barrick Gold remedy mechanism review  
Visiting Professor, Osgoode Hall Law School  
[dsaibil@gmail.com](mailto:dsaibil@gmail.com)



Association Inc

Mobile: (+675) 75587268

email [jamrivanicia@yahoo.com](mailto:jamrivanicia@yahoo.com)

P. O. Box 100, PORGERA

Enga Province, Papua New Guinea

August 25, 2015

Porgera Remedial Framework Association Inc  
P.O Box  
Patam  
Enga Province

Dear Meriana/Everlyn

**RE: LIST OF NAMES FOR RAPE VICTIMS WHO HAVE MISSED OUT UNDER PORGERA REMEDY FRAMEWORK MECHANISM**

Pertaining the aforesaid caption, Akali Tange Association Inc. (ATA) would like to send the final list of names for rapes and sexually assaulted local indigenous women who have suffered in the hands of Barrick Gold Corps' Security Personnel who have been missed out under the Remedial framework Mechanism

We at ATA have verified through interviews that these women have surely been raped and sexually assaulted by the Barrick's Security Personnel and are eligible to be covered under the program (Porgera Remedy Framework Mechanism) however, they were *not* due to some of the considerable reasons as outlined besides their names (on the attachments).

ATA has so far interviewed more than 100 women however, ATA felt that some of them should not be sort listed for inclusion in the program as they have provided unreliable and insignificant information. ATA strongly condemns such false allegations to be entertained by the program and that ATA really wants to support the program despite ATA being discredited by Barrick to be party to the program.

ATA's support and contributions during this programs critical time will directly testify that ATA is committed to supporting Barrick PJV and the its program, remedy framework mechanism and that ATA has *no "Local Poisonous Politics"* with Barrick per the *"Human Rights Watch Report on Gold a Costly Dividend"*. Thus ATA is committed in supporting and contributing meaningfully towards achieving the Porgera Remedy Frameworks Mechanism's objectives.

Further, ATA would like to stress here boldly that the list of names that ATA is submitting now are true and that ATA has considered this list of names for the women to be honest. ATA further recommends that these women be covered under the remedy framework mechanism.

ATA also condemns the practice in which PRFA officials are processing the claimants as PRFA is promoting false claimants without proper consultations and verification processes. ATA strongly beliefs that such practices by PRFA Officials is only promoting false claimants and that ATA has the initiator of the Human Rights Issues in Porgera condemns such practices with the strong possible terms.

With these ATA believes that this list of names that ATA is submitting now is the final and that no other women must be interviewed and entertained by PRFA through ATA or other groups and organizations. ATA beliefs that there is none other Human Rights Organization in Porgera Valley other than ATA for PRFA to cohesively work with to address this severe Human Rights issues in Porgera specifically the Rapes and Sexual Assault Issues despite ATA being discredited by Barrick.



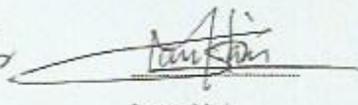
Please find attached is the names of women who were raped and sexually assaulted and their reasons for not being covered under the Program Porgera Remedy Framework Mechanism.

ATA would like to thank you in advance for your approval and considerations of this list as genuine, honest and reliable.

Should you require further information, please do not hesitate to contact the undersigned person(s).

Yours Truly,

*Abadi Tange Association Inc*

		
McDiyan Yapan Public Officer	James J Wangia CEO	Langan Muri Chairman

Cc: Peter Sinclair  
Senior Vice President, Corporate Affairs  
Barrick Gold Corporation  
[psinclair@barrick.com](mailto:psinclair@barrick.com)

Marco Simons  
Legal Director - Earthrights International  
1612 K Street NW 401  
Washington DC 20006

Sarah Knuckey, Ph.D.  
Assistant Clinical Professor of Law  
Director Human Rights Clinic  
Co-Director Human Rights Institute  
Columbia Law School

Catherine Coumans Ph. D.  
Research Coordinator and Asia Pacific Coordinator  
Mining Watch Canada  
250 City Centre Avenue, Suite 508  
Ottawa, Ontario  
K1R 6K7

Talyer R Giannini  
Clinical Professor of Law  
Co-Director International Human Rights Clinic  
[giannini@law.harvard.edu](mailto:giannini@law.harvard.edu)

Yousuf Aftab  
Principal Enodo Rights  
[Yousuf.aftab@enodorigths.com](mailto:Yousuf.aftab@enodorigths.com)



**From:** Akali Tange Association INC <akalitange\_association@yahoo.com>  
**Date:** October 7, 2015 at 4:47:38 AM EDT  
**To:** Jethro Tulin <jctulin@gmail.com>, "mal.waka@yahoo.com" <mal.waka@yahoo.com>, James Wangia <jameswangia@yahoo.com>, Langan Muri <langanmuri15@gmail.com>, Lely Kesa <lelykesa12@gmail.com>, Mark Tony Ekepa <emarktony@gmail.com>  
**Cc:** Catherine Coumans <catherine@miningwatch.ca>, "Sarah M. Knuckey" <sk3946@columbia.edu>, Tyler Giannini <giannini@law.harvard.edu>, "marco@earthrights.org" <marco@earthrights.org>, "GWalker@barrick.com" <GWalker@barrick.com>, "psinclair@barrick.com" <psinclair@barrick.com>  
**Subject:** TOO MANY CONMENS IN HUMAN RIGHT ISSUES IN PORGERA  
**Reply-To:** Akali Tange Association INC <akalitange\_association@yahoo.com>

Dear all,

The Akali Tange Association (ATA) is on the ground watching how the WORLD ZION BARRICK COMPANY from CANADA washing off Human Bloods Painted in Porgera valley while engaging with Mining activities.

Since 1989 Placer Dome Extracted Porgera gold with Human bloods up till 2004 and nobody raise out all these Human Right Issues. People in Porgera Valley don't have any idea about human right issues.

The PJV security personnel continuously shot people unlawfully, and once my brother late John Wangia was shot by security personnel's; by that time I wrote a letter to mine manager.

The replyment Directed by Previous mine manager for Porgera Joint Venture Mr Brad Gordon, Refer ATAs document case book title (THE SHOOTING FIELD OF PORGERA JOINT VENTURE Appendix No 5 page 118). ("If you believe however that the PJV was negligent by failing to take steps to prevent the deceased from trespassing on to land over with PJV holds leases granted to it by the state, the appropriate course for you to take is to issue court proceeding against the PJV").

Mr Brad Gordon Instructed to follow against court proceeding and now relatives of the mine victims (decease) documented the case and formed a association called Akali Tange, means, The Human Rights and it is registered under constitutional law of Papua new Guinea. ATA includes PJVs attention and every information about human rights is clear and still the issue is ongoing now.

Human Rights Organization Akali Tange Association (ATA) is on the ground and watching, but too many opportunities for sacked/ former members of ATA and conman's forming all kinds of groups and association, wanting to take Advantage from opportunities granted. The idea for Porgera human right issues were brought up by ATA and it is the brain cell and the trademarks as a grass root organization called (akali Tange association Inc (ATA)).

All different kinds of Groups and types of organizations getting contact information and addresses on the street outside of ATAs communications is all about bullshit .They are forming organizations to manipulate ATAs idea to make money from ATAs Overseas partners. The idea was initially raised by ATA for human right issues and no other organization apart from us would seek opportunities to take the Human Rights Issues.

For your information ATA group as set up a strong relationship with International partners joining mind/ideas to fight Porgera Joint Venture for unlawful activities caused to abuse human rights. The idea was initially brought to the International Partners about unlawful killing of people with blood painted the Porgera Gold Mine. The ATA group as worked closely with overseas International Partners to take revenge for the Human Rights being abused.

Therefore, the ATA group is currently working around the clock with the International Partners to claim compensation for the Human Rights being abused and the case is still ongoing. People all over the worlds are keeping their eyes on these issues now.

The message may apply to and include other issues connected with Porgera Mine and its operations.

If anyone or group in Porgera collecting any form of money on promise or from outside Porgera like, International Partners than you are now kindly asked to immediately stop.

The organization or group, who is found doing so, will be tolerated under our Engan customary law, sending all the body (deceased) bags to your organization to meet their compensation payment and this is the final notice to all.

I hope this message is loud and clear and everyone understands my wards.

You're Sincerely

James Jimmy Wainga  
Chief Executive Officer (ATA)



P.O. Box 100  
PORGERA  
Enga Province  
Papua New Guinea  
[Akalitange\\_association@yahoo.co](mailto:Akalitange_association@yahoo.co) or [jameswangia@yahoo.com](mailto:jameswangia@yahoo.com)

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16<sup>th</sup> October, 2015

Peter Sinclair  
Senior Vice President, Corporate Affairs  
Barrick Gold Corporation

Dear Peter Sinclair,

I am writing to respond to your e-mail to Catherine Coumans that she sent to me for a response. You wrote about my e-mail of October 7, 2015 and asked Catherine about my use of the word 'ZION' and you said that I was threatening 'to kill other human rights activists for any engagement with international organizations.' I am sorry that you were not able to understand my writing.

On reflection I realise that I was wrong to type the word 'zion' instead of giant. Also, I did not threaten to kill anyone. I threatened to deposit the body bags of the deceased through violence at the PJV mine to groups who say they can give the families compensation so that they will have to do that. I regret using Engan cultural slangs and translated direct to the English Language in my email. I thought in Enga but wrote the email in English instead of thinking in English and writing in English just like many fellow Papua New Guineans and others do whose first language is not English.

I wish to explain my reasoning very carefully. I really feel it's needed and would make the situation better.

1. ATA is asking Barrick Gold Corporation, to remove the requirement that women sign away their rights to pursue future legal action against Barrick when they accept a remedy package for the harm they have endured.
2. ATA is asking other Human Organizations Rights Groups and Individuals in Porgera Valley not to support Barrick Gold Corporation's requirement to sign away their rights to pursue future legal action when they accept a remedy package for the harm they have endured.
3. Barrick Gold Corporation's failure in engaging ATA on Human Rights related matters, bypassing ATA and using a seriously flawed remedy program used by remedy program staff of language and culture not appropriate to the local victims of rape and harms to human life.
4. Barrick Gold Corporation's remedy program in Porgera is not in line with the Guiding Principles on Business and Human Rights.
5. ATA is asking Barrick Gold Corporation to setup a Fund and engage ATA to compensate the physically wounded victims and family members of the deceased.

6. ATA is asking Barrick Gold Corporation to assist the victims and relatives with compensation programs, restitution, or litigation and calling for help from the other Human Organizations Rights Groups and Individuals in Porgera Valley.

With that we wish to assure you that Akali Tange Association as a Human Rights organization will always endeavour to work in line with the Guiding Principles on Business and Human Rights and only when we sense abuse and flaws do we speak out.

Again, we are sorry my words were not clear to you and I hope that we can put this matter behind us as we mean no harm to anyone.

We look forward to working with you soon. If you have any thoughts in this, please feel free to share.

You may contact me at your convenience at [akalitange\\_association@yahoo.com](mailto:akalitange_association@yahoo.com) or [jameswangia@yahoo.com](mailto:jameswangia@yahoo.com) or contact me on +67572030543.

We remain yours faithfully,

**AKALI TANGE ASSOCIATION**

**James Jimmy Wangia** OF

Chief Executive Officer

Copy to – Catherine Coumans, Sarah Knuckey, Tyler Giannini, Marco Simons



**HUMAN RIGHTS INTER-PACIFIC ASSOCIATION**  
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14<sup>th</sup> August 2015

**Enodo Human Rights**

**295 Church Street**

**Third Floor**

**New York**

**NY 10013**

**Attention: Yousuf Aftab**

**Dear Sir,**

**Re: Marginalized Grieve Concerns For Sexually Abused Victims who participated in the Porgera Remedy Program:**

**Welcome & Introduction**

I am Karath Mal Waka one of the senior local human rights advocate who heavily participated as a support person for those who were engaged as clients for Earth Rights International (ERI) via Akali Tange Association (ATA).

I bear witness for those clients of ERI, I worked as a very neutral person engaged by ERI as a translator for its' clients based at trust and honesty and with this privilege, I thank ERI for a job well done for its' clients who participated in the Porgera Remedy Program.

Before I elaborate further I would like to thank Enodo Human Rights despite this investigation is highly suspicious of its' financier is against the United Nations' Business & Guiding Principles for Human Rights and the United Nations Office of the High Commissioner for Human Rights (OHCHR) thus I submit this as a petition for the frustrated gross victims who participated under the Porgera Remedy Program.

### **Porgera Remedial Program In-sufficient Awareness & Information**

1. Porgera Remedial Framework Policy (Olgeta Meri Iगत Rait /Manuel Book) Porgera Remedy program was not published widely and was written with insufficient information for the benefits that the victims would get from Barrick Gold Corp and Porgera Joint Venture (PJV).
2. The document call Porgera Remedial Program policy under/Olgeta Meri Iगत Rait document copy was not given to the leading local human rights organisations like Akali Tange Association (ATA), Porgera Landowners Association neither Porgera Alliance and leading individual human rights advocates to interoperate the Framework Policy. Barrick & PJV secretly published it at the website which we learned very lately.
3. Barrick and PJV claimed that they have published or advertised the remedy program widely is a lie. Barrick & PJV secretly conducted an investigation at Suyan Camp and at the mine site in 2010. In the investigation a total of eighteen (18) laddies were identified in the year 2010 by an investigation team from Port Moresby/Konedabu Police Station. Four (4) of the laddies participated in the remedy program while fourteen (14) of them are missed in the remedy program.
4. In a video documentary by Human Rights Watch titled Gold's Cost Dividend, a victim at 03:10-10:12 did not participate in the remedy program while another victim who was forced to chew a used condom also did not participate in the remedy program.
5. In another surprising incident that of a Porgera Remedial Program Officer died after a very short illness. Her data's that she recorded for the victims were lost and those ladies did not participate in the remedy program.
6. More than one hundred laddies are missed out in the remedial program and Barrick and PJV closed the program deliberately leaving the victims behind without remedy.

### **Barrick & PJV Took Advantage of Illiteracy & Poorness Passed Legal Rights/Waiver**

1. PJV & Barrick took advantage of illiteracy luring the process with the influence of fast money and business start-up grants dominated the thoughts of almost all victims that participated in the remedy program. The interpreters at Porgera Remedial Framework used the disadvantages of winning a law-suite against Barrick & PJV as a tool to convince all the victims and explained the victim that you will be given goods valued to Fifteen Thousand Kina (K15,000.00) and a Five Thousand Kina (K5,000.00) supplementary added to Twenty Thousand Kina. A three (3) years health care voucher and a three years free educational support grand sponsored by Barrick & PJV. These goods were offered with business training certificates and the victims were influenced to sign a legal waiver that states never to sue Barrick if they accept Barricks offer.
2. More than one hundred and twenty laddies have agreed and signed legal documents with Barrick & PJV closing up their right to appeal or have legal rights to sue Barrick. Barrick asked the laddies to hold on to the holy bible before in which I think Barrick

may right at some points but Barrick was indirectly forcing the laddies to hold on the holy bible.

- 3 The laddies participated in the remedy program however their legal rights were forced to close never to sue Barrick. The victims have compromised with Barrick to benefit from what little goods provided by Barrick.
- 4 Barrick & PJV fail to follow up the victims' health care program and school fee subsidies for three years. The health care program was not considered to an extend which Barrick proposed in the Porgra Remedial Framework policy manual. Most of the laddies' health is at risk. PRFA Barrick is no longer interested in providing health support.

**Barrick implicated to increase cash compensation**

- 1 Porgera is a very small mining town with everyone living much close to each other. The rumour of a huge monetary cash compensation was offered to the eleven ladies which are clients for ERI. The one hundred and Twenty laddies are very frustrated with Barrick & PJV with Fifty Thousand Kina.
- 2 The one hundred and twenty laddies are wishing to ask Barrick to increase a cash value equivalent to the victims that were supported by ERI and consider another round of free health care a free education sponsored by Barrick and PJV. If Barrick disagrees to increase the remedy value equivalent to what the clients of ERI, the one hundred and twenty laddies will file a law suit and ask the courts to increase.

**New Claimants**

Many sexually abused victims with evidence are still missed out in the remedial framework. More than one hundred rape victims are missed out in the remedial program. I want Barrick to re-open the remedial program.

Remedy mechanism was first welcomed by everyone in the Porgera Valley however due to the huge monetary compensation payment offered by Barrick to the eleven ladies that were supported by ERI most of the laddies are angry with the remedial program.

Barrick & PJV must be fair in providing equivalent remedy values to the one hundred and twenty ladies.



Karath Mal Waka  
Chairman Human Rights