

About the Akali Tange Association Inc (ATA)

The Akali Tange Association Inc. (ATA) is a local human rights organization duly incorporated in 2004 under the laws of Papua New Guinea. The Association was incorporated by a group of like-minded relatives of the deceased, survivors of sexual and non-sexual assaults and the general public of the Porgera Valley in the remotest highlands of Papua New Guinea. ATA currently has 10,000 plus members originally from the Porgera Gold Mine's Special Mining Lease (SML), Leased for Mining Purposes Areas (LMP) and membership being extended to provincial and nationwide. The main purpose being to unveil the mining policies, legal requirements and civil suits to bringing about peace and justice to protect the rights of people within the vicinity of mining areas, Enga and the country at large.

So far, it has documented published reports and advocated on the gross human & environmental rights abused by the Barrick Gold Corporation, a Toronto based mining giant. The Association has been vocal on the gross human rights violation issues in Porgera for the last decade despite Barrick's prolonged delay in responding to the allegations.

Apart from its core function as human rights advocate, the Association further provides counseling and guidance to its victimized clients and other HIV/AIDS victims with its allies (Anglicare-PNG & Local Porgera Family and Sexual Violence Unit of the Porgera Police). The Association now proposes to work cohesively and in an amicable manner with the Porgera Joint Venture to evaluate the allegations, about improving the human rights and social and environmental outcomes of Porgera Gold Mine project.

The ATA's mission is to serve as a fair, trusted, and effective human rights activist to ensure that the allegations of negative human rights impacts caused by Barrick - PJV and its allies are evaluated in a transparent, accountable and reliable manner and where merit, ensure that the PJV OGM provides remedies that are rights-compatible, culturally appropriate and in satisfactory manner. Most importantly, ATA intends to become party to the existing Barrick's OGM to ensure that the UN Guiding Principles on Business & Human Rights are implemented without flaws and omissions.

For more information about the ATA, please visit <https://sites.google.com/site/akalitange/>

About the Author

The Author of this document is the Executive Officer of the Akali Tange Association Inc. The Author is a member of the Association and is instrumental in advocating, documenting & reporting of Gross Human Rights Violation Issues caused by Barrick Gold Corporation at Porgera Gold Mine. His commitment to the Human Rights Advocacy group in Porgera has resulted in publishing of this document.

M^cDiyan Robert Yapari was born in Testres Village, Kandep Enga Province, in 1985 and has attended local schools and later to the University of PNG and has taken Business Administration. He has been operations manager, project coordinator and has held many other senior positions with various companies before become the Executive Officer of the Association.

He's curiosity in becoming human rights advocate developed when his uncle, Late John Wangia was killed at a waste dump site by PJV Security Guards using high powered rifle. Further, his only biological brother Jerry Yelo Yapari was also crushed by rocks deliberately pushed by the PJV Security Guards at the PJV Open Pit whilst Late Jerry was searching for gold bearing ores. Late Jerry died sometimes later after being admitted in a hospital at Porgera. These and other similar unwarranted deaths, assaults and rapes by Barrick Gold Corporations' Security Guards had forced him to the position where he is now.

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- X. Immediate Families and Relatives of the Deaths.
- XI. Survivors of Assaults, Tortures, Illegal Detentions and Rapes or Gang Rapes

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Lot 10 Section 21, Porgera Station
P.O. Box 100
Porgera, Enga Province
Papua New Guinea
Telephone: (675) 71112610
Internet: <https://sites.google.com/site/akalitange/>
E-mail: mc.yapari@gmail.com

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Position Paper/Akali Tange Association Inc (ATA)
Lot 10 Section 21, Porgera Station
Porgera, Enga Province
Papua New Guinea

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Lot 10 Section 21, Porgera Station
P.O. Box 100
Porgera, Enga Province
Papua New Guinea
Telephone: (+675) 71112610
Internet: <https://sites.google.com/site/akalitange/>
E-mail: mc.yapari@gmail.com

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Lot 10 Section 21, Porgera Station
P.O. Box 100
Porgera, Enga Province
Papua New Guinea
Telephone: (+675) 71112610
Internet: <https://sites.google.com/site/akalitange/>
E-mail: mc.yapari@gmail.com

Cover Design:

Photo showing custodians of the deaths and survivors of the rapes and assault victims protesting against Barrick PJV. Photo courtesy of the ATA



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Key word and their Definitions

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GRIEVANCE– An issue, concern, problem, or claim (actual) that an individual or community group wants a company or contractor to address and resolve. Further it is a stakeholder issue that is related to a company’s operations and which the stakeholder believes is the responsibility of the company. The stakeholder may be seeking anything from an apology to a change in operations to compensation

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COMPANY-COMMUNITY GRIEVANCE MECHANISM– A locally based, formalized way to accept, assess, and resolve community complaints concerning the performance or behavior of a company, its contractors, or employees. This is also a process established by the company to provide opportunity for a stakeholder to have their grievance addressed. The process should be designed to understand, respond to and remedy grievance in a culturally appropriate and respectful manner.

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CULTURALLY-APPROPRIATE GRIEVANCE MECHANISM – a locally based, culturally acceptable, formalized way to accept, access, and resolve community complaints concerning performance or behavior of a company and its allies.

Foreword

Grievance mechanisms are increasingly important for development projects and extractive sectors where ongoing risks or adverse impacts are anticipated. They serve as a way to meet requirements, prevent and address negative human rights impacts, community concerns, reduce risk, and assist larger processes that create positive social change. Today, many companies employ ad hoc or exclusively internal processes to address grievances including the Barrick PJV. Unfortunately, these systems often produce less than satisfactory outcomes from the perspective of the company and/or the community. Recognizing this and noting a lack of effective alternatives, companies and communities are becoming more proactive in their efforts to design and build more effective strategies for addressing community grievances.



Yet it is often challenging for companies to design and implement successful grievance mechanisms that suit the project context. Recognizing the challenge, the ATA offers its position on how PJV can best design its project-level grievance mechanisms pursuant to *United Nations Guiding Principles on Business & Human Rights [The Guiding Principles]* and an *Ipili/Engan Culturally-Appropriate Grievance Mechanism*.

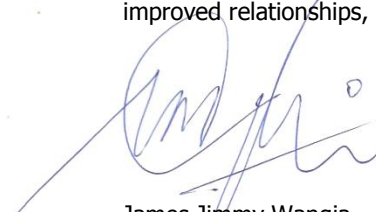
This ATA's report on the Gross Human Rights Violation Issues and the "Way Forward" or the guide also emphasizes the importance of communication and coordination among the PJV-Barrick, ATA, communities, and other stakeholders directly affected by the PJV's operations. We have learned from many years of experience that open dialogue and collaborative grievance resolution simply represents good business practice—both in managing for human and environmental risks and in furthering the community development objectives.

This report is offered as a companion to Performance Standards and accompanying Guidance Notes published by United Nations High Commissioner for Human Rights and other International Human Rights Organizations. These standards set forth the role for the PJV's Operational Grievance Mechanisms for the Barrick PJV's negative human rights impacts its operations has caused in this reports last chapter the "Way Forward".

Against the backdrop of the UNGP and Right to Remedy's Performance Standards, this ATA's proposed remedy mechanism Paper consolidates knowledge and lessons learned regarding grievance resolution from the Porgera Remedial Framework "The Olgeta Meri Igat Raits" [All Women have Rights], the Independent Assessment Report of the Porgera Remedy Framework, "Pillar III: The Independent Assessment Report of the Porgera Remedial Framework" and various sources, including on-the-ground experiences of the ATA, findings from studies on existing PJV's OGM at the PJV Mine site, and from practical Ipili Cultural experience in establishing peace accords and procedures in post conflict disputes over tribal fights, family and sexual violence, land and property. Our methodology also included an extensive review of existing information on PJV's Grievance Mechanisms from the field of conflict resolution with local conflict resolution know-how.

In addition, we obtained first-hand accounts through the previous Barrick created remedy mechanism, existing PJV's OGM, researches with industry personnel, academics, nongovernmental organizations (NGOs), international financial institutions, consultants, and others with experience of grievance mechanisms. These researches focused on the challenges involved in designing and implementing grievance mechanisms and the practical strategies and steps required for an effective system, regardless of its form.

As grievance resolution mechanisms are increasingly adopted, ATA urges PJV via this report's recommendation to review, redesign and implement these ATA's proposed grievance mechanism system or components cooperatively and more effectively for Barrick's potential to be realized. We hope this ATA's contribution towards the PJV's OGM will equip the Company in initiating a grievance resolution program with the practical steps and tools they need to be successful in efforts to address the escalating negative human rights violations in Porgera Valley and promote improved relationships, fair and culturally-appropriate remedies, and just procedures.


James Jimmy Wangia
Chief Executive Officer – ATA
March, 2017

I: Porgera Gross Human Rights Issues and the “Way Forward” Specifics

The enormity of the death and injury toll hints the killings and exploitation of local harmless community individuals by Porgera Joint Venture Company during every stage of the Porgera Mine Operation which are of course appalling and relentless. As previously stated in the ATA’s Case Document “The Shooting Fields of the Porgera Joint Venture”, was a tribute to the endurance, courage and humour of the victim’s relatives, deprived and marginalised silent majority of ordinary people on their own land.¹

Given the fact that unresolved mystery of eighty six deceased who were murdered, more than thirty caused grievous bodily harm and more than 1227 tortured, arbitrary arrested and detention and seventy eight raped or gang raped during absent of the rule of law, by economic actors in search for extractive resources. The actions amount to criminal act and International Crimes against Humanity that directly a complicit in crimes against humanity. The Porgera Joint Venture owners have used a systematic approach to abuse the local civilian population.

The overall objective of this ATA’s report on the Porgera Joint Venture’s Operational Grievance Mechanism the push for review and the way forward is to ensure that the existing grievance mechanism is reviewed in a manner to be legitimate, accessible, predictable, equitable, rights-comfortable and transparent. ATA further through this report ensures to see that the existing Company-created operational grievance mechanism be based on engagement, dialogue and mediation. Such mechanism will focus on engagement and dialogue between the parties, aiming to both identify solutions that are acceptable to all, and to redress imbalances in power, knowledge and influence between the Company and potential complainants, to enable informed dialogue, a shared responsibility for outcomes, and a process based on respect. This approach will also reduces the risk that the BNL-PJV Company will find itself accused of acting as both “judge and jury”, because the ATA and community will be actively engaged in identifying solutions alongside company staff. This approach may also guard against less genuine complaints, simply because the complainant [ATA] and the Company must both invest time in reaching a solution together.

Finally the Company should work with the ATA to redesign the mechanism. This will help ensure the mechanism is accessible, legitimate, predictable, and transparent in resolving the allegations of negative human rights impacts caused.

¹ Shooting Fields of Porgera Joint Venture –A case document released by ATA 2005, See: http://www.miningwatch.ca/sites/www.miningwatch.ca/files/ATA_Case_Documentation.pdf

II: Executive Summary

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

This report's objective is to review an existing grievance mechanism that was company-created and established to remedy the survivors and custodians of the negative human rights impacts around the mine. Using the key lessons that were learned from a company created remedy mechanism; this report provides valuable tools for Barrick PJV, PNG Government, other civil societies, survivors and affected communities, and the international community about the benefits, challenges, and limitations of company-created remedy mechanisms as a means of redressing serious human rights violations. The report is grounded in the experiences of assaulted survivors and the findings are based on hand-on experiences in Porgera before and during the implementation of a remedy mechanism.

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

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

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

This remedy mechanism was created supplementarily to the existing operational level grievance mechanism at the PJV Mine Site.



Above: *ATA's clients staging peaceful protest demanding Barrick Gold Corporation to remove legal waiver in exchange to providing remedies in the existing PJV OGM (Photo Credit: ATA Photo File)*

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

Several reports including the independent assessment report, the Righting + Wrongs, MiningWatch Canada, EarthRights International and ATA's responds to the assessment report found that although the remedy mechanism had a number of positive features, it contained serious design and implementation flaws.

Barrick's remedy mechanism provided Porgeran women with a remedy that many otherwise would have been unlikely to receive. Significant barriers to remedy and justice in Porgera result from PNG's weak judicial system, limited local governance, the involvement of local police

themselves in a range of abuses, the remote location of the mine, and myriad structural disadvantages (including poverty and illiteracy) faced by local communities and individual rights-holders. Many women in Porgera, especially those who have experienced sexual violence, face particular challenges in speaking out about their attacks and seeking legal redress, due to numerous complex factors, including lack of education, difficulties in accessing police and legal assistance, the social stigma of sexual assault, and the potential for threats or violence from husbands and other family members.

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

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

An effective and rights-promoting remedy mechanism should strive to address inherent structural power imbalances. This multinational corporation has wielded enormous power over the State, ATA, local community, and individuals affected by its operations. If unaddressed, this power imbalance is likely to be replicated in any purported effort to remedy a rights violation, creating the risk that company offer "take it or leave it" remedy packages that rights-holders (ATA and the Porgera Community) feel are inadequate but which they have little ability to influence and feel unable to refuse. To mitigate the risk that such power differences undermine individuals' rights, strict reviews and safeguards of the existing company-created remedy mechanism must be put in place to address and recalibrate the balance of bargaining power between the Company and rights-holders.

Fundamentally, the Barrick remedy mechanism did not adequately overcome the acute power inequalities in Porgera, and this had a substantial effect on its effectiveness.

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

The initial concerns regarding power inequality and a lack of rights-holder centrality manifested themselves in a number of specific deficiencies in the remedy mechanism's design and implementation. As detailed in this report, the following elements of the Barrick remedy mechanism inhibited its effectiveness and the advancement of human rights for affected communities in Porgera. The following findings has prompted the ATA to provide this report to review the existing company created grievance resolution or the remedy mechanism. The findings are that:

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

- *Consultation and engagement with survivors and other key stakeholders was inadequate.*
- *The remedy mechanism was limited in scope without proper explanation or justification.*
- *The remedy mechanism was not sufficiently accessible or safe for survivors.*
- *Full and effective reparations have not been provided, and many survivors consider the remedies unfair and insulting.*
- *Barrick improperly required individuals to waive their legal right to sue, and many women did not have adequate independent legal representation.*
- *Barrick's process was not as transparent and predictable as it could have been, and it could not achieve full independence.*
- *The remedies provided was not culturally-appropriate and rights-compatible*

The Barrick's supplementary mechanism is novel, but as the existing Barrick's OGM seeks to fulfill its responsibilities to provide remedies for human rights abuses while operating in a country that has weak governance zones and judicial systems, similar mechanism is likely to be implemented in Porgera. In theory, this non-judicial project level operational grievance mechanism, if reviewed and redesigned and implemented well, will have the potential to provide access to remedies where it may otherwise be unavailable, and to open a dialogue between Barrick and the ATA. Because Barrick frequently has structural power advantages relative to ATA, individual claimants and impacted communities, the existing remedy mechanism created by the Company carry the risk of being concerned with limiting company's legal liability and advancing its human rights reputations, without adequately providing survivors and custodians of human rights abuses with effective, fair, and proportionate remedies.

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

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

At a minimum, the Company created remedy mechanism must seek to overcome acute power imbalances and to center rights-holders and communities at each step in the process. A

rebalance of power needs to be a critical measure of success when analyzing a remedy mechanism, and should be a key goal of a mechanism's design, implementation, and monitoring. Fundamentally, addressing structural power imbalances can only be achieved by ensuring that rights-holders and impacted communities play a central role in the development and implementation of the remedy mechanism. Likewise, the rights-holders (ATA and the Porgera Community) must have the knowledge and experience to bring to the table, including, for example, about what remedies they consider appropriate and how to disburse them in a way to meet their security and privacy needs. As the Porgera experience shows, rights-holders can be mistrustful of a process that was imposed on them by the powerful foreign entity in spite of the latter's best intentions, particularly if survivors and the custodians of the deaths viewed the imposer to be connected to the harms they suffered. Many concerns and deficiencies that later arose with respect to the remedy mechanism could have been alleviated through deep engagement with rights-holders and the community as early as possible.

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

The existing PJV Operational Grievance Mechanisms must provide a way to reduce risk for its project, offer ATA and the communities an effective avenue for expressing concerns and achieving remedies, and promote a mutually constructive relationship.

At a maximum, the survivors and the custodians of the deaths need a trusted way to voice and resolve concerns linked to the Barrick PJV's Gross Human Rights Violation Issues, and the PJV Barrick need an effective way to address community concerns. ATA stands firm that a locally based grievance resolution mechanism will provide a promising avenue by offering a reliable structure and set of approaches where ATA and the Barrick PJV can find effective solutions together.

ATA is committed to seeing a well-functioning grievance mechanism that:

- Provides a predictable, transparent, and credible process to all parties, resulting in outcomes that are seen as fair, effective, and lasting
- Builds trust as an integral component of broader community relations activities
- Enables more systematic identification of emerging issues and trends, facilitating corrective action and preemptive engagement.

ATA is now demanding for such effective grievance mechanism to be established which is increasingly underpinned by International Human Rights NGOs and initiatives such as the United Nations Human Rights Council.

This report and its Note offers practical guidance to assist in the design and implementation of effective project-level grievance mechanisms by the Barrick PJV.

The Four Phases of Designing and Implementing Grievance Mechanisms

From ATA's perspective, developing and implementing the existing PJV's OGM can be broken down into four phases, each with its own set of activities.

- Phase 1. Define scope and determine goals. The design team develops the overarching purpose and goals for the grievance mechanism and makes sure that design decisions flow from its purpose.
- Phase 2. Design. The design team shall assemble a preliminary plan that will outline the purpose, goals, scope, resolution approaches, structure, and specifics about how the grievance mechanism will function. This preliminary plan must be tested and refined through consultation with intended users, employees and community members and presented to senior management for their approval.
- Phase 3. Implement. The Company and the ATA must work together to introduce, refine, and institutionalize the grievance mechanism.
- Phase 4. Monitor, report, and learn. Information shall be gathered on the effectiveness of the mechanism in particular and, more generally, on the PJV's ability to prevent and address grievances. This information must be used to refine the system.

These four phases are discussed in detail in Part II Chapters 4-7.

Problems shall be often resolved more easily, cheaply, and efficiently when they are dealt with early and locally.

The hand-on experience gained by the ATA from the Barrick's "Olgeta Meri Igat Raits" Framework and the existing OGM puts ATA on a better track to compile this report as a guide to indicate that there is a core set of practices that mark effective, credible company-community grievance mechanisms. These practices are offered as good practice markers for effective grievance resolution systems that Barrick- PJV can adopt.

Refine core company values. To improve the ATA and the community relations in general and PJV's grievance resolution in particular, the Barrick's OGM can adopt certain critical values or attitudes. These include:

- Commitment to fairness in both process and outcomes

- Freedom from reprisal for all involved parties—within the company and in the community
- Dedication to building broad internal support for the grievance mechanism across PJV's project lines
- Mainstreaming responsibility for addressing grievances throughout the project, rather than isolating it within a single department
- Willingness by senior management to visibly and sincerely champion the grievance system.

Start early in the project cycle. The most successful grievance mechanisms are put in place as early as possible—ideally, during the project feasibility phase—and are modified for later project phases, however; this has never eventuated thus resulting in criticisms of the Porgera Remedial Framework from local and international stakeholders. Hence, problems have not been often resolved more easily, cheaply, and efficiently when they are dealt with early and locally. For instance, the PJV's negligence in admitting the escalation in Gross Human Rights Violation at an earlier date and stage of the Porgera Gold Mine Project is another contributing factor.

Involve ATA and the other Stakeholders in the design. Stakeholders from the community and company should be involved in the grievance mechanism design. Indeed, ATA feels that imposing a company-designed system could be worse than having an ad hoc system. The Barrick PJV should engage ATA as a community representative to identify key factors, such as the kinds of negative impacts the Barrick PJV has had on the community thus far and the possible negative human and environmental impacts that could arise during the project life, how people in the community actually want to raise concerns, the effectiveness of current company procedures for resolving complaints, and the availability of local resources to resolve conflicts. Based upon this assessment, the ATA as a community representative and the stakeholder to the negative human rights impacts can help shape both the design and future improvements.

Ensure accessibility. An effective grievance mechanism should be accessible to diverse members of the community, including more vulnerable groups such as women and youth. Multiple points of entry should be available, including face-to-face meetings, written complaints, telephone conversations, or e-mail. Confidentiality and privacy for complainants should be honored where this is seen as important.

Maintain a wide scope of issues. The grievance mechanism should be open to a wide range of concerns: both those based in factual data and those arising from perceptions or misperceptions. Perceived concerns can be as critical to address as actual hazards. The mechanism should also be able to address multi-party and multi-issue complaints.

Develop culturally appropriate procedures. The mechanism should be responsive, respectful, and predictable—clearly laying out an expected timetable for key process milestones. The grievance mechanism should be capable of bridging deep divides, including cultural divides. The design and operation of the grievance mechanism should consider the Enga/Ipili's cultures, such as compensation; attitudes towards compensation, cooperation, and conflict; the desire to preserve relationships among complainants; authority, social rank, and status; ways of understanding and interpreting the world; concepts of time management; attitudes toward third parties; and the broader social and institutional environment.

Incorporate a variety of grievance resolution approaches. To accommodate differences in personal and cultural preferences, the grievance mechanism should offer a variety of grievance resolution approaches—not just a single grievance procedure. The complainant should have influence over which approach to select. Some complaints may be managed in an informal way solely by those directly involved, such as a company representative and the complainant.

ATA as a stakeholder to the escalating gross human rights violation issues in the Porgera Valley, it proposes to see the existing PJV's OGM be reviewed in a manner to include local, customary ways of grievance resolution be incorporated into the system.

The ATA is obliged to see a grievance mechanism that should offer a variety of approaches, not just a single grievance procedure. The complainant should have influence over which approach to select.

Identify a central point for coordination. A well-publicized and consistently staffed position, headed by an individual or team, should be maintained. This central coordinator shall include the ATA as the only local stakeholder to facilitate the development and implementation of the grievance mechanism, administer some of its resources, monitor internal and external good practice, ensure coordination among access points, and make certain that the system is responsive to the information it manages especially in this escalating gross human rights impact issue.

Maintain and publicize multiple access points. Expanding access beyond those individuals who have the primary responsibility to receive grievances can significantly reduce barriers to entering the system and encourage community members to address problems early and constructively. Individuals serving as access points including a delegate from ATA can be most effective as their Executives are trustworthy, trained, knowledgeable, and approachable regardless of the ethnicity, gender, or religion of the complainant.

Report back to the community and the stakeholders. The company should provide regular feedback to relevant stakeholders including ATA and the local Porgera Community and other International Stakeholders including MiningWatch Canada, Harvard, New York and Colombia Human Rights Clinics to clarify expectations about what the mechanism does and does not do; to encourage people to use the mechanism; to present results; and to gather feedback to improve the grievance system. Information reported back might include types of cases and how they were resolved, and the way the grievance has influenced company policies, procedures, operations, and the grievance mechanism itself.

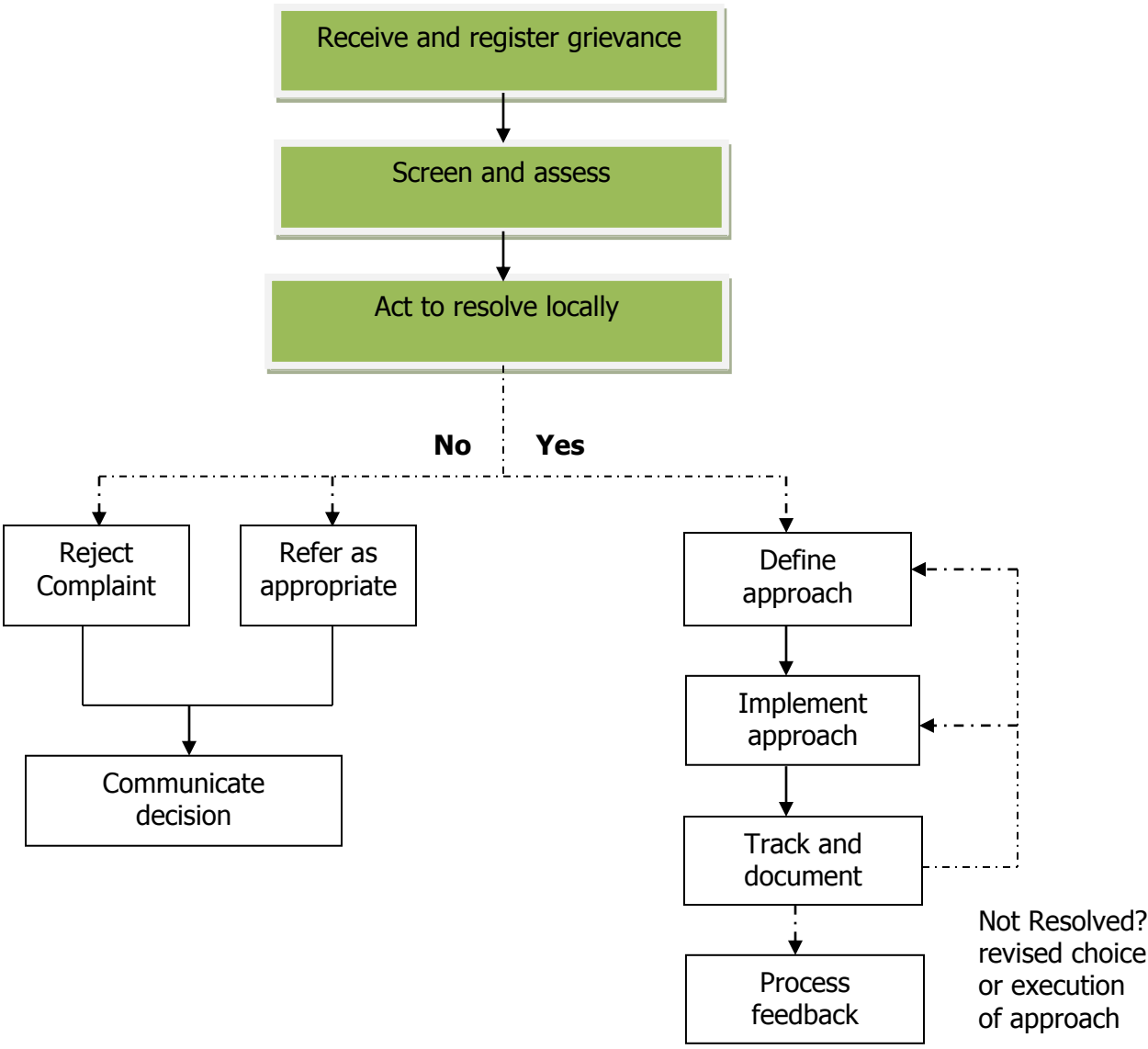
Use a grievance log to monitor cases and improve the organization. In addition to resolving this escalating gross human rights violation issues, the grievance mechanism is an opportunity to promote improvements in the company. A grievance log (or register) can be used to analyze information about grievance and issues, and project operations to anticipate the kinds of conflicts they might expect in the future, both to ensure that the grievance mechanism is set up to handle such issues and to propose organizational or operational changes. ATA proposes that enacting policies or other types of structural change can resolve

grievances around this human rights issue, rather than continuing to settle individual complaints on a case-by-case basis.

Evaluate and improve the system. The Company should periodically conduct an internal assessment of the grievance mechanism to evaluate and improve its effectiveness. Important elements of evaluation include: general awareness of the mechanism; whether it is used and by whom; the types of issues addressed; the ability of the mechanism to resolve conflicts early and constructively; the actual outcomes (impacts on project operations, management systems, and benefits for communities); its efficiency; and, most fundamentally, the ability to accomplish its stated purpose and goals. At certain times, the company should also solicit and include the views of stakeholder representatives to see how the mechanism is proving effective in practice.

Barrick OGM must be simple to understand, but not simplistic in its dealings with people and issues. Clarity and a user-friendly approach are certain to yield positive results. Here is an example of a basic grievance mechanism structure that BNL should look into as an example.

Figure 1. The Steps of Operational Grievance Mechanism – Proposed by the ATA for PJV’s OGM





*Above: Photo showing ATA Women Executives during a Human Rights Show hosted by ATA. The Theme of the Show was "**No to Human Rights Violations in Porgera, Enga Province and PNG**" at large. This show was hosted to commemorate the International Human Rights Day. Photo Courtesy of ATA*

Bottom: The Porgera Community's solitary to ATA during the ATA's Human Rights Mine Show

III: Purpose of the Report – The Porgera Human Rights Issues and the Way Forward

The purpose of this document is to provide an insight into the previous company created remedy mechanism's lessons learned and how the Porgera Joint Venture (herein referred to as BNL PJV) can review, redesign, plan and implement the existing operational grievance mechanism that will be community-company grievance resolution mechanism.

At the maximum, this document is compiled for PJV to use as an idle instrument to review the existing operational grievance mechanism using the guidance notes provided herein to predict that the grievance mechanism is legitimate and accessible. The guide will ensure that the allegations of gross human rights violations are evaluated in a transparent manner and where merits provide remedies that are equitable, rights-compatible, culturally-appropriate and in a satisfactory manner.

Ideally, this document has been compiled with the intension to demonstrate ATA's eagerness to become party to the grievance resolution mechanism as envisioned in the United Nations Guiding Principles on Business and Human Rights 31 Commentary "h" [*"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"*].

Supplementarily, the AKALI TANGE ASSOCIATION INC (hereinafter referred to as ATA) through this report affirms that it has the utmost capacity and creditability backed with cultural aspects of resolving conflicts and also with concreted fundamental expertise of reviewing, designing, planning, monitoring and implementing a grievance mechanism with transparency and accountability. The ATA vies to become party to the existing grievance mechanism, or any other future supplementary grievance mechanism despite criticisms of ATA being male dominated and lacking capacity in handling human rights issues. As every organization, either NGO, business and or state institutions goes through transition after analyzing its weaknesses and failures; the ATA during its Annual General Meeting held mid 2015 had gone through massive reshuffle in its executives and had adapted several structural changes. These changes include:

- Creation of Women Executives
- Engagement of Consultants
- Signed formal MOU with Porgera Family & Sexual Violence Unit – Porgera Police
- Formally allied with Anglicare – PNG to provide counseling to HIV/AIDS victims, physically and psychologically traumatized victims to name a few.

This document has been prepared by the ATA in collaboration with families of the victims and other parties in this pursuit. The content of this material constitutes the ATA Inc's entire understanding of the deaths and the fact that the ATA is vying to become a party to the existing Barrick's operational grievance mechanism that will facilitate any dispute to be settled in a reasonable time.

Please note that the ATA did not review unsolicited story, ideas or articles or proposals pertaining to materials currently published in this document. All materials or properties have been adequately reviewed before being published for the purposes of this document.

IV: Introduction

This report presents crucial views on the Barrick remedy mechanisms (“Olgeta Meri Igat Raits” and the existing operational grievance mechanism) in light of international human rights principles. It contains three parts:

Part I: Background provides information about the history of the PJV gold mine and the general conditions for communities living around the mine. This section describes the alleged violence by security guards at the mine site, including deaths, assaults, beatings and rapes/gang rapes. This part also outlines the development of the Barrick remedy mechanism, as well as its procedures, created in response to the allegations of widespread sexual violence.

Part II: Guide to reviewing, redesigning and implementing the existing grievance mechanism lays out the applicable human rights framework that should be applicable to design, plan and implement the remedy mechanism, with a focus on the international human right to a remedy. It sets out the general human rights standards at issue, including the responsibilities of corporations under international human rights law as identified in the UN Guiding Principles on Business and Human Rights and elsewhere. It contains three parts:

Chapter 1: The Need for Review of the Existing PJV’s Operational Grievance Mechanisms provides information about how a locally based grievance resolution mechanism can offer a reliable structure and set of approaches whereby local stakeholder, [the ATA] and the Company Barrick Niugini Limited can find effective solutions together. There are concreted fundamentals necessitating the review for the existing operational grievance mechanism. These include:

- Traditional ways the PJV Handles Grievance including: blind trusts, Ad hoc, investigate, decide and announce which can be used to control the process and the outcomes.
- A better approach grievance resolution mechanism
- Lacking Guidance on the PJV’s OGM
- How the existing grievance mechanism fits into project level stake-holder engagement
- How BNL PJV’s operational grievance mechanism can fit into the larger context of project accountability

Chapter 2: Understanding Grievance Mechanisms provides the definition of the grievance mechanism as a formalized way for company to accept, assess and resolve community complaints related to company activities. This chapter aims to elaborate on the variations of project phases, the dual goals of accountability to stakeholders and risk reduction which shall remain constant. The part also states why it is best for the BNL PJV to understand the grievance mechanism and the reasons why ATA is pushing for the review of the existing grievance mechanism. Introductorily, ATA ensures to see that the mechanism must be reviewed to see the output of the mechanism processed be, legitimate, easily accessible and the process to evaluate the allegations and complains be predictable and transparent. This application will guide the operational grievance mechanism to provide remedies that are equitable, rights-compatible and culturally appropriate as well as satisfactory to the complainants.

Additionally, this chapter identifies some of the components that can be inserted to the operational grievance mechanism as envisioned in the UN Guiding Principles on Business and Human Rights Principles.

Chapter 3: Initiating a review on the operational grievance mechanism specifies grievance resolution mechanism as everybody's business, from the core business operations to production to environment management. It further identifies three key actors: identifying a promoter within the company and the community, cultivating leadership within company and community.

Also this chapter states the importance of building a core design team which is vital for controversial projects like Porgera. The understanding of the environment and engaging of the stake-holders and rights-holders by building an understandable and coherent initiative is not only crucial to the community for whom the mechanism will be created for but also to the BNL-PJV. This may mean, after gathering relevant information from the community, the Company can plan new policies, strategies and guides to control, mitigate and eliminate such complain from reoccurring during the project's lifespan.

In this chapter, an overview of the Porgera mine and its negative human rights impacts, negligence by the operators of the PJV on this issue and latterly acknowledgement of the gross human rights violation as true are also discussed. Included in this discussion, is also the Barrick's creation of the Porgera Remedy Framework as supplementary to the existing operational level grievance mechanism.

Moving on with, the identifying of existing preventative measures, characterize community systems for handling grievances and locating the dispute resolution capacity are most valuable questions that can be utilized as tools for effectiveness of the mechanism. Further evaluating dynamics working for or against of a grievance mechanism inside and outside the company by asking questions such as: are the existing mechanism that can be viewed as competing and others forms the basis for the grievances mechanism's models and features of effective OGM. Once this and other related tasks are accomplished, it is time for the design team to develop a new detailed design of the mechanism.

Part III: Developing and Implementing Effective Grievance Mechanisms emphasis that there is no ideal model or one-size-fits-all approach to grievance resolution. The best solutions to conflicts are generally achieved through localized mechanisms that take account of the specific issues, cultural context, local customs, and project conditions and scale.

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

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

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

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

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

Chapter 6: Waiver of Legal Rights and Access to Counsel discusses the implications of the remedy mechanism's requirement that claimants waive their right to sue as a condition of receiving a remedy. This section also discusses the role of legal counsel in the process and its effect on outcomes for rights-holders.

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

The report's **Conclusions and Findings** summarize the overall findings of the report and sets light to the way forward in processing and providing remedies to the claimants using the existing grievance mechanism.

V. Recommendations

Recommendations for Barrick Gold

Barrick needs to ensure the Porgera mine has an ongoing and effective independent project-level grievance mechanism to process claims from both men and women who have suffered human rights abuses of all kinds by mine security, mine contractors and police guarding the mine. The effectiveness and rights compatibility of the mechanism should be monitored and reported on publicly at least once a year by an independent organization. The mechanism explicitly should be informed by, and not repeat, failures of the remedy mechanism discussed in this brief. Also this is reference to Barrick funded Assessment Report by EnodoRights: Pillar III on the Ground, Report of the Porgera Remedy Framework's recommendation stating "*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*".

- **Offer an additional remedy to the 119 women who have already received a remedy through the Barrick remedy mechanism.** The additional amount should bring the total amount in line with the remedy received by the 11 women who received a settlement outside the remedy mechanism. Each of the 119 women should be consulted as to how she would like to receive her additional remedy, whether in cash, the form of direct purchasing for her of goods or services (such as education, funds to start a business), or some other form. Barrick should take significant additional steps to protect security and privacy when offering and disbursing further remedies. These steps should include: one-on-one individual counseling and security assessments for each woman, comprehensive relocation assistance for women at risk if appropriate, and ongoing one-on-one monitoring.
- **ATA to become a party to future remedy mechanism,** having failed to consult the local organization Akali Tange Association which has intimate knowledge of and long-standing public concern for the issues addressed in The Framework, with regard to the appointment of key individuals such as the Independent Expert and the Review Panel, Barrick should assure that the ATA is consulted about and have a meaningful role to play in the remediation mechanism, for example by representation in the governance structure.
- **Fund individualized, case-by-case security advice and assessment** for all women who accessed the remedy mechanism, and **fund protection measures** to any women in need.
- **Void all legal waivers** signed by rights-holders through the remedy mechanism, and ensure that all complainants are informed of the voiding and its implications.
- **Address allegations not remedied by the mechanism.** Barrick should initiate an open dialogue with rights-holders as well as local, national, and international stakeholders and experts about how to effectively remedy alleged security guard abuses not remedied through the existing Barrick remedy mechanism process. Concrete

steps should be taken to create a permanent remedy mechanism developed jointly by the company and rights-holders and the community. Such a mechanism should replace any other process for handling complaints from the community. It should be designed for alleged sexual assault survivors who did not submit complaints to the existing remedy mechanism, as well as individuals who allege other security guard abuses, such as physical assaults and killings.

- **Offer community-level direct public apologies** at the village level. Senior management from Barrick Gold and the PJV, following consultations with rights-holders and village and clan leaders, should personally visit each village in Porgera, and offer a public apology and explanation for past security guard abuses.
- **Make public further information** regarding the Barrick remedy mechanism, including:
 - ✓ The type and nature of harms suffered by individuals awarded remedies, and about the conduct and nature of the accused;
 - ✓ The specific reasons any claims were refused by the remedy mechanism;
 - ✓ The number of individuals who have been: (a) dismissed from Barrick employment or disciplined because of any direct involvement in alleged sexual assaults, and for non-sexual assaults; (b) dismissed from Barrick employment or disciplined because of any role in not preventing or not adequately responding to allegations of abuse; (c) referred to the PNG police for criminal investigation and prosecution because of alleged sexual or other abuse; (d) subject to criminal investigation, prosecution, and conviction for any involvement in abuse; and (e) the factual basis for dismissal, discipline, or referral to the police;
- ✓ A timeline of changes to the remedy mechanism and to remedy packages and why those changes were made;
- ✓ The values and content of each and every remedy package, and the basis for any variation between the packages. Such information should be made available while also maintaining the anonymity of those receiving the package;
- ✓ The Barrick-commissioned assessment of the mechanism carried out by Business for Social Responsibility (BSR); and Financial information regarding the remedy mechanism, including: (a) total amounts provided for remedy packages to date; (b) any amounts reserved for future remedies; (c) costs to design and implement the mechanism; (d) costs associated with disseminating information about the mechanism to survivors; (e) costs associated with disseminating information about the mechanism in national and international forums, and in the media;
- ✓ and (f) and costs associated with assessing or reviewing the mechanism.
- **Report on the progress and outcomes of steps taken to prevent violence** in and around the mine site. Reported outcome data should include the rate of complaints about abuses over time, changes in security guard behavior, and data on the processes and impacts of Barrick-funded sexual assault prevention programs.
- **Future remedies provided be culturally-appropriate and rights compatible**, Barrick has an international investor citizen in the Enga/Ipili shall provide remedies that are culturally-appropriate inline to that of Enga/Ipili's indigenous compensation customs.

Recommendations for the Government of Papua New Guinea

- **Investigate and, where appropriate, prosecute** individuals who committed abuses in and around the PJV mine. Investigations should consider whether senior management and the company itself bear legal responsibility for violations. There should be publicly available reporting on the investigations, arrests, and any prosecutions for violations committed on or around mine property by PJV employees and/or police or other state security sector personnel.
- **Conduct an assessment** of the implications of corporate-created remedy mechanisms for human rights as well as the PNG justice system, and **consider the adoption of government guidelines** or regulations that may be required for such mechanisms. Any guidelines should strive to ensure that any mechanism centers the rights-holders and addresses power inequalities between the parties involved.
- **Table the 2006 Porgera Investigation Report**, make known to public, right-holders and the stakeholders of the 2006 Porgera Investigation Report that the National Executive Council has approved and funded.
- **Set up Extractive Sector Ombudsperson**, to investigate and where appropriate liquidate multinational extractive companies who abuses human and environmental rights in PNG.

**Part I: Background:
Porgera's Human
Rights Abuse
Allegations and the
Creation of the
Barrick Remedy
Mechanism**

I: FACTS: Abuse by Barrick Gold Corporation

Canadian mining company Barrick Gold Corporation, the largest gold mining company in the world, operates the Porgera mine in Papua New Guinea (PNG), where security guards have raped and gang-raped hundreds of local women and girls and killed, injured, and tortured several local men. Akali Tange Association as the names implies in local Engan dialect meaning “the rightful and legitimate custodians of deaths, the survivors of raped and or gang raped, tortured and assaulted victims”. It was incorporated under the Laws of PNG by the victims and their custodians to pursue their claims against Barrick Gold Corp.

II: Barrick’s Porgera Gold Mine

In 2006, Canadian company Barrick Gold, one of the world’s largest gold mining companies, acquired a 95% interest in the PJV mine as part of its takeover of mining company Placer Dome.¹ Barrick Gold’s wholly owned subsidiary, Barrick (Niugini) Ltd., managed the mine. The remaining 5% interest has been held by Mineral Resources Enga, divided between the Enga Provincial Government (2.5%) and local landowners (2.5%). In May 2015, Barrick announced that Chinese company Zijin Mining Group acquired 50% ownership of Barrick (Niugini) Ltd.² The Porgera Joint Venture (PJV) gold mine, the second largest gold mine in Papua New Guinea (PNG), is located in the Porgera Valley—a region in the highlands of PNG’s Enga Province. The mine began operations in 1989.

The specific operations and effects of the Porgera mine have taken place against a backdrop of complex and contrasting national dynamics. PNG is rich in natural resources, but grapples with persistent poverty, weak regulatory oversight of companies, and an often ineffective justice system.³ The Porgera mine has brought some benefits to the local area. Communities have had greater access to infrastructure, educational facilities, a hospital, and roads. The mine also has provided opportunities in the form of scholarships, employment, and increased government revenues.⁴

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

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

³ PNG is ranked 157 out of the 187 countries on the 2014 Human Development Index of the UN Development Programme (UNDP). The adult literacy rate is 62.4% and life expectancy is 62.42 years. See United Nations Development

Programme, Human Development Reports: Papua New Guinea, [http://hdr.undp.org/en/countries/profile/PNG\(lastvisitedNov.1,2015\)](http://hdr.undp.org/en/countries/profile/PNG(lastvisitedNov.1,2015))

United Nations Development Programme, UNDP in Papua New Guinea, About Papua New Guinea, [http://www.pg.undp.org/content/papua_new_guinea/en/home/countryinfo\(lastvisitedNov.1,2015\)](http://www.pg.undp.org/content/papua_new_guinea/en/home/countryinfo(lastvisitedNov.1,2015))

The UNDP estimates that 75% of the population depends on subsistence agriculture. The justice system is under-resourced and insufficiently staffed, police are improperly trained, and there are high levels of corruption. See Press Statement, Christof Heyns, UN Special Rapporteur on extrajudicial, summary, or arbitrary executions, Preliminary Observations on the Official Visit to Papua New Guinea (Mar. 14, 2014),

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14373&LangID=E>

⁴ See Alex Golub, *Who Is the "Original Affluent Society?" Ipili "Predatory Expansion" and the Porgera Gold Mine, Papua New Guinea*, 18 *Contemp. Pac.* 265, 278 (2006) (“The Porgera gold mine meant massive physical change to the valley and well as in influx of money that was unimaginable.”); Alex Golub, *Leviathans at the Gold Mine: Creating Indigenous and Corporate Actors in Papua New Guinea* 11 (2014) (detailing the money donated to groups in Porgera Valley for education and infrastructure, and the additional building of a hospital and roads).

Additionally, the mine has provided revenue streams to local communities in a variety of ways, including through compensation payments for mining impacts, and royalty payments for access to mineral resources. The company has also provided funds for some civil society groups.⁵ However, the mine has often had a fraught relationship with the local community. Community grievances have stemmed from allegations of, among other concerns: unfairness in the original mining agreement; a perceived lack of sufficient employment opportunities at the mine; increases in risky small-scale mining practices; reductions in the land available for traditional subsistence agriculture due to mine operations; lack of food security; adverse mine impacts on air and water quality; noise pollution; and physical violence, including alleged killings, beatings, and rapes perpetrated by the mine security forces.⁶ The development of the mine has brought significant changes to the physical landscape of the immediate area, and to the local communities that live in and around the mine.⁹ For example, there has been a widespread belief among the local population that mining operations are leading to environmental damage, which locals often refer to as the “poisoning” of their land and water. However, many locals including ATA have lacked access to information about the nature or type of any environmental and health impacts. The population has also increased significantly; with some estimates suggesting an increase from 9,253 in 1990 to 50,000 in 2010.¹⁰ This has resulted in complaints about overcrowding, with various social and health implications.

⁵ See Barrick Gold Corp., *Barrick Gold in Papua New Guinea: A Special Report on Porgera* (Sept. 8, 2010), <http://barrickbeyondborders.com/mining/2010/09/barrick-gold-in-papua-new-guinea-a-special-report-on-porgera/> [hereinafter *Barrick Special Report on Porgera*] (“PJV has invested over \$60 million in health, education and community infrastructure (e.g. roads, schools, medical facilities) . . . [and] has built or improved dozens of schools, including funding scholarships for over 700 students. An adult literacy program has helped more than 2,500 people learn essential reading and writing skills. A further \$40 million has been spent on sponsorships and training to improve the skills of employees.”); United Nations Development Programme, *2014 National Human Development Report, Papua New Guinea, From Wealth to Wellbeing: Translating Resource Revenue into Sustainable Human Development* 2, 35, 37 (2014), http://www.pg.undp.org/content/dam/papua_new_guinea/docs/Publications/FINAL%20PNG%20NHDR_low%20res_compressed.pdf

⁶ These revenue streams do not impact every community equally. For an overview of these payments, see Peter Johnson, Nat’l Research Inst., *Lode Shedding: A Case Study of the Economic Benefits to the Landowners, the Provincial Government, and the State from the Porgera Gold Mine, Background and Financial Flows from the Mine* (2012), http://www.nri.org.pg/images/Downloads/Publications/2012_publications/Lode%20Shedding_A%20Case%20Study%20of%20the%20Economic%20Benefits%20from%20the.pdf.

⁷ See *Barrick Special Report on Porgera*, *supra* note 5.

⁸ See, e.g., Susan Bonnell, *The landowner relocation programme*, in *Dilemmas of Development: The social and economic Impact of the Porgera Gold Mine (1989-1994)* 128-159 (Colin Filer ed., 2012), <http://press.anu.edu.au/wp-content/uploads/2012/12/ch04.pdf>; see also; *International Human Rights Clinic, Harvard Law School and Center for Human Rights and Global Justice, New York University School of Law, Legal Brief before the Standing Committee on the Foreign Affairs and International Development House of Commons Regarding Bill C-300 (2009)*, <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Harvard-testimony-re-Porgera-Main.pdf> [hereinafter *Legal Brief Regarding Bill C-300*].

⁹ The PJV engages in both open pit and underground mining. See Barrick, *Porgera, Operations*, Papua New Guinea, <http://www.barrick.com/operations/papua-new-guinea/porgera/default.aspx> (last visited Nov. 1, 2015). The villages within the mining area were relocated to the border of the mine. For more detailed description of the relocation, see Bonnell, *supra* note 8; see also *Legal Brief Regarding Bill C-300, supra* note 8, at 5-6. The experience of displacement as a result of the mine, subsequent population growth and calls for further relocation is also documented in Human Rights Watch, *Gold’s Costly Dividend: Human Rights Impacts of Papua New Guinea’s Porgera Gold Mine* 33 (Feb. 1, 2011) [hereinafter *Gold’s Costly Dividend*].

¹⁰ See Penny Johnson, *Porgera Environmental Advisory Komiti, Scoping Project: Social Impact of the Mining Project on Women in the Porgera Area* 17 (2010), http://www.peakpng.org/resources/Women-in-Porgera-Report_Final.pdf.

Further, Barrick also acquired a legacy of environmental damage and human rights abuses that it has failed to remedy. Each day, Barrick dumps more than 16,000 tons of waste into the Porgera River and local creeks that villagers have long relied upon for drinking water, bathing, and washing clothes and food. The mine's ever expanding waste dumps continue to take over the land and bury the homes of the original landowners that have lived in the region for generations, long before large-scale mining came to Porgera. Surrounded on all sides, villagers have no choice but to cross the dangerous dumps to reach agricultural land, commercial areas, schools or other villages.

Many have not been compensated for the loss of their land and their homes, and Barrick has refused to relocate them. Without land to farm and sources of clean water, practically the only means of income available to some of the local indigenous communities is to scavenge for remnants of gold in the open pit or the treacherous waste dumps.



Above: View of the Porgera Gold Mine. Photo Credit: Langan Muri

Bottom: The Red Water Tailings where local Porgera Alluvial Miners used to Pan for gold. Photo Credit: Emily Allen

III: Barrick's Security Guards

Barrick employs a private security force to patrol the open pit and the waste dumps. Villagers who are caught scavenging in the dumps or pit are often detained in a holding cell at the mine site before being transferred into police custody for "illegal mining" or trespassing. The security force includes local PNG police officers and others with a police or military backgrounds who are employed by Barrick to protect the mine. Barrick has a Memorandum of Understanding with the government of Papua New Guinea to provide police reservists from its own security guards in order to augment the local police force; in practice, these reservists patrol the mine at Barrick's direction. Barrick also provides financial and other support, such as housing on mine property and transportation, to the PNG Mobile Police squads, a branch of the national police force, to protect its facilities. The Mobil Police have a long history of serious human rights abuses, including shootings,¹¹ beatings,¹² rape,¹³ forced evictions, and burning of homes.¹⁴



Photo showing Mr. Buka Lita showing his dislocated jaws and lost teeth. Photo courtesy of ATA

¹¹ One good example for killing by PNG Mobil Squad hired by Barrick PJV to augment its Security at the mine site is Late Londari Mara a male 27 years old shot death by the PNG Mobil Squad 06 at the Porgera Station. Medical & Criminal Investigation Division of Porgera Police Reports confirms his cause of death as being shot by the Police using a M16 Rifle. Original medical and police report in the Author's files. *see also:* <http://www.protestbarrick.net/article.php?id=394>

¹² Beatings by joint operations of PNG Police and Barrick Security guards are frequent in Porgera. "A complainant namely Buka Lita has claimed that he was beaten by PJV Security Officers and PNG Mobil Squads during a joint operation in Porgera. He sustained permanent jaw dislocation and loose of teeth.

¹³ Apart from the rapes and gang rapes done to the local girls and women by Barrick Security Guards, PNG Police Mobil Squads, most of the times gang raped and robbed off young women and girls' personal properties in cash and kind. For example, a young woman claims that she was gang raped by Police Mobil Squads hired to augment Barrick Security guards dragged her into their vehicle from a public bus stop and took her to one of the Barrick's project sites, (Waile Creek Dam) and they gang raped her. After raping her they took from her a sum of K450.00 which she had brought to buy store goods for her parent's small canteen. Medical and local Porgera Police reports are in the Author's files.

¹⁴ During three of their joint operations, the Police and Barrick Security Guards have burnt down Wingima Village, see <http://www:>



Photo showing PJV hired Reservist Police with "Sig Rifles" imported to kill armless local trespassers at the LMP and SML. Some of the most destructive weapons known to mankind. Photo Credit: ATA Photo File



Above: PJV Security Guards display "pump-action" shoot guns imported to shot alluvial miners.
Photo Credit: ATA Photo File

Below: On guard at the Peak of the Open Pit. Armed with a Sig Riffle

IV: Systematic Sexual Violence and Gang Rape by Barrick Security Guards

For two decades, women and girls living near the mine have been brutally raped by the mine's security guards patrolling in or near the dumps. Many suffer from lasting physical and emotional injuries, as well as marginalization and social isolation in their community. One of rape victim, a young girl at the time, was panning for gold with her older sister when they were surrounded by ten armed Barrick security guards. The guards handcuffed her behind her back, beat her and gang-raped her. They then locked her in a holding cell at the mine site until she was transferred to police custody and jailed for "illegal mining." It took her family a week to gather bail money, during which time she received no medical treatment for her injuries, which included broken bones and swelling from a blood clot. She still has trouble walking today. Another ATA member and a rape victim was caught by guards in the dump after they fired teargas at her group. She was beaten, cut with a knife, and brutally raped by ten guards. She had to be carried home by relatives and could not walk for weeks; walking still causes her pain. After her newlywed husband found out about the rape, he abandoned her, and she is no longer able to have children. She was ostracized by the community and had to move to live with relatives in another town. Dozens of women have suffered similar sexual assault by mine security guards. Akali Tange Association (ATA) began warning of abuses committed by mine guards before Barrick formally took over the mine; the company ignored or denied the problem for years. In 2008, Barrick's CEO wrote in a letter to Porgeran leaders that the allegations of gang rape were "most distasteful, to say the least as you know these allegations to be untrue."



The photo above validates the allegations of systematic sexual and no-sexual abuses done by Barrick-PJV Security Guards. Note the ropes being used to tie the unarmed women. Photo Credit: ATA Photo File

Finally, after investigative reports from groups like MiningWatch Canada, Human Rights Watch, and Amnesty International, the company admitted in 2011 that there was a problem.¹⁶

V: Routine Beatings, Shootings and Killings by Barrick Security Guards

In addition to the systemic violence against women, over the course of the mine's existence, local men and boys have been routinely beaten, shot, and killed for entering the open pit, the dumps, or simply being near the mine's property. ATA has documented numerous incidents of violence and killings by mine security guards and Mobil Police squads working for the mine over the past 20 years. In 2005, just before Barrick took over the mine, its predecessor, Placer Dome, acknowledged some of those deaths, but alleged they were all in self-defense. Most killings have not been independently investigated, however, and Barrick generally continues to deny any responsibility. In 2006, the PNG government initiated an investigation into the unusually high number of deaths near the mine; no report was publicly released. One victim was only 15 years old when he was shot and killed. He was staying with a relative in Porgera, and one night, he followed a group of locals to a gap in the mine fence. The group attempted to gain entrance to the open pit to look for gold. Guards stationed at the entrance, behind a fence, began shooting into the crowd. The boy was killed by a shot to the head. His relatives reported the shooting to the police but no one was ever prosecuted for his death. 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.



Photo showing PJV Security Guards removing unknown alluvial miner's body bag after shooting him. Photo Credit: ATA Photo Files.

16 Barrick Gold Corp., A Framework of Remediation Initiatives in Response to Violence Against Women in the Porgera Valley 3 (May 16, 2013), <http://www.barrick.com/files/porgera/Framework-of-remediation-initiatives.pdf> [hereinafter Barrick Remedy Framework]; Barrick Gold Corp., Statement by Barrick Gold Corporation in Response to Human Rights Watch Report 10 (Feb. 1, 2011), <http://www.barrick.com/files/porgera/Response-to-Human-Rights-Watch-Report.pdf> [hereinafter Barrick Response to HRW Report].



Photo showing Late John Wangia's body after being shot by the PJV Security Guards using hire powered rifle at the Anawe Waste Dumpsite. Note the scars where the pellet penetrated.

VI: Barrick's Acknowledgment of Harm

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

At the Porgera mine, Barrick conducted a thorough internal investigation in relation to these incidents. Barrick and the PJV have terminated employees and had undertaken series of actions which include changes to the security function at PJV. Our deepest concern is for the women who may have been the victims of these alleged crimes Information was turned over to the police and the PJV has terminated employees who were found to have violated Barrick's Code of Conduct. In addition, PJV has terminated those who had knowledge of, but did not report, misconduct by others. Further terminations and other disciplinary actions may occur pending the results of police investigation.²³

Barrick announced a range of measures, including the introduction of systems to monitor guards, and enhanced human rights training for security personnel.²⁴ Despite these efforts, the changes did not decrease the incidence of violence, including sexual violence, perpetrated by security and other personnel.²⁵ In the wake of Barrick's internal investigations and public statements, there was still uncertainty about whether the company would take steps to provide reparations to victims.

²¹ Barrick Gold Corp., A Framework of Remediation Initiatives in Response to Violence Against Women in the Porgera Valley 3 (May 16, 2013), <http://www.barrick.com/files/porgera/Framework-of-remediation-initiatives.pdf> [hereinafter Barrick Remedy Framework]; Barrick Gold Corp., Statement by Barrick Gold Corporation in Response to Human Rights Watch Report 10 (Feb. 1, 2011), <http://www.barrick.com/files/porgera/Response-to-Human-Rights-Watch-Report.pdf> [hereinafter Barrick Response to HRW Report].

²² Gold's Costly Dividend, *supra* note 9, at 67.

²³ Barrick Response to HRW Report, *supra* note 21.

²⁴ *Id.*

²⁵ Despite several attempts being made to hold Barrick accountable for its gross human rights abuse, provide reparations and remedies to the victims and to implement preventive measures, the Barrick security guards human rights abuse is still continuing. See: <http://www.radionz.co.nz/international/pacific-news/308167/deadline-looms-for-png-mine-owners-over-violence-claims> see also: <http://www.radionz.co.nz/international/programmes/datelinepacific/audio/201808428/claims-mining-venture-failing-to-address-abuses-at-png-mine>

VII: The Creation of the Porgera Remedy Mechanism

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

The resulting Barrick effort, the “*Olgeta Meri Iगत Raits* (All Women Have Rights)” Framework, included two core components: reparations for individual victims (which this report refers to generally as “the remedy mechanism”) and community-oriented initiatives. There is also a set of “other initiatives” listed in the framework document. Barrick stated that the individual remedy aspect of the framework was designed to “provide individualized support and services to women who have been the subject of sexual violence or abuse by current or former employees of the PJV.”²⁷ The remedy mechanism could provide remedies to survivors whose complaints were deemed eligible and legitimate.²⁸ As listed in the original written framework document, the individual remedy program could include: (a) facilitating access to justice mechanisms; (b) access to medical and/or psychosocial support services; (c) provision of “fair and appropriate” financial reparations for personal harm or economic damages suffered; and (d) to the extent practicable, rehabilitation of rights and circumstances experienced prior to the alleged offense(s).²⁹

According to Barrick’s framework documents, the remediation packages could be in the form of financial compensation, but could also include access to support programs such as counseling, health care, livelihood assistance, household goods, micro-credit, or economic development grants.³⁰ The community-oriented aspect of the framework included, according to Barrick, community-level initiatives designed to “complement and enhance” existing programs for women who had suffered sexual violence.³¹ These services and facilities were to be available to women residing or working in Porgera. The framework also included other initiatives, including internal reforms at the Porgera mine and external capacity development.³² This involved facilitating counseling on violence against women and training for community representatives and people employed in key local positions, including local police. It also reportedly involved initiatives to build capacity in the law enforcement and justice sector.³³

²⁵ Barrick Gold Corp., Addressing Violence Against Women at Porgera (Oct. 27, 2011), <http://www.barrick.com/files/porgera/Progress-on-Human-Rights-at-Porgera.pdf>.

²⁶ *Id.* at 4.

²⁷ Barrick Remedy Framework, *supra* note 21, at 7.

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

²⁹ Barrick Remedy Framework, *supra* note 21, at 8.

³⁰ Barrick Gold Corp., The Porgera Joint Venture Remedy Framework 6 (Dec. 1, 2014), <http://www.barrick.com/files/porgera/Porgera-Joint-Venture-Remedy-Framework-Dec1-2014.pdf> [hereinafter Barrick Remedy Framework Summary].

³¹ Barrick Remedy Framework, *supra* note 21, at 7.

³² See *eg.* Barrick Gold Corp., A Framework of Remediation Initiatives in Response to Violence Against Women in the Porgera Valley (Oct. 22, 2012), <http://www.barrick.com/files/porgera/Porgera-Backgrounder-Framework-fremediation-initiatives.pdf>; Barrick Remedy Framework, *supra* note 21, at 8-9.

³³ Barrick Remedy Framework, *supra* note 21, at 8-9.

Funding was provided to hire a women's welfare liaison officer to provide support and assistance to victims of sexual and domestic violence. As part of this initiative, Barrick reported partnering with the Fiji Women's Crisis Centre to provide training for PNG-based practitioners to assist women affected by violence.³⁴ According to Barrick's framework documents, the *Olgeta Meri Igat Raits* Framework would be overseen by the Porgera Remedy Framework Association (PRFA), a not-for-profit entity created by Barrick, incorporated in PNG, and comprised of "key stakeholders," including Barrick representatives.³⁵

Barrick stated its intent to keep the individual reparations framework "to the maximum extent practical . . . independent of Barrick," and Cardno, an Australian development contractor, was hired to implement the remedy mechanism portion of the framework.³⁶ The remedy mechanism established a significant number of procedures. The mechanism placed the onus on individuals to file a claim with the mechanism.³⁷ A "Complaints Assessment Team [CAT]" administered the individual reparations program,³⁸ and claimants could file their claims with a CAT officer,³⁹ whose role was to explain the process, help claimants prepare their statements, and then assess the eligibility of those claims.⁴⁰ The Claims Manual for the mechanism initially instructed CAT officers to accept claims for assaults that took place between January 1, 1990 and December 31, 2010.⁴¹ Barrick reported in 2014 that claims relating to assaults outside this period are considered on a case-by-case basis.⁴²

A CAT officer would provide an assessment of the claim to the Independent Expert, who prepared a decision as to eligibility and legitimacy.⁴³ Claimants could also appeal adverse decisions.⁴⁴ During the claim submission and assessment process, claimants could meet with what Barrick referred to as an "Independent Legal Advisor" (ILA). The ILA was a PNG lawyer tasked with providing "free advice to any claimant on matters relating to their claim."⁴⁵

³⁴ Barrick Remedy Framework Summary, *supra* note 30, at 2.

³⁵ Barrick Remedy Framework, *supra* note 21, at 17; *see also* Barrick Framework Summary, *supra* note 30, at 5.

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

³⁷ Barrick Remedy Framework Summary, *supra* note 30, at 5.

³⁸ Barrick Remedy Framework, *supra* note 21, at 11 (stating that the CAT "will be responsible for administering the individual reparations program with guidance from an expert advisory group on establishing the parameters of the program.").

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

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

⁴¹ Claims Manual, *supra* note 28, at 1.

⁴² Barrick Remedy Framework Summary, *supra* note 30, at 6 n.7.

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

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

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

"Also, 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 that were interviewed expressed a shared lack of understanding of Framework processes, potential outcomes, and the settlement agreement. 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 did not seem to understand the waiver, without a firm comprehension of the rest of their remedy package.

The vast majority of claimants believe they were treated unfairly and that they did not receive the remedies they were promised."⁴⁶

⁴⁶ Pillar III on the Ground, an Independent Assessment of the Porgera Remedial Framework-EnodoRights, page 6 & 7

To accept the remedy package, the claimant was required to sign a waiver, giving up her right to bring any claim in any jurisdiction against the PJV, the PRFA, or Barrick “relat[ed] to in any way” the sexual violence.⁴⁶ The remedy mechanism opened in October 2012, and accepted new claims until a “nominal end date” of May 25, 2013, with any subsequent claims assessed on a case-by-case basis. Claims were accepted through a series of “rotations” in Porgera, which involved sessions in which the office was open and staffed, usually for two weeks at a time.⁴⁷

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



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

⁴⁷ Barrick Remedy Framework Summary, *supra* note 30, at 1; Barrick Email, June 24, 2015, *supra* note 45, at 2.

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

**Part II:
Concerns regarding
the Non-Judicial
Grievance
Mechanism for
Women Victims of
Sexual Violence by
Barrick Pongera Joint
Venture.**

Introduction:

The following comments on Barrick's remedial framework [The Framework] for victims of human rights abuses committed by Barrick personnel at the Porgera Joint Venture (PJV) mine in Papua New Guinea (PNG) raised concern that the framework and its implementation did not reflect best practice and was not sufficiently protective of the rights of the women who have been harmed by sexual violence at the hands of Barrick security personnel. The comments that follow are based on the framework text "Olgeta Meri Igat Raits: A Framework of Remediation Initiatives in Response to Violence Against Women in the Porgera Valley" [The Framework] and Barrick's Porgera Remedial Framework Association's (PRFA) performance.

Further the Barrick's set up of the "Remedial Framework" to enable rape survivors to apply was a limited benefits. This was designed to be an "Operational Grievance Mechanism," as envisioned by the U.N.'s 2011 Guiding Principles on Business and Human Rights, but from the outset the Remedial Framework failed the U.N. criteria. For example, the Guiding Principles state that such 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. More than two hundred women lodged complaints of rape and gang rape; ATA through believes that the actual number of victims is even higher.¹ Barrick claimed that it would assess each woman's needs and offer a flexible benefits package that might include financial reparations or even relocation where appropriate. EarthRights International (ERI) a not for profit NGO law firm based in the US had represented several dozen women who lodged claims with the Remedial Framework, but soon discovered that they were not being offered appropriate financial compensation commensurate with the gravity of the abuses. Nearly all of ERI's clients were offered benefits packages that were calculated to amount to exactly the same value – 21,320 kina, and 30,000 kina respectively at two different intervals. When many of ERI's clients objected and asked for appropriate compensation, the Remedial Framework rejected their request. In a statement (see below), the Framework's Advisory Panel accepted that the claimants had suffered horrific abuses – "physical assault and imprisonment as well as aggravated rape." But they rejected the notion that compensation for "aggravated rape" should rise above K50, 000 per woman, regardless of the details of her experience, for several reasons:

- The Panel suggested that, since other women had already accepted their standard packages, it would be "unjust" to them to give these claimants anything more.
- 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.
- The Panel believed that – despite the fact that the women themselves were asking for compensation – it was better to treat these rape survivors as an economic development project, by giving them "income-generation skills training" and "startup" grants.

¹ EnodoRights Independent Assessment Report of the Porgera Remedy Framework, "The Pillar III on the Ground" *supra* note 1 at 6 Recommendation to Barrick.

Two of the benefits packages, with names redacted (see below), demonstrate that the women were offered almost identical benefits regardless of their desires and circumstances. The largest component of the packages is a business training program; after attending Barrick's mandatory training, women could get a "business grant" of 15,000 kina – about \$6000 – which they were expected to use to start a small business raising chickens or selling second-hand clothing. No exceptions were made to the mandatory business training program – not even for an 87-year old woman. The rest of the value of the package was made up small components, such as school fees (in a country where such fees have been abolished) and vouchers for counseling services. Then the packages included a "financial supplement" of up to 5,000 kina (about \$2000), in order to make up the difference to 21,320 kina. In order to accept these packages, women were required to sign an agreement (see below), promising never to sue Barrick for their injuries. The women that ERI represented were apparently the only women in the process with any representation by legal counsel. All of the women who were not represented by ERI accepted the agreements.

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).²

The outcomes of the Remedial Framework fail the fundamental test that, under the U.N. Guiding Principles, such a process should be "[r]ights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights." Providing manifestly inadequate benefits in exchange for waivers of legal rights – especially for unrepresented women, most of whom are extremely impoverished, with little formal education – is inconsistent with international human rights standards, which require remedies that are proportional to the gravity of the abuses. Eleven women represented by EarthRights International rejected the agreements offered through the Remedial Framework. The "Concerns regarding the Non-Judicial Grievance Mechanism for Women Victims of Sexual Violence by Barrick Porgera Joint Venture Security Personnel" as stated above.

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

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

² Supra note 2 at 7 EnodoRights Report; Pillar III on the Ground: An Independent Assessment of the Porgera Remedy Framework

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

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

Seven specific comments merit expansion here:

I. On Consultation and Trust Building

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

Additionally, Barrick’s public release regarding the remediation framework, dated 23 October 2012, maintains that Barrick has adopted an approach that was consistent with the UN Guiding Principles on Business and Human Rights. The UN Guiding Principles require that non-judicial grievance mechanisms involve consultation with the stakeholder groups for whose use they are intended on their design and performance (Principle 31(h)).³Barrick has neither consulted with women who have been victims of violence by Barrick’s security guards nor did Barrick consult the Akali Tange Association, a grassroots local human rights organization that has documented the claims of victims of violence by PJV security guards and has been publicly raising the issues of violence and sexual assault by Barrick security for many years.

²⁶ Guiding principles (31(h)), states: *Operational-level mechanisms should also be: 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.*

The lack of consultation and inclusion of this local organization in the development of the Framework and its implementation has consequences in terms of lack of trust, resulted in failing the UN criteria. 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

Applicable Human Rights Principles

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

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

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

While the UN Guiding Principles do not detail what adequate consultation specifically looks like, to be effective, consultation should cover all aspects of the remedy mechanism’s design, processes, and outcomes, and requires identifying the “legal, cultural, economic, and other obstacles” faced by victims to overcoming the harm they have experienced.³ Consultation should consider a range of factors, including an assessment of security conditions, economic resources, and fears of retaliation or ostracism that may be associated with accessing the remedy mechanism. Consultation with human rights and other experts can also be critical to the success of a mechanism.

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

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

² *Id.* ¶ 31 (commentary, h).

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

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

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

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

Barrick's Consultation Practice

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

⁵ See, e.g., Organization for Economic Co-operation and Development, Annex 5 The Human Rights Based Approach to Development Cooperation. Towards a Common Understanding of the Human Rights Based Approach to Development Cooperation (2003), <http://www.oecd.org/derec/finland/43966077.pdf>; Independent Expert on the Right to Development, *Report of the Independent Expert on the Right to Development*, ¶¶ 21-22, U.N. Doc. A/55/306 (Aug. 17, 2000) (by Arjun Sengupta); Margaret Satterthwaite & Amanda Klasing, *A Rights Based Approach: Assessing the Right to Water in Haiti*, in *Rights Based Approaches to Public Health* 143 (Elvira Beracochea, Corey Weinstein & Dabney P. Evanseds., 2011); United Nations Development Program (UNDP), *A Human Rights-based Approach to Development Programming in UNDP – Adding the Missing Link* (Aug. 8, 2001), <http://www.pogar.org/publications/other/undp/hr/hr-missinglink-00e.pdf>.

⁶ For a description of former UN Special Representative for Business and Human Rights John Ruggie's involvement, see Barrick Gold Corp., CSR Advisory Board, <http://www.barrick.com/responsibility/csr-advisory-board/> (last visited Nov. 14, 2015). Barrick stated that it consulted with Human Rights Watch, UN Women, the former UN Special Representative for Business and Human Rights, the Harvard International Human Rights Clinic, the Porgera District Women's Association (PDWA) and the PDWA's Women's Welfare Office, Paiam hospital, the Porgera Medical Centre, local police, and the PJV's Community Affairs personnel. Barrick also stated that it held intensive consultation workshops with the Papua New Guinea Family and Sexual Violence Action Committee, the PNG Australia Law and Justice Partnership, the Family and Sexual Violence Unit of the Royal Papua New Guinea Constabulary, the PNG Department of Justice and Attorney General, the PNG Chamber of Mines and Petroleum (Women in Mining Program), human rights specialists from private legal practices, and the Porgera Environmental Advisory Komiti (PEAK). Further specifics are laid out in: Barrick Gold Corp., *A Framework of Remediation Initiatives in Response to Violence Against Women in the Porgera Valley* (May 16, 2013), <http://www.barrick.com/files/porgera/Framework-of-remediation-initiatives.pdf>; Barrick Gold Corp., *The Porgera Joint Venture Remedy Framework 4* (Dec. 1, 2014), <http://www.barrick.com/files/porgera/Porgera-Joint-Venture-Remedy-Framework-Dec1-2014.pdf> [hereinafter *Barrick Remedy Framework Summary*]; Letter from Peter Sinclair, Vice President, Corp. Soc. Responsibility, Barrick Gold Corp., to Dr. Navanethem Pillay, UN High Comm'r for Human Rights 2-3 (Mar. 22, 2013), <http://www.barrick.com/files/porgera/Letter-to-UNHigh-Commissioner.pdf> [hereinafter *Barrick Letter to OHCHR* (Mar. 22, 2013)].

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

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

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

Human Rights Analysis by the Clinics

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

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

⁷ Barrick Gold Corp., Statement by Barrick Gold Corp. in Response to Human Rights Watch Report 10 (Feb. 1, 2011), <http://www.barrick.com/files/porgera/Response-to-Human-Rights-Watch-Report.pdf>; Barrick Gold Corp., Addressing Violence Against Women at Porgera (Oct. 27, 2011), <http://www.barrick.com/files/porgera/Progression-Human-Rights-at-Porgera.pdf>; Porgera Environmental Advisory Komiti (PEAK), FAQs, <http://www.peakpng.org/faqs/> (last visited Nov. 14, 2015); Barrick Remedy Framework Summary, *supra* note 6, at 2.

⁸ Global Justice Clinic, New York University School of Law and International Human Rights Clinic, Harvard Law School, Comments on The Framework of Remediation Initiatives in Response to Violence Against Women in the Porgera Valley by Barrick Gold Corporation—Key Human Rights Concerns and Recommendations (May 14, 2012).

⁹ Barrick’s original remedy mechanism framework documents do not list MiningWatch Canada, the ATA, or PLOA among those it consulted. It is the ATA’s understandings that those organizations only had an opportunity to provide feedback during a late stage, when the design was already finalized. In 2013, Barrick stated that in 2012, “ATA and PLOA both had the opportunity to review the framework and provide whatever feedback and thoughts they may have.” *See* Barrick Letter to OHCHR (Mar. 22, 2013), *supra* note 6, at 6. myself.”; Interview 20-2011 (Mar. 17, 2011); Interview 21-2011 (Mar. 17, 2011). *See also* Clinic Interview 2-2014 (Mar. 19, 2014) (“No one ever spoke to us They should have come and talked to us here instead of just starting this framework.”).

Design Phase

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

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

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

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

Against this background, when the remedy mechanism began, numerous rights-holders including ATA have expressed a lack of faith about the company's efforts to provide a remedy.¹¹ One claimant indicated that if "they came to us and did it our way, it would be good. Because they are doing it in their own way, I don't think they're doing something good."¹²

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

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

Possibilities for local consultation with civil society: ATA as a local civil society who has been condemning security guard violence around the mine and carrying out advocacy to stop it—and landowner organization the PLOA—were also largely excluded from the remedy design consultation process.¹³

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

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

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

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

¹³ See *supra* note 9.

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

¹⁵ Barrick letter to OHCHR (Mar. 22, 2013), *supra* note 6, at 5. Human Rights Watch has also expressed concern regarding their internal administration and financial management. Human Rights Watch, *Gold’s Costly Dividend: Human Rights Impacts of Papua New Guinea’s Porgera Gold Mine* 34–37 (Feb. 1, 2011).

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

¹⁷ Interview 1-2014 (Mar. 19, 2014); Clinic Interview 2-2014 (Mar. 19, 2014); Clinic Interview 10-2014 (Mar. 20, 2014); Clinic Interview 3-2014 (“Even though I live out there [outside of Porgera], if anything like this happens, we have the ATA.”). Some women expressed hesitation in filing a claim unless encouraged by the ATA; see also Interview 7-2013 (Mar. 7, 2013); Interview 9-2013 (Mar. 6, 2013) (“If it was one of these ATA’s . . . not this PJV, who would come, then I would believe and trust them.”); Interview 1-2014 (“I have kept what happened to me secret all my lifetime [thinking that] if someone knows it was going to be a big problem. But when the boys of the ATA said that if you have been raped you can tell us, I decided to come out and take the risk.”); Interviews 4-2013 (Mar. 6, 2013); Interview 5-2013 (Mar. 7, 2013); Interview 7-2013 (Mar. 7, 2013); Interview 17-2013 (Mar. 7, 2013); Interview 18-2013 (Mar. 7, 2013). It is worth noting that advocacy by local groups continues. The ATA has advised that even after the remedy mechanism ended, it is assisting a further 280 people to make formal complaints to Barrick about alleged injuries, death, and assaults through the site’s operational grievance mechanism. This includes numerous women who allege that they have been raped. Email from Langan Muri, Chairman, ATA to Sarah Knuckey (Oct. 3, 2015) (on file with author).

It is essential for any remedy mechanism to avoid reproducing gender dynamics that subordinate women's voices. Constructive engagement with local leaders can hold the potential to enhance women's access to, and engagement with, a remedy mechanism, as opposed to discouraging their participation.¹⁸

While ATA should not have been proxies for the survivors (just as national experts should not have been), the local organization could have facilitated direct access to individuals. Thus, ATA participation could have increased some individuals' and the community's ownership of the mechanism. When the mechanism did begin, some members of ATA were in fact active in facilitating women's access to it.

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

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

¹⁸ Sarah Knuckey & Eleanor Jenkin, *Company-Created Remedy Mechanisms for Serious Human Rights Abuses: A Promising New Frontier for the Right to Remedy?*, 19 Int'l J. Hum. Rts. 801, 806 (2015) (noting that "when 'gatekeeper' groups and leaders are engaged constructively, they have the potential to enable rather than block rights-holders' engagement"). *See also*, Centre for Social Responsibility in Mining, *Mining Industry Perspectives on Handling Community Grievances: Summary and Analysis of Industry Interviews*, at xii, 38 (Apr. 2009) (arguing that "[i]gnoring or refusing to engage least trusted groups" is a strategy that "does not work" to enable responsible grievance-handling by mining companies).

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

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

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

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

²² Interview 21-2014 (Mar. 8, 2014).

Implementation phase

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

The dialogue with certain claimants and external groups seems to have led to some positive changes during the mechanism’s implementation, including changes in the design of the remedy packages offered, adding additional windows of time for receiving complaints, improving translation processes, and providing additional information about the role of the “Independent Legal Advisor.”²⁴

However, the clinics’ experience and interviews indicate that this feedback process was not subject to any formal or consistent procedure. *See further* Part III, Chapter 7: Additional Rule of Law Issues (discussing predictability and continuous learning).

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

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

²³ Barrick Remedy Framework Summary, *supra* note 6, at 4.

²⁴ *See* Barrick Gold Corp., Clarification of the Porgera Remediation Framework (Dec. 3, 2013), <http://s1.q4cdn.com/808035602/files/porgera/Clarification-of-the-Porgera-Remediation-Framework.pdf>; Barrick Gold Corp., A Summary of Recent Changes to the Porgera Remediation Framework (June 7, 2013), <http://s1.q4cdn.com/808035602/files/porgera/Summary-of-Recent-Changes-to-the-Porgera-Remediation-Framework.pdf>; Interview 11-2014 (Mar. 20, 2014); Interview 21-2014 (Mar. 20, 2014); Barrick Remedy Framework Summary, *supra* note 6, at 13–14.

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

Lessons Learned to be Applied by Barrick in its Existing Operational Grievance Mechanism

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

Effective consultation does not simply involve collecting information or providing stakeholders an opportunity to provide feedback after key decisions have already been made; it entails early, proactive, ongoing, and comprehensive dialogue and engagement with all stakeholders and other relevant experts. Organizations that have been particularly vocal about human rights abuse allegations should be at the table; they should not be automatically excluded because a company has low trust in those actors. Remedy mechanisms will benefit from structured consultations with a level of transparency to promote the integrity of such efforts. Such effective consultation with the local community and particularly victims is a necessary step towards establishing a remedy mechanism that is accessible, trusted, legitimate, and effective, and that advances human rights. However, a “consultation” model of engagement with survivors and others impacted by corporate activity is the bare minimum required. Typical consultation models can maintain the unequal power relationship between rights-holders and companies; even where rights-holder views are taken into account, the company fundamentally retains control over the design and implementation of the mechanism.

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

Recommendations:

- The Framework and its execution should, minimally, provide a more comprehensive historical account of the efforts to alert Barrick to these abuses made by ATA, as well as the International Human Rights Clinic at Harvard and the Center for Human Rights, Mining Watch Canada and Global Justice at New York University School of Law.
- In light of the lack of consultation with key stakeholders, such as Akali Tange Association and possibly victims of violence themselves, Barrick should have committed to an immediate review of the remediation process by an independent panel, which should include local stakeholder groups.

II. Promptness

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

The right to remedy includes a right to "prompt" reparations—promptness is a key component of the right to remedy in human rights law.¹

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

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

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

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

² *Id.* Art. IX(22)-(23).

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

⁴ UN Office of the High Comm'r for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* 23, U.N. Doc. HR/PUB/12/02 (2012), http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf [hereinafter *Corporate Responsibility to Respect Human Rights*].

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

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

Barrick’s History of Responding to Allegations of Abuse

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

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

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

⁵ Voluntary Principles on Security and Human Rights, http://www.voluntaryprinciples.org/wp-content/uploads/2013/03/voluntary_principles_english.pdf. Barrick has joined these principles. See Barrick Gold Corp., Human Rights Policy (Oct. 30, 2015), <http://www.barrick.com/files/governance/Barrick-Human-Rights-policy.pdf>.

See also International Council on Mining & Metals, 10 Principles ¶ 4 (May 2003), <https://www.icmm.com/our-work/sustainable-development-framework/10-principles>.

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

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

⁸ Akali Tange Association, *The Shooting Fields of Porgera Joint Venture* (2005), http://www.miningwatch.ca/sites/www.miningwatch.ca/files/ATA_Case_Documentation.pdf; Press Release, MiningWatch Canada, Papua New Guinea Conducts Flawed Investigations of Killings at Barrick Mine (July 10, 2006), <http://www.miningwatch.ca/papuanew-guinea-conducts-flawed-investigation-killings-barrick-mine> (quoting the then Executive Officer Jethro Tulin of the Akali Tange Association).

⁹ Letter from Jethro C. Tulin, the then Chief Executive Officer, Akali Tange Association to Greg Wilkins, Chief Executive Officer, Barrick Gold Corp. (Nov. 4, 2005), <http://www.miningwatch.ca/sites/www.miningwatch.ca/files/barrick.wilkins.pdf>.

In 2006, the government of PNG created a commission of inquiry to investigate the allegations of killings by security personnel at the mine; however, the ATA and international NGOs have yet to be able to obtain the results of the inquiry.¹⁰

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

In 2008, 2009, and 2010, local representatives addressed Barrick's Annual General Meetings and specifically mentioned allegations of security guard abuses, including killings and sexual assaults.¹² In 2009, Mr. Jethro Tulin of the ATA presented a statement to the UN Permanent Forum on Indigenous Issues: Last year, Dr. Sarah Knuckey, PhD explained that mine guards and police were killing locals and raping our women; there have been five more killings and many more rapes since...The increasing global power and influence of trans-national companies like the Canadian Barrick Gold, managers of the Porgera mine[,] means that they, alongside the PNG government, must be responsible for upholding human rights within their spheres of influence.¹³

¹⁰ See, e.g., Porgera Landowners Association, Akali Tange Association, MiningWatch Canada, The Operations of Barrick Gold Corp. at the Porgera Joint Venture Mine on the Land of the Indigenous Ipili of Porgera, Enga Province, Papua New Guinea, Request for Review Submitted to the Canadian National Contact Point Pursuant to the OECD Guidelines for Multinational Enterprises 9 (Mar. 1, 2011), http://www.miningwatch.ca/sites/www.miningwatch.ca/files/oeed_request_for_review_on_barrick_in_porgera.pdf [hereinafter 2011 Request for Review of Barrick Operations at Porgera]; Human Rights Watch, Gold's Costly Dividend: Human Rights Impacts of Papua New Guinea's Porgera Gold Mine 45 (Feb. 1, 2011) [hereinafter Gold's Costly Dividend].

¹¹ See, e.g., David Martinez, Corp Watch, Barrick's Dirty Secret: Mining in Papua New Guinea (2006) (containing an interview with Jeffrey Simpson, ATA representative, in which he refers to rapes at the mine site); Mark Ekepa, *Letter to Barrick Management on Behalf of Porgera Landowners Association* (Mar. 8, 2008), <http://www.porgeraalliance.net/2008/03/letter-to-barrick-management-on-behalf-of-porgera-landowners-association/> (referring to various allegations, including "raping, even gang-raping" by mine security guards); Mark Ekepa, *Statement of Mark Ekepa, Chairman of the Porgera Landowners Association at Barrick's Annual General Meeting* (Apr. 28, 2010), <http://www.porgeraalliance.net/2010/04/statement-of-markekepa-chairman-of-the-porgera-landowners-association-at-barrick%E2%80%99s-annual-general-meeting> (referring to allegations of "gross violations of human rights"); 2011 Request for Review of Barrick Operations at Porgera, *supra* note 10; Jethro Tulin, Akali Tange Association, *Statement at United Nations Permanent Forum on Indigenous Issues, Seventh Session* (Apr. 23, 2008), <http://www.porgeraalliance.net/statements/unpfii/7th-session-statement-at-united-nations-permanentforum-on-indigenous-issues/>; Jethro Tulin, Akali Tange Association, *Statement at the UN Permanent Forum on Indigenous Issues, Eighth Session* (May 20, 2009), <http://www.porgeraalliance.net/statements/unpfii/8th-session/>.

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

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

In a letter addressed to the PLOA in 2008, the then General Manager of the mine stated that: “we found your public allegation of our employees “gang raping” Porgera Land Owners’ women to be most distasteful, to say the least as you know these allegations to be untrue.”¹⁴

The media continued to report on the issue throughout 2009, including on allegations of rape and other violence.¹⁵ In one 2009 article, Barrick is reported as having refuted its responsibility for unlawful killings, and as calling into question the credibility of the organizations making the claims; no specific response from Barrick to the allegations of sexual abuse was reported.¹⁶ International groups, including MiningWatch Canada and Clinics, have been involved in monitoring the PJV mine since at least 2002.¹⁷ After Barrick’s acquisition of Placer Dome, MiningWatch Canada undertook field assessments and a range of advocacy efforts related to security guard abuse, including lodging an official complaint with the UN Special Rapporteur on extrajudicial, summary or arbitrary executions on behalf of the ATA in 2007.¹⁸

The clinics conducted numerous fact-finding investigations in PNG starting in 2006, interviewing hundreds of individuals and focusing primarily on alleged mine-related security abuses.¹⁹

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

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

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

¹⁷ MiningWatch Canada has been involved in monitoring environmental and other social impacts of the mine. See, e.g., Catherine Coumans, *Placer Dome Case Study: Porgera Joint Venture* (Apr. 2002), http://www.miningwatch.ca/sites/www.miningwatch.ca/files/PD_Case_Study_Porgera_0.pdf; Press Release, MiningWatch Canada, *Placer Dome Admits to Killings at Porgera Mine in Papua New Guinea* (Apr. 8, 2006), <http://www.miningwatch.ca/placer-domeadmits-killings-porgera-mine-papua-new-guinea> [hereinafter MWC Press Release, Apr.8,2006] (discussing the violence at the mine from 2006).

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

¹⁹ See Methodology; Part I: Background.

In 2009 and 2010, the clinics presented their findings to the Standing Committee on Foreign Affairs and International Development of Canada's House of Commons.²⁰ The testimony reported on alleged killings, violence, and rape that raised serious concerns that gross human rights violations had occurred at the mine.

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

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

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

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

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

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

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

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

²² Barrick stated: Letter from Barrick Gold Corp. to The Business and Human Rights Resource Centre (Feb. 2010), <http://www.reportsand-materials.org/sites/default/files/reports-and-materials/Barrick-Gold-response-re-Porgera-mine-Feb-2010.pdf>.

²³ Les Wittington, *MPs Told of Gang Rapes at Mine*, Toronto Star, Nov. 24, 2009, http://www.thestar.com/news/investigations/2009/11/24/mps_told_of_gang_rapes_at_mine.html.

In February 2011, Human Rights Watch released a report in which they documented violent abuses by security forces, including but not limited to sexual assault. Human Rights Watch also reported that

Barrick's early responses to abuse allegations were inadequate:

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

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

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

Barrick's initial public acknowledgement of human rights abuses at the PJV mine, however, heavily emphasized the allegations of violence against women.²⁹ Despite referencing the advocacy by Human Rights Watch, which included concerns other than sexual violence, Barrick did not directly respond to allegations of other forms of violence.

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

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

²⁵ Gold's Costly Dividend, *supra* note 10, at 66-67.

²⁶ Barrick Gold Corp., Statement by Barrick Gold Corporation in Response to Human Rights Watch Report 10 (Feb. 1, 2011), <http://s1.q4cdn.com/808035602/files/porgera/Response-to-Human-Rights-Watch-Report.pdf> [hereinafter Barrick Statement, Feb. 1, 2011].

²⁷ See Part I: Background.

²⁸ Barrick Gold Corp., The Porgera Joint Venture Remedy Framework 15 (Dec. 1, 2014), <http://www.barrick.com/files/porgera/Porgera-Joint-Venture-Remedy-Framework-Dec1-2014.pdf> [hereinafter Barrick Remedy Framework Summary].

²⁹ Barrick Statement, Feb. 1, 2011, *supra* note 26.

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

Abuse by security forces in Papua New Guinea is common, well-known, and foreseeable.³¹ Due diligence should have revealed to a business seeking to use or cooperate with security forces in the country the serious risk of abuse. The high rates of sexual abuse in the country are also very well known.³²

In such an environment, Barrick was under a particular responsibility to put in place stringent policies to protect vulnerable people from harm, to actively monitor for potential abuse, and to take seriously all allegations of abuse.³³ Barrick, however, failed to take reports seriously for years, and did not launch necessary internal investigations despite repeated allegations of abuse from multiple sources.

Until 2010-2011, Barrick's response was instead to generally attack the credibility of messengers, and to argue that it had no responsibility to act on general or anonymized allegations of harm. Barrick also deferred to the police force, and referred complainants to the PNG police. This displayed a serious misunderstanding of the reality on the ground for many Porgerans, who had reasonable and significant concerns about approaching police with these kinds of complaints, due to well-founded fears of retaliation, imprisonment, and police inaction.³⁴ It also demonstrated a failure to meet the company's own corporate responsibilities to prevent and address harms: effective human rights due diligence, proactive monitoring, and complaints processes would have alerted the company to security force abuses. The allegations should have triggered immediate internal investigations.

³¹ See Burton, *supra* note 6. See also Gold's Costly Dividend, *supra* note 10, at 46 ("Barrick should have been well aware of the serious potential for violent abuses to occur"); Amnesty International, *Undermining Rights: Forced Evictions and Police Brutality Around the Porgera Gold Mine, Papua New Guinea* (February 2, 2010), <http://www.amnestyusa.org/research/reports/undermining-rights-forced-evictions-and-police-brutality-around-the-porgera-gold-mine-papua-new-guin>; Press Release, UN Office of the High Comm'r for Human Rights, UN Special Rapporteur on Torture presents preliminary findings on his mission to Papua New Guinea (May 25, 2010), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10058&LangID=E/Findings>. See also Comm. on the Elimination of Discrimination Against Women, *Concluding Observations of the Committee on the Elimination of All Forms of Discrimination Against Women: Papua New Guinea*, ¶ 29, 46th Sess., July 12-30, U.N. Doc. CEDAW/C/PNG/CO/3 (July 30, 2010): [T]he Committee expresses its deep concern about reports of sexual abuse of women upon arrest and in police custody, perpetrated by both police officers and male detainees, and at times in the form of collective rape, and that such abuses are rarely documented and investigated and perpetrators not prosecuted and punished.

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

³³ See *Corporate Responsibility to Respect Human Rights*, *supra* note 4, at 65: A grievance mechanism is not just an internal administrative procedure for handling impact or grievances. Whereas an internal procedure is typically passive, i.e., waiting for problems to arise and then responding, a grievance mechanism is active: it aims to facilitate the identification of grievances and address them as early as possible. It does so by ensuring it is known to, and trusted by, those stakeholders for whom it is intended.

³⁴ *Legal Brief Regarding Bill C-300*, *supra* note 20.

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

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

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

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

Lessons Learned to be Applied by Barrick in its Existing Operational Grievance Mechanism

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

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

³⁵ Barrick Remedy Framework Summary, *supra* note 28, at 15.

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

III. Scope of Harms Remedied

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

The right to remedy includes a right to “prompt” reparations—promptness is a key component of the right to remedy in human rights law.¹ Prompt reparations includes promptly ceasing continuing violations, providing full and public disclosure of the truth, accepting responsibility, and undertaking preventative measures such as human rights training and adopting codes of conduct.²

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

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

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

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

² *Id.* Art. IX(22)-(23).

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

⁴ UN Office of the High Comm’r for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* 23, U.N. Doc. HR/PUB/12/02 (2012), http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf [hereinafter *Corporate Responsibility to Respect Human Rights*].

⁵ Voluntary Principles on Security and Human Rights, http://www.voluntaryprinciples.org/wp-content/uploads/2013/03/voluntary_principles_english.pdf. Barrick has joined these principles. See Barrick Gold Corp., Human Rights Policy (Oct. 30, 2015), <http://www.barrick.com/files/governance/Barrick-Human-Rights-olicy.pdf>. See also International Council on Mining & Metals, 10 Principles ¶ 4 (May 2003), <https://www.icmm.com/our-work/sustainable-development-framework/10-principles>.

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

Human rights analysis by the Clinics

Human rights norms establish that remedies should be prompt to be effective. For too long, Barrick failed to adequately respond to serious allegations of violence. This delay had several consequences. First, it is likely that numerous assaults could have been prevented if more prompt action had been taken.⁶ Second, earlier action could also have led to an earlier remedy, and women could have received necessary psychological and medical assistance. Third, the delay undermined trust in the remedy mechanism that Barrick eventually created.

Abuse by security forces in Papua New Guinea is common, well-known, and foreseeable.⁷ Due diligence should have revealed to a business seeking to use or cooperate with security forces in the country the serious risk of abuse. The high rates of sexual abuse in the country are also very well known.⁸ In such an environment, Barrick was under a particular responsibility to put in place stringent policies to protect vulnerable people from harm, to actively monitor for potential abuse, and to take seriously all allegations of abuse.⁹ Barrick, however, failed to take reports seriously for years, and did not launch necessary internal investigations despite repeated allegations of abuse from multiple sources.

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⁸ See Rachel Jewkes et al., *Prevalence of and factors associated with non-partner rape perpetration: findings from the UN Multicountry Cross-sectional Study on Men and Violence in Asia and the Pacific*, 1 *The Lancet Global Health* 169, 208-18 (Oct. 2013), <http://www.sciencedirect.com/science/article/pii/S2214109X13700743>. A UN Special Rapporteur report noted that in one study, up to 60 percent of men interviewed indicated that they had participated in gang rape. See UN Special Rapporteur on Violence Against Women, its Causes and Consequences, *Report of the Special Rapporteur on violence against women, its causes and consequences, Mission to Papua New Guinea*, ¶ 27, Human Rights Council, U.N. Doc. A/HRC/23/49/ Add.2 (March 18, 2013) (by Rashida anjoo). A 2010 research project based on a validated World Health Organization (WHO) research instrument on domestic violence found that nearly two-thirds of participants were survivors of domestic violence. See Margit Ganster-Breidler, *Gender-Based Violence and the Impact on Women's Health and Well-Being in Papua New Guinea*, *Contemporary PNG Studies: DWU Research Journal* 17, 24 (Nov. 13, 2010) http://www.dwu.ac.pg/en/images/Research_Journal/2010_Vol_13/2_Ganster-Breidler_Gender_based_violence_in_PNG_17-30.pdf.

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Barrick's changed public posture to the assault allegations starting in 2010-2011 was a commendable shift. Once it decided to take the sexual assault allegations seriously, it took swift and significant steps to investigate and put in place prevention and mitigation policies, and these steps appear to have helped reduce security force violence.¹² Further, the establishment of the remedy mechanism, and the processing of individual claims, was generally also timely. *See* Part III, Chapter 5: Reparations.

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

¹⁰ *Legal Brief Regarding Bill C-300, supra note 20.*

¹¹ Barrick Remedy Framework Summary, *supra* note 28, at 15.

¹² However, there are some allegations that some violence is ongoing. *See, e.g.,* Interview 1-2015 (January 2, 2015) ("Now it's better, but some of them they are still doing it. That is why I moved."). *See* Part III, Chapter 5: Reparations.

Lessons Learned to be applied in the existing Barrick PJV Operational Grievance Mechanism

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

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

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

IV. Accessibility and Security

"Inadequate steps were taken to ensure that the remedy mechanism was accessible and safe for as many potential claimants as possible. "Word of mouth" and targeted outreach strategies were adopted to inform women about the remedy mechanism, rather than a widely and openly publicized awareness campaign. The decision to rely on the narrower approach was reportedly adopted in response to legitimate concerns about the safety and privacy of sexual assault victims. However, once the decision was made to use "word of mouth," insufficient steps were taken to mitigate the foreseeable problems that arose from this approach. For example, accurate information about the existence and nature of the mechanism did not reach as many potential claimants as it could have. This lack of information, along with the single and public location and limited time frame in which claims could be presented to the mechanism, undermined the accessibility and equitability of the remedy mechanism. Despite warnings about potential security impacts on women, inadequate steps were taken to mitigate harm and to ensure that necessary proactive measures were taken to protect women. For example, the single entry point intake process appears to have put women at risk of being identified. In general, there could have been a more consultative, comprehensive, and tailored approach that would have better mitigated risk for each individual woman entering the mechanism, moving through it, and receiving remedy packages".¹

An effective remedy mechanism should be accessible to rights-holders. This means that it should be "known to all stakeholder groups for whose use [it is] intended" and that victims who "may face particular barriers to access" are provided "adequate assistance."² To ensure that the right to a remedy is effective, individuals should have access to information regarding any possible remedies or services that might be available, and must be provided with proper assistance and resources in seeking access to justice.³

In addition, the design and implementation of a remedy mechanism should take into account potential security or other adverse impacts on mechanism users, and, where a security risk is present, proactive steps should be taken to mitigate risk, so that individuals feel more secure in accessing the mechanism. Attention to security is necessary to ensure a mechanism's effectiveness and rights-compatibility, to ensure that a company does not cause further adverse impacts through its remedy mechanism, and to advance remedy mechanism goals of preventing "harms from compounding and grievances from escalating."⁴ This is part of the general human rights principle of "do no harm,"⁵ which is also a corporate responsibility.⁶

¹ Righting + Wrongs, Accessibility and Security Summary Note. Pg 59

² UN Office of the High Comm'r for Human Rights, Guiding Principles on Business and Human Rights, ¶ 31(b), U.N.Doc. HR/PUB/11/04 (2011) [hereinafter UN Guiding Principles].

³ See, e.g., Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, ¶ 24, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) (there should be means of informing victims of all "rights and remedies addressed by these Basic Principles and Guidelines and of all . . . other services to which victims may have a right of access"); *id.* ¶¶ 12(a), 12(c) (states should "[d]isseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law" and "[p]rovide proper assistance to victims seeking access to justice").

⁴ UN Guiding Principles, *supra* note 1, ¶ 29 (commentary).

⁵ UN Office of the High Comm'r for Human Rights, *Manual on Human Rights Monitoring*, at ch. 2, p. 4, U.N. Doc. HR/P/PT/7/Rev.1 (2011), <http://www.ohchr.org/Documents/Publications/Chapter02-MHRM.pdf>.

⁶ See Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, *Statement by Prof. John Ruggie during 63rd Session of the General Assembly* (Oct. 27, 2008) (by John Ruggie).

Accessibility and Security in the Remedy Mechanism Process

Outreach: Initially, a public awareness campaign about the mechanism was planned, using, for example, public radio announcements.⁷ However, Barrick has stated that some PNG experts advised that such a public campaign entailed risks in Porgera.⁸ First, there was concern that if everyone in the community knew about the mechanism and its purpose, women who accessed it would face difficulties in keeping their sexual assault confidential, and publicity might lead to stigma, retribution, and physical violence against some women. Second, the fear of such effects could deter legitimate claimants from coming forward.⁹

In response to these concerns, more discreet “word of mouth” and individually targeted outreach approaches were adopted. The awareness strategy relied on sharing information about the mechanism with certain actors in the community, who would then share information with other women who might be potential claimants, or who could further relay information. During implementation, groups such as the PLOA, ATA, and the clinics, who were in possession of specific knowledge as to the identities of women who had previously made sexual assault allegations, also sought to individually notify women of the remedy mechanism, and to assist them in accessing it.¹⁰ Cardno was amenable to the clinics sharing with them the names of additional women (at the women’s request) who sought to make claims.

Point of entry: There was generally only one apparent physical entry point into the mechanism, which was an office located in Porgera Station, at the time in the same building as the Women’s Welfare Office. The building is behind a number of stores, off a street that is often busy with foot traffic and roadside vendors. The clinics were informed that the co-location with the Welfare Office was to provide women a safer pretext for necessary in-person visits when accessing the mechanism.¹¹

⁷ Interview 21-2014 (Mar. 21, 2014); Barrick Gold Corp., A Framework of Remediation Initiatives in Response to Violence Against Women in the Porgera Valley 28-29 (2013), <http://www.barrick.com/files/porgera/Frameworkof-remediation-initiatives.pdf>.

⁸ Interview 21-2014 (Mar. 21, 2014); see also Email from Simon Jimenez, Director, Corporate Social Responsibility, Barrick Gold Corp., to Sarah Knuckey (Sept. 29, 2015) (on file with author) (“[Experts in gender based violence]” recommended a localised approach, rather than a broad media campaign, to protect confidentiality and avoid revictimization”); see also Letter from Dame Carol Anne Kidu to Dr. Navanethem Pillay, UN High Commissioner for Human Rights (Mar. 24, 2013), <http://s1.q4cdn.com/808035602/files/porgera/Letter-from-Dame-Carol-Kidu-to-UNHigh-Commissioner-for-Human-Rights.pdf> (“It was in fact the group of internal expert advisers at program design stage and the Claims Assessment Team (mature, highly experienced Papua New Guinean women) who insisted on confidentiality and opposed any media/public announcements at the commencement of the program by Barrick. This decision was made in consultation with women on the ground in Porgera.”). See also Letter from Patrick Bindon, Manager, Corporate Affairs, Australia–Pacific, Barrick Gold Corp. to Sarah Knuckey and Tyler Giannini 3 (Mar. 26, 2013) (on file with the author) (“[O]utreach and publicity on the program was overseen exclusively by Cardno and based on the advice of local and national experts on violence against women”).

⁹ *Id.*; Interview 21-2014.

¹⁰ During visits to Porgera, the clinics sought to locate individual women who had previously been interviewed about their alleged assaults. When these women were found, they were informed about the existence of the mechanism and provided information about how to access it. The clinics offered direct assistance in accessing the mechanism to women where necessary. In addition, during visits to villages, the clinics informed women about the mechanism. Through the duration of the mechanism, members of the ATA and PLOA also spent considerable time locating and assisting individual women in accessing the mechanism.

¹¹ Interview 21-2014 (“[I]f we announced it publicly, women would be scared to come . . . men would watch to see if women went there.”). Early on, there was a plan to receive complaints at the local hospital, however this was never implemented. *Id.*

¹² Claims Process Procedures Manual 1 (undated), <http://www.barrick.com/files/porgera/Claims-Process-Procedures-Manual.pdf> [hereinafter Claims Manual].

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

Time frames: Sexual assault victims could lodge complaints when the remedy mechanism staff members were on "rotation" in Porgera, starting in October 2012. The Claims Manual for the remedy mechanism states that claims must be lodged by the end of April 2013, but notes that claims lodged after that date may still be considered in certain circumstances, such as when referred by the clinics.¹² In separate communications with Barrick, the company stated that the "nominal end date" for new claims was shifted to May 25, 2013, with any subsequent claims assessed on a case-by-case basis.¹³ Claims presented by some EarthRights International clients were lodged during an extra rotation that took place in November 2013.¹⁴

Human Rights Analysis by the Clinics

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

Barrick and their mechanism implementer, Cardno, appear to have been aware of and to have taken into account the serious security concerns associated with women making sexual assault complaints, and the stigma associated with sexual assault in PNG, when designing and implementing the mechanism process. Domestic and sexual violence rates are extremely high in the country,¹⁵ and rape carries a pernicious stigma.

¹³ Email from Peter Sinclair, Senior Vice President, Corp. Affairs, Barrick Gold Corp. to Sarah Knuckey 2 (June 24, 2015) (on file with author) [hereinafter Email from Barrick (June 24, 2015)].

¹⁴ *Id.*

¹⁵ Rape of women by someone other than their partner was found to be occurring at a rate of 41% in Papua New Guinea, according to a study done on behalf of the United Nations. Rachel Jewkes et al., *Prevalence of and factors associated with non-partner rape perpetration: findings from the UN Multi-country Cross-sectional Study on Men and Violence in Asia and the Pacific*, 1 *The Lancet Global Health* e208, e208 - e218 (2013). A UN Special Rapporteur report noted that in one study, up to 60% of men interviewed indicated that they had participated in gang rape. Special Rapporteur on Violence Against Women, *Report of the Special Rapporteur on violence against women, its causes and consequences, Mission to Papua New Guinea* ¶ 27, U.N. Doc A/HRC/23/49/Add.2, (Mar. 18, 2013) (by Rashida Manjoo). A 2010 research project based on a validated World Health Organization (WHO) research instrument on domestic violence found that nearly two-thirds of participants were survivors of domestic violence. Margit Ganster-Breidler, *Gender-Based Violence and the Impact on Women's Health and Well-Being in Papua New Guinea*, 13 *Contemporary PNG Studies: DWU Research Journal* 17, 24 (2010).

An assaulted woman is often at risk of additional negative consequences if the rape becomes known, including beatings from her husband or other family members, stigma in her community, and divorce and the return of her bride price.¹⁶

Potential harm to women following a rape becoming publicly known through the process of accessing Barrick's remedy mechanism or after being provided a remedy was a foreseeable risk.¹⁷ Security and privacy should be essential considerations at all stages of the mechanism, including communications strategies, access points, and remedy disbursement.

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

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

"Word of mouth" strategy: Legitimate concerns about privacy and security led to a decision to adopt a "word of mouth" and targeted outreach approach, instead of a broad public awareness campaign. Barrick has explained that the reason for this was that experts in gender based violence recommended "a localized approach, rather than a broad media campaign, to protect confidentiality and prevent re-victimization."¹⁸ In Porgera, the presence of multiple clans, numerous distinct villages, and some survivors' travel or movement away from the area, made the chosen approach to raising awareness complex and difficult. An approach that better met the goals of raising awareness as well as sensitivity to privacy and security might instead have combined targeted outreach with a broader public awareness effort, matched by close attention to security during outreach and in subsequent phases of implementation. In addition, as discussed below, the "word of mouth" and targeted outreach approach did not sufficiently inoculate women from security risks and privacy concerns later in the process. Ultimately, the strategy of seeking to address security at the outreach stage by limiting general awareness of the mechanism had a number of negative consequences for the mechanism's effectiveness, and in particular, its accessibility.

¹⁶ During the course of the clinics' investigations, several women said that their husbands or other male family members had assaulted them, and/or that their husbands had divorced or separated from them after learning about their alleged rape at the hands of Barrick personnel. Women shared their fears should certain family members learn of their assault, as well as the negative impacts that flowed from family members finding out about the rape. *See, e.g.*, Interview 2-2014 (Mar. 19, 2014); Interview 13-2014 (Mar. 20, 2014); Interview 22-2014 (Mar. 21, 2014); Interview 24-2014 (Mar. 21, 2014); Interview 29-2014 (Mar. 22, 2014); Interview 35-2014 (Mar. 22, 2014); Interview 49-2014 (Mar. 22, 2014); Interview 17-2013 (Mar. 7, 2013). A person with knowledge of the mechanism was also aware of this problem. Interview 11-2013 (Mar. 20, 2013) ("Some women were further harmed by their husbands or families because of the rape.").

¹⁷ In a submission to Barrick before the remedy mechanism began operating, the clinics noted this risk. Global JusticeClinic, New York University School of Law and International Human Rights Clinic, Harvard Law School, Comments on The Framework of Remediation Initiatives in Response to Violence Against Women in the Porgera Valley by Barrick Gold Corporation—Key Human Rights Concerns and Recommendations 2, 11, (May 14, 2012).

¹⁸ Email from Barrick (June 24, 2015), *supra* note 12.

First, awareness of the mechanism was uneven, and numerous women with claims simply had not learned about the mechanism at the time of interviews with the clinics, or had not been properly informed of the mechanism in time to make a complaint.¹⁹ From 2013 to 2015, the ATA and the Clinics interviewed a number of alleged sexual assault victims from different villages who had not heard about the mechanism, or had heard only vague details and did not understand its purposes or operations—some women explained that the mechanism was not well known in their area; others believed it was too late for them to seek remedies for their cases.²⁰

Second, numerous women received incorrect information about the mechanism, and their access was compromised as a result. The lack of information from reliable or direct sources, such as Barrick or mechanism employees, led to distrust among some women in the villages and facilitated the spread of misinformation. For example, some women did not know that they could access the mechanism individually to make a complaint, and instead mistakenly believed they could only access the mechanism through an intermediary.²¹

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

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

¹⁹ Righting + Wrongs, *supra* note 18 at 58 “This concern was communicated to Cardno by the clinics. See e.g., Email from Sarah Knuckey to Joshua de Bruin, Senior Consultant, Cardno Emerging Markets (Australia) (Mar. 17, 2013) (on file with author) (“[T]here is a general concern that outreach in Porgera about the framework has not been adequate. A number of women we spoke with had not heard of the framework. There are no doubt other women in the community who we did not meet with, and who also do not know of the framework. It seems to me that more dedicated effort will be necessary to cast the net more widely.”).

²⁰ Righting + Wrongs *Supra* notes 19 at 60, “In one case, a woman only learned about the remedy mechanism by overhearing other women talking about it. Interview 24-2013 (Mar. 8, 2013). Another woman said she did not access the remedial framework because she did not know what it was or understand what it was about. Interview 17-2013. Some women who moved to other areas did not know about the mechanism, and could not access its benefits. One interviewee explained that she did not know anything about the remedy framework because she was in another town for two months, and that she didn’t know anything about it before the interview. Interview 19-2013 (Mar. 7, 2013). See also Interview 29-2014; Interview 49-2014; Interview 50-2014 (Mar. 22, 2014); Interview 51-2014 (Mar. 22, 2014); Interview 24-2014. In 2015, while there were many women who by that point had heard of the mechanism, the clinics interviewed some women who said that they had heard too late to take part in the mechanism. Interview 5-2015 (Jan. 8, 2015).”

²¹ Interview 31-2014 (Mar. 22, 2014).

²² *Id.* These reports were communicated to Cardno by the clinics. See Email from Tamara Morgenthau to remedy mechanism staff (Mar. 24, 2014) (on file with author).

²³ Interview 21-2014 (commenting that the women brought into the framework were “the tip of the iceberg”).

Clinic research teams should have been frequently surprised by the levels of confusion or lack of knowledge among women about the remedy mechanism during visits to Porgera, and it is the clinics' considered view that there are likely additional women with credible claims who did not access the remedy mechanism.²⁴

In practice, the "word of mouth" strategy alone was too *ad hoc*, relied on the unpredictable actions of individuals outside the control of the mechanism, and did not have sufficient reach. More time and effort should have been invested in ensuring that women knew about the remedy mechanism and in taking steps to improve the outreach to mitigate the limitations of the chosen strategy.

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

Given its public location, and that numerous women would often gather there together during the intake process, some claimants with heightened fears of retribution were likely reluctant to access the mechanism's office. Individuals with knowledge of the remedy mechanism also informed the clinics that the location may have prevented some women from submitting complaints.²⁵ The clinics were informed that there had been a suggestion at one point to provide a point of entry at the hospital.²⁶

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

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

In 2015, the clinics were provided information from local actors that scores of additional women wanted to access the mechanism.²⁷ The clinics were not able to interview all women in this set of alleged cases. However, at least one of the women interviewed by the clinics had serious and detailed allegations.²⁸

²⁴ *Id.*

²⁵ Since 2006, the clinics have repeatedly visited villages in Porgera, frequently holding individual, small group, and public meetings. They have often met individually with women or groups of women, and have faced few difficulties in doing so.

²⁶ Interview 21-2014.

²⁷ *Id.*

²⁸ One local actor stated in January 2015 that he had created a list of women who wished to lodge complaints. Interview 8-2015 (Jan. 8, 2015). In October 2015, another local actor stated that his organization had the names of numerous women allegedly sexually assaulted who had not made claims through the remedy mechanism. *See* Email from Langan Muri, Chairman, ATA, to Sarah Knuckey (Oct. 3 2015) (on file with author).

The cut-off date for making claims likely prevented some women with legitimate claims from receiving the benefits of the mechanism, and limited its accessibility, particularly when combined with the limited outreach strategy. Survivors should not bear the burden of the deficiencies of the intake system, and at minimum, all women with legitimate allegations should be taken seriously and have access to an effective and independently administered remedial process.²⁹

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

Barrick and Cardno made various efforts to protect women from risk. Barrick's decision to not release the names of victims discovered through its internal investigations in any public materials was good practice. In the clinics' dealings with Barrick's third party implementer, both management and staff took steps to guard the confidentiality of women (such as protecting the names of claimants). In addition, the remedy mechanism documents stated that claimants would be informed of the "steps available to maintain . . . confidentiality and the privacy," and noted that any cash awards would be "carefully considered and discussed" with each claimant to "minimize" risk.³⁰

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

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

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

²⁹ See attachments: The Letter from ATA, page 139 & 140, The List of names who had missed out from the remedy framework, The Pillar III on the Ground, Assessment Report of the Porgera Remedial Framework. Note that it was not right for ATA to submit those claimants' names publicly, however; after lengthy discussions with the Assessor, Mr. Yosef Aftab, these names were submitted.

³⁰ Interview 5-2015.

³¹ Claims Manual, *supra* note 11, at 3, 6.

Lessons Learned to be applied on the existing Barrick PJV Operational Grievance Mechanism

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

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

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

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

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

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

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

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

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



Above: Photo showing the Author and the Executive Officer of ATA, Mr. M^cDiyen Robert Yapari speaking to the custodians of the deaths and survivors of assaults and rapes during a mass funeral service party at Lower Yanzkona, Porgera Station, Porgera Enga Province. The mass funeral services' party was hosted by ATA as a Remembrance Day for all the Deaths, injuries and rapes/gang rapes done by the PJV Security Personals. In one of his speeches he stated that least we will hardly forget and forego the unbearable events where in our own lands our very own tribesmen and women have been shot death as criminals in the hands of foreign extractive companies. Photo Credit: ATA Photo File

V. Reparations

"Barrick's overall response to sexual assaults by PJV personnel included important steps towards meeting some of the elements of full and effective reparations, including compensation, rehabilitation, and guarantees of non-repetition. In particular, the company has: improved policies to better prevent abuses committed by its security guards; provided remedy packages including some degree of compensation to a significant number of women; and made medical and counseling services available to sexual assault victims. Additionally, Barrick's remedy mechanism provided a forum in which victims of sexual violence could speak about the harms they suffered, and the remedy packages provided some women in Porgera with a degree of acknowledgement about the harm that was done to them. However, for many victims, remedies were offered years after the initial harm, and, while Barrick's program formally offered acknowledgement and regret about the sexual assaults, Barrick did not accept responsibility through the remedy agreements, and there has not been a full public reporting by Barrick of mine staff abuses. Many rights-holders perceived the remedy packages offered by Barrick to be insulting, unfair, inadequate, and failing to reflect the severity of the harms suffered. These perspectives were heightened when eleven women represented by U.S.-based attorneys reportedly received, in a separate settlement, remedies ten times greater than those awarded through the Barrick remedy mechanism. Furthermore, the manner in which the remedy packages were disbursed could have been better tailored to each individual's needs or their security concerns. Additional security and support measures are now needed: some women report that they have been threatened and assaulted by family members in attempts to take their remedy. Finally, while Barrick fired employees and provided evidence to police, and the mechanism could theoretically facilitate complaints by victims to the police and prosecutors, it appears that, to date, there have been no criminal convictions".¹

Victims of human rights violations have the right to an adequate, effective, prompt, and appropriate remedy, including reparations.² The UN Guiding Principles reiterate that fundamental right, noting that where a company has caused or contributed to human rights violations, it should "provide for or cooperate in their remediation."³

Full and effective reparation includes (where appropriate to the circumstances of the case) measures in the form of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.⁴

¹ Righting + Wrongs *supra* note 1, at 61.

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

³ UN Office of the High Comm'r for Human Rights, Guiding Principles on Business and Human Rights, ¶ 22, U.N.Doc. HR/PUB/11/04 (2011). See also UN Office of the High Comm'r for Human Rights, *Opinion Re: Allegations regarding the Porgera Joint Venture Remedy Framework* 6 (July 2013),

<http://www.ohchr.org/Documents/Issues/Business/LetterPorgera.pdf> [hereinafter *OHCHR Opinion*]: Where outcomes have implications for human rights, care should be taken to ensure that they are in line with internationally recognized human rights. In other words, assessing whether the programme is rights-compatible in terms of the outcomes and remedies it offers to the claimants, reference should be had to applicable international standards on remedy, such as the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation.

⁴ Right to Remedy Principles, *supra* note 1, ¶ 18.

Survivors have a right to equal and effective access to justice, and to equality of treatment before the law.⁵ Remedies should not be arbitrary, and similarly situated individuals should receive equitable amounts.⁶

Restitution should, in cases where it is possible, restore the victim to the position before the harm was suffered.⁷ Compensation is provided for economically assessable damage including for physical or mental harm, lost opportunities, material or moral damages, and costs for legal or other expert assistance.⁸

Reparations should be proportional to the gravity of the violations and the harm suffered.⁹ Rehabilitation should include medical and psychological care and legal and social services.¹⁰ In addition to compensation and rehabilitation, in order to provide the “full and effective” remedy required by human rights law, measures of satisfaction are crucial.¹¹ These measures should include “full and public disclosure of the truth” (with necessary caution so as not to undermine the security interests of individuals), sanctions against persons responsible, commemorations and tributes to victims, and public apology including “acknowledgment of the facts and acceptance of responsibility.”¹²

Under human rights law, satisfaction includes administrative and judicial sanctions against perpetrators.¹³ Judicial sanctions are a state function.¹⁴ With respect to corporate responsibilities, the right to satisfaction would require the company to ensure internal administrative sanctions against responsible employees, to ensure that it cooperated fully with police and prosecutors and handed over relevant evidence, and to ensure that a grievance mechanism complemented rather than supplanted state judicial processes.¹⁵ Guarantees of non-repetition should include measures to prevent harms occurring in the future.¹⁶ Reparations must also take into account the security of survivors, and consideration should be given for the security implications of the content of a remedy and how it is disbursed.¹⁷ With respect to company-created remedy mechanisms, attention to security is necessary to ensure the mechanism’s effectiveness and rights-compatibility, and to ensure that a company does not cause or contribute to further adverse impacts through its remedy mechanism.

⁵ *Id.* ¶ 12; UN Secretary-General, *Guidance Note of the Secretary-General, Reparations for Conflict-Related Sexual Violence*, ¶

⁶ OHCHR (June 2014) [hereinafter *Guidance Note of the Secretary-General*]; UN Special Rapporteur on Violence against Women, its Causes and Consequences, *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences*, U.N. Doc. A/HRC/14/22 (Apr. 23, 2010) (by Rashida Manjoo); UN Special Rapporteur on Extreme Poverty and Human Rights, *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, ¶¶ 6-13, U.N. Doc. A/67/278 (Aug. 9, 2012) (by Magdalena Sepúlveda Carmona). ⁵ See, e.g., Right to Remedy Principles, *supra* note 1, ¶¶ 18, 25.

⁷ *Id.* ¶ 19.

⁸ *Id.* ¶ 20.

⁹ *Id.* ¶¶ 15, 18.

¹⁰ *Id.* ¶ 21. Rehabilitation and compensation can overlap: the costs of medical services and counseling can, for example, be included in the compensation award. See *id.* ¶ 20(e).

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

¹² Right to Remedy Principles, *supra* note 1, ¶ 22.

¹³ *Id.*; CJA Amicus Brief, *supra* note 10, at 20-21.

¹⁴ Right to Remedy Principles, *supra* note 1, ¶ 22(f); International Covenant on Civil and Political Rights, Arts. 2, 3(b),

Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 [hereinafter ICCPR].

¹⁵ Right to Remedy Principles, *supra* note 1, ¶¶ 22, 25 (commentary), 29 (commentary).

¹⁶ *Id.* ¶ 23.

¹⁷ *Id.* ¶ 12(b); *Guidance Note of the Secretary-General*, *supra* note 4, ¶ 16 (“Issues of security should also be considered.”).

Reparations Provided by Barrick

Barrick initially provided remedy packages valued at, according to Barrick, on average 23,630 kina (USD \$9,248.17) to each woman.¹⁸ This included direct compensation in the amount of 15,000 kina (USD \$5870.61), provided through the form of a “business grant.” In addition to the kina that was disbursed, the packages also included rehabilitation measures in the form of counseling, medical expenses, business training, and school fees (or a financial supplement for those without need of school fees). In addition, satisfaction measures undertaken by Barrick included terminating the employment of some employees, referring some individuals for criminal investigation and prosecution, and acknowledging the sexual assaults. Important steps were also taken to cease and prevent future harms.

Restitution and compensation: Sexual assault victims interviewed by the clinics initially understood their remedy offers to consist of some goods and services. When the remedy mechanism first started, claimants explained to the clinics that remedy mechanism staff had offered them services, such as medical care, and a list of goods or items, such as chickens or second-hand clothes, from which women could choose. The items seemed to be offered with the intent that they would form the basis of small businesses which the women could start, although not all women interviewed were clear about the amount of goods being offered or the purpose. In its published remedy mechanism documents, Barrick has cited concerns for the safety of women should they receive lump sums of cash, although Barrick’s remedy framework documents foresaw the possibility of cash payments being made to women.¹⁹ Rights-holders and NGOs criticized the packages, as they were then understood, as not being proportionate to the gravity of the sexual assaults, and as not reflecting the wishes of the sexual assault survivors.²⁰

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

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

¹⁸ Barrick Gold Corp., A Framework of Remediation Initiatives in Response to Violence Against Women in the Porgera Valley 12 (2013), <http://www.barrick.com/files/porgera/Framework-of-remediation-initiatives.pdf> [hereinafter Barrick Remedy Framework]: Some participants [in Barrick’s consultation meetings] recommended against there being any cash component as it would create a real risk that the Claimant would not get the benefit of any cash award; instead family members may appropriate the cash, often by using violence against the Claimant. There was also a concern expressed that the potential for a cash award would induce false claims, often with the Claimant being coerced through intimidation or violence into making the claim. Barrick has determined that there are compelling reasons for including awards of cash among the potential remedies available under the program where this is the stated preference of the Claimant. A primary guiding principle is that remedies should be designed based on principles of individual agency and empowerment of women to determine their own destiny. Another guiding principle is that awards should be culturally appropriate; as noted above, the granting of a cash award is consistent with cultural practice at Porgera. As a practical measure, it may be necessary to include a cash component as a means of facilitating another type of remedy.

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

²⁰ Barrick Gold Corp., The Porgera Joint Venture Remedy Framework 13 (Dec. 1, 2014), <http://www.barrick.com/files/porgera/Porgera-Joint-Venture-Remedy-Framework-Dec1-2014.pdf> [hereinafter Barrick Remedy Framework Summary].

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

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

Following the claimants' advocacy, in June 2015, each of the women was offered an additional 30,000 kina.²⁴ In October 2015, Barrick stated that it had no plans to provide further compensation.²⁵

However, the additional payment neither was satisfactory to the rape victims nor was it in conformance to the international best practice. This has resulted in the 119 women's protest against Barrick and even further demanded for additional payment to balance that of the ERI claimants.²⁶

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

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

²³ Press Release, EarthRights International and Barrick Gold Corp. (Apr. 3, 2015), <http://www.earthrights.org/media/survivors-who-alleged-rape-and-killing-papua-new-guinea-mine-pleased-barrick-gold-settlement>: Barrick Gold Corporation and EarthRights International (ERI) have negotiated a settlement of claims Eleven of these individuals are women with claims alleging acts of sexual violence, including rape. Pursuant to the terms of the settlement, the women will receive compensation under the Porgera Remedy Framework, and a payment in connection with their participation in the mediation process which led to the resolution of their claims. The remaining claims, which relate to alleged deaths, were lodged through the operational grievance mechanism at Porgera, and have also been resolved. All claimants are pleased with this resolution.”).

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

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

²⁶ *see*... (United Nations Human Rights Forum)

Rehabilitation: In addition to the “business grants,” many women were offered three years of school fees for their children. Some women were also offered the costs of resettlement to another village, or school fees for the claimants’ own education, or a small “financial supplement.”²⁷ The remedy contracts also generally (but not always) include provision for counseling services and medical costs, and women were offered business training.²⁸

Satisfaction: After a number of years of investigation and advocacy by civil society groups, *see* Part I: Background, Barrick publicly *acknowledged*, on its website and in international fora, the occurrence of the sexual violence. According to their framework summary document: “at the conclusion of the process, the company formally apologizes to the claimant,”²⁹ and Business for Social Responsibility, the consultancy retained by Barrick, explained that “the inclusion of the waiver allows Barrick to issue a formal apology—an important component of remediating human rights impacts.”³⁰ However, while the written remedy agreements contain an acknowledgement and “regret” of harm, they explicitly do “not admit[] any liability” and do not include an apology.³¹

Barrick has publicly stated that sexual assaults occurred, but there has not been full and public disclosure of the nature and extent of the sexual violence and other abuses.³²

Barrick reports that its mechanism was designed with the intent to complement and not replace the PNG criminal justice system.³³ This design intent would help facilitate the state’s fulfillment of its obligations to provide judicial sanctions. Barrick also reports that the PJV is a partner in a multi-stakeholder initiative designed to address rule of law concerns and to build the capacity of the justice system in PNG.³⁴

Barrick’s response to abuse allegations included internally investigating sexual assaults, firing 14 employees,³⁵ as well as urging police to conduct investigations.³⁶ In 2011, Barrick stated that the evidence from its investigations led to several arrests, and that criminal investigations were then ongoing.

²⁷ Remedy Agreement QG8 (on file with author) (including cost of resettlement).

²⁸ *See e.g.*, Remedy Agreement BK1 (on file with author); Remedy Agreement QG8 (on file with author); Remedy Agreement UJ7 (on file with author). The value of the business training was 180 kina and was to be paid directly to the service provider. The average cost of counseling for 12 sessions was 540 kina and was to be paid to the service provider. Medical expenses varied.

²⁹ Barrick Remedy Framework Summary, *supra* note 20, at 10.

³⁰ *Id.* at 44.

³¹ The recitals to the Individual Reparations Program Agreement state: “While not admitting any liability, Barrick acknowledges the Conduct, expresses its regret for the harm suffered by the Claimant” *See, e.g.*, Remedy Agreement DL9 (on file with author).

³² *See, e.g.*, Claims Process Procedures Manual (undated) 3, <http://www.barrick.com/files/porgera/Claims-Process-Procedures-Manual.pdf> [hereinafter Claims Manual]; Barrick Remedy Framework Summary, *supra* note 20, at 2, 3; Letter from Barrick Gold Corp. to Business and Human Rights Resource Ctr. (Feb. 2010), <http://www.reports-andmaterials.org/sites/default/files/reports-and-materials/Barrick-Gold-response-re-Porgera-mine-Feb-2010.pdf>.

³³ Barrick’s materials note that the mechanism was designed to complement PNG public policy and programs focusing on violence against women and human rights. *See* Barrick Remedy Framework, *supra* note 18, at 14 (“Another significant guiding principle is that the program should be designed in such a way as to conform with or complement relevant elements of PNG public policy and programs dealing with the issues of [violence against women] and human rights more broadly.”).

³⁴ Barrick Gold Corp., Statement by Barrick Gold Corp. in Response to Human Rights Watch Report (Feb. [Response to HRW Report](#)).

³⁵ Email from Barrick (June 24, 2015), *supra* note 21.

³⁶ Barrick Remedy Framework, *supra* note 18, at 3.

However, while four arrests were made, it is the clinics' understanding based on questions to Barrick and to local officials that no convictions have yet resulted.³⁷ In addition to taking steps themselves, Barrick and remedy mechanism staff stated that they encouraged claimants to file complaints with the police, although the clinics have no data as to how many claimants did file complaints with police after they approached the remedy mechanism.³⁸ Reporting to the police was reportedly facilitated where appropriate, but was not mandatory.³⁹

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

Guarantees of non-repetition: Barrick stated in 2011 that it had taken a number of steps towards the prevention of future harm, including through systems to monitor guards, enhancing human rights trainings for security personnel, and developing initiatives to address sexual violence generally in the Porgera Valley.⁴⁰ In 2014, Barrick reemphasized its "condemnation of violence against women in the strongest possible terms" and stated that those from Barrick "have zero tolerance for human rights violations and investigate all reports, suspicions or rumours of human rights abuses and take strong and appropriate action."⁴¹

Human Rights Analysis by the Clinics

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

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

³⁷ Email from Barrick (June 24, 2015), *supra* note 21 (responding to the question, "how many Barrick employees were . . . [s]ubject to criminal investigation, prosecution, and conviction for any involvement in sexual abuse?" by stating, "13 incidents of criminality were identified, some involving sexual assault. Barrick provided 30 witness statements to the police. A total of four arrests were made.").

³⁸ Claims Manual, *supra* note 31, at 3 (stating that claimants are encouraged but not required to report criminal conduct to police). See also Barrick Remedy Framework, *supra* note 18, at 13-14. See also Interview 11-2014 (Mar. 20, 2014) (noting that the ILA encouraged women to file complaints to the police and offered to help take them there, and expressing the belief that the claimants "hadn't made complaints because they were scared of police, they saw police as the ones who had done these things to them.").

³⁹ Barrick Remedy Framework, *supra* note 18, at 11.

⁴⁰ Barrick Response to HRW Report, *supra* note 33.

⁴¹ Barrick Remedy Framework Summary, *supra* note 20, at 15.

Restitution and Compensation

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

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

The harms: The sexual assaults committed by mine staff caused and continue to cause grave harm to women. The women have suffered long-term and serious physical, psychological, and societal/ communal impacts. Women have reported harms that include: peritraumatic and continuing fear; ongoing nightmares; anxiety; extreme physical pain at the time of and after the assaults; the need for ongoing medical care; fears about pregnancy and sexually transmitted diseases; treatment for infections contracted; menstruation and reproductive issues; miscarriages believed by women to be connected to harm caused by the assaults; dislocated bones; broken teeth; scars; hearing and visual impairments resulting from beatings; back pain; stomach and abdomen pain; digestive and intestinal issues; decreased sense of self-worth; discrimination and rejection by family and community members; demands from husbands for divorce and the return of bride price; and beatings and sometimes mutilation from male family members upon learning of the sexual assaults.⁴²

A number of women emphasized their continued feelings of emotional pain, and shame. One woman expressed: "I don't feel good about the rape that happened . . . I don't feel good about myself . . . I'm still living with those feelings."⁴³ In addition to feeling personally discriminated against by others in her community, this woman also experienced guilt associated with her belief that her family now has a "bad reputation."⁴⁴

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

⁴² Interview 4-2013 (Mar. 6, 2013).

⁴³ *Id.*

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

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

Reactions to the remedy package agreements: Numerous claimants interviewed did not consider the amount of compensation offered in the remedy agreements to be proportional to the gravity of the violations and harm suffered,⁵⁰ and expressed that the remedy does not adequately reflect their expectations of a just and fair remedy. One woman who reported being raped and beaten by ten mine personnel stated that: “[t]he amount given to us is not fair—it is not good enough. The pain and trauma is big.

There was no option, so I took it These are lifetime injuries we are going through.”⁵¹ Other women who spoke about the monetary compensation echoed the concern that the money was grossly inadequate. One woman said, “I was unemployed, four kids, jobless husband. My only way was to say yes. If during that time I had money, I would have told Barrick to get lost. It’s peanuts, it[] doesn’t compensate my life.”⁵² Another said, “The remedy framework was set up by the company itself. The claim we put in was big amount of money. This framework is just like a mother buying a crying child a small snack. The company set up the framework so they can just pay us small money.”⁵³

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

⁴⁵ Interview 21-2013.

⁴⁶ Interview 14-2013.

⁴⁷ Interview 17-2013 (Mar. 7, 2013).

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

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

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

⁵¹ Interview 35-2014 (Mar. 22, 2014).

⁵² Interview 7-2015 (Jan. 7, 2015).

⁵³ Interview 4-2014 (Mar. 19, 2014).

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

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

Forces such as poverty, lack of viable alternatives, years of waiting, and barriers to justice through the national legal system⁵⁶ left numerous women feeling as though they had no option but to accept the compensation package.⁵⁷ "Since I am not going to get anything from my land, I must get it [the compensation] to survive," one woman said.⁵⁸

Another explained why she signed the agreement despite being dissatisfied with the compensation:

"I don't have anywhere else to go. Nobody is looking at me. There is no option. I would just die like this."⁵⁹ "Barrick is a big company," said another claimant, "how can I put them to court?"⁶⁰ Women explained that the compensation was offered on a "take it or leave it" basis: "Cardno told us we had to sign or we wouldn't get the remedy All the 120 women are not satisfied with the payment.

Everyone disagrees with the smaller payment. Everyone will come and say the same thing."⁶¹ A group of claimants did make requests through the remedy mechanism for greater compensation amounts (exceeding the 20,000–25,000 kina packages generally offered), but the PRFA Advisory Panel denied those requests.⁶²

⁵⁴ Interview 11-2015 (July 24, 2015).

⁵⁵ Interview 4-2014.

⁵⁶ See *infra*, Judicial and administrative sanctions.

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

⁵⁸ Interview 44-2014 (Mar. 22, 2014).

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

⁶⁰ Interview 30-2014 (Mar. 22, 2014).

⁶¹ Interview 10-2015 (July 23, 2015).

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

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

I was not satisfied with what they paid us. Some got a lot, and some of us got less. We got bad names. We were colored with the bad name of rape. But some got 75,000 or 200,000. We are not happy We are about 120 women. The eleven women got more than us. But we live in the same community.⁶⁴

Another woman raised the question of why the eleven women got 200,000 kina: "Were they raped in their ears? They were raped just like us." Women see no difference between the two sets of cases, except that the group of eleven women were represented by U.S.-based lawyers in a negotiation process outside Barrick's remedy mechanism. Women protested their smaller remedy packages, and publicly demanded packages of equal value to those given to the eleven women. In June 2015, Barrick offered each woman an additional 30,000 kina,⁶⁵ an amount which many women consider insulting and insufficient.⁶⁶ The disparity has led to a great deal of resentment and sadness among the women who went through Barrick's mechanism. One woman described their shared resentment and confusion with the disparate treatment: [We are] all harmed the same. Company is the same. Our case is the same. Barrick must treat us equally.⁶⁷

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

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

⁶⁴ Interview 10-2015 (July 23, 2015).

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

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

⁶⁷ Phone interview (Oct. 12, 2015).

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

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

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

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

Barrick states that the mechanism is “rights-compatible”⁷¹ and that the remedies offered ensured “proportionality” and complied with the UN Guiding Principles on Business and Human Rights.⁷²

However, there are serious concerns about whether the packages signed by women meet international legal standards for remedies. “Proportionality” concerns in this case have related to both the *nature* as well as the *quantum* of compensation. As discussed above, concerns about the exact nature of the content of each package have shifted during the course of the remedy mechanism—with there being early concerns particularly about packages that might involve chickens and used clothes, for example. As the mechanism has closed, proportionality concerns now primarily relate to the quantum or valuation of the compensation that has been provided.

Determining the valuation: With respect to how quantum was determined, Barrick’s materials can be difficult to understand and raise concerns about both arbitrariness and proportionality. Earlier materials appear to give the impression that PNG domestic awards were a reference point or benchmark for the quantum. Barrick’s 2013 framework document states that “the range of damages awards made by PNG courts for proven instances of rape, similar to those experienced at Porgera, will be considered as a point of reference for the total value of the remediation package.”⁷³

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

⁷¹ Barrick Remedy framework summary, *supra* note 20, at 10.

⁷² Barrick, A Summary of Recent Changes to the Porgera Remediation Framework 3 (June 7, 2013), <http://www.barrick.com/files/porgera/Summary-of-Recent-Changes-to-the-Porgera-Remediation-Framework.pdf> [hereinafter Barrick, A Summary of Recent Changes].

⁷³ Barrick Remedy Framework, *supra* note 18, at 12. *See also* Letter from Peter Sinclair, Vice President, Corp. Social Responsibility, Barrick Gold Corp., to Dr. Navanethem Pillay, UN High Commissioner for Human Rights 4 n.13 (Mar. 22, 2013), <http://www.barrick.com/files/porgera/Letter-to-UN-High-Commissioner.pdf> (“A recent enhancement is to make clear that, while each remediation package will be distinct, the CAT, independent expert, and review panel will bear in mind the range of awards that have been rendered in the Papua New Guinea civil justice system for rape and sexual assault.”). The OHCHR appears to have understood the offered remedy amounts as typical of a PNG judicial damages award. *See OHCHR Opinion*, *supra* note 2, at 11: These programs will be chosen with the claimant during the follow-up meeting, and selected from a standard range of programmes available to claimants in general. These may include, but are not limited to: counseling, health care, education and training, appropriate financial reparations for personal harm or economic damage suffered (at levels reflecting those awarded for sexual offences in the civil justice system in Papua New Guinea).

In a subsequent document in 2013, Barrick stated that “the total value of remedy packages provided are determined based on reference to . . . [among other factors] the upper levels of compensation that have been awarded by PNG courts in civil claims concerning rape and sexual assault,”⁷⁴ and in 2014 Barrick stated that “the total value of the remedy package was benchmarked against the upper range of awards that have been rendered in the PNG civil justice system for rape and sexual assault.”⁷⁵ However, in some communications, a different impression is given. For example in a 2015 communication with the clinics, Barrick stated that the company only set “a general lower limit for remedy package value—not an upper limit. The lower limit was benchmarked against the assault [found to be 20,000-25,000 kina], as identified by external legal counsel based on a review of published decisions.”⁷⁶ It is not clear whether the “reference” amounts were focused solely on cases of sexual assault, or if the legal research also examined cases of torture, multiple and repeated rapes, or corporate liabilities.⁷⁷ The company said that the remedy mechanism itself, independently of Barrick, could determine the amounts, above the lower limit.⁷⁸

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

What is ultimately essential is that compensation be proportional to the human rights violation and not arbitrary. Available domestic remedies should not be determinative of this assessment.⁷⁹ This is particularly so where a domestic judicial system is regularly criticised for failing survivors of abuse. Awards made in comparable domestic cases are a relevant, but not decisive consideration.⁸⁰ Both the European and the Inter-American human rights courts have emphasized that compensation must be awarded on an equitable basis, and have departed from domestic awards if found inequitable.⁸¹ Here, there are serious equity concerns about using the PNG amounts as a dominant “reference point” or “benchmark” because women also had to sign legal waivers, which purport to prevent them from seeking compensation in countries like the United States, Australia, or Barrick’s home state of Canada, where payments would be significantly higher.⁸²

⁷⁴ Barrick, A Summary of Recent Changes, *supra* note 72, at 2-3.

⁷⁵ Barrick Remedy Framework Summary, *supra* note 20, at 6. law in PNG, and that the firm found that damages awarded for similar cases of rape have been within the upper range of 20,000 to 25,000 kina. *See* Claims Manual, *supra* note 31, at 6. *See also* Letter from Patrick Bindon, Manager, Corp. Affairs, Australia-Pacific, Barrick Gold Corp., to Sarah Knuckey (Mar. 26, 2013) (“Our stated position, in fact, is that such civil awards more properly should be considered a floor for claims believed to be legitimate, particularly where there are aggravating circumstances.”).

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

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

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

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

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

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

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

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

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

It is unclear to the clinics if Barrick or Cardno worked from any specific guidelines related to defining the content of the individual remedy packages. Barrick’s framework documentation gives the impression that the packages were individualized, which would have helped to ensure that the unique needs of individual women were met.⁸⁷ Yet the packages were largely set *for*, not *with*, the claimants.⁸⁸

⁸³ *Id.* In addition, given that part of the purpose of compensation is to serve as a deterrent to future human rights abuse, it is worth considering whether the relatively low amounts awarded could fulfill that purpose. See Dinah Shelton, Remedies in International Human Rights Law 14 (2d ed. 2005). Abuse, it is worth considering whether the relatively low amounts awarded could fulfil that purpose. See Dinah Shelton, Remedies in International Human Rights Law 14 (2d ed. 2005).

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

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

⁸⁶ EarthRights International, EarthRight International’s response to Barrick Gold’s Statement (Nov. 6, 2015), <http://www.earthrights.org/blog/earthrights-internationals-response-barrick-golds-statement>.

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

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

In practice, the amount of compensation and the amount of services were broadly set, so that the packages were generally nearly identical. For instance, if a woman did not have children, she would generally receive 5,000 kina more in financial compensation to make her package equivalent to the amount of school fees given to women that did have children.⁸⁹ Although women report suffering a wide range of abuse—some, for example, report being gang raped; some report suffering additional physical assault; some report suffering long-term physical injuries; some reported being raped on multiple separate occasions;⁹⁰ and some presented in interviews with symptoms consistent with severe PTSD and/or depression—it is not clear the extent to which or how such circumstances were individually accounted for in the packages. One woman explained:

"Some women have minor injuries. Some have big injuries. But the remedies are all the same."⁹¹ Importantly, the standardization additionally meant that packages were inadequately tailored to respond to each woman's security and familial situation. *See Security and Remedy*, below, for additional treatment of this concern.

Rehabilitation

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

Importantly, remedy contracts provided for counseling, which was reportedly made available to all women. Some women found it useful in the healing process and to instill a sense of courage.⁹⁵ However, some women told the clinics that they did not know what counseling was; others said that they had not been personally provided it, or did not think that the counseling provided was good.⁹⁶

⁸⁹ Interview 21-2014 (Mar. 21, 2014).

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

⁹¹ Interview 35-2014 (Mar. 22, 2014).

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

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

⁹⁴ Interview 32-2014 (Mar. 22, 2014).

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

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

Numerous survivors and those assisting survivors expressed to the clinics through 2015 their strong interest in receiving counseling training and becoming counselors in Porgera. All claimants were reportedly entitled to medical care related to their assaults.⁹⁷ Initially, it appeared that the mechanism would only pay for medical care for those women who had accepted the remedy package and signed a waiver of their legal rights to sue.⁹⁸ But after concerns were raised by Cardno and civil society groups about excluding some women, Barrick clarified that all eligible claimants could receive medical care, regardless of whether they signed a waiver.⁹⁹

Medical care, if properly provided, is a significant contribution to rehabilitation and could support the well-being and protection of the women in the long term.¹⁰⁰ However, some women reported that they did not receive adequate treatment.¹⁰¹ Several women stated that the medical care was only covered up to a certain amount, and that care would discontinue once that amount was reached.¹⁰²

There was confusion about how much money was allocated for health care services and how the money for health care was administered.¹⁰³ Business training was also provided to women as part of their remedy packages. The business training, combined with the cash compensation, appears to have been intended to assist the women in developing a sustainable income. Claimants have expressed positive responses to the business training aspects of the remedy packages.¹⁰⁴ Several women supported the idea of using the cash and training to start businesses to support themselves and their children.¹⁰⁵

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

⁹⁸ See, e.g., Interview 63-2014.

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

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

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

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

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

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

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

One woman told the clinics, “I am feeling happy because I didn’t know how to budget and they are teaching me to budget.”¹⁰⁶ While the business training sessions represent an important step in supporting women in the establishment of businesses and achieving self-sufficiency, the level of training provided does not appear to have adequately met that goal. When the clinic interviewed an individual with knowledge of the mechanism, she echoed this concern:

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

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

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

Satisfaction

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

Some claimants viewed the remedy packages as an “apology,”¹¹¹ and Barrick stated that it would apologize to each claimant at the end of the remedy process.¹¹² However, Barrick’s signed remedy agreements with women express “regret,”¹¹³ but do not provide an apology, and they explicitly disavow liability. While Barrick has used the word “reparation” to describe its program,¹¹⁴

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

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

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

¹⁰⁹ Barrick Remedy Framework, *supra* note 18, at 12.

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

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

¹¹² Barrick Remedy Framework summary, *supra* note 20, at 10.

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

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

Barrick's program might thus be understood as equivalent to *solatia* or condolence payments connected to harm, rather than as true reparations connected to an admitted violation of a human right for which responsibility is accepted.

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

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

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

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

Judicial and administrative sanctions: Barrick has taken steps towards helping fulfill individuals' right to remedy by imposing administrative sanctions, including firing some of its employees.¹¹⁸ Barrick has also taken some steps to facilitate judicial sanctions, including handing over evidence to the police.¹¹⁹ An individual with knowledge of the mechanism said that mechanism staff tried to facilitate women making formal complaints with police.¹²⁰

¹¹⁵ Sarah Knuckey & Eleanor Jenkin, *Company-created remedy mechanisms for serious human rights abuses: a promising new frontier for the right to remedy*, 663 Int'l J. Hum. Rts. 801, 808 (2015).

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

¹¹⁷ Barrick Response to HRW Report, *supra* note 33, at 2.

¹¹⁸ Email from Barrick (June 24, 2015), *supra* note 21; See Barrick Remedy Framework Summary, *supra* note 20, at 2.

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

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

The mechanism was intended to complement the judicial system, and does not formally preclude criminal sanctions. Barrick informed the clinics in June 2015 that following its 2010-2011 investigations, “[i]n total, fourteen people implicated in the investigation have been terminated,” noting that six people were terminated “immediately,” and another eight were terminated “shortly before for other policy breaches.”¹²¹

Barrick did not clarify specifically what these terminations were for, but noted that of the crimes discovered through the investigation, “some” were sexual assaults. Barrick stated that the number of employees subjected to internal sanction, but not dismissed, was “very difficult [] to calculate with any accuracy.”¹²² According to Barrick, thirteen “incidents of criminality were identified” in its review and investigation of the security and community relations function of the PJV, and four individuals were arrested to face criminal prosecution.¹²³

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

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

The state has a legal obligation to pursue judicial sanctions, as prosecution and punishment form part of the right to remedy. A non-judicial grievance mechanism can never alone fulfill all aspects of a right to remedy, especially for serious human rights violations. International human rights courts have recognized that financial compensation is not a full and effective remedy.¹²⁷

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

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *See, e.g.*, Human Rights Watch, *Bashed Up: Family Violence in Papua New Guinea* 41 (2015); Sadaf Lakhani & Alys M. William, *The Socio-economic Costs of Crime and Violence in Papua New Guinea: Recommendations for Policy and Programs*, Research Dialogue Series No. 5 World Bank Group 9 (2014).

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

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

Special Rapporteur Report on Violence against Women, *supra* note

¹²⁵, at ¶ 84.

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

Remedy requires accountability, including criminal investigations, prosecution, and punishment of those responsible, including, where appropriate, companies themselves.¹²⁸

Many men and women who reported mine site personnel abuses to the clinics expressed a desire to have the perpetrator and/or the company investigated and brought to account through formal judicial proceedings.¹²⁹ Only minimal information is available about whether senior management in the company was investigated or held to account in the case of any wrongdoing. Barrick informed the clinics in 2015 that “14 people implicated in” Barrick’s investigation had been terminated, and that they could not “calculate with any accuracy” how many employees had been subject to internal sanction, but were not dismissed.¹³⁰

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

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

Guarantees of Non-repetition

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

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

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

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

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

¹³² Interview 53-2014.

¹³³ Barrick Remedy Framework Summary, *supra* note 20, at 11, 15.

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

Clinic investigations in Porgera suggest that these initiatives appear to have made a difference in terms of the safety of women in and around the mine site vis-à-vis Barrick security personnel. Interviews with numerous women suggest improvements in security, and interviews with security personnel indicate improved training and messaging around zero tolerance for sexual assault.¹³⁵

However, despite the positive changes, some women still report feeling a general lack of security; for example, one woman reported that while security has improved, she decided to move away because of continuing violence.¹³⁶ The clinics have also received some reports of alleged rapes in recent years by mine staff, but do not have information as to how widespread any continuing violence is, and have not been in a position to investigate the cases to assess their credibility. Barrick has not publicly reported the results of any internal assessments about changed mine staff conduct or changes in allegations of abuse following the new violence prevention initiatives. Thus, while Barrick has taken significant and important steps to guarantee non-repetition, it should continue to sufficiently resource efforts to eliminate violence, and monitor and publicly report on the effects of its prevention policies and initiatives.

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

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

VI. Waiver of Legal Rights and Access to Counsel Applicable Human Rights Principles

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

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

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

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

Relatedly, the UN Guiding Principles recognize that it is critical that claimants have access to the advice and expertise necessary to engage in any grievance process on “fair, informed and respectful terms.”⁴

1 UN Office of the High Comm’r for Human Rights, Guiding Principles on Business and Human Rights, ¶ 25 (commentary), ¶ 29 (commentary), U.N. Doc. HR/PUB/11/04 (2011) [hereinafter UN Guiding Principles]. See also Basic

Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, ¶ 12, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) (“A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have *equal access to an effective judicial remedy* as provided for under international law.”) (emphasis added).

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

3 *Id.* at 8.

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

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

Barrick's Practice: Legal Waiver and Access to Counsel

Each claimant was required to sign a legal waiver to receive a remedy package from Barrick.⁷ By signing the waiver, the claimants waived their rights to "pursue any claim for compensation, or any civil legal action, that relates in any way to the Conduct."⁸ The "Conduct" is defined as "sexual violence attributable to one or more current or former employees of the Porgera Joint Venture."⁹

Initially, the waiver did not expressly exclude pursuing any criminal actions, but it was criticized, and later amended to eliminate any possibility that the waiver would be read as affecting criminal proceedings.¹⁰ The waiver was designed by Barrick and was non-negotiable. Barrick has stated that the waiver will "cover only instances where a claimant may seek a double recovery from the company for the same injury."¹¹

Through the claims process, all claimants had access to what Barrick called an "Independent Legal Advisor" (ILA), who was selected by and funded through the PRFA (which was funded by Barrick).¹²

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

6 See International Covenant on Civil and Political Rights, Arts. 2, 14, 26, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6

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

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

8 *Id.*, see also: <http://www.globalresearch.ca/rape-victims-must-sign-away-rights-to-get-remedy-from-barrick-gold/5321167>

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

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

10 Initially the waiver stated, "the claimant agrees that she will not pursue or participate in any legal action against PJV, PRFA . . . or Barrick." *OHCHR Opinion, supra* note 2, at 6. Barrick amended the waiver to specify that it applies only to claims for compensation and civil legal actions relating to the conduct in question, and to expressly state that

the waiver does not apply to future criminal actions. Barrick Gold Corp., A Summary of Recent Changes to the Porgera Remediation Framework 4 (June 7, 2013), <http://www.barrick.com/files/porgera/Summary%20of%20Remediation%20Framework%20Amendments.pdf> [hereinafter Barrick Summary of Framework Changes].

11 *Id.* at 4.

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

The ILA's desk was located in the remedy mechanism office with the remedy mechanism implementation team. Barrick reports that the ILA's role was "to provide advice on different legal options, explain the process and consequences of resolving the claim, and to discuss whether it is in the best interests of the Claimant to accept any offer made to her under this Program."¹³ The ILA, according to the Claims Manual, would "advise the claimant how she can take criminal or civil legal actions against the alleged perpetrator, and advise the claimant of other legal options available to her" including "seeking redress against the PJV or others through the courts."¹⁴ To the clinics' knowledge, with the exception of claimants represented in the mechanism process by international NGO EarthRights International, the claimants did not have other legal representation and only had access to the ILA lawyer during the remedy mechanism process.¹⁵

Human Rights Analysis by the Clinics

Inappropriateness of legal waiver in these circumstances: In these circumstances, Barrick's requirement that rights-holders waive their legal rights to receive the remedy was not appropriate. Barrick has argued that the waiver was not contrary to the UN Guiding Principles and that it was important to ensure final settlement and certainty.¹⁶ The OHCHR provided an opinion in July 2013 on the waiver issue:

[T]he presumption should be that as far as possible, no waiver should be imposed on any claims settled through a non-judicial grievance mechanism. Nonetheless, and as there is no prohibition per se on legal waivers in current international standards and practice, situations may arise where business enterprises wish to ensure that, for reasons of predictability and finality, a legal waiver may be required from claimants at the end of a remediation process.¹⁷

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

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

13 Claims Manual, *supra* note 7, at 3, 12; Barrick Gold Corp., A Framework of Remediation Initiatives in Response to Violence Against Women in the Porgera Valley 21 (2013), <http://www.barrick.com/files/porgera/Framework-of-remediation-initiatives.pdf>; The ILA is funded through the PRFA. *Id.* at 21 n.41.

14 Claims Manual, *supra* note 7, at 8.

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

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

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

The Framework is promoted by Barrick to female victims of violence as “upholding your rights and protecting your dignity”. However, the Framework’s implementation has been more protective of Barrick’s interests than of the rights of the women the process should have been serving. It did not conform to best practice. Nor did it conform to the United Nations Guiding Principles on Business and Human Rights (GPs) which Barrick references. Women should not have been required and told to sign away their rights to future legal action. This is in line with the GPs which, in the Commentary to Article 29 (*dealing with the need for adverse impacts to be remediated promptly and directly*), states ‘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 labour related disputes, nor to preclude access to judicial or other non-judicial grievance mechanisms.

(Emphasis added).

No release of potential future claims by the victims should be required under the remediation process. It is not best practice for a remediation scheme to require a release of potential claims. At most, a remediation scheme might contain a mechanism to prevent a victim from “doubling up.” For example, if there was a subsequent claim by the victim it might be a condition of the remediation scheme that any compensation for damages provided by the non-judicial remediation scheme would be deducted from any subsequent award of damages through a legal process. Examples of reparation schemes that do not require a release are provided in Appendix I below.

Through Barrick’s drafting of “Olgeta Meri Igat Raits: A Framework of Remediation Initiatives in Response to Violence Against Women in the Porgera Valley” [The Framework] and the Framework’s implementation process, Barrick maintains that remedies are independently determined by the Complaints Assessment Team (CAT) and an independent expert. This, of course, was necessary to the legitimacy of the process; it protected not only the victims, but Barrick. If fair remedies were provided, there can be little need or incentive for victims to pursue additional remedies. Additionally, women in the claims process who progress to the remedy stage are accepted by the process as being the victims of gross violations involving sexual assault, in some cases gang rapes, by Barrick’s employees. These women have been subjected to traumatic experiences at the hands of Barrick’s employees. Given that premise, it is problematic to say the least that the individual reparations process (which Barrick stated was to ensure the welfare and safety of the individuals who have been the victim of sexual assault by the PJV) provides: trauma response services; psychological counselling; or Health care; only if the victim first signed a release of potential claims against Barrick. Too, trauma response services; psychological counselling; or Health care were never implemented as yet, thus leaving the victims in chaos and total darkness.

ATA and the MiningWatch has consistently expressed strong opposition to Barrick’s requirement that the Porgera rape victims waive their right to take civil action in return for remedy through Barrick’s mechanism. MiningWatch raised this issue in detail in its first public review of the remedy Framework in January 2013, and in all subsequent communications on the remedy program.

The human rights principle that underlies a project level grievance mechanism is simply that corporations have a responsibility to provide rights compatible remedy to those whose human rights have been harmed by the corporation’s operations. This principal is reflected in the UN Guiding Principles on Business and Human Rights (see Principles 22, 29, 31).

Barrick made the provision of remedy **conditional** on the victim's providing Barrick with something of great value to the company, legal indemnity. The victims of rape and gang rape by mine security guards could only receive the remedy being offered by Barrick after signing a waiver, which provides permanent legal indemnity from civil suit by the women in regard to the rapes, for Barrick, its local subsidiary PJV and the Porgera Remedy Framework Agreement (PRFA) team.

ATA, Clinics, ERI and MiningWatch consistently argued that Barrick should not be requiring legal waivers in return for remedy from extremely vulnerable women involved in an experimental corporate-led non-judicial mechanism without the usual protections provided by a court of law. We have argued that corporate-led project-level **non-judicial** grievance mechanisms should not result in a **judicially binding outcome** that creates yet another barrier to access to judicial remedy, particularly for victims of criminal acts and gross violations of human rights.

Furthermore, we have argued that – in what should be a victim-centred process – there is only **value** in these waivers, and the finality they seek to create, for Barrick, PJV and the PRFA team who are covered by the waiver. The waivers represent an additional **cost** borne by the victims, in the form of lost opportunity to obtain judicial remedy from Barrick for the sexual violence they endured.

Of all victims of the mine's employees, those that posed the greatest legal risk to Barrick were the rape victims. There is no defence that would justify sexual violence. In this context Barrick's dogged insistence on the legal waivers can be understood as a key goal of the remedy mechanism and one that drove many of its most problematic features, including its narrow focus on mine employees and on sexual violence.

Recommendations:

- Barrick should have removed the requirement for women to sign away rights to future legal action against Barrick or PJV in which Barrick, thus; the victims have signed the legal waiver.
- Barrick should have allowed women to keep the remedial offers made to them in the remedy process open for a period of time that is long enough for them to seek legal counsel and evaluate their options
- Barrick should have offered female victims the opportunity to meet with advisors from the Mining Watch Canada, Harvard and NYU human rights clinics as well as Earth Rights International who have a long-standing involvement with the women victims of Porgera.

XII. Additional Rule of Law Issues: Transparency, Predictability, Continuous Learning, and Independence

Barrick's creation and publication of a written framework for its remedy mechanism enhanced the mechanism's predictability and transparency. At a number of points, Barrick showed a willingness to modify the mechanism in response to external feedback, to communicate those changes, and to engage in continuous learning to improve the mechanism. A degree of flexibility in implementation is valuable, and indeed at times necessary to ensure that a mechanism is responsive to feedback, criticism, and unanticipated challenges. However, claimants and outside experts too often experienced confusion regarding the process and outcomes of the remedy mechanism, and feedback was inhibited by the absence of formal communication channels. Several aspects of implementation seemed to deviate from the written procedures and descriptions. Finally, although important aspects of the mechanism's implementation were appropriately independent of Barrick, the company's role in the mechanism's funding and design and its interventions to make changes during implementation mean that the mechanism was not independent in certain respects. Joint design or creation with rights-holders could have improved the practice and perception of independence.

Applicable Human Rights Principles

Predictability and transparency are fundamental rule of law principles, and core elements of any mechanism designed to provide a remedy for human rights abuses.¹ Similarly, continuous learning and independence advance human rights by helping to secure the legitimacy and effectiveness of institutional design and implementation.

The UN Guiding Principles emphasize—in line with human rights and rule of law principles—that grievance mechanisms should be *transparent*, defined as “keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism’s performance to build confidence in its effectiveness and meet any public interest at stake.”² The Commentary to the UN Guiding Principles notes that providing transparency about a mechanism’s performance to wider stakeholders (while respecting the confidentiality of individual claimants) can be important to “demonstrate its legitimacy and retain broad trust.”³

1 See, e.g., UN Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies* ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004) (noting that rule of law must include “procedural and legal transparency.”). See also Alan Boyle & Kasey McCall-Smith, *Transparency in International Law-Making*, in *Transparency in International Law* (Andrea Bianchi & Anne Peters eds., 2013); Larry Cata Backer, *Transparency Between Norm, Technique and Property in International Law and Governance: The Example of Corporate Disclosure Regimes and Environmental Impacts*, 22 Minn. J. Int’l L. 1, 4 (2013); Andrew Savitz & Karl Weber, *The Triple Bottom Line: How Today’s Best-Run Companies Are Achieving Economic, Social and Environmental Success—and How You Can Too*, 49-51, 59-61 (2006).

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

3 *Id.* ¶ 31(e) (commentary) (“Providing transparency about the mechanism’s performance to wider stakeholders, through statistics, case studies or more detailed information about the handling of certain cases, can be important to demonstrate its legitimacy and retain broad trust.”).

The UN Guiding Principles also note that grievance mechanisms should be *predictable*, with a “clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available.”⁴ Predictability is critical to ensuring the accessibility, legitimacy, and underlying fairness of a grievance mechanism.

The UN Guiding Principles provide that an effective non-judicial grievance mechanism should be a “source of *continuous learning*,” and should be structured to enable the identification of “lessons for improving the mechanism.”⁵

Finally, since a company “cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome,” remedy mechanisms should focus on dialogue-based solutions, or, where “adjudication is needed, this should be provided by a legitimate, *independent* third-party mechanism.”⁶

Barrick’s Practice: Transparency, Predictability, Continuous Learning, and Independence

Barrick created a detailed plan for the structure and operations of its remedy mechanism. This plan is reflected in the framework documents and the Claims Manual, both of which were made publicly available. There have been numerous modifications to the framework over the course of its implementation and a number of these written updates or clarifications became available on Barrick’s website.⁷

The company and the implementers of the mechanism were also willing to receive feedback from and provide some additional information to external stakeholders through informal channels at the stakeholders’ request. Barrick has stated that some of the women who accessed the mechanism provided feedback to mechanism staff.⁸

In early 2013, Barrick retained Business for Social Responsibility (BSR), an organization that works with businesses such as Monsanto, Rio Tinto, and Microsoft on human rights issues, to conduct a mid-program review of the mechanism.⁹

4 *Id.* ¶ 31(c).

5 *Id.* ¶ 31(g) (emphasis added).

6 *Id.* ¶ 31(h) (commentary) (emphasis added).

7 For example, on Oct. 22, 2012, Barrick released a four page framework description; on Oct. 23, 2012, it released a two page update; on Feb. 1, 2013, it released a two page response to a public statement by MiningWatch Canada; on Apr. 16, 2013, Barrick released its Mar. 22, 2013 letter to the UN High Commissioner for Human Rights; on June

7, 2013 it released a four page summary of changes to the framework; on Nov. 1, 2013 it released a one page update; and on Dec. 3, 2013, it released a one page update with amendments to the framework. Then, on Dec. 1, 2014 Barrick published a summary of the framework. See Barrick Gold Corp., Operations, Papua New Guinea, Porgera (47.5%), <http://www.barrick.com/operations/papua-new-guinea/porgera/default.aspx> (last visited Nov. 14, 2015), [hereinafter Barrick Framework Publications].

8 Barrick Gold Corp., The Porgera Joint Venture Remedy Framework 4 (Dec. 1, 2014), <http://www.barrick.com/files/porgera/Porgera-Joint-Venture-Remedy-Framework-Dec1-2014.pdf> [hereinafter Barrick Remedy Framework Summary].

9 *Id.* at 4; Business for Social Responsibility, Human Rights Client List, <http://www.bsr.org/en/consulting/advisoryservices/human-rights> (last visited Nov. 14, 2015).

The complete review is not public, although Barrick released a limited summary of the findings.¹⁰ In 2015, Barrick retained Enodo Rights, an organization that companies can hire to help them address their “human rights risks,”¹¹ to assess the mechanism.¹² Barrick and Enodo Rights state that Enodo Rights was commissioned to “prepare an independent final report on the implementation of the [remedy] framework.”¹³ Barrick and EnodoRights have stated that this report will be public.¹⁴

Barrick often describes its remedy mechanism as “independently” implemented or administered.¹⁵ It is the ATA and the clinics’ view that remedy mechanism staff decided independently from Barrick which individual claims were eligible and legitimate. However, Barrick designed the mechanism, and Barrick was involved in and influenced aspects of implementation and issued various amendments throughout implementation.

Human Rights Analysis by the Clinics

Barrick’s efforts to create written procedures and to make them publicly available were positive steps towards creating a predictable and transparent process for claimants. In practice, information provided a useful overall sense of the mechanism and its operations, as well as specifics on a number of important issues. However, some of the information made publicly available was not as detailed as it could have been or was inconsistent with other information, the process in practice at times differed from the procedures that were recorded in the official framework documents, and at times claimants and external stakeholders experienced confusion regarding the procedures.

Outside actors found Barrick and Cardno (the third party implementer) willing to directly receive criticism, feedback, and suggested reforms, but this generally occurred through informal processes initiated by outside actors. Improved, formalized communication with outside parties, and the public release of more specific and clarifying information about the remedy mechanism (including the results of the review Barrick funded) would have improved transparency, and contributed towards greater legitimacy. The mechanism would also have benefited from more clarity about the role that Barrick played in its design and then maintained in its implementation, which appeared to fluctuate in ways that could be difficult to predict and which affected perceptions of independence of the remedy mechanism.

10 Barrick Gold Corp., A Summary of Recent Changes to the Porgera Remediation Framework (June 7, 2013), <http://www.barrick.com/files/porgera/Summary-of-Recent-Changes-to-the-Porgera-Remediation-Framework.pdf> (discussing suggestions including “involving victim representatives in key decisions going forward,” and “ensuring effective engagement with individual victims in determining the most appropriate individualized remedy”).

11 See Enodo Rights, Our Services, <http://enodorights.com/services> (last visited Nov. 14, 2015).

12 Barrick Gold Corp., Continued Progress of Claims Under the Porgera Remediation Framework (Nov. 1, 2013), <http://www.barrick.com/files/porgera/Continued-progress-of-claims-under-the-Porgera-Remediation-Framework.pdf>; Barrick Remedy Framework Summary, *supra* note 8, at 11.

13 E-mail from Yousuf Aftab, Principal, Enodo Rights to Sarah Knuckey (Apr. 20, 2015) (on file with author) [hereinafter Enodo Rights Email (Apr. 20, 2015)]; Letter from Peter Sinclair, Senior Vice President, Corporate Affairs, Barrick Gold Corp. to Zeid Ra’ad Al Hussein, UN High Commissioner for Human Rights (Sept. 21, 2015), http://business-humanrights.org/sites/default/files/documents/Barrick%20Letter%20to%20OHCHR_Sept21-15.pdf [hereinafter Barrick Letter to OHCHR (Sept. 21, 2015)].

14 Letter from Yousuf Aftab, Principal, Enodo Rights to Zeid Ra’ad Al Hussein, UN High Commissioner for Human Rights (Sept. 21, 2015), <http://business-humanrights.org/sites/default/files/documents/Enodo%20Letter%20to%20OHCHR%2020150921.pdf> [hereinafter Enodo Rights Letter (Sept. 21, 2015)]; Barrick Letter to OHCHR (Sept. 21, 2015), *supra* note 13; Letter from Barrick to Mark Ekepa, Chairman, Porgera Landowners Association (Sept. 24, 2013) <http://business-humanrights.org/sites/default/files/media/barrick-response-sep-24-2013.pdf>.

Transparency

Publication of information about the mechanism and its performance: Barrick published several documents on its website explaining the framework, and providing updates to the framework regarding implementation.¹⁶ This public communication regarding the processes of the remedy mechanism aided transparency, and was an important step towards “build[ing] confidence” and meeting the “public interest.”¹⁷

Despite the efforts given to transparency, further improvements could be made. Some of the remedy mechanism documents that Barrick has made available provide only very general information on key issues. For example, Barrick’s summary of the remedy mechanism’s implementation could include additional information to better enable external monitoring and assessment, including, for example:

- The type and nature of harms suffered by victims awarded remedies, and the conduct and position of perpetrators;
- The specific reasons claims were refused by the remedy mechanism;
- The values and content of each and every remedy package, and the basis for any variation between the packages; and
- Details regarding Barrick’s administrative sanctions, including how many employees were terminated for direct involvement in sexual assaults and how many for a failure to prevent, and how many sexual assault allegations have been referred to police.

In addition, the remedy mechanism summary document contains some mistakes or inconsistencies with other available information, limiting its usefulness for transparency and monitoring.¹⁸

16 See Barrick Framework Publications, *supra* note 7. In addition, Barrick’s third party implementer, Cardno, engaged in email communication with external stakeholders who were seeking information on the design and functioning of the mechanism. Cardno provided clarity on some points of confusion or concern, but at times refused to provide information. See Email from Joshua De Bruin, Senior Consultant, Cardno Emerging Markets (Australia) to Sarah Knuckey (Mar. 2, 2013) (on file with author).

17 Guiding Principles, *supra* note 2, ¶ 31(e).

18 For example, Barrick reports that the lowest value package awarded to a claimant in the mechanism was 23,040 kina. Barrick Remedy Framework Summary, *supra* note 8, at 13. However, signed remedy contracts reviewed by the clinics contain lower amounts, such as 20,180 kina. See, e.g., Remedy Agreement AB1 (2013) (on file with author). Another discrepancy and source of confusion involved school fees. The public documents stated that school fees would be paid for two years per child, Barrick Remedy Framework Summary, *supra* note 8, at 14, however the claimants’ remedy agreements provide for three years, see, e.g., Remedy Agreement EF2 (2013) (on file with author). Following the clinics’ requests for clarification, Barrick has stated that the fees were to be awarded for three years. Email from Peter Sinclair, Senior Vice President, Corporate Affairs, Barrick Gold Corp. to Sarah Knuckey (June 24, 2015) (on file with author) [hereinafter Barrick Email (June 24, 2015)]. In an October 2015 phone interview with claimants, numerous women expressed concern about whether the school fees and medical expenses would continue to be paid. Phone Interview (Oct. 12, 2015).

Barrick has also not made public the full mid-program assessment of the remedy mechanism that it commissioned from BSR, or financial information about the total amount provided for remedy packages, the mechanism's design and implementation costs, assessment costs, or costs associated with disseminating information about the mechanism in national and international forums and in the media.¹⁹

Without such important relevant information fully being made public, there have been limits on the ability of third parties to monitor the performance of the mechanism and reach conclusions regarding its efficacy.

Predictability

Moving from paper to practice: At a broad level, the mechanism was predictable—women made claims that were assessed and were then provided with remedy packages. In a number of important ways, however, the claimants did not consistently experience in practice the procedures as they appear on paper and as they were communicated to claimants and other stakeholders.²⁰

Some examples of these discrepancies include:

- Contrary to what was described in the official documents, claimants have reported that, they were not all given a clear explanation or overview of the claims process or the appeals process.²¹
- The Claims Manual states that “[c]laims may be lodged from 25th October [2012] until the end of April 2013.”²² In practice, the mechanism did not continuously receive complaints, but received complaints during a number of distinct two week “rotations.”²³ This “rotation” structure differed from the continuous period readers may understand from the manual,²⁴ and could have made accessing the mechanism more difficult for some claimants. For further discussion, see Part III, Chapter 4: Accessibility and Security.

19 See *supra*, Recommendations.

20 An individual with knowledge of the remedy mechanism explained, “there is a structure in place on paper, but it is not well implemented.” Interview 11-2014 (March 20, 2014). An ERI representative noted, “what Barrick and Cardno said was going to happen looked nothing like what women were experiencing when they went to the office.” Interview 63-2014 (May 7, 2014).

21 See, e.g. Interview 1-2014 (Mar. 19, 2014); Interview 63-2014 (May 7, 2014).

22 Barrick, Claims Process Procedures Manual (undated) 1, <http://www.barrick.com/files/porgera/Claims-Process-Procedures-Manual.pdf> [hereinafter Claims Manual]. As noted above, this period was extended during implementation, so that the “nominal end date for new claims” was May 25, 2015, with additional claims allowed on a “case-by-case basis.” See Barrick Email (June 24, 2015), *supra* note 18.

23 *Id.* (The email includes a table of the rotations, noting Rotation 1 as Oct. 20-Nov. 3, 2012, for “Expert panel [to] meet women leaders and initial claimants;” Rotation 2 as Nov. 24-Dec. 8, 2012; Rotation 3 as Jan. 5-19, 2013; Rotation 4 as Feb. 9-23, 2013; Rotation 5 as Mar. 15-23, 2013; Rotation 6 as Apr. 6-13, 2013; Rotation 7 as Apr. 27-May 4, 2013; and Rotation 8 as May 18-25, 2013, with the notation “Nominal end date for new claims; any claims from this point were to be considered on a case-by-case basis.” Two more rotations took place, Oct. 12-26, 2013 and Nov. 16-26, 2013, which were designated as “special rotation to consider only ERI claims; no other new claims at this point.” A total of 23 “rotations” are detailed in this response: six were “health and counseling rotations;” three were “financial literacy trainings;” four involved expert panel and/or board members’ visits; three were CAT Teams specifically “available for ERI claims.” Several of the 23 rotations had more than one purpose.

24 Barrick’s main framework document Barrick Gold Corp., A Framework of Remediation Initiatives in Response to Violence Against Women in the Porgera Valley (2013), <http://www.barrick.com/files/porgera/Framework-fremediation-initiatives.pdf>, and its framework summary document, Barrick Remedy Framework Summary, *supra* note 8, do not discuss a “rotation” schedule. The discussions in these documents about opening the claims office give the impression that the office is continuously open.

- Compensation packages were not “individualized” for all women to the extent suggested in published materials. According to the procedures laid out in the Claims Manual, if a claim was found to be legitimate and eligible, “a tailored remediation package” would be designed “in conjunction with the Claimant.”²⁵ The Claims Manual states that the recommended remediation package should be selected from a “standard range of programs” listed in the manual.²⁶ Making this list of remedial options publicly available was a positive step towards transparency. In practice, however, compensation packages were not “individualized” in any strong sense for all women. Some packages differed in relatively small ways by awarding, among other things, school fees for the claimant’s education and/or that of her children, or varying amounts for health care.²⁷ However, many claimants received near or actually identical packages.²⁸ Numerous claimants stated that they played only a marginal role, if any, in proposing or negotiating their own remedy packages. “They didn’t give us time to talk about it, they didn’t get our opinion,” reported one woman who had accepted the package.²⁹ In another case, even when the claimant expressed a clear desire for specific forms of reparations, the Independent Expert overruled her and designed the remedy package as they “consider[ed] . . . appropriate.”³⁰ It also does not appear that disbursement of the remedy was sufficiently tailored to individuals with regards to security and privacy considerations. *See* Part III, Chapter 5: Reparations. The description of the different compensation options identified in the Claims Manual, and the suggestion that packages would be “tailored” to the needs of the specific claimants, appears to overstate—and may give readers the wrong impression about—the actual extent of individualization.

- Claimants reported to their lawyers that remedy mechanism staff sometimes failed to disclose financial reparations as one of the remedy options.³¹

At various points, claimants have reported inadequate communication from those associated with the mechanism, causing confusion and distress.³² At the initial stages, this included confusion over the specific content of the remediation packages that were being offered. Some women expressed confusion about the length of time that they would benefit from the remedy package, and in particular whether the cash compensation was a one-time payment, or an annual payment paid over multiple years.³³ One woman stated that remedy mechanism staff told her “that they would be with us for three years, and we were happy and we signed the paper, but now I don’t know if I get more benefits in 2015, 2016, 2017.”³⁴

25 Claims Manual, *supra* note 22, at 6.

26 *Id.*

27 For a detailed description and analysis on the forms a remedy package could and did take, *see* Part III, Chapter 5: Reparations.

28 *See, e.g.*, Remedy Agreement XT6; Remedy Agreement SW3; Remedy Agreement RP2; Remedy Agreement QG8;

Remedy Agreement BK1 (on file with author); *See also* Part III, Chapter 5: Reparations.

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

30 Claim Assessment by Independent Expert: Appeal of Final Report of CAT, case CD5 (on file with author)

(“Claimant wanted assistance on school fees for her children and also wanted some financial assistance on her livelihood. These sorts of assistance, however, are unsustainable in a long term and should not be encouraged. It also encourages a ‘hand-out’ mentality.” The Independent Expert then listed medical attention, micro-funding assistance “to set up small businesses such as a poultry project,” and “life skills trainings” as the remedies that should be awarded).

31 *Id.*

32 *See, e.g.*, Interview 1-2015 (January 2, 2015); Interview 3-2015 (January 8, 2015).

33 Interview 1-2015 (January 2, 2015); Interview 3-2015 (January 8, 2015); Interview 7-2015 (January 7, 2015); Phone Interview (Oct. 12, 2015) (“Barrick told us we’d have three years of the remedy—they would look out for us for three years. It’s been cut off in the middle. They haven’t finished the three years of payments. Our school fees and medical fees have not been completed. It’s not finished.”). For further details of a lack of satisfaction among the claimants, *see* Part III, Chapter 5: Reparations.

34 Interview 3-2015 (January 8, 2015).

Another woman explained, "It [20,000 kina] is not enough for me to support my living. My body has been spoiled. I thought they were going to give me 60,000 and that's why I agreed."³⁵ More recently, inadequate communication has also contributed to confusion over whether the mechanism has fully closed or if it will continue to meet claimants' medical, psychological, and school fee needs.³⁶

- Women also expressed confusion as to how much of their remediation package was earmarked for specific uses, such as health care or school fees, and whether such expenses would be taken from their general cash awards or were part of a separate allocation.³⁷
- Compounding this confusion, and contrary to what is described in the Claims Manual, some women reported that they found it difficult at some points to obtain access to copies of their paperwork.³⁸ Some women reported that remedy mechanism staff had denied their direct requests for access to their paperwork.³⁹ These women felt that they were unable to verify questions and concerns regarding the amounts and composition of their original remedy packages.

While no mechanism could be immune from challenges in implementation, the discrepancies that claimants experienced in Barrick's mechanism caused unnecessary confusion and distress, and challenged the predictability of the mechanism.

Continuous learning

Identifying key lessons and improvements: As discussed above in Part III, Chapter 2: Consultation and Rights-Holder Engagement, the mechanism evolved in some important and positive ways for the women in light of feedback received. Continuous learning would have been improved through additional formalized and regular processes of feedback from stakeholders to complement the informal mechanisms and assessments used.⁴⁰

Barrick's decision to hire a consultant to conduct a mid-program review of the mechanism was a positive step for company continuous learning. The full report should be made public so that third parties can best understand and participate in the monitoring of the mechanism.⁴¹ In addition, Barrick should explain what specific steps it took to respond to the review.⁴²

35 *Id.*

36 Phone interview, Oct. 12, 2015.

37 Interview 2-2015 (January 8, 2015); Interview 4-2015 (January 8, 2015).

38 See Claims Manual, *supra* note 22, at 7-9 ("A copy of the report will be made in a language or form that the Claimant can understand and offered to her, or held for safe-keeping by the CAT if requested by the Claimant to do so." "A copy of the Claim Assessment, prepared in a manner or format that the Claimant can understand, must be given to the Claimant." "A copy of the Appeal Assessment must be made in a language or format that the Claimant can understand, and offered to her by the CAT, or retained for safe-keeping if requested to do so by the Claimant."). Compare with Interview 2-2015 (January 8, 2015); Interview 3-2015 (January 8, 2015) ("I wasn't given a copy of the paper work, and I was not given a copy of what Barrick was agreed to give us. We were not given any copy of this information."); Interview 4-2015 (January 8, 2015) ("I want [the remedy mechanism] to provide all the information and show me all the documents . . . We want to see for ourselves what is in the documents."); Interview 10-2014 (July 23, 2015); Interview 63-2014 (May 7, 2014) ("[W]e did have to push to get documents [for our clients] from Cardno." The clinics view is that it is possible that some of the claimants may be mistaken. However, the fact that so many women report confusion about the mechanism in interviews with the clinics suggests that more could have been done to clearly communicate with claimants.

39 Interview 2-2015 (January 8, 2015).

40 See Part III, Chapter 2: Consultation and Rights-Holder Engagement.

41 Barrick Remedy Framework Summary, *supra* note 8, at 44-45.

42 Barrick has claimed that "a number of aspects of the Framework were adjusted following BSR's review and recommendations." Claims Manual, *supra* note 22, at 7. Barrick has yet to adequately explain, however, what concrete steps were taken. See also Barrick Gold Corp., A Summary of Recent Changes to the Porgera Remediation Framework (June 7, 2013), <http://www.barrick.com/files/porgera/Summary-of-Recent-Changes-to-the-Porgera-Remediation-Framework.pdf> ("The Framework already has adopted some of the suggestions, and will be implementing and considering others.").

The Office of the High Commissioner for Human Rights (OHCHR) and civil society organizations have recommended an independent review of the Barrick remedy mechanism.⁴³ The OHCHR has specifically recommended that the process for establishing and conducting the review be inclusive and transparent.⁴⁴

In 2015, Barrick retained Enodo Rights to conduct what they called an “independent” and “authoritative” review of the remedy mechanism.⁴⁵ The Barrick-funded review will likely be important for corporate learning. However, because Barrick is funding the assessment and chose both the external committee of review and the assessors, and key local stakeholders played no role in setting up the review, the design and establishment of the review were not as inclusive as they should have been.⁴⁶

While the assessment is independent in the sense that Enodo Rights and the external committee overseeing the report have stated that they control the report’s content, the process is not as independent as it could be. Independence considerations also include sources of funding, who designs and sets up a review, who selects reviewers or implementers, and the effect of repeat players on independence perceptions. By selecting and compensating those who will review it, Barrick has been involved in designing its own assessment. Given the history of controversy and international debate surrounding this mechanism, it was particularly important that a review be as fully independent as possible and that it be seen to be independent. Barrick should have taken further steps to establish the review through a process that is, as the OHCHR has recommended, “inclusive” of the various stakeholders, particularly rights-holders.⁴⁷

43 UN Office of the High Comm’r for Human Rights, *Re: Allegations regarding the Porgera Joint Venture Remedy Framework* 10 (July 2013), <http://www.ohchr.org/Documents/Issues/Business/LetterPorgera.pdf> [hereinafter *OHCHR Opinion*]. The opinion calls for: [E]fforts . . . to establish a process to identify an individual, group of individuals or organization, *considered credible by Barrick, the claimants and other key stakeholders*, to conduct an *independent* review of the Porgera remediation programme. [] The independent review should be focused on the perspectives of the victims of sexual abuse, and the implementation of the programme should be assessed against the effectiveness criteria for non-judicial remedy mechanisms as set out in Guiding Principle 31. An *inclusive and transparent process* for establishing and conducting such an *independent* review could help address any residual concerns stakeholders may have about the implementation of the programme. (emphasis added); Letter from the clinics to Peter Sinclair, Senior Vice President, Corporate Affairs, Barrick Gold Corp. et al (May 27, 2015) (on file with author) [hereinafter Clinics Letter (May 27, 2015)]; Letter from Catherine Coumans, Ph.D., Asia-Pacific Program Coordinator, MiningWatch Canada to Dr. Navanethem Pillay, UN High Commissioner for Human Rights 2, 5 (September 4, 2013), http://www.miningwatch.ca/sites/www.miningwatch.ca/files/letter_to_unhchr_re_porgera_opinion_2013-09-04.pdf [hereinafter MiningWatch Canada Letter (Sept. 4, 2013)]; Letter from Catherine Coumans, Ph.D., Asia-Pacific Program Coordinator, MiningWatch Canada to Zeid Ra’ad Al Hussein, UN High Commissioner for Human Rights (July 13, 2015) (on file with author) [hereinafter MiningWatch Canada Letter (July 13, 2015)].

44 *OHCHR Opinion*, *supra* note 43, at 10 (“An inclusive and transparent process for establishing and conducting such

an independent review could help address any residual concerns stakeholders may have about the implementation of the programme.”).

45 Enodo Rights Email (Apr. 20, 2015), *supra* note 13; Enodo Rights Letter (Sept. 21, 2015), *supra* note 14; Barrick Letter to OHCHR (Sept. 21, 2015), *supra* note 13.

46 Sexual assault survivors in Porgera were not consulted about the review, and some have expressed concerns about its potential outcomes. *See, e.g.*, MiningWatch Canada Letter (July 13, 2015), *supra* note 43; Phone Interview (Oct. 12, 2015).

47 Clinics Letter (May 27, 2015), *supra* note 43.

Independence

Separation between Barrick and the remedy mechanism: Barrick asserts that its remedy mechanism is independently implemented.⁴⁸ Independence has a number of elements, including who designs systems, who selects implementers, who selects key decision-makers, who provides funding, and who can make changes to the system during implementation. While the mechanism was largely independent in some ways, it was not independent in other important aspects.

The clinic investigations indicate that the mechanism was independent in at least one important sense: remedy mechanism staff decided independently from Barrick which sexual assault claims were eligible and legitimate, and claimant names and other confidential claim information were not shared with Barrick. The clinics found no evidence that Barrick played any role in assessing individual claim decisions.

However, the mechanism was not fully independent from Barrick: First, Barrick itself designed and funded the remedy mechanism, and thus controlled *ab initio* critical aspects of its scope and functioning, including the nature of the waiver.⁴⁹

Second, when the clinics and others raised concerns with Barrick about implementation, Barrick stepped in at certain points to adjust or modify the remedy framework, indicating ongoing involvement in design and decision-making. For example, Barrick made the decision to change the legal waiver language, and introduced amendments and proposed refinements to clarify available medical and counseling services as well as the availability of translation, the types and amounts of remedies, and the role of and advice given by the “Independent Legal Advisor.”⁵⁰ Barrick also stated that “it would consider further amendments and improvements to the implementation of the Remediation Framework where practical changes are proposed.”⁵¹

48 Barrick Remedy Framework Summary, *supra* note 8, at 1.

49 In addition, at some points, where substantive questions were asked of Cardno (the implementer), the clinics were referred to Barrick. See, e.g., Email from Joshua De Bruin, Senior Consultant, Cardno Emerging Markets (Australia) to Sarah Knuckey (Mar. 2, 2013) (on file with author) (“Cardno is the implementing partner for the remediation framework, any substantive questions on the design of the program should be directed to Barrick.”); See also Interview 21-2014 (Mar. 21, 2014).

50 See Barrick Gold Corp., Clarification of the Framework (Dec. 3, 2013), <http://s1.q4cdn.com/808035602/files/porgera/Clarification-of-the-Porgera-Remediation-Framework.pdf>; Barrick Gold Corp., A Summary of Recent Changes to the Porgera Remediation Framework (June 7, 2013), <http://www.barrick.com/files/porgera/Summaryof-Recent-Changes-to-the-Porgera-Remediation-Framework.pdf>. On some issues, in response to critiques, Barrick proposed “solution[s] to the concerns,” and stated that it would “request that the CAT” begin to implement new processes “immediately” and request that the new changes “be documented in each client case file.” See Email from Jonathan Drimmer, Vice President, Deputy General Counsel, Barrick Gold Corp., to Marco Simons, Legal Director, EarthRights International (Nov. 26, 2013) (on file with author). See further Email from Jonathan Drimmer, Vice President, Deputy General Counsel, Barrick Gold Corp., to Marco Simons, Legal Director, EarthRights International (Nov. 22, 2013) (on file with author) (“We will check to make sure that these matters have been explained clearly to claimants, and address it if not.”). Barrick also brought itself into conversations about improving implementation. See Email from Peter Sinclair, Senior Vice President, Corporate Affairs, Barrick Gold Corp. to Catherine Coumans, Ph.D., Asia-Pacific Program Coordinator, MiningWatch Canada (Mar. 23, 2013) (on file with author) (“[W]e . . . encourage [MiningWatch Canada] to provide, either to us or Cardno, interview notes . . . from [those] who participated in the remedy framework to ascertain whether enhancements to the framework are necessary and appropriate.”). *But see* Letter from Patrick Bindon, Manager, Corporate Affairs, Australia—Pacific, Barrick Gold Corp., to Sarah Knuckey and Tyler Giannini (Mar. 26, 2013) (on file with author) (stating that “outreach and publicity on the program was overseen exclusively by Cardno”).

51 Barrick Gold Corp., Clarification of the Framework (Dec. 3, 2013), <http://s1.q4cdn.com/808035602/files/porgera/Clarification-of-the-Porgera-Remediation-Framework.pdf>. See also Barrick Gold Corp., A Summary of Recent Changes to the Porgera Remediation Framework (June 7, 2013), <http://www.barrick.com/files/porgera/Summaryof-Recent-Changes-to-the-Porgera-Remediation-Framework.pdf> (noting that Barrick will continue to review the framework’s operation “to assess whether further enhancements are appropriate.”).

Barrick stepping in at these points improved the mechanism, and Barrick's involvement in such changes is not in and of itself a negative feature. However, Barrick's capacity to intervene qualifies the mechanism's independence, and highlights the likely independence limitations of any company-created mechanism.

Lessons Learned to be applied on the existing operational grievance mechanism

The publication of remedy mechanism designs and processes are critical for transparency and predictability. Systems should be put in place to ensure that procedures, designed to advance rights and justice, are carefully followed. At the same time, some flexibility in the implementation of a remedy mechanism is important to ensure that the mechanism is responsive to the local context, unforeseen problems, and changing circumstances. Because modifications during implementation can lead those accessing the mechanism to experience confusion or unpredictability, if changes are made, the content of these changes should be well documented, shared publicly, and explained in detail. Continuous learning must therefore be done in a way that fosters predictability through clear and transparent communication to the claimants, community, and general public.

The privacy and security of individual claimants should be of paramount concern at all times, but transparency about mechanism procedures and outcomes should be as complete and detailed as possible. Any mechanism should strive to make sure that claimants and participants themselves have a clear understanding of the procedures and outcomes of the mechanism.

Involving rights-holders in design directly would likely help avoid information and expectation gaps. Transparency to third parties is also important for external monitoring, and to enable the dialogue necessary for facilitating trust in the mechanism and promoting its legitimacy. Implementers of a mechanism should be proactive about transparency and continuous learning—regularly releasing information as a matter of course, and providing formal and informal systems for feedback. Processes that incorporate feedback from community members, victims, external monitors, and those implementing the mechanism aid in institutionalizing constructive feedback and help to ensure that the concerns of all claimants and third parties are heard. A lack of transparency and insufficient formal feedback procedures can exacerbate existing power imbalances, and limit the ability of claimants and broader stakeholders to monitor and assess a mechanism or to suggest improvements.

Continuous learning through company commissioned reviews of a mechanism can be important for assessing the process and identifying areas for improvement. Internal, company-created reviews are appropriate for a company's continuous learning. However, when designed and funded by the company, their independence is inherently limited. Particularly in contentious cases, the best review model would entail involving rights-holders and key stakeholders in jointly appointing the reviewing body and jointly designing its scope and methods.

Remedy mechanisms created by companies themselves are unlikely to ever be fully independent of the company. Independence involves a number of dimensions, including design, selection of implementers, implementation decision-making, and funding. Companies can best ensure independence around the assessment of complaints by facilitating the creation of a separate institution to carry out assessments, and creating structural measures to insulate such decisions from the company's influence. Companies may experience challenges to maintaining independence in connection with continuous learning: if monitoring and feedback

processes reveal concerns, the company may seek to step in. Such revisions may be important, but may also simultaneously affect perceptions of independence.

Actual and perceived independence is inherently limited where a company itself designs a process to remedy its own harms. Given that a primary goal of independence is to increase the actual and perceived legitimacy of a mechanism, it is critical that the actor under scrutiny does not retain undue control over a remedy mechanism. Thus, concerns about independence are likely to be greatly mitigated if the mechanism is jointly created with rights-holders or jointly appointed by companies and affected individuals and stakeholders. If a jointly designed arrangement involves significant power sharing, concerns about company control (and thus mechanism independence) would be diminished.



Above: Photo showing ATA claimants protesting against Barrick Gold Corp at Porgera demanding for respond to their allegations under the PJV Grievance ID No: 3936 and removal of legal waiver in exchange for remedy in future remedies to be provided by Barrick. Photo Credit: ATA Photo File

XIII. Culturally-appropriate and rights compatible - An Engan Perspective: On Issues and Traditional Practices in the Context of Engan Society.

Papua New Guinea is a unique country in terms of the rapid modernization that it has experience. There are about 700 languages, which is indicative of its cultural diversity. There are common cultural features and cultural differences as well between the Papua New Guineans. Parts of the country such as the highlands have virtually jumped from the stone age to the computer age within half a century and Porgera community is no exception.

However, few traditional cultures are still being practiced. Like many other highlands, the family ties are very strong and these ties place heavy obligations on individuals whilst in turn ensuring support from them in hard times. Clans/ family members contribute wealth and support for members during these difficult times such as funerals, bride-price payments, compensation payments, tribal fighting and any other socio-economic or political crises in the clan or family unit. The Barrick has never given due consideration and respected the peoples cultures and traditions which have been handed down from generations past.

Indigenous form of Compensation

Firstly, research and the Barrick's operational grievance mechanism speaks volumes that the Barrick is continuously neglecting such indigenous form of compensation. This kind of ignorance is proven with the company's own actions. A K 30 million claim was presented to PJV by relatives of ten (10) deceased under the Death Claim Committee dated 19th May 2004. The, then Mine General Manager Brad Gordon responded in a letter dated 8th July 2004 by singling out the chairman of the group to issue court proceedings against the PJV. By contrasting that letter, the PJV was well aware, the advantage was that the individual actions so far regarding similar cases have ended up abandoned due to constraints in resource coupled with inability of locals to push to the limits. Brad Gordon wrote, "We note that you seek compensation of K30 Million for the death of the late John Wangia and others 'community members'. Please note that the incident in which the deceased (John Wangia) was shot was reported to the Police. We understand that the Criminal Investigation Division of the Wabag Police is investigating the matter. Until such time the investigations are completed, we cannot comment on the matter. If you believe however that the PJV was negligent by failing to take steps to prevent the deceased from trespassing onto land over which the PJV holds leases granted to it by the State, the appropriate course for you to take is to issue court proceedings against the PJV."⁵²

Mr. Gordon further wrote on to conclude that; " In addition to the above, if the dependents of the persons allegedly shot by security officers of the PJV feel that the PJV is liable and should pay compensation, the dependants should take court proceedings against the PJV."⁵³

By carefully concurring the intend of the response, the PJV did concluded that due to the former weak points and considering that any individual attempts to seek relief in a form of compensation will eventually die without justice entered.

The indigenous form of compensation for such killings in Enga Province and almost the entire Highlands region is well developed even before the 'first contact' from outside world some 87 years ago. The true spirit of this well developed system has formed one of the very important basis for social and economic civilization of men kind in this part of the world. The indigenous or the Enga 'Tee (Maku)' form of compensation was inherited and passed on from generation to generation and figures prominently in the dispute resolution processes of Enga Province.

52 Brad Gordon PJV 2004

53 Brad Gordon PJV 2004

The Enga Tee system enables those adjudicating any dispute to gain fuller appreciation of the forces at work and "achieving a balance of exchange in all their relationship" ⁵⁴(Philip England, Griffith University Book Review 1998). The Enga Tee form of compensation is paid not only after a defendant is found guilty or a party to a killing death offence being committed but a person alleged is morally obliged to do so, in order to void repercussions and to settle the dispute.

One of the very common practices that a liability to pay compensation falls upon an innocent person is a poor guy that lives next to a bridge over river. The kind of unforeseen circumstances to accept liability arises when a person who uses the bridge falls and gets drown in the river by accident without any contributing cause from the landlord who resides nearby the bridge. The landlord is morally obliged by customary laws to pay compensation.

Another interesting and classical indigenous form of accepting liability to pay compensation arises when a person is killed or shot for self- defense or any other reasons that includes a person who participates in a tribal fight and shot dead by the enemy tribe. Even, still the deceased was a tribal enemy or a person from another tribe who just assisted the enemy tribe to rage the fight, the other opposing tribe as a moral responsibility at customary law to pay compensation regardless.

The 1994 PJV site induction manual page 5 exemplifies the former that; "In order that the problems are resolved satisfactorily, the village chiefs negotiate for a compensation payment. When a compensation payment is made, the opponents forget about what had happened in the past and return to normal. It is a custom and is still being practiced today, in paying of compensation, called the ' Maku' in Ipili language."⁵⁵

The Ipili Wai magazine, a bi-monthly publication of the PJV published an article on page 12 being cheated to proof beyond reasonable doubt that the indigenous form of compensation, a prime compensation claim settlement method, but knowingly ignorance by PJV has become the stumbling block.

The full transcript of the publication;

" Porgera Clan Pays Huge Compensation (heading).

A clan in Porgera Enga Province has paid what is believed to be the biggest compensation ever to be paid by anyone in the country. The Muape clan of the Tiene tribe recently gave 407 live pigs, one cassowary and K 2,000 in cash to the Ulga clan of Nebilyer, Western Highlands for the death of one of their clansmen.

Earlier, it had paid another K 12,000 in cash as sorry money for the death of the late Paulus Wak, a father of four young children who was murdered at the Porgera market in January this year while selling vegetables.

It is understood the accused had taken out his anger and frustration on the late Paulus Wak because he was from Western Highlands, an easy target for retaliation over the adulterous affairs of his wife who comes from Minji but was going around with someone from Banz.

54 Philip England, Volume 2 1998

55 PJV site induction 1994 Pg 5

The accused who is now in police custody awaiting trial is the younger brother of prominent Porgera leader and businessman, Nixon Magape who personally handed him over to police to allow justice to take its course.

Relatives of the deceased had demanded K600, 000 and 300 pigs from Mr. Magape's Muape clan but on 23rd May 2004, the clan responded with what it could gather- over 400 pigs and K 2,000. According to Mr. Magape, most of the pigs had been bought, costing more than K 507,000.

Ulga Councilor, Joeseeph Makap said his people were happy to receive such big compensation, saying any ill-fillings that may have existed between the two clans was now over and that Porgerans should feel free to travel to Mt. Hagen to do business and other activities. He said the only concern he had was the amount of cash that was paid, saying it was not enough to help his people hire trucks to take the pigs back to Nebilyer. He said the number of pigs should have been reduced to half and the value of the other half given in cash.

However, after much debate, the Nebilyer people finally accepted the pigs and money but sold some of the pigs later to help hire trucks to take the rest home,⁵⁶ Against this backdrop, the initial K 30 million compensation claim was demanded on true spirit of the underlying customary laws with the view to settle the compensation liability without re-course to further justice. Even the accused cheated on the Paulus Wak incident was awaiting criminal trial whilst his clan members honored the customary obligation burden to settled the liability.

Accordingly, Barrick PJV being an international corporate citizen of the host Province and the Country, that qualifies the company's social obligations to effect amicable settlement. However, the Barrick PJV stubbornly bullied to just ignore during its planning, designing and implementation of the Porgera Remedial Framework "Olgeta Meri Igat Raits" and establishing of its operational grievance mechanism. Barrick has not so far behaved like responsible corporate citizen of the host province Enga and so, violations of human rights have become a common occurrence at Porgera.

Particularly, during interviews with the women rape victims by MiningWatch, the women themselves have demanded for indigenous form of compensation including pigs plus some cash.⁵⁷

It was clear early in its implementation that the remedy program was not tailoring remedy to individual needs per their cultures, nor was it going to provide what the women themselves said they required as just compensation. Instead the women were nearly uniformly told they would get small scale development projects that entailed, for example, raising baby chickens and selling second hand clothes. Even the women who told us that they would accept this, and sign the legal waiver, because they felt it was all they could get, and, "something was better than nothing," told us that it was not an adequate compensation and some were more outspoken, saying it was insulting given the enormity of the assaults they had endured.⁵⁸

⁵⁶ 2004 PJV Ipili Wii Pii, Pg12

⁵⁷ MiningWatch respond to EnodoRights Assessment - *Barrick Consultant Delivers Biased Report on Inequitable Remedy Mechanism for Rape Victims pg 6*

⁵⁸ MiningWatch respond to EnodoRights Assessment - *Barrick Consultant Delivers Biased Report on Inequitable Remedy Mechanism for Rape Victims pg 6*

One aspect of rights compatibility in remedy is that it meets the expectations of victims. This was pointed out explicitly by the OHCHR: "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." ATA, MiningWatch and others, noted repeatedly that the remedy being offered had not resulted from prior consultation with the victims themselves and was not rights compatible in this regard. Also, Barrick's remedy provided is neither culturally-appropriate nor it's right-compatible and satisfactory to the claimants.



Above: Photo showing Engan/Ipili mode of making compensation. Before pigs and cash (money) are given to the deceased relatives, words of apology is utmost important in the Enga Society. Photo Credit: ATA Photo File.

"The Way Forward"

Part III. ATA's Guide
to Reviewing,
redesigning, planning
& implementing of
existing PJV's OGM

Chapter 1: Overview

A locally based grievance resolution mechanism will offer a reliable structure and set of approaches whereby local stakeholder, [the ATA] and the Company Barrick Niugini Limited can find effective solutions together.

Introduction

After several attempts made, urging Barrick PJV to present its designs, plans and implementation structural layouts of its existing operational grievance mechanisms, the ATA in this report likes to present to the Company the ATA's suggestion to design and implementation of a operational-level grievance mechanism (OGM) that is driven by community conceptions of justice and fair play.

Barrick OGM has been a system that Barrick has set up at its operational site to handle complaints from workers, community members, and other stakeholders. The United Nations Guiding Principles on Business and Human Rights (UNGPs) have popularized the idea of OGMs as an important way for companies to fulfill their responsibilities to respect human rights and provide for an effective remedy. Existing Barrick created OGM, however, has generally been designed and implemented by Barrick alone to address complains of gross human rights violation and other negative social and environmental impacts caused by its operations. This Barrick OGM reflects a significant power imbalance between the parties whom the grievance has been established for. In numerous cases, the ATA as a local stakeholder and other outside observers have criticized this mechanism for failing to meet international standards on fair process and predicts that the remedies provided for human rights abuses will be inadequate.

Recent researches on implementation of OGMs show that when companies design a grievance mechanism, it is often the case that neither side truly trusts the mechanism or the other side. Corporate-designed OGMs have been shown in some cases to weaken the legal rights of victims of abuse, risk their physical safety, and subject victims to bureaucratic hurdles that feel abusive rather than cathartic. Researches also show that existing grievance mechanisms suffer from a lack of corporate buy-in. Even where companies themselves design the mechanism, they may not be sufficiently supportive of or engaged in an OGM because of a lack of trust in the community, a fear of one group within the company losing power or control to another, or a simple failure to take the process seriously due to their perception that the community lacks bargaining power.

After these experiences, ATA seeks to create a community-driven alternative to company-developed OGM, based on the insight that Barrick OGM should be designed and implemented based on the expectations and intentions of the affected communities whose rights they purport to respect. Unlike in the existing Corporate-driven OGM, ATA is pursuing for a community-driven OGM where it shall be designed primarily by the affected populations themselves to meet their needs and expectations as rights-holders seeking an adequate remedy.

In order to submit ATA's suggestions, ATA has interviewed many survivors of assaults and custodians of deaths to obtain their views. After gathering all the feedbacks and new ideas from the rights-holders, ATA now via this report presents it to Barrick for considerations forthwith.

Chapter 1. The Need for Review of the Existing PJV's Operational Grievance Mechanisms

Companies are being called upon to lead and work with their host communities to find nontraditional approaches for preventing and addressing community grievances.⁸

Large-scale development projects represent dramatic change for communities (see box 1.1). While change may lead to opportunity for some, it may put others at risk, despite project efforts to be socially and environmentally responsible, and despite genuine attempts to engage communities and create project safeguards. Risk and change work hand in hand to create conditions where community conflicts arise such as the Porgera Joint Venture's escalating gross human rights violations. The existing OGM that the PJV has set is incapable in the sense that it is not, legitimate, accessible, predictable, equitable, rights-compatible and transparent in processing the Porgera's escalating human rights violation issues.

To validate this allegation, the ATA as the local grassroots human rights organization has acted for and on behalf of the raped and or gang raped women and girls, injured victims and the custodians of the deceased who were shot death by the Porgera Joint Venture's Security Guards and its Special Hired PNG Mobil Squad had lodged a grievance with the PJV's OGM. In acknowledging of the grievance, the ATA was issued a grievance acknowledgment number 3936; however, nothing has been done to date. Another example is of Mr. Mark Kepoko. Mr. Mark, a male of Mungulep Village was an employee of the PJV when he got injured at the workplace (Minesite) on the 6th November, 2010. He had sustained serve soft tissue injuries and was treated at the PJV Mine Site Medical Centre before being transferred to Paiam Hospital for admission. He was discharged but was permanently paralysed. He went on a wheel chair and lodged his grievance with PJV's OGM demanding for compensation and reparation. In acknowledgment of his grievance he was issued the grievance number 1163. However; since then nothing has been done.

There are so many similar case not only relating to negative human rights impacts but also environmental and social issues that have long been lodged with the PJV's existing OGM yet nothing has been done to mitigate, evaluate and where merit provide the appropriate remedy or reparation and apologies where it due.

Box 1.1. Defining "Community"

For some types of projects, the definition of community is complex. For example, pipeline projects can impact people along a corridor thousands of miles long. In this instance, the "community" may include people of different ethnic groups as well as different countries. The communities along the pipeline may experience short-term impacts during construction, but typically fewer and different impacts during operation. On the other hand, the community surrounding a mining project is more limited spatially.

For this example, the community may experience more localized but longer-term impacts.

⁸ A Guide to Designing and Implementing Grievance Mechanisms for Development Projects. **The Office of the Compliance Advisor/Ombudsman** for the International Finance Corporation (IFC) Multilateral Investment Guarantee Agency (MIGA) Members of the World Bank Group <http://www>.

The primary objectives in setting up Non-Judicial Project Level Grievance Mechanism is that companies in the business of developing large-scale projects must find effective ways to fairly and respectfully address community disputes to reduce their risk and protect local people who may become exposed to some form of harm (see table 1.1). A thoughtful response is all the more urgent for companies operating in countries with poor governance structures and an inadequate judiciary. Similarly, the Barrick Gold Corp has established its OGM, but the true vision of the OGM and its purpose has never been achieved thus far. This OGM has acted as a blanket to cover up the Company's wrong doings. In environments with an inadequate means to voice and resolve grievances, ATA has turned to other venues of protesting where the risk level for ATA is dramatically higher, including the streets, an unpredictable court system, or the international press. Alternatively, ATA felt powerless to act, while its grievances—unresolved, ignored, or scorned—accumulate over time, eventually is on the stage to erupting into intractable community opposition (see box 1.2).

Box 1.2. Community Expectations When Grievances Arise

When local people present a grievance, they generally expect to receive one or more of the following:

- Acknowledgment of their problem
- An honest response to questions about company activities
- An apology
- Compensation
- Modification of the conduct that caused the grievance
- Some other fair remedy.

In voicing their concerns, they also expect to be heard and taken seriously. Finally, the company, contractors, or government officials must convince people that they can voice grievances and work to resolve them without retaliation.

To address these challenges, the PJV Barrick is being called upon to lead and work with the ATA to find non-judicial, dialogue-based approaches for preventing and addressing the escalating gross human rights violation grievances.

Traditional Ways the PJV Handles Grievances

Like all companies, the PJV OGM uses some approach to address conflicts with local people, but it is rarer to find a well-constructed, systematic approach. After thorough investigations, the ATA has cited three common ways the PJV OGM handles grievances.

Trust is not a substitute for a grievance mechanism, and a grievance mechanism is not a substitute for trust.

Blind trust: Rely on reputation to avoid disputes

Proponents of the trust approach advise that a grievance mechanism is not necessary as long as the company has established sufficient trust with the community. Relying upon a purely preventive approach is not recommended, however. Inevitably, complaints arise that trust alone cannot avert. While trust will likely make the resolution process easier, it is not a substitute for a grievance mechanism—and a grievance mechanism is not a substitute for trust. For this instance, the PJV Community Affairs together with its Commercial Department has set up a Monetary Fund for the Anawe LMP. However; ATA noted there is gross mismanagement being done by the overseers of the Fund in particular, the Commercial Manager.

Ad hoc: Hope for the best

Individual managers apply their own idiosyncratic version of grievance resolution on a case-by case basis as specific disputes arise. Each case is handled as an individual event, without a basis in conscious policy or established practice. The approach is pragmatic, flexible, and inconsistent. The tactics and techniques used depend upon the specific circumstances of each case. Senior management often is not involved.

Ad hoc approaches pose several limitations for companies:

- Transparency is lacking. Complainants do not know where to find assistance with their grievance.
- Successful resolution is too dependent upon the skills of the particular project personnel who happen to receive the complaint.
- The approach is too reactive to address conflicts of any complexity.
- Only a limited number of grievances can be handled, as grievance management is viewed as taking time away from the “real” work of the business.
- The structure impedes the company’s ability to provide equitable, efficient, and consistent responses across the project, since staff resolves complaints independently without knowing how others are addressing similar situations.

Investigate, decide, and announce: Control the process and the outcome

ATA now urges the Barrick PJV to have a more developed formal grievance mechanism subscribe to some variation of an “investigate, decide, and announce” approach. More formal than the ad hoc approach, this model offers an internal, multi-step procedure with specific time frames. Complaints are received through designated channels, and investigated to establish their validity or to determine that the complaint is without basis. If the complaint is deemed eligible for further investigation, it is referred to management for action and a formal company response is prepared and presented to the complainant. If the complainant does not accept the response, there may be an appeals process through successive levels of the company management hierarchy.

A Better Approach: Grievance Resolution Mechanisms

An effective grievance mechanism enhances the ability of a company to justly address community concerns.

Local people and the ATA need a trusted way to voice and resolve concerns linked to the Porgera’s Gross Human Rights Violation issues (see box 1.3). The ATA proposes that a locally based grievance resolution mechanism provides a promising avenue by offering a reliable structure and set of approaches where local people, the ATA and the Company can find

effective solutions together. The ATA further propose that a well-functioning grievance mechanism:

- Increases the likelihood that small disputes can be brought to a conclusion relatively quickly before they become deep-seated grievances
- Keeps ownership of the dispute in the hands of local people
- Offers an early, efficient, and less costly way to address concerns
- Promotes a more stable business climate for the Company that reduces risk and enhances accountability to the host community.

Box 1.3. The ATA's Perspective on Grievance Resolution

The victims and the custodians of the deceases who have long suffered in the hands of the Barrick Gold Corp and its partners need a means to have their grievances addressed. They may seek a system that provides access to influence decisions that affected their lives, access to a fair hearing and procedural justice, access to information, and access to a fair remedy—without fear of retaliation.

The ATA as a local stakeholder to this issue also believes that an effective grievance mechanism can result in a more equitable allocation of benefits, costs, and risks during the life of the Porgera Gold Mine. Notably, grievance mechanisms can:

- Give affected custodians and the victims as well as the stakeholders the leverage to negotiate mutually acceptable agreements under which their concerns can be addressed
- Enhance the ability of a company to justly address these concerns
- Ensure that even the poor and most marginalized get their concerns heard and addressed.

The ATA suggest that well-designed systems will not only resolve these human and environmental rights issues, but also change project policies and operations for the better.

ATA believes that a well-functioning grievance mechanism can also provide valuable feedback to the Company Barrick Niugini Limited by:

- Serving as an early warning system for wider problems
- Yielding insights from individual grievances that spotlight changes that might be needed to company operations or management systems
- Indicating possible systemic changes that might be needed to ensure that particular grievances do not recur.

Without the feedback loop that the proposed good grievance mechanism can provide, the Company may perhaps miss crucial opportunities to identify ways to improve operations. (For more on the business case for grievance mechanisms, see box 1.4.)

Box 1.4. The Business Case for Grievance Mechanisms

“There is only one chance to make a good first impression. It’s difficult to get back on track after a project has problems.”

—General Manger, mining project, Peru

The general manager at a large copper mining project under development in Peru makes a powerful case for the practical benefits a grievance mechanism offers a company and the community. A veteran to community complaints and grievances and with extensive experience working in the conflicted mining sector in Peru, he has seen firsthand what conflict can do to a project. He describes the motivation behind their grievance resolution mechanism like this: “It’s part of a process of engaging constructively with communities. We see it as an opportunity to share information. With a more formal system, we can identify issues early that could become big problems in the future. There is only one chance to make a good first impression. It’s difficult to get back on track after a project has problems. We have seen what happened with other mining projects in Peru. Creating a grievance mechanism at the beginning of a project sends a message to the community and NGOs that you want to engage productively. Developing a process early allows you to do a substantial amount of learning that you can apply when the project becomes a full-scale development in the future...Much of the work is done by contractors and this is one of the few ways to offer consistency between company and contractor responses, as well as control behavior of contractors. It also is a chance to instill our corporate ethic in our contractors. We think grievance mechanisms also make affected people part of the solution, which is a good practice.”

In addition to serving as a platform to resolve grievances, an effective grievance mechanism designed, planned and executed by Barrick Niugini Limited together with the ATA as a local stakeholder can help achieve the following goals:

- Open channels for effective communication
- Demonstrate that the Company is concerned about community members and their well-being
- Mitigate or prevent adverse impacts on communities caused by the Company’s operations
- Improve trust and respect
- Provide structures for raising, addressing, and resolving issues that reduce imbalances in power
- Promote productive relationships
- Build community acceptance of a company’s “social license” to operate (see box 1.5).

Box 1.5. The Company's "Social License" to Operate

Just as the Company must secure permits and licenses from local, regional, and national governments, it must secure a "social license" from the local and wider community to function as a legitimate and respected operator in their midst.^a To obtain a social license, companies are realizing that it is good business practice to take the level of social and environmental performance "beyond compliance" with basic legal requirements; they are finding it necessary to meet and sometimes exceed societal expectations. This, in turn, requires companies to align their operations with local needs, values, and concerns. For an increasing number of companies, grievance mechanisms form an integral part of this effort.

^a. Gunningham, Kagan, and Thornton (2004).

ATA's Guidance on PJV's OGM

Recognizing both the community development and the business case for managing grievances, the Barrick Niugini Limited already have policy commitments that contain provisions relating to grievance mechanisms.

With respect to their own institutional commitments, the ATA hereby urges Barrick PJV to be held accountable to the UNGP on Business and Human Rights and Right to Remedy which are the independent recourse mechanism available to project-affected peoples. The question of how a project-level grievance mechanism interacts with the UNGP on Business and Human Rights and Right to Remedy is dealt with below.

ATA has also prepared a set of Guidance Notes that correspond to each standard to explain requirements.⁹

Box 1.6 below summarizes the principles and good practice measures described in the Performance Standards and Guidance Notes.

Taken together, the Policy, Performance Standards, and Guidance Notes of the UNGP on Business and Human Rights and Right to Remedy form a robust foundation upon which the rationale and design of project-level grievance mechanisms—as elaborated in this document—rest.

9 see also: <http://www.ifc.org/ifcext/enviro.nsf/Content/GuidanceNotes>

Box 1.6. Principles and Good Practice Measures on Grievance Resolution Derived from UNGP on Business and Human Rights and Right to Remedy's Performance Standards and Guidance Notes

UNGP on Business and Human Rights and Right to Remedy's Performance Standards and Guidance Notes present various principles and good practice measures on grievance mechanisms that Barrick PJV can adapt:

- Establish a procedure for receiving, recording/documenting, and addressing complaints that is easily accessible, culturally appropriate, and understandable to affected communities.
- Inform the affected communities about the mechanism during the company-community engagement process.
- Consider when and how to seek solutions to complaints in a collaborative manner with the involvement of the affected community.
- Scale the grievance mechanism to the potential risks and adverse impacts of the project.
- Address concerns promptly, using an understandable and transparent process that is readily accessible to all segments of the affected communities—and at no cost and without retribution.
- Ensure full participation of both genders and vulnerable groups.
- Take into consideration customary and traditional methods of dispute resolution when designing the system.
- Assign consistent, experienced, and qualified personnel within the client organization with responsibility for receiving and responding to grievances.
- Establish a redress mechanism so those who feel their grievances have not been adequately addressed have recourse to an external body for reconsideration of their case.
- Document grievances received and responses provided and report back to the community periodically.
- Provide periodic reports on issues that the grievance mechanism has identified as of concern to those communities.
- Be aware of judicial and administrative mechanisms available in the country for resolution of disputes and do not impede access to these mechanisms.

The Performance Standards and Guidance Notes emphasize that a grievance mechanism should help the client understand the community's perception of project risks and impacts so as to adjust its measures and actions to address the community concerns.

How PJV's Operational Grievance Mechanisms can Fit into Project-level Stakeholder Engagement

Actively anticipating potential problems and initiating preventive strategies and actions should be integral activities for Company, ATA and Porgera Community.

Stakeholders are persons or groups that are directly or indirectly affected by a project, as well as those that may have interests in a project and/or have the ability to influence its outcome either positively or negatively. Stakeholder engagement encompasses a range of activities and interactions between a company and community over the life of a project that are designed to promote transparent, accountable, positive, and mutually beneficial working relationships. Stakeholder engagement includes identifying and analyzing stakeholders, disclosing information through community consultation, anticipating and preventing conflicts, forming partnerships, and involving the community in project monitoring. Stakeholder engagement can prevent conflicts by building rapport, positive relationships, and trust between the company and a community. Grievance resolution mechanisms are one component of an effective stakeholder engagement program.

One of the most effective forms of prevention the Company can encourage is the active participation of the ATA as a local stakeholder at all levels in the Porgera Community's civic, social, or religious life (see box 1.7).

Such participation can provide a means to build positive personal relationships, establish connections with the ATA and the Porgera Community groups and leaders, promote open and informal communication and information exchange, and demonstrate concern by the Company and its employees for the community's well-being. It can also offer informal access to information about community concerns and provide early warnings about any conflicts in the making. Such alerts are valuable; they give the Company plenty of time to prepare an adequate response and address the escalating tensions.

Since 2010, the Company has had prevention through well-formulated stakeholder engagement as it has been seen as an unnecessary frill in project development. The Company is often reluctant to make necessary expenditures of effort, funds, time, and personnel when it is not clear that ATA as a local stakeholder to this gross human rights violation issues is needed.

Neglecting prevention, however, has been detrimental to the Company, the ATA and the Porgera Community. Prevention is good management, and benefits typically outweigh costs.

Box 1.7. The Importance of Community Engagement to Avoid Conflicts

"Community engagement is a core strategy to know what our problems are before a grievance arises. Our local staff is involved in local chambers of commerce, church organizations, festival committees, and many other civic activities. [We] also have a foundation—with local people on the board—and they decide where community development funds go. The most proactive mechanisms have been active locally in civic life."—A company vice president in charge of community relations

How PJV's Operational Grievance Mechanisms can Fit into the Larger Context of Project Accountability

In addition to being part of an effective stakeholder engagement program, the PJV's OGM can also fit into the larger world of corporate accountability that goes beyond the project level. Grievance mechanisms often are used as a first resort. If the grievance cannot be resolved, the complainant may refer to an external party such as the court system or an independent recourse mechanism such as the National Contact Point to hear the case. Various accountability mechanisms exist at the industry, national, regional, and international level.¹⁰

Non-project-level accountability mechanisms do have limitations, however:

- The *judiciary*—often the institution of choice for resolving conflicts in some countries—is not trusted by either companies or communities in many parts of the world.
- *Traditional systems of justice* may be preferred by some community members; however, PJV may not fully understand or trust these forums. Nevertheless, it is likely that the Company would be willing to abide by their process or decisions.

Independent recourse mechanisms, such as the CAO or the World Bank's Inspection Panel, can play a valuable role, but are available to complainants only when the financial institution has an interest in the project, and are often subject to several other jurisdictional limitations.

Though these non-project recourse mechanisms present a reasonable alternative in some circumstances, they do not replace a working project-level grievance mechanism like that of Barrick's existing OGM at Porgera.

Conclusions:

The ATA urges Barrick Niugini Limited the Operator of the Porgera Joint Venture to review its existing OGM as the replicas that are currently being established also encounter many criticisms. Experience has shown that an internally based mechanism of BNL has:

- Reinforce power inequities by leaving BNL in a position of power and ATA and the communities in a position of dependency
- Significantly limit procedural choices available for solving the problem
- Emphasize investigations and formal responses based upon internal discussions over face-to-face dialogue and problem solving
- Prevent the complainant from having much influence in crafting a solution
- Omit stakeholders from involvement in the design of the grievance mechanism
- Rely upon individuals without specific training or capacity in grievance resolution to manage the system
- Adapted through trial and error.

¹⁰ Rees and Vermijs (2008).

Chapter 2. Understanding Grievance Mechanisms

A grievance mechanism should be in place throughout the entire project cycle.

A project-level grievance mechanism by definition means a locally based, formalized way for a company to accept, assess, and resolve community complaints related to company activities. It offers a package of widely understood and effective procedures for solving problems that are culturally appropriate, in combination with specially trained personnel, and aims to help parties reach speedy, efficient, and acceptable resolutions with dignity, justice, and finality. The grievance mechanism draws upon conflict resolution resources from several areas—those inside the company, traditional and customary systems, and private systems (mediation, conciliation, arbitration).¹¹

These approaches complement one another and act together in a coordinated way. Sometimes a company representative and a community member sit together informally and work out an agreement on their own. Other times, a trusted third party—possibly a mediator, technical expert, local authority, ombudsman, or wise person—may help the parties talk or suggest ways in which they can resolve their dispute fairly.

Having these in mind the PJV's OGM should be in place throughout the entire project cycle, beginning with the planning phases and continuing through construction and operations, until the end of the project life. While the PJV OGM may evolve as the Porgera Gold Mine moves through various phases, the dual goals of accountability to stakeholders and risk reduction remain constant.

Some Guiding Principles

Some of the approaches to grievance resolution advocated in this ATA's Position Paper Note are grounded in principles of mediation and interest-based negotiation common to the field of alternative dispute resolution (ADR). ADR approaches emphasize creating an enabling environment for inclusive decision making and generation of locally owned decisions. Ultimately, ADR approaches focus on empowering parties to participate in a process that is fair, principled, and robust.

There are circumstances when interest-based conciliation approaches are not appropriate or desirable to one or the other party in a dispute. Under these circumstances, arbitration or judicial recourse may be more appropriate after careful consideration. The ATA is concerned that interest-based approaches can encourage one party (usually the weaker) to compromise or negotiate away its fundamental human rights.

Clearly, the PJV's OGM incorporating mediation or other interest-based processes must be grounded in a framework of ethics and principles that should not be violated. As per the report from the UN Special Representative on business and human rights, ATA suggests that the PJV's existing OGM be reviewed and must be:

- *Legitimate.* The PJV's OGM must have clear, transparent, and sufficiently independent governance structures to ensure that no party to a particular grievance process can interfere with the fair conduct of that process.
- *Accessible.* The OGM must be publicized to those who may wish to access it and provide adequate assistance for aggrieved parties who may face barriers of access, including language, literacy, awareness, finance, distance, or fear of reprisal.
- *Predictable.* Barrick's existing OGM must provide a clear and known procedure, with time frames for each stage; clarity on the types of process and outcome it can (and cannot) offer; and means of monitoring the implementation of any outcome.
- *Equitable.* The mechanism must ensure that aggrieved parties have reasonable access to sources of information, advice, and expertise necessary to engage in a grievance process on fair and equitable terms.
- *Rights-compatible.* The mechanism must ensure that its outcomes and remedies accord with internationally recognized human rights standards.
- *Transparent.* PJV's Operational Grievance mechanism must provide sufficient transparency of process and outcome to meet the public interest concerns at stake and should presume transparency wherever possible. Non-state mechanisms such as the Porgera Joint Venture's project level grievance mechanism in particular should be transparent about the receipt of complaints and the key elements of their outcomes.¹²

As one example, in the case of the CAO, the Ombudsman "will not support agreements that would be coercive to one or more parties, are contrary to IFC/MIGA policies, or that would violate domestic laws of the parties or international laws."¹³

Proposed Components to be inserted to the PJV's Existing Operation Grievance Mechanism

The existing PJV's project level grievance mechanism shall include several elements, including some or all of the following:

- *A transparent grievance receipt and registration system* to provide ways for community members to register complaints and confirm they have been received
- *Grievance eligibility assessment* to determine if the issues raised in the complaint fall within the mandate of the grievance mechanism and the complainants have standing
- *Grievance evaluation* to clarify the issues and concerns raised in the complaint, to gather information on how others see the situation, and to identify whether and how the issues might be resolved
- *Several choices for solving problems, with or without the assistance of independent, third parties:*
 - *Internal decision-making processes*, whereby issues can be handled by the Company officials, using stated standards and criteria, to develop and propose a company response to the grievance and to allow for an appeals process
 - *Joint problem solving*, in which the Company and the complainant engage in direct dialogue
 - *Third-party decision making* to offer a solution when a voluntary agreement is not possible
- *Grievance tracking, monitoring, and reporting to the ATA and the community*
- *Company-community feedback and information sharing* to strengthen grievance resolution processes
- *Organizational learning* and identification of systemic problems and the need for changes to policies and procedures to prevent recurrent future disputes.

There might be no ideal model or one-size-fits-all approach to grievance resolution; indeed, the best solutions to the Porgera's escalating gross human rights violation issues will be generally achieved through localized or culturally appropriate mechanism whereby taking this account of the specific issues, cultural context, local customs, and project conditions and scale. Nonetheless, the ATA's experience—together with research undertaken for this Position Paper, which solicited the views of a wide range of practitioners — suggests that these basic components are especially helpful to establish a community, driven grievance mechanism by the Porgera Joint Venture.

¹¹The option of using formal legal redress should always remain available. The company should never impede a complainant's right to pursue legal remedies.

¹²Ruggie (2008).

¹³CAO Operational Guidelines (2007).

See: <http://www.cao-ombudsman.org/html-english/caoperationalguidelines.htm>



Chapter 3. Initiating a Review on the Grievance Mechanism

Grievance resolution is everybody's business, from the company's core business operations, to production, to environmental management.

Grievance mechanisms start somewhere and with someone. It is common practice for the company's community relations, external affairs, human resources, or legal department to be charged with initiating the effort. These offices, however, are not the backbone for resolving community grievances. Grievance resolution is everybody's business, from the company's core business operations, to production, to environmental management. As one regional director commented: "You need to view inside and outside the fence as part of the same system. Otherwise, Environmental and Operations folks will look at grievance handling as social's job, dismissing a complaint as something that has nothing to do with them. The reality is that grievances often materialize as a result of perceptions by community members related to environmental and operations issues and performance."

Identify and Engage Key Actors

When the Barrick PJV starts out, it is important that the Company should recruit support and leadership for building the new reviewing system: from within the company, from the community, and from a range of stakeholders including the ATA.

To develop needed support:

- *Identify a promoter within the company.*¹³ These individuals are rarely experts on grievance mechanisms. Nonetheless, they are important change agents who:
 - Maintain momentum through the early stages, addressing skepticism and resistance
 - Garner support inside the company and the community
 - Build the business case and articulate it to gain acceptance from senior management
 - Contribute ideas that strengthen how the grievance mechanism will work
 - Critically assess results once the grievance mechanism is up and running.
- *Identify promoters within the community.* It is also important to locate key champions within the community who can help build support for the use of the system and address concerns. The mechanism should ensure that promoters represent the community (such as elected, selected, or traditional leaders), and are not a self-promoting individual or group with a political agenda.
- *Cultivate leadership within the company and community.* Leadership commitment is critical for deciding whether or not to move forward with developing a grievance mechanism. The initiative should not proceed until such support can be raised.

Establish a Design Team

Building a core design team is especially important for large, controversial projects.

The design team serves as a strategy team, sounding board, designer, and promoter. The team normally provides technical and political capability to move the process forward, enhances acceptance during the initial introduction, and ensures that implementation is effective.

¹³ Lipsky, Seeber, and Fincher (2003).

Building a core design team is especially important for large, controversial projects.

Effective design teams:

- Comprise individuals of mixed levels and functions from the company (such as operations, environmental affairs, community relations, legal affairs, contractors). Staffing the design team from just one function such as community relations or human resources is unwise. Further inclusion of the local stakeholder for whom this mechanism is being designed is key to the success of the mechanism.
- Include a balanced group of representatives from the community, representing the range of constituencies and demographics that will be using the grievance mechanism, while keeping the team small enough to be responsive.
- Are representative and manageable in terms of their size (8 to 12 members).
- Rely upon clear terms of reference and a work plan that outlines team goals, roles and responsibilities, level of decision-making authority, reporting lines, tasks, time frame, and products.
- Use the services of a professional design consultant or facilitator with experience in developing community/company grievance mechanisms to help the team get started.

Understand the Current Environment

The first task for the design team is to conduct an assessment of the types of grievance that are likely to arise, local capacity to handle grievances, and, since the project is already operating, the nature of any community grievances that have been presented so far including the gross human rights violation issues.

This type of assessment forms an integral part of any stakeholder identification and engagement planning process. Much of the necessary information could be available in project documents, such as the Social and Environmental Impact Assessment (SEIA), or in the archives of the project sponsor or various government agencies. For instance, the ATA has all the necessary information on behalf of its claimants, thus this would be a bonus for the ATA to be identified and engaged in the design team.

Some specific questions related to grievance mechanisms may not have been addressed by previous work. To fill these gaps, the assessment process should involve a range of approaches, including interviewing and consulting with the community and company, and reviewing documents. When approaching a community, the design team must respect cultural sensitivities. Based on data collection and analysis, the design team can develop an overarching goal and direction for the grievance mechanism that recognizes the needs of both the community and the company and that responds to the question of what you want the grievance mechanism to accomplish. The analysis also guides the team in its decision about which specific design features to select to ensure compatibility with context and culture.

Stakeholder feedback is part of any design team's education. To address doubts, gather valuable input, and build support, those leading the initiative should develop a plan for gathering input from local stakeholders and community people at the front end of the planning process, as follows:

- Before designing the grievance mechanism, reach out to a broad group of stakeholders (employees, contractors, managers, community leaders, local officials) through public meetings or a series of focus groups.
- Use outreach meetings to receive information and understand people's doubts, objections, expectations, and perceptions related to a grievance mechanism.

- Help people understand why the system is being reviewed, what it will look like in broad terms, and how it might benefit local people and those connected to the company.
- Use such conversations to gather valuable input about traditional ways that members in the community handle conflict. Identify some of the cultural differences the complaints system will need to address if people are to use it.
- Survey existing dispute resolution capacity in the community and consider how it might play a role in the grievance resolution mechanism.

An effective outreach process engages all stakeholders to: help shape what the grievance resolution mechanism looks like; increase transparency by presenting the company's preliminary thinking about the grievance resolution mechanism (why the company has put one in place and ways in which it has benefited local people and the need to review); and build understanding and support for the initiative among diverse stakeholders.

Porgera Gold Mine – Brief Overview

Porgera Gold Mine was first granted the Mining License in 1989 by the PNG National Government and the construction phase started the same year and the first gold was poured in 1990. Since then there hasn't been any project level no-judicial grievance mechanism established. The PJV operators enjoyed the shooting spree of local alluvial miners when and where they wanted. The young women and girls became preys for the PJV Security Guards and the PJV Hired PNG Police Mobil Squads. Young men and boys were shot death, beaten and tortured and even illegally detained behind the Container Lock-Ups at the PJV Mine Site. It was until summer of 2004, when the PJV Security Guards shot death Late John Wangia at the Anawe Erodible Waste whilst he was panning for gold bearing ores.

From this very day till today, things had turned soars for the PJV Operators. The death of Late John Wangia was the birth of the Human Rights in Porgera. Since then the like minded victims and the custodians of the deaths incorporated this Association, the Akali Tange Association and had demanded for compensation and remedy from the PJV. However; PJV taking advantage of the weak laws of this country bulldozed and denied the allegations.

Through collaborative efforts from some elites at that time, a book was documented titled, "The Shooting Fields of Porgera" and was sent to all the International Human Rights Activists globally stating "Crying for Help". Fortunately, a reputable NGO, the MiningWatch Canada responded and has did intensive research into the allegations of gross human rights violations. After that several other international NGOs flooded into Porgera and did their researches. After their fact finding missions, the then Operator of the PJV a Canadian Multinational Mining Company, the Placer Dome Inc was held accountable for its gross human rights violations.

Nonetheless, this company denied that the allegations until sometimes later with the assistances from MiningWatch Canada headed by Dr. Catherine Coumans PhD lodged complain with the Canadian National Contact Points. After complain was lodged, an independent NGO, HumanRights Watch was engaged to investigate and do report on this allegation of gross human rights violations. The HRW did it's independent report without fear and favour and in its report it confirmed that these killings and constant raping of young women and girls has been ongoing by the PJV Operators.

To address, mitigate evaluate and provide remedy and reparation to the victims and their custodians, the Barrick Gold Corp has set up the existing project level grievance mechanism in

2010. However; since it was inaccessible, not transparent and rights-compatible, the intended users ignored this mechanism.

Knowing that the mechanism was not utilized by the intended users, the Barrick Gold Corp set up another non-judicial project level grievance mechanism, the "Porgera Remedy Framework" and it was supplementary to the existing OGM.

This supplementary project level grievance mechanism was too narrow in its scope and was time bound that it did not cater for other allegations and was primarily focused on the violations against women alone. On the other hand this framework was designed, planned and implemented by Barrick alone and that neither a stakeholder nor a victim was consulted during its planning, designing and implementation stages which attracted international criticisms regarding the framework.

To make it more worse, the claimants were even told to sign off their legal rights in exchange for remedy and too the remedy that was provided was not satisfactory, rights-compatible and of international standards.

Once the program was closed, the Barrick engaged an assessor of the framework. This assessor has pretended to be independent but was like a wolf wearing a sheep's skin to further traumatize the already traumatized poor raped victims. The assessor's insensitivity and poor understanding of the Enga and Ipili's rich complex culture as well as his insensitivity to handlings of such issues has added fuel on to the already burning fires on this escalating human rights violation issues here in Porgera. His short-sighted and one sided report to our understanding have set bad reputation for his organization and himself.

Moving on with, after the assessment was done, the ATA had tried to utilized the existing PJV's OGM and had lodged its grievances with it. As an acknowledgment of the grievance being lodged, the ATA was issued Grievance ID Number 3936. ATA has followed up on its allegations since then, however; noting has been done and its grievance is still sitting idle there.

It is therefore, the ATA is pushing for the Review of the PJV's existing OGM provided the grounds as stated on Chapter 1 and 2 of this ATA's Position Paper.

On the other hand, community members may be wary that such an initiative is little more than a public relations scheme. Both groups will have doubts about the ability of the mechanism to prevent retaliation.

Thus an information-gathering exercise can help identify concerns and suggest ways to review and develop and implement a grievance mechanism that will be accepted and used by stakeholders (see box 3.2).

Box 3.2. Information Needed to Develop and Review the Existing Porgera's Grievance Mechanism

Characterize grievances, key actors, causes, and costs.

- What are the current types of grievances related to company operations? What additional issues do people anticipate? What are possible causes of these grievances? How often do they seem to arise?
- Whom do the community members blame for the issues (the company, one particular employee, a subcontractor, or others)?
- Whom do the issues being raised typically affect? Individuals? Whole families or communities?
- Why are these grievances arising?
- Are there structural problems that could be changed to reduce conflict, such as different policies, rules, roles, decision-making processes, communication systems, or a better division of labor?
- What are the costs of these conflicts for the company and the community? (Costs should be discussed not only in monetary terms but also in broad terms, such as relationship costs, time, and reputation.) How severe is the impact?
- Who will use the grievance mechanism? How do users differ? Are they from different ethnic, tribal, language, or religious groups? Do they have different levels of education? Are some rural and some urban? Are some women and some men? Based on any of these differences, do they maintain different assumptions about conflict and its resolution that will affect how they feel about a new grievance resolution mechanism?
- Who will have standing to bring a complaint (local individuals, local community groups, local or national NGOs, international NGOs, local governments, regional-national governments)?

Characterize the current system for handling complaints.

- How are complaints handled now? Identify formal, informal, and ad hoc approaches inside the company for addressing grievances.
- Are there mechanisms for early intervention or resolution so cases do not escalate?
- How well are any of these systems working? Are the existing channels for dealing with community complaints able to handle future grievances?
- Why are particular procedures being used or not used?
- Where are the gaps?
- What are the existing barriers for those who might want to complain?

Identify existing preventive measures.

- What form of stakeholder engagement does the company have in place?
- How does the company communicate with the community?
- Does the company have methods for anticipating potential conflicts?

Characterize existing community systems for handling grievances and locate local dispute resolution capacity.

- How does the community typically handle conflicts? (Consider traditional systems based on clan, religious, or other customary institutions; government systems such as an office of human rights; or privately created systems such as centers for mediation, arbitration, or conciliation.)
- Are trusted institutions within the community engaged in resolving grievances, and might they play a role in the grievance mechanism?

Evaluate dynamics working for or against the introduction of grievance mechanism inside and outside the company.

- Are there existing mechanisms that could be viewed as competing?
- Does the company have the support of senior management?
- Have both contract employees and others been consulted and is there a plan to win their support?

Once the information has been gathered, it is important to consider what to do with the results. For example, is this the time to check back with senior management? Is it valuable to report back to the ATA and the Company, to build support and acceptance of the analysis, diagnosis, and broad purpose? Does the design and the review team have the authority to proceed directly to the design stage?

This is also the time for the design and the review team to build its own capacity and knowledge about the PJV's OGM. Design and review teams should become familiar with:

- Models and features of effective OGM
- Good practice markers employed by the Company (see the Executive Summary)
- Common pitfalls to avoid
- What other projects are doing. Consider making on-site visits or holding interviews with companies and their community stakeholders where a grievance mechanism has been implemented.

Once these and related tasks have been accomplished, it is time to for the design and the review team to develop a new detailed design.



Part IV. Developing and Implementing Effective Grievance Mechanisms

There is no ideal model or one-size-fits-all approach to grievance resolution. The best solutions to conflicts are generally achieved through localized mechanisms that take account of the specific issues, cultural context, local customs, and project conditions and scale.

Chapter 4. Define Scope and Determine Goals (Phase 1)

- Phase 1. Define Scope and Determine Goals
- Define the scope of grievances to be handled
 - Determine the purpose and goals

In this phase, the PJV OGM design and the review team shall determine the scope of grievances to be handled by the system and the purpose and goals. These elements form the foundation upon which the PJV OGM will be assembled. They will be crafted from the subjective assumptions and values of team members and a more objective analysis presented in the situation assessment.

Define the Scope of Grievances

Using the information gathered through the situation assessment, the design and the review team's next step is to review the type of grievances that are likely to arise or, in the case of the PJV, Gross Human Rights Violation issues that have arisen so far. Generally, PJV OGM should be open to a wide range of concerns: both those based in factual data and those arising from perceptions or misperceptions. For instance, the factual data shall include but not limited to gross human rights violations, negative social and environmental impacts the PJV has caused thus far. On the other hand, perceived concerns can be as critical to address as actual hazards. They often arise when people do not have adequate information. The PJV's OGM should also be able to address multi-party and multi-issue complaints. The design and the review team then prioritizes those types of complaints that the mechanism will primarily target.



Define the Purpose and Goals

If the PJV’s OGM design and the review team cannot reach consensus on a statement of purpose—or if it does so superficially—its future work may be in jeopardy.

The review, design and implementation of the PJV’s OGM must respond directly to the purpose and goals defined. In turn, the purpose and goals must respond to some fundamental questions:

“Why is PJV OGM being established?” “What do we hope to achieve in both the short term and the long term?”

If the PJV’s OGM review and the design team cannot reach consensus on a statement of purpose—or if it does so superficially—its future work may be in jeopardy. Consensus sometimes can be difficult to reach, however, because diverse stakeholders will come to the “design table” with very different life experiences, values, and assumptions about the PJV’s OGM. These differences may create tension during discussions about the mechanism’s fundamental purpose and goals. While all can appreciate that a primary goal revolves around resolving specific grievances in a manner that meets the Company, Community and the ATA’s needs, it is important to uncover more unconscious assumptions related to the system’s purpose to ensure agreement and commitment by all.

Discussions about the purpose of the PJV's OGM review must go to the very heart of matters underlying power relationships between the BNL and the ATA.

Discussions about the system's purpose must go to the very heart of matters underlying power relationships between the Company, ATA and the Porgera community at large. It is hard to imagine a comprehensive approach to understanding conflict between the Company and Porgera communities that does not address how power is wielded and distributed. If these discussions fail to occur, PJV OGM will run the risk of becoming just another tool by which the Company wields power. Consequently, in articulating the purpose and goals for the grievance mechanism's review, questions such as the following should be considered:

- Will the grievance mechanism's review and the function once redesigned be oriented primarily around concerns of the Porgera Community's gross human rights violations and the negative social and environmental impacts that the PJV has caused or around joint concerns of the Company and Community?
- Is the grievance mechanism oriented toward identifying root causes of gross human rights violations and negative social and environmental impacts and addressing them through systemic change or is it exclusively focused on the resolution of individual complaints?
- Is the grievance mechanism primarily oriented towards the Company's investigation and internal redress or toward a more comprehensive set of options for resolution and the provision of justice?
- How can the grievance mechanism be structured in a way that does not reinforce power inequities?

Chapter 5. Design (Phase 2)

Phase 2. Review and Redesign

- Prepare a preliminary design
- Choose ways to receive, register, assess, and respond to grievances
- Select grievance resolution approaches
- Design a means to track and monitor grievances
- Develop the grievance mechanism infrastructure
- Review and refine the design.

Prepare a Preliminary Design

The way a grievance resolution mechanism is designed is as important as what form it finally takes, because the process establishes credibility and trust.

In this phase, the design team shall develop a plan or blueprint for what the PJV OGM will look like. In its simplest form, the PJV OGM can be broken down into the following primary components (see figure 5.1).

- Receive and register a complaint.
- Screen and assess the complaint.
- Formulate a response.
- Select a resolution approach.
- Implement the approach.
- Settle the issues.
- Track and evaluate results.
- Learn from the experience and communicate back to all parties involved.

Choose Ways to Receive, Register, Screen, Assess, and Respond to Grievances

Receive and Register a Complaint

Receiving and registering complaints is a simple process where local people can inform the Company about concerns directly and, if necessary, anonymously or through third parties which the existing PJV OGM has done so far. However, the reception procedures must be most effective and must be convenient, culturally appropriate, simple to understand, and easy to use (see box 5.1).

Box 5.1. Culturally Appropriate Grievance Receipt and Registration

In some cultures, senior managers may be the most appropriate people to solicit and accept community complaints. As the general manager of a gold mine explains, "Rural Mongolia is an oral, face-to-face type of culture. Attending to relationship is crucial. Here, relationships go a long way toward project understanding and to addressing problems. Our procedures are simple and straightforward and ones that invest a lot of face time. Much of the face time is that of the general director, who is out meeting and greeting on a regular basis."

Design (Proposed Barrick OGM Model)

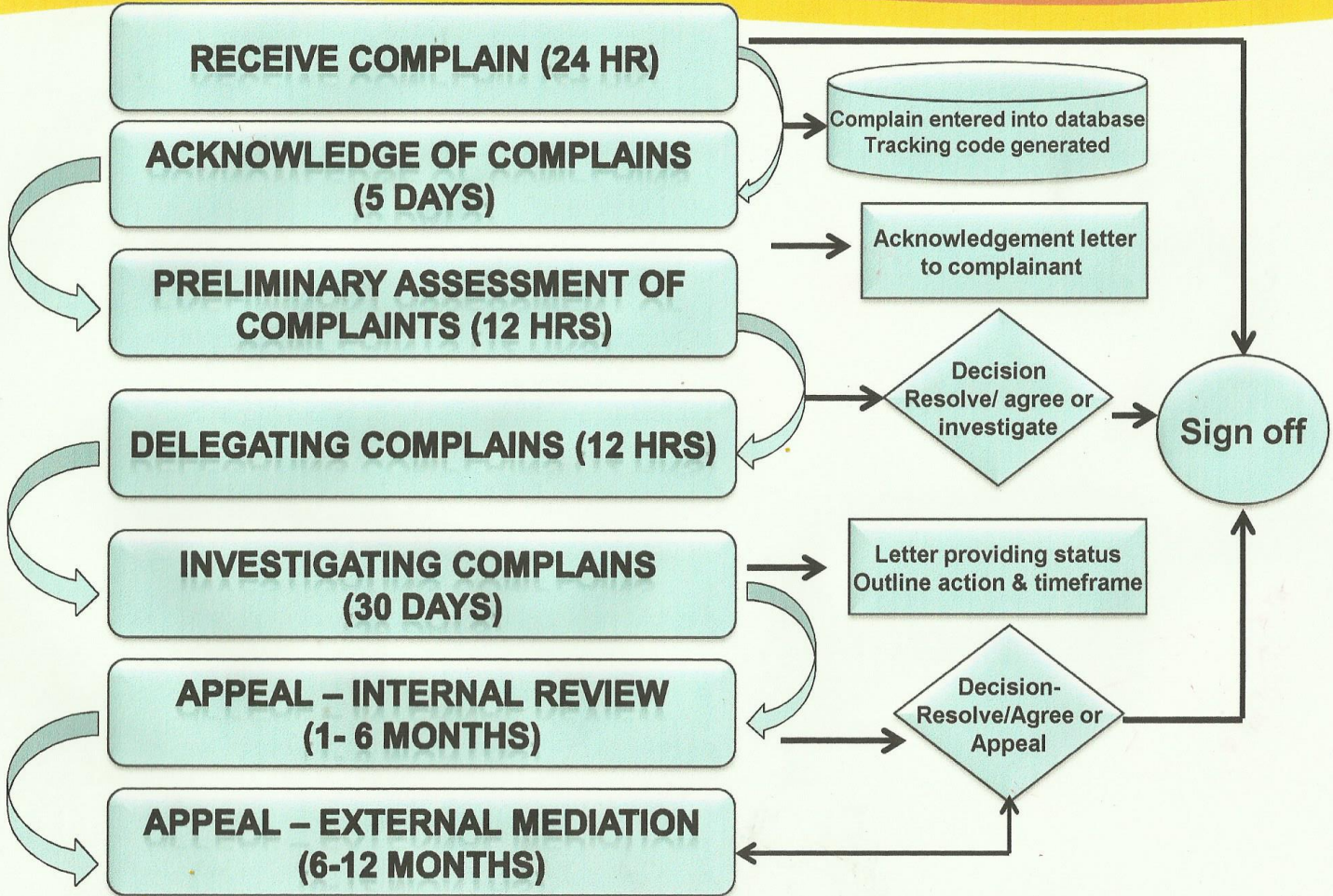
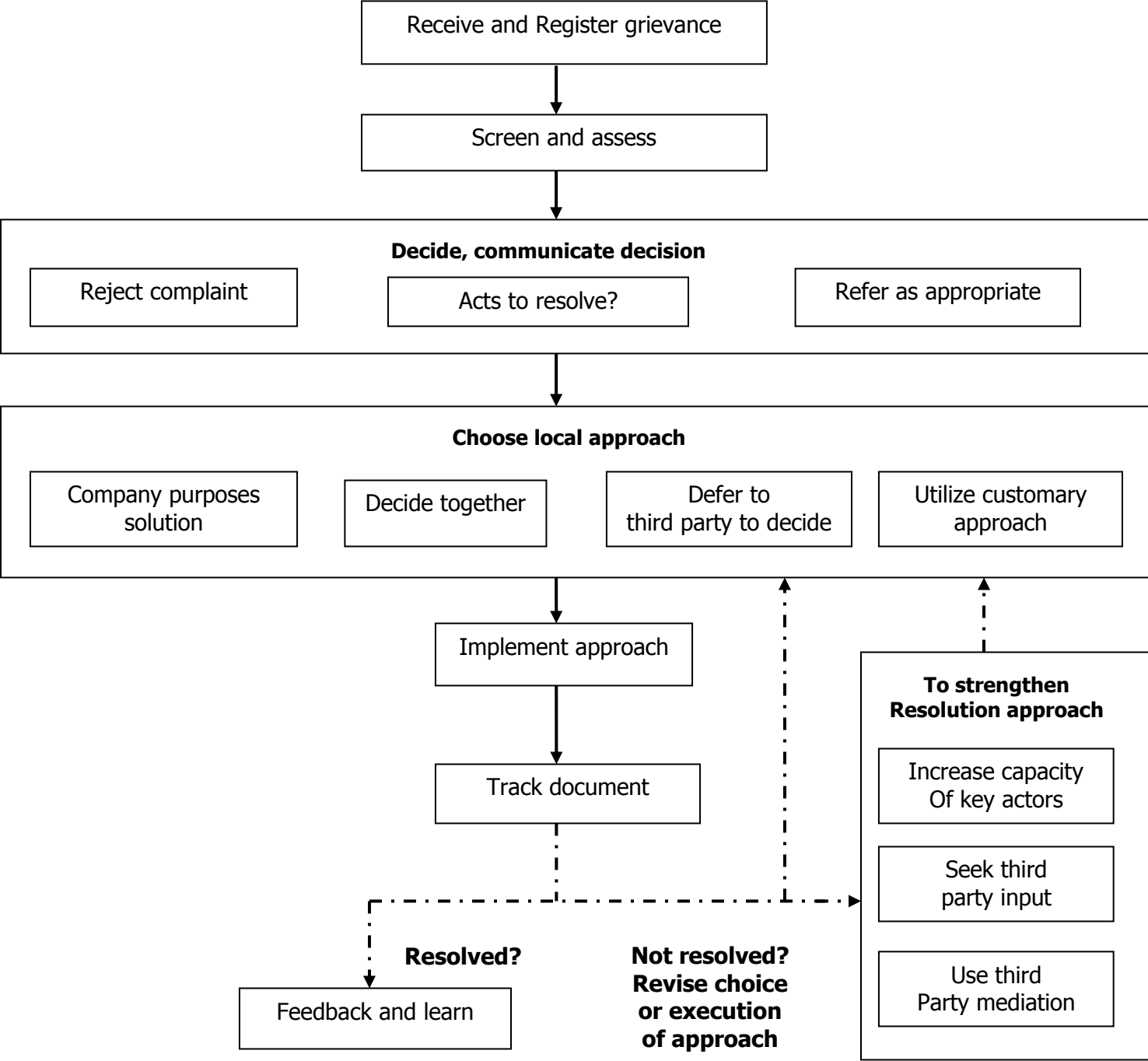


Figure 5.1. PJV’s OGM “MUST” have Multiple Local Approaches to Resolving Complaints



The PJV OGM's grievance receipt and registration process should provide the following:

Multiple channels should be available to gather and forward local people's concerns.¹⁴ A network of people (ATA, community leaders, government officials, community organizations, contractors, company environmental and operations employees, community liaison officers) should be accessible. At least one member of the network should be independent of the Company. Those designated to accept complaints, whether written or oral, record them on a simple form, which is forwarded to the central point of contact at the company for further action (see box 5.2).¹⁵

Box 5.2. The Importance of Maintaining Multiple Channels to Receive Grievances

"In our current system, anyone (field team, land team, community liaison officers, etc.) can take a grievance. It can be in the form of a letter from people, or they can use our company form. The local population can call the community liaison officer (CLO) directly. Alternatively, an operation's worker or field team can make a call to the CLO and ask them to visit the complainants, etc. It is crucial to make sure the field teams are aware of process, know how to refer to the CLOs, and know how to take a complaint themselves."

—A company representative from a pipeline company

Diverse methods that are culturally appropriate should be used, including self-identified, confidential, or anonymous procedures (professional letter writers, suggestion boxes, mail-in forms, toll-free telephone, electronic submission through a company's Web site).

A central point of contact should be available to receive complaints and log them into a central register rather than the existing OGM Officer at Yoko where the complainants are constantly chased out by the PJV Security Guards.

Designated complaint-resolution staff, consisting of both male and female employees, should accept complaints, provide relevant information on the process, discuss the complainants' situations with them, and explore possible approaches for resolution

Processes for acknowledging the receipt of a grievance and informing the complainant about the time frame in which a response can be expected should also be in place.

Once a complaint has been received, it should be recorded in the complaints log or data system.

Screen for Eligibility

It is advisable to give complainants the benefit of the doubt and engage in a conversation before deciding to reject a complaint.

This step determines whether a complaint is eligible for the grievance mechanism. Design and review teams should develop a screening procedure based upon a few simple eligibility criteria that do not involve judging the substantive merit of the complaint.

¹⁴ In situations where local people fear that raising complaints will lead to retribution, it is advisable to develop a receipt and registration system that relies upon a trusted stakeholder—in this case the ATA—and entrust it with the role of taking complaints to the company on behalf of local people with problems.

¹⁵ Staff not associated with complaint procedures may receive complaints from stakeholders. Systems for managing and forwarding such complaints should be established. The company will need to provide guidance to these staff on how to recognize a complaint and where to refer it.

Eligible complaints may include those where:

- The complaint pertains to the PJV's operations
- The issues raised in the complaint fall within the scope of issues the grievance mechanism is authorized to address
- The complainant has standing to file.

Ineligible complaints may include those where:

- The complaint is clearly not project-related
- The nature of the issue is outside the mandate of the grievance mechanism
- The complainant has no standing to file
- Other company or community procedures are more appropriate to address the issue.

If the complaint is rejected, the complainant is informed of the decision and the reasons for the rejection.

It is advisable to give complainants the benefit of the doubt and engage in a conversation before deciding to reject a complaint. Complainants often provide incomplete information. The Company needs to make an effort to truly understand the grievance before responding. In addition, some companies have found that even where cases appear frivolous or seem to be unlinked to project operations, the potential issues underlying these complaints may still need to be explored, as they could indicate some underlying concern with the project, such as lack of trust. In such cases, it is advisable for PJV to proceed with an assessment before determining whether the complaint is inadmissible. PJV must observe that making a commitment to investigate all complaints submitted, and to be seen as taking responsibility even when there is not a clear link between the complaint and the operation can increase trust in the PJV's operations. If eligible, the complainant should be notified, and the grievance should be processed and proceed to an assessment. Box 5.3 presents a checklist to keep in mind for handling procedures at this stage.

Box 5.3. A Checklist for Grievance Handling Procedures

- Assessment procedures (who conducts the assessment and how is the assessment conducted)
- Procedures to identify appropriate people in the company to whom a specific concern should be forwarded
- Procedures to determine the appropriate resolution process (in consultation with complainant)
- Procedures for making decisions on proposed settlements
- Appropriate time frames for each step in the grievance resolution process (including screening, assessment, and resolution)
- Notification procedures to the complainant about eligibility, assessment results, proposed settlement, and the like.

Assess the Grievance

During the assessment, the team including ATA shall gather information about the case and key issues and concerns and help determine whether and how the complaint might be resolved.

Tips

1. Determine who will conduct the assessment. Typically, the complaints coordinator performs this task or directs it to an appropriate staff or department (production, procurement, environment, community relations, and human resources) for assessment. However, for the gross human rights violation issues, it is advisable that independent assessors must be hired by the PJV including the ATA in conducting the assessment.
2. Encourage ATA to engage directly with the complainants to gain a first- hand understanding of the nature of the complaint.
3. Clarify the parties, issues, views, and options involved:
 - Identify the parties involved
 - Clarify issues and concerns raised by the complaint
 - Gather views of other stakeholders, including those of the company
 - Determine initial options that parties have considered and explore various approaches for settlement.
4. Classify the complaint in terms of its seriousness (high, medium, or low). Seriousness includes the potential to impact both the Company and the Community including but not limited to negative human rights and social and environmental impacts caused by the PJV's operations. Issues to consider include the gravity of the allegation, the potential impact on an individual's or a group's welfare and safety, or the public profile of the issue. A complaint's seriousness is linked to who in the company needs to know about it and whether senior management is advised.
5. Rather than resorting to a purely unilateral "investigate, decide, and announce" strategy, engage more directly with the complainant in the assessment process, and involve the complainant in influencing the resolution process to be selected, as well as settlement options.

Formulate a Response

The BNL should develop a system for responding to the complainant should specify *who* communicates and *how*. In some cases, it may be appropriate that feedback is provided by the staff member responsible for assessment, accompanied by the coordinator of the complaints procedure. The site manager may participate in feedback, depending upon the seriousness of the complaint.

Tips

1. The PJV OGM's complaint coordinator and/or relevant department may prepare the response. The response should consider the complainants' views about the *process* for settlement, as well as provide a specific remedy. The response may suggest an approach for how to settle the issues, or it may offer a preliminary settlement.
2. To present and discuss the response to the complainant, PJV must consider holding a meeting with the complaint coordinator, relevant company manager, and the complainant. If a direct meeting is not possible, consider meeting with a neutral facilitator which is ATA. The group would also discuss appropriate next steps during this meeting. If the proposal is a settlement offer and it is accepted, the complaint is resolved successfully and there is no need to proceed to the next step of selecting a resolution approach. If the complainant is not happy with the response about a resolution process or substance, the group should try to reach an agreement that would be mutually acceptable and culturally appropriate.
3. If the case is complex and a resolution time frame cannot be met, provide an interim response—an oral or written communication—that informs the person of the delay, explains the reasons, and offers a revised date for next steps.

Select Grievance Resolution Approaches

“Ninety –five percent of complaints should be handled in face-to-face meetings with the Complainant in a Culturally Appropriate Manner.”¹⁴

The PJV's Operational Grievance Mechanism should offer a variety of grievance resolution approaches to accommodate differences in personal and cultural preferences—not just a single grievance procedure. Where possible, customary ways of grievance resolution (*Culturally-Appropriate*) should be evaluated and incorporated into the system. It is also important that the complainant has influence on the way a problem will be handled. For instance, the PJV is hopefully aware of the Ipili/Enga's culture in settling grievances.¹⁵

Four Grievance Resolution Approaches

In general, there are four basic approaches the PJV OGM's review and design teams should consider when evaluating what array of resolution approaches to offer:

1. The company proposes a solution.
2. The ATA, community and Company decide together.
3. The company, ATA and community defer to a third party to decide.
4. The Company, ATA and community utilize traditional or customary practices.

These approaches vary in how the authority to make decisions is addressed. Each approach may involve only the parties to the dispute, or may be facilitated by an independent third party without decision-making authority, such as a mediator.

¹⁴ Caroline Ristau, Consultant to Pro Natura, Nigeria, USA

¹⁵ Porgera Clan pays huge compo - Porgera Joint Venture's IPILI WAI PII – May/June 2004 Issue No: 131
See also: “The Shooting Fields of the Porgera Joint Venture 12.5 – Indigenous Form of Compensation pages 90-93
http://www.miningwatch.ca/sites/www.miningwatch.ca/files/ATA_Case_Document.pdf

Approach 1. The company proposes a solution

Use when:

- The complaint is straightforward, the issue is clear, and the solution is obvious.
- People in the company can resolve the issue alone, to the satisfaction of the complainant, based on their knowledge and authority.
- A considered and respectful company proposal is more likely to be acceptable to the complainant.

In this approach, the Company shall propose a solution and offer it to the complainant or the ATA.

The Company, ATA and Community jointly decide if the solution is acceptable, and, hence, share decision-making authority.

The Company shall perceive several advantages:

- A more rapid response
- Use of fewer company personnel and material resources
- Some control of resolution procedures and outcomes.

Tips

1. Review information collected through the initial assessment process and make a settlement proposal that the Company hopes the complainant will accept. The appropriate department/manager can conduct this step. The proposal should be based on consistent standards and criteria so that similar complaints receive similar remedies.
2. Present the Company's proposal to the complainant. The way the proposal is presented may be as important as what is in the proposal. Measures that help increase the acceptability of responses include:
 - A rationale for the decision, and presentation of any data that were used to reach a conclusion (for example, cost reimbursements for medical expenses, value of the loss suffered and etc).
 - An opportunity during the Company decision-making process for the complainant to verbally present his, her, or their case to a company representative. The representative should listen to and acknowledge the complainant's statement to help reach emotional closure and restore positive relations between the complainant and the company.
 - Timely delivery of a response and rapid restitution once a decision has been made.
 - Delivery of the Company's response in writing and, when appropriate, a visit by the Company representative to explain the decision in person.
3. If the complainant rejects the proposal, offer the option of a joint decision process (as described in Approach 2). If this approach is not acceptable, the grievance may be referred to an external mechanism for assessment or adjudication.

Approach 2. The ATA, Community and Company decide together

Use when:

- An ongoing relationship and a face-to-face resolution process matter.
- The case is more complex and several diverse stakeholders are involved.
- The ATA and Local community members distrust the Company proposal.
- The response from the “Company proposes a solution” procedure is not acceptable.
- Talking together is required to promote more accurate communication, share information, or develop mutually acceptable solutions.
- There are procedural, psychological, and substantive interests for both parties that lend themselves to such an approach.

With the potential to resolve perhaps 95 percent of all grievances, “decide together” should be the centerpiece of the BNL Operational Grievance Mechanism’s resolution options.

“Decide together” approaches are probably the most accessible, natural, and unthreatening ways for the ATA and the communities and BNL to resolve differences. With the potential to resolve perhaps 95 percent of all grievances, “decide together” should be the centerpiece of the BNL Operation Grievance Mechanism’s resolution options.

Under this option, the Company representatives, the ATA and complainants share decision-making authority and jointly engage in a problem-solving approach to reach a resolution of the grievance by themselves. The process may involve only the Company, the ATA and complainant, or may be facilitated by a neutral third party without decision-making authority, such as a mediator. The advantages include the following:

- Those *directly involved* can address the complaint early, rapidly, and informally.
- Ownership of the dispute and its solution rests with the parties—those who are most qualified to know the issues and who have the most to gain from an equitable resolution.
- Parties can devise solutions that do not feel like a compromise.
- The process can improve relationships as well as address substantive concerns in a principled and creative way, leaving both sides better off.
- Problem solving approaches are often less adversarial, faster, more flexible, and less costly in economic and noneconomic terms.

“Decide together” may be a more formal process that involves a mediator to help the parties reach an agreement. Alternatively, it may be an informal process employed almost immediately when a grievance arises at the place of origin (see box 5.4). There are several common “decide together” approaches that can be used separately or in combination.

Box 5.4. On-the-Spot Resolution

Many grievances can be resolved early and rapidly on the spot, in an informal process of investigation and resolution. One mine manager, for example, recalled how “a truck had parked in a farmer’s field without authorization. The farmer accused the truck driver of causing damage to his crops. Immediately, our community relations department identified the responsible contractor, went out to the farmer’s field, brought the farmer into the conversation, and invited a local authority representative, whose role was to observe and pass judgment, in a sense, about the complaint. Together, in the middle of the farmer’s field, the group sorted out the problem and the community relations officer made a decision on the spot that the contractor was at fault and agreed to compensate for the damages.”

Listening. Good listening is fundamental to every grievance resolution approach. It shall provide a greater sense of fairness and addresses a basic need of anyone with a grievance—to be heard by the PJV. Simply listening supportively, thinking through a problem, discussing and seeking ways to reduce tension, and perhaps looking into a problem informally may adequately address the grievance.

Information sharing. Facilitating access to information can help clarify facts or misperceptions. For example, a community member may have questions regarding the Company’s operations, its environmental and social performance, or its impacts. Or they may want to provide someone in authority with information about a perceived safety problem.

Dialogue and negotiation. This can be one of the most effective approaches to resolve a grievance, particularly if dialogue is initiated early and the parties are interested in an approach that will meet their interests and concerns. The ATA as the complainant and the PJV Company representatives may choose to speak on their own, in the presence of a trusted person invited by the complainant, or in the presence of designated observers, such as respected members from the community who serve as witnesses to the grievance resolution process.

Joint fact-finding. This may be an appropriate approach when critical information to resolve a complaint is missing, the accuracy of information is being questioned, or a conflict about data is exacerbated by a long history of disagreement and lack of trust among the parties. The PJV and ATA as the complainant shall share control of the process and jointly frame the questions to be studied, define the process for gathering information, select experts to conduct the research, decide how the information will be analyzed, and determine how the results will be used. In this way, the Company and the Complainant shall learn together and jointly decide how to use the results of any investigation. In cases where there are significant power imbalances or major differences in people’s technical backgrounds, ways will need to be found to equalize access to expertise and close gaps in knowledge.

Finding a “bridge.” Dispatching trusted messengers between the parties shall be helpful when parties are more comfortable talking through a third person rather than sitting together should PJV prefer, when PJV suggests that direct confrontation would damage the relationship and when saving face is critical. However; this shall be culturally unacceptable to deal with especially in the gross human rights violation issue through indirect means.

Tips

1. When using dialogue, negotiation, joint fact-finding, or a bridge:
 - Ensure that the appropriate individuals from the BNL's PJV and from the complainant's (ATA) side are participating in the talks
 - Draw out each person's view of the situation
 - Define the issues people want to talk about
 - Identify each party's highest priority concerns and needs
 - Explore a variety of ideas and options for addressing a complaint
 - Incorporate customary ways for resolving disputes.
2. More complicated, contentious cases like the negative human rights impacts may require extensive planning, a more formal approach, and a trusted party (potentially an outside mediator) to organize and conduct the talks.

Approach 3. The Company, ATA and Community defer to a third party to decide

Use when:

- "Decide together" procedures are not acceptable to one or more parties.
- There are disputes of fact or conflicts about data.
- The parties have been unable to reach a voluntary settlement through other procedures.

On occasion where the Companies, ATA and complainants are unable to resolve a problem on their own. In these cases, the parties hand decision-making authority over to an independent, neutral party. The neutral party may be a trusted individual or group in the community, a respected technical expert, or an independent arbitrator.

Compared to typical court decisions, this approach shall offer several advantages:

- Simpler and less legalistic procedure
- Expedited decisions
- Lower costs
- Choice regarding who hears and decides a case
- More predictability, accessibility, impartiality, and transparency than may be available from legal institutions.

There are three main approaches that can be used: arbitration, fact-finding, and use of an existing external mechanism. These approaches tend to be more formal and rights-based.

Arbitration. Arbitration is a private, voluntary, and adjudicative process for resolving complaints. It involves joint submission of a complaint by concerned parties to a mutually acceptable and impartial intermediary—an arbitrator—that may be an individual or a group, such as a panel. After parties present their views, the intermediary makes a decision. Compliance with laws, policies, standards, rules, regulations, procedures, past agreements, or common practice may serve as the basis for decisions.

Should the gross human rights violation turns to an arbitration case, the ATA would decide if the decision is binding (the parties promise at the beginning of the process to implement the intermediary's decision) or nonbinding (the intermediary's decision is a recommendation to the BNL, ATA and the Claimant, and can be appealed in court or to some higher authority). If the arbitration is incorporated as part of the PJV's OGM, however, there will be a serious risk to the credibility of the mechanism if binding decisions cuts off the ATA and the Claimants' right to judicial recourse. As such, PJV's OGM must allow that arbitration will be nonbinding on the ATA and the Claimant's but binding on the PJV.

In addition, arbitration case for PJV must not require that both parties share the cost equally, which will make this option out of reach for the ATA and the Claimants' that would use the PJV OGM. Therefore, PJV OGM should consider using public, no-cost arbitration mechanism or allowing the company pay the full cost if no-cost solution is not available. PJV OGM shall allow ATA and the Claimants' to take issues directly to arbitration without resorting to a "decide together" approach.

Fact-finding. The PJV and ATA shall initiate a fact-finding process to obtain an independent assessment of the nature of the grievance and of relevant company practices (see box 5.5). The independent intermediary selected shall control the process, investigates the problem, identify causes, make findings, and develop recommendations on steps and terms for the settlement of the claim. The fact finder's process shall be less formal than arbitration and shall not require a hearing. The fact finder shall have the right to pursue his or her own leads and to receive testimony and facts outside the presence of the ATA. The fact-finding report shall be served as a basis for further negotiation, the PJV response, an offer of settlement, or a final decision by senior managers of the BNL.

Fact-finding is recommended when it is important to use third party expertise to resolve a data dispute using a process that is less formal and without the need for a hearing. Thus, like arbitration, fact-finding by a third party can be binding or nonbinding, depending on the decision of the ATA and BNL. If the result of fact-finding is to be binding, ATA and the BNL shall decide on this outcome before beginning the process. As with arbitration, care should be taken if the parties [the BNL and ATA] decide to make the outcome binding. ATA predicts that the nonbinding fact-finding can be both powerful and compelling. Should the ATA and BNL agree on the process and intermediary, there will be strong social pressure to voluntarily comply with its outcome.

It is important to survey local resources and enhance rather than undermine their authority or duplicate what already exists.

Existing external mechanisms. If PJV and the ATA are unable to reach decisions voluntarily, design teams should explore possible resources in the form of trusted local governmental and civil society institutions that may be able to provide independent decisions and recommendations. This point shall underscore the importance of surveying local resources and enhancing rather than undermining their authority or duplicating what already exists.

While the concept of independent redress is appealing, the practicalities of developing such mechanisms at the project level are extremely challenging (see box 5.6).

Box 5.5. Lessons in Fact-finding

The experience of a mining company in Africa illustrates the importance of designing fact-finding exercises carefully. The company and the district administrator of the local government had received several hundred complaints about blasting related to the mine. The company recognized the need to deal with this cluster of conflicts and met with the administrator to discuss an approach. The administrator suggested that both the community and the company hire separate experts. A mining company official recalled: "They hired a group and we hired a group and we planned to compare notes once the fact-finding processes had been completed. Although there is not a significant substantive difference between the findings, we now realize we should have been much more transparent about who our expert was; why we hired that person; the process we would use to share information about results; the process for what to do with the results if they differed; etc. We should have been much clearer about the path forward. Instead, we agreed with the community to submit our findings to the chief administrator, who would receive and distribute both documents and convene the parties. We neglected to think through with the community how we would proceed together if our separate fact finders disagreed. Now we each are going to receive documents with some contradictory conclusions. We have no process for dealing with the differences and the chief administrator feels a bit caught in the middle."

Box 5.6. Challenges in Developing Independent Redress Mechanisms

The local context can make locating or developing an independent recourse mechanism particularly challenging. One company official described a situation where over 100 distinct communities were involved. She put it this way: "In a distrusting society that is ethnically mixed, a panel that everyone would see as fair and independent is not feasible. No one would ever agree on the composition or the outcomes. If such a commission said no, the complainants would go elsewhere. We find that it is impossible to have an independent panel all would accept. If you could have a credible panel that could render decisions parties would accept, this would be useful. I can't see how to do this here. From my experience, this is asking a lot." In this case, it would be difficult if not impossible to make an agreement with only one panel.

Realizing that an independent panel would not work, the same company entered into an agreement with a local NGO to run a grievance mechanism for the company. The NGO fielded a team that visited each village, took grievances, logged them, and then passed them on to the company. It was felt that this would add some transparency and credibility to the overall system. The company would then address the grievance as they thought appropriate, and inform the NGO of the outcome. When the NGO felt the company had come up with the "wrong" answer, the grievance was returned to the company for further internal discussions. If still unable to come to an agreement with the NGO, the company would discuss that particular grievance with an independent monitoring panel focused on land and compensation issues. There was only one issue (that related to 15 grievances) that the company ended up discussing with the independent monitors. The cases were resolved quickly thereafter.

While the NGO mechanism provided third-party verification of substantive resolution and case closure, it also lengthened the process and complicated the system. The company believes the NGO's participation was worthwhile for many reasons: notably, it helped relieve the workload of the land team, which had become so overwhelmed with resolving grievances that there was no one left in the field to take any new ones! The company was able to provide an independent verification mechanism—but with an additional layer of complication.

Approach 4. The PJV, ATA and Community can use traditional and customary practices

Use when:

- “Imported” procedures are unfamiliar, inaccessible, or culturally incompatible with local Ipili/Enga customary practices.
- Alternative traditional means that are available which can be adapted in a way that is mutually acceptable to ATA and the BNL.

All societies have internal ways of handling their differences. Local people may go to secular or religious leaders to resolve their disputes with one another. They may use traditional problem solving or judicial procedures and may employ local standards and criteria to guide decisions. In Ipili/Enga, traditional dispute resolution procedures are more acceptable than any external ones provided by governments or “foreign” parties, such as the Company.

Those responsible for designing the PJV’s Operational Grievance Mechanism should inventory local and customary approaches for solving conflicts and consider how to adapt traditional dispute resolution mechanisms to deal with community-company grievances (see box 5.7). Initially, the Company may be uncomfortable seeking resolution assistance from traditional or customary approaches. Local people and procedures, however, have elements that can complement or augment the Company’s Grievance Mechanism. Consider the following options:

Observers, witnesses, and testifiers. Many traditional cultures in Africa, Southeast Asia, and Latin America utilize respected community members as observers and witnesses in efforts to resolve disputes. Their presence legitimizes the process, verifies fairness, and assures that agreements comply with widely accepted community values and norms. Likewise, the PJV can actively engage community elders, chiefs, or widely respected and trusted community members as witnesses in this initiative to resolve community-company complaint or the gross human rights violation issue. ATA proposes that their participation will have significantly increased the acceptability of settlements, both for complainants and for concerned members of the wider community.

Advisors. Members of traditional communities often seek advice from respected or wise members on how their differences can best be resolved. Disputants often ask for recommendations that comply with community norms and restore harmonious relationships. Several companies in Africa and Latin America have sought out respected community members for advice on how they can settle complaints in a culturally sensitive and responsive manner. Others have either created functional equivalents of councils of elders, which are composed of several respected community leaders or officials, or turned to existing local institutions to provide credible advice on reasonable procedures, standards, and criteria for settlements. For example, the Defensoría del Pueblo in Peru and the councils of chiefs in Ghana have served this capacity effectively.

Mediators. Almost all cultures utilize some form of mediation to help people resolve differences. In some cultures, intermediaries focus on repairing damaged relationships, opening communication between parties, or providing procedural assistance to further more effective problem solving. In a large number of cultures, mediators also provide wise counsel or specific recommendations to parties on possible settlements. For instance, the Company once again, may not be comfortable using traditional intermediaries to resolve company-community grievances, especially should the process involve giving advice or making critical

judgments on company actions or the behavior of its personnel or contractors. Nevertheless, use of local and respected community leaders, such as mediators, to resolve gross human rights violation issues or to work internally within community groups to help reach agreements may be useful in furthering grievance resolution efforts for the PJV's OGM.

Box 5.7. Drawing on Customary Ways of Resolving Grievances

A mining company in Peru described the value of drawing on customary ways of addressing grievances. The General Manager explained: "We looked at the Rondas Campesinas (a grassroots civil defense organization for rural farming communities), that have a system in place to address grievances. We didn't use every feature of their system, but we tried to build on some of what they did. Our purpose was two-fold: to fit our grievance mechanism into an existing system where we could, so that as a newcomer you are not perceived to be in conflict with traditional ways of doing things. Secondly, we had to ensure that what we borrowed fit within a human rights framework. The company has high standards for human rights and behavior, so some things had to be different."

Design a Means to Track and Monitor Grievances

Grievances need to be tracked and monitored as they proceed through the PJV's OGM system (see boxes 5.8 and 5.9). Effective tracking and documentation shall accomplish many goals.

- Document the severity of a complaint (high, medium, low) according to specific criteria. The level of severity guides requirements for alerting senior management and determines the seniority of management oversight needed.
- Provide assurance that a specific person is responsible for overseeing each grievance—from receipt and registration to implementation.
- Promote timely resolution.
- Inform all concerned (the complainant and appropriate company personnel) about the status of the case and progress being made toward resolution.
- Document the Company's response and outcome(s), to promote fairness and consistency.
- Record stakeholders' response(s) and whether additional research or consultation is needed.
- Provide a record of settlements and help develop standards and criteria for use in the resolution of comparable issues in the future.
- Monitor the implementation of any settlement to ensure that it is timely and comprehensive.
- Provide data needed for quality control measures, to assess the effectiveness of the process and action(s) to resolve complaints.
- Identify learning from specific cases to be used later to assess the effectiveness of the mechanism or address systemic issues that may require changes in the BNL policies or performance.

Tracking and documenting grievance resolution shall require the following elements:

- *Tracking forms and procedures* for gathering information from the Company personnel and complainant(s)
- *Dedicated staff* to update the data base routinely
- *Systems with the capacity to analyze information* so as to recognize grievance patterns, identify any systemic causes of grievances, promote transparency, publicize how

complaints are being handled by the Company, and periodically evaluate the overall functioning of the mechanism.

- *Processes for informing stakeholders* about the status of a case (such as written status reports)
- *Procedures to retrieve data* for reporting purposes.

Box 5.8. Community Involvement in Monitoring and Tracking Cases

Involving communities in case monitoring and tracking is a cutting edge approach. In Peru, a large international gold mining company began registering all signed agreements between the mine and community members with the local branch of the government's ombudsman's office, the Defensoría del Pueblo. The Defensoría provides external, independent monitoring of agreements and objective determination of compliance, with a timeline for implementation. Each month, the Defensoría publicizes monitoring results on accords and actions of signatories to agreements. The agency also meets periodically with mine and community representatives to evaluate progress made on settlements and implementation.

Develop the Grievance Mechanism Infrastructure

Without strong commitment from the top, the grievance mechanism is likely to be ineffective or underutilized.

Before presenting the proposed design to senior management for approval, the design team should consider how the system will be implemented and supported over time. Questions of governance and oversight, the institutional "home" for the grievance mechanism, and staffing needs should be considered. These are complex and important decisions that have practical and political ramifications.

Define the Governance Structure

Governance of grievance mechanisms refers to the authority, procedures, and personnel involved in handling and resolving complaints, including:

- Authority delegated to specific personnel who have general oversight of the grievance mechanism as a whole, serve as gatekeepers for acceptance of complaints, and make decisions regarding the redress of issues
- Companies' internal policies and procedures that provide direction to managers and employees on how to process and resolve complaints
- Internal procedures to ensure that the chief grievance manager can obtain the necessary inputs and cooperation from company staff with close knowledge of the subject of the grievance
- Explicit steps for resolving grievances.

The PJV Operational Grievance Mechanism policies should be derived from the work of the design team. Successful implementation, however, will depend upon approval and active promotion by the highest levels of management. Without strong commitment from the top, the initiative is likely to be ineffective or underutilized.

Determine the Institutional "Home" for the Grievance Mechanism

In many situations, the grievance mechanism is housed inside the company in one of its functional units (community relations, external affairs, human resources, legal, environmental management). For instance, Porgera Joint Venture's OGM is housed inside the Yoko I, PJV Mine Site. In other situations, parts of the mechanism may be housed in a local community or government agency. In Peru, for example, the Defensoría del Pueblo houses an independent tracking mechanism that monitors complaints and agreements reached between mining companies and local community members (see box 5.8).

In general, complaints will most effectively be addressed should grievance resolution is seen as everyone's job, rather than something the "social folks" do. There should be a single point for coordination of this function, however, and a single, high-level person who has ultimate responsibility for the system. Where the mechanism resides and who is responsible within the Company must send strong message to the community, company employees, and contractors about the company's commitment to grievance resolution.

While the home of the mechanism's coordination function should be in a prominent unit of the Company and high-level personnel should be assigned to manage it, the work of the system should be mainstreamed throughout operations and the business side of the PJV. If responsibility for resolution of complaints is assigned exclusively to community affairs or a social and environmental unit, these entities and their leaders may not have the authority to secure effective resolutions. Similarly, the effectiveness of the mechanism is likely to be compromised should the mechanism is totally disconnected or only loosely linked to operations—often the source of a complaint and therefore necessary to engage in resolution.

The Company shall have sought various ways to mainstream grievance resolution activities and link social and environmental functions with operations. Some solutions shall include regular forums, such as meetings that bring together community affairs, environmental, and operations staff to discuss community concerns.

Incorporate the Community

To draw upon the ATA and the Porgera Community's perspective, the PJV's OGM system may tap community leaders, elders, chiefs, or other respected people. Some of their functions may include accepting and forwarding community complaints to the appropriate company official; serving as witnesses who publicly verify the fairness of a resolution process; acting as advisors or advocates for either individual complainants or the Company and complainant on fair, reasonable, and/or customary procedures or solutions that could be used to settle a complaint; and serving as facilitators or mediators. Particularly for the Porgera's Gross Human Rights Violation case, inclusion of Mr. John Pokean¹⁶ of Panadaka Village, Porgera would be a bonus for the PJV OGM to fast track the allegations under the PJV's Grievance Acknowledgement ID Number 3936.¹⁷

Regardless of whether staff or others involved in designing or operating the grievance mechanism are from the Company, ATA or the Porgera Community, it is critical to clearly define and have common understandings concerning roles, responsibilities, and authority.

¹⁶ John Pokean is a well-known and respected Community Leader, a member of the Royal PNG Reservist Constabulary and an ex-senior PJV Community Relations Officer. He is the paramount chief of the Mamai Clan of the Porgera Gold Mine's SML area.

¹⁷ PJV Grievance Acknowledgment ID Number 3936 refers to the allegations lodged against Barrick-PJV by the ATA. In this ID Number, victims names list has been submitted for PJV to evaluate and where merits provide reparations, remedies and apology.

Review and Refine the Design

Once the design team has detailed the components of the grievance mechanism and designed the infrastructure for the mechanism, it is important to capture this plan in a comprehensive design document. The team should then step back and evaluate the design, considering questions such as those listed below.

- Will the mechanism be effective in meeting our stated goals, objectives, and principles?
- Have we taken into consideration good practice markers?
- Will the mechanism be able to respond to the range of grievances specified in our scope?
- Have we built in an adequate diversity of resolution approaches?
- Have we adequately identified means to improve upon those resolution approaches, if necessary (such as through an outside mediation option, technical expert consultation, or capacity building)?
- Do we believe that the infrastructure we have designed is sufficient to support the effective operation of the grievance mechanism?
- Is the grievance mechanism effectively integrated into the company's overall stakeholder engagement approach and management (See box 5.9)?

With the design complete, the design team should then present the grievance resolution mechanism to senior management for their approval, along with recommendations for governance, staffing, and the support structure. Suggestions from the PJV Management, ATA and community stakeholders are reviewed and incorporated into the final grievance mechanism plan. With the necessary approval in hand, the design team shall shift its attention to implementation.

Box 5.10. Integrating a Grievance Mechanism into a Project's Management Framework

As part of its response to heightened community concerns, a small hydropower facility in northern India established a grievance mechanism. The mechanism comprised a small office in the local village to receive complaints, and a grievance redress committee—made up of internal as well as external members. After some months of operation, it became clear that nobody from the community had lodged any serious complaints with the office. The grievance committee had never met. Was this a sign that all was well?

In fact, the project was plagued with complaints: to managers, the local magistrates, the high court, district officers, and financiers. Community members were choosing not to use the grievance mechanism to resolve their concerns. The project manager expressed his frustration: "We have this grievance mechanism, which we created because our financiers asked us to do so, but it's no use, because everyone just complains everywhere else and doesn't want it. What is the point?"

Part of the explanation as to why the grievance mechanism failed is that it was added as a standalone function, and was not integrated into the project's management. As a result, neither the project managers nor community members felt that they understood how to get the most out of it. Some people began to see it as an additional bureaucratic step (time-consuming busy work whose main function seemed to be filling out forms), and the managers saw it as less responsive than reacting on the spot to a community complaint.

It is relatively easy to see that the company could improve the situation and strengthen its community relations by:

- Developing a grievance register to consolidate complaints from multiple work sites and recording the response
- Periodically reviewing data for trends that might help spot systemic problems (such as recurrent road safety issues)
- Recording feedback on grievance resolution to see what types of responses are more effective, but also to identify persistent, recurrent, unresolved complaints that might signal deeper problems
- Effectively raising persistent, unresolved complaints to the grievance redress committee, and then acting on the advice of the committee to demonstrate how the project is responsive to these concerns
- Reporting the status of grievances back to the community to demonstrate how the company has responded—feedback that should help build trust in the responsiveness and accountability of the company and enhance community relations.

Chapter 6. Implement and Operate (Phase 3)

Phase 3. Implement and Operate

- Introduce the grievance mechanism
- Communicate to build awareness
- Train and support participants.

The goal of this phase is to introduce the grievance mechanism and promote its use. It may be piloted and refined before full rollout or launched immediately on a community-wide scale. In either case, successful implementation of the PJV's OGM will require *marketing materials* that describe the mechanism and its benefits in simple and visual terms; *a communication and outreach strategy* that educates community members and the Company/contract managers and employees about the system and their role; and *training* for personnel administering the system and for those designated to accept complaints.

Introduce the Grievance Mechanism

The way a grievance mechanism is introduced to company employees and the public can have significant implications for its effectiveness over time.

The way a grievance mechanism is introduced to company employees and the public can have significant implications for its effectiveness over time. Hence, several factors must be carefully considered by the PJV's OGM, including who must receive information regarding the mechanism's existence and use, what information needs to be shared, and how this information will be delivered, both in the immediate term and on an ongoing basis. The development of incentives to use the mechanism might also be considered.

Communicate to Build Awareness

Educating local people and the Company about the grievance mechanism is an essential and ongoing responsibility. It does no good to have a perfectly designed grievance mechanism that no one knows about (see box 6.1).

Get the Word Out to Communities

The fundamentals of a successful strategy to publicize the complaints procedure to the local population include the following:

- *Develop simple, visually engaging marketing materials.* These should describe the process for handling people's concerns and the benefits that can result. The materials should also inform the local population about where to go and who to contact if they have a complaint.
- *Provide materials in an understandable format and language.* Consider special approaches if the literacy rate is low.
- *Use face-to-face, informal meetings in local communities* as the primary vehicle for building awareness about the program. Make these visits interactive and engaging.

Box 6.1. Reaching Out to the Public to Inform Them About Available Grievance Mechanisms and Approaches

Most companies with effective grievance mechanisms use a range of approaches to engage and inform community members and often take advantage of public social gatherings, meetings of associations of people (such as irrigation ditch committees), chambers of commerce, or service organization functions, fiestas, and town meetings. The Company representatives may request time or may perhaps set up staffed tables or booths at similar gatherings here at Porgera to present information about the function and use of the PJV's OGM.

The Company can also sponsor and convene their own forums to provide public education. Meetings should be scheduled on a regular basis and be held at convenient times and locales. Meetings also may be used to:

- Brief the public about the Company's activities or upcoming events
- Solicit community concerns and input on specific issues or problems and ask for ideas on how to address them
- Assist concerned stakeholders in voicing and filing complaints, which the Company personnel can accept on the spot
- Discuss a specific issue or event particularly the negative human rights the PJV has caused.

In situations where individuals or communities that have been affected by the PJV's operations are spaced far apart or are located in isolated regions, the Company personnel should make regular visits to meet with the individuals, families, or the ATA.

BNL may consider using puppet shows or role-plays to illustrate how to make a complaint and how the Company representative and complainant might work together to resolve their differences. Establishing a personal connection with the local population (as well as with the Company Managers, employees, and contractors) is what it will take to get people to buy into and use the system.

- *Build incentives* to use the system (see box 6.2). Consult the community about any risks or fears they have associated with using the system. Gather information about what else they might need to voice a complaint and participate effectively in the mechanism (such as training, coaches, and accompanists).
- *Involve the design team* as promoters.
- *Supplement briefing sessions with other communication approaches*, such as brochures, posters, billboards, radio spot-ads, or brief television ads.

Remember that communicating about the grievance mechanism is an ongoing effort, rather than a one-time launch. Otherwise the Company may build it, but no one will come.

Establishing a personal connection with stakeholders is what it takes to get people to buy into and use the system.



Get the Word Out to the Company and Contractors

The PJV shall encourage their personnel to view complaints and opposition as a source of valuable information that can lead to improved operations, reduced risk, and a supportive relationship with the community.

The Company personnel also need to be educated about community grievance resolution mechanisms and procedures. This is especially true as the Company will be expecting larger numbers of employees to be more directly involved in the informal education of community members about complaint procedures, to accept complaints, or to participate in on-the-spot resolution of minor problems. The following points are worth considering when developing briefing sessions for the Company employees and contractors:

- *Focus sessions on why the grievance mechanism is in place, its goals, benefits, and how it operates.*
- *Discuss roles and expectations of employees and contractors (what to do if a member of the community approaches them with a grievance, how best to respond to aggrieved stakeholders and the importance of listening, remaining objective, and taking stakeholder concerns seriously).*

- *Highlight the constructive role of community dissent in project operations*, by encouraging the view that complaints and opposition are a source of valuable information that can lead to improved operations, reduce risk, and develop a supportive relationship with the community.
- *Emphasize that there will be absolutely no reprisals* within the Company or community.

Train and Support Participants

A fundamental goal of the grievance mechanism is to solve problems early at the lowest level. It is important to support that goal with training for employees.

A fundamental goal of the grievance mechanism is to solve problems early at the lowest level. Thus it is important for the PJV to support that goal with basic stakeholder engagement and conflict resolution training for employees. Training in a variety of responsibilities is required in the startup of a grievance mechanism for the following people:

- *Personnel who will administer the system* must receive skill training in conducting receipt and registration, referral processes, service provision, quality control, monitoring and record keeping, and the grievance mechanism ethics.
- *Grievance coordinators* must receive training in conflict resolution and grievance management.
- *Those who register complaints* must receive training about the receipt and registration process, and the procedure for forwarding complaints to a central point of contact within the Company. They also need a set of complaint forms.
- *Managers and supervisors* need problem-solving skills because the bulk of complaints can be resolved by using informal “decide together” approaches without having to resort to more formal procedures, such as arbitration. Managers and employees who assume a new role—that of a problem solver—will be more successful if they are prepared.
- *Users* need information about the system, information about their rights, help in thinking through their choices, and appreciation for their efforts to address their disputes in a responsible, productive way.

For all these reasons, training is a key element of quality control for the system.

Incentives must also be established to encourage the use of the grievance mechanism. Some ways to build incentives are discussed in box 6.2.



Box 6.2. Building Incentives to Ensure that the System Is Used

The best way to promote the use of the grievance mechanism is to ensure that it resolves grievances effectively and that this success is demonstrated to staff and potential users.

The true proof of the success of the grievance mechanism will be measured by how much it is used and what results it achieves. Use is connected to minimizing the risks and maximizing the benefits of the system. For the PJV's OGM, an ongoing issue will be how to develop incentives and encourage its use. ^a Focusing on the following five questions will help PJV's grievance personnel to ensure that the system is used:

1. What else can we be doing to minimize the risk and fear of using the system?
 - Are we successfully demonstrating that retaliation is not tolerated?
 - Are we protecting confidentiality?
 - Do people feel their rights are protected?
2. What else should we be doing to encourage community members to use the system?
3. What are we doing as a company to change the way we view conflict and complaints?
 - Are we overcoming the prevailing attitude that "getting a grievance is not okay"?
 - Is grievance management included as a core competency in a performance appraisal system?
4. What are the tangible benefits and results we see from the grievance mechanism?
 - Are we reporting benefits and results back to the community and the company?
 - Are we publicizing success stories of people who have used the grievance mechanism?
5. Do community leaders encourage use of the mechanism?

The best way for PJV to promote the use of the grievance mechanism is to ensure that it resolves grievances effectively and that this success is demonstrated to staff and potential users.

a. Some concepts for building incentives are drawn from Lipsky, Seeber, and Fincher (2003, pp. 257–58).

Chapter 7. Monitor, Report, and Learn (Phase 4)

Phase 4. Monitor, Report, and Learn

- **Get the right people and create suitable forums**
- **Establish clear standards and criteria for evaluation**
- **Create a plan to implement changes to the mechanism**
- **Report back to the community**
- **Learn and modify.**

The goal of ongoing monitoring is not only to improve the system, but also to improve the company.

Creating and implementing effective grievance mechanisms is not an exact science. Their development is experimental and always a work in progress, requiring assessment and refinements to assure that the mechanism is achieving desired goals. Lack of satisfaction by the system's users, lack of support in the community or company, accessibility problems, or procedural inefficiencies may be indicators that change is needed. In all cases, such change should be the result of an intentional, structured, broadly participatory, and ongoing process.

It is therefore necessary the PJV to monitor and evaluate the overall performance of the grievance mechanism throughout the project life cycle. The goal of this level of monitoring is not only to improve the system, but also to improve the Company. PJV can adapt to changes in its external environments that is better able to meet its goals.

Ongoing company-community learning and assessment of the PJV's OGM can be viewed as a five-step process.

Get the Right People and Create Suitable Forums

- Create a grievance advisory committee—an oversight group with advisory authority, composed of PJV, ATA and community representatives who monitor performance and provide strategic advice about the grievance mechanism. (For a discussion of a formal monitoring and evaluation entity, the Business Excellence Committee, see box 7.1.)
- Involve appropriate PJV, ATA and community members: the grievance manager and team, complainants who have used the grievance process, and the grievance advisory committee.
- Include internal company forums such as staff meetings, community relations meetings, and weekly safety meetings. Do not censor or discourage discussion about the performance of the system and possible suggestions for changing the company.
- Solicit input from community members and, where appropriate, engage them in deliberations on appropriate changes to the mechanism.
- Use independent experts with expertise in grievance resolution mechanisms to conduct an independent evaluation every three to five years.
- Consider appropriate venues and processes to secure the best citizen suggestions on the functioning of the mechanism, and shape these according to local cultural norms (see box 7.2).

Box 7.1. Business Excellence Committees

Ad hoc internal company committees must be created to monitor and evaluate the performance of grievance mechanisms. PJV should ensure that they do not often fall short in achieving their goals because of the level within the company hierarchy of personnel appointed to them, lack of broad representation from diverse parts of the company, unclear mandates, changing personnel, difficulty in maintaining an institutional memory concerning what has been done in the past, and absence of authority to make needed changes directly.

One potentially more effective approach would be for senior management to create a Business Excellence Committee. These committees shall have formal and permanent status within the Company. They can have a mandate to gather and regularly assess the performance of the grievance mechanism, and make any changes necessary. Senior managers from all parts of the Company must be involved in processing or resolving grievances would be involved in the assessment of the mechanism, to determine what to change and how to implement changes.

Once information has been gathered, the PJV, ATA and community representatives shall meet to evaluate it.

Establish Clear Standards and Criteria for Evaluation

PJV shall identify which aspects of the grievance mechanism to evaluate: the whole mechanism, the performance or behavior of company personnel, the time required to process complaints, kinds of resolutions, patterns of settlements, structural issues posed by the system and its operation, settlement costs, and so forth. Questions should be developed in two broad areas: the performance of the grievance mechanism, and lessons related to company operations that have emerged. Some possible questions to pursue are listed below.

Questions targeted to the grievance mechanism's performance

- How well is the system accomplishing its purpose and goals?
- Is the system making a difference? How?
- Is the mechanism saving money and reducing risk?
- Does the mechanism enable complainants to raise their concerns, engage in a fair process, and obtain a satisfactory settlement to their issues (when appropriate)?
- Where are the gaps? What is and is not working?
- What types of problems is the system addressing?
- Do people know where to go? Is the mechanism accessible and easily understood?
- Do those who receive and register complaints document the complaints?
- Can complainants readily determine the status of their complaint and how the company is responding?
- To what extent is the system actually used by a wide cross-section of men, women, and youth from the community?
- How well does the mechanism address the power imbalance between the company and complainant and assure that the complainant is not always merely receiving a judgment from the company?
- Does the mechanism provide adequate opportunities for face-to-face participation and discussion and joint development of mutually acceptable solutions to issues in question?

- Does the mechanism allow and facilitate, when appropriate, complainants' pursuit of external and independent means to redress their grievances?
- What conflict trends, community issues, and project operations could influence the kinds of conflicts that might be expected in the future?
- Is the grievance mechanism set up to handle such issues?
- What actions would increase effectiveness?

Questions targeted toward organizational learning and improving PJV's policies, procedures, and operations

- What kind of demonstrable change and improvement is the mechanism producing in project operations, management systems, and benefits for communities?
- How does the mechanism facilitate identification of root causes of conflict?
- What actions has the company taken to address these root causes? Is the company adopting any structural changes?

Actions should be identified to address any system shortfalls. Evaluation meetings should focus not only on adapting the grievance mechanism, but also on identifying specific, structural causes of grievances themselves, the sources of which, if changed, could eliminate a whole class of similar disputes.

Box 7.2. Forums and Procedures to Obtain Feedback on the Performance of a Grievance Mechanism

PJV can create forums and procedures to obtain feedback on the performance of its grievance mechanism:

- Regular company-community meetings with two-way feedback and joint appraisals of the mechanism, its components, or specific procedures
- Regular or targeted meetings between senior company managers, ATA and local community leaders
- User evaluation/feedback forms distributed to complainants at the time of settlement and again several months later
- In-person or telephone interviews by company staff with past complainants to assess their satisfaction with mechanisms and procedures to address complaints.

Create a Plan to Implement Changes to the Mechanism

Decisions on changes to the mechanism must be followed up with a clear implementation plan. The plan should explain in detail what is to be done, when, where, how, and by whom. Ideally, an oversight or monitoring process should be put in place to ensure that implementation happens in a timely and effective manner. In Porgera's gross human rights violation case, it may be desirable to utilize participatory monitoring, in which PJV, the ATA and community members have oversight of implementation and have the authority to raise concerns if it is not being conducted as mutually understood or planned.¹⁸

¹⁸ CAO (2008).

Report Back to the Community

In the spirit of transparency and accountability, the PJV is urged to disclose information about the results of the grievance mechanism, including the volume and nature of complaints, case outcomes, and resolution rates—as well as key conclusions from the monitoring and evaluation process.

The PJV's grievance team should provide regular feedback to the ATA and the community to clarify expectations about what the mechanism does and does not do, to encourage people to use it, and to gather feedback to improve the grievance mechanism. The company and the community should talk about:

- Types of cases and how they were resolved, presented in an interactive way that maintains confidentiality of the parties where required
- Impacts of the grievance mechanism and complaints on company policies, procedures, and operations, including what the company is learning and how has the company changed
- How to make the grievance mechanism more effective.

Learn and Modify

The BNL should use information from the grievance mechanism to learn and report to stockholders about ways it could improve performance:

- Report on key insights emerging from individual grievances that indicate where changes might be needed to company operations or management systems.
- Indicate possible systemic changes that might be needed to ensure that particular grievances do not recur.
- Make sure that results of the analysis are factored into the ATA and the community engagement plan and the social and environmental monitoring plan as these tools are updated.
- Continually provide feedback to management.

The Company also should assess the impacts of any changes to the grievance mechanism by considering how the mechanism responded to complaints and how the complainants viewed the response. The company also should assess what further modifications might be necessary to improve the system.

By building in regular review and incorporating findings into improvements in company procedures and activities, the BNL can improve both its own performance and any development impacts on the ground.



Conclusion:

Barrick Gold created a novel non-judicial remedy mechanism that provided remedy packages to more than a hundred women who had been sexually assaulted by its security guards and other employees. Yet Barrick's remedy mechanism falls short, and a close analysis reveals numerous serious deficiencies in its design and implementation. The mechanism left many survivors feeling dissatisfied, and failed to adequately meet international human rights standards. Significant strains on the relationship between the company and the survivors and communities remain today.

The myriad of concerns about the design and implementation of the mechanism highlight that companies and right-holders would be better served with a different approach. Fundamentally, a remedy mechanism must center rights-holders in every step of the process and address power imbalances if it is to advance rights and transform the damaged relationships that accompany human rights violations. In the long run, such an approach can work toward a more restorative form of justice that will better benefit the community as well as the business. Without centering rights-holders and addressing power differences, remedy mechanisms are likely to fall short in both their effectiveness and their legitimacy.

One pervasive deficiency of the Barrick mechanism was the treatment of rights-holders as passive recipients of remedy packages instead of as active participants in the design and implementation of the entire process. While businesses may instinctually favor maintaining control over the design and implementation of a mechanism established to remedy abuses, the experience of the Barrick mechanism demonstrates that the failure to place rights-holders at the center of mechanism design and implementation not only negatively affected the mechanism's outcomes, but also led to a chain of problems starting from the very beginning of the process. As a result, the legitimacy of the mechanism was severely undermined, and the mechanism has not produced the reconciliation with local stakeholders that Barrick may have intended.

Barrick's failure to ameliorate the power differential between itself and the rights-holders also contributed to an array of concerns. Barrick missed an opportunity through its remedy mechanism to address the problem of power inequality resulting from factors such as poverty, lack of education, prolonged waiting, and lack of alternatives. Important measures that could have elevated rights-holders' power, such as early and deep engagement with survivors and providing more robust independent counsel, were either not implemented or implemented poorly. In contrast, when the rights-holders were able to augment their bargaining power, such as by coming together as a group to demand additional remedies, they secured much better outcomes for themselves than when they were isolated as individuals during the two-year mechanism process. When rights-holders can organize towards a better bargaining position for themselves, the outcome can be significantly improved.

This report illustrates that a company-created remedy mechanism has inherent limitations especially when used to redress gross human rights abuses. When businesses themselves set up systems to remedy abuses caused by or associated with their own activities, conflict of interest concerns arise. When the violations are egregious or widespread and where the company seeks legal waivers from survivors, those concerns are all the more present. Thus, company-created mechanisms to remedy serious human rights violations, if they are used at all, should only be used in the narrowest of circumstances and when the strictest human rights standards apply.

The development of an effective and legitimate remedy mechanism must include the active participation of a number of key stakeholders. Rather than *company-created* models, a better approach would be for companies, survivors, and communities to jointly design remedy mechanisms, or for these key stakeholders to jointly appoint an independent third party to develop and implement the mechanism. Co-creation centers the rights-holders in the process from the outset, can help address power differentials, and may aid in achieving more transformative reconciliation. It must also be recognized that non-judicial remedy mechanisms alone can never provide a full remedy to survivors; state action is needed to provide the required judicial sanction under human rights law.

Thus, states, companies, mechanism implementers, civil society, and rights-holders all need to be proactively engaged to bring about full and appropriate remedy for survivors. States must investigate and prosecute those responsible for violations. Corporations should participate with rights-holders in the co-creation or joint appointment of an independent remedy mechanism, and cooperate with state investigations and prosecutions. Those implementing remedy mechanisms should abide by clear, transparent, and predictable processes, maintain independence from corporate influence, and facilitate the provision of full, effective, and appropriate remedies. Civil society should be ready to monitor these processes, support communities, and assist rights-holders in their advocacy and negotiations. And rights-holders should be active participants in co-designing or jointly appointment such mechanisms, and their interests should be centered throughout the process.

In considering these different roles and responsibilities, the valuable lessons drawn from the experience with the Barrick mechanism will not only benefit other corporations contemplating remedy mechanisms, but should also generate a longer and on-going conversation between rights-holders, communities, states, international bodies, companies, and civil society about how best to advance the human right to remedy.

Also the valuable lessons learned from Barrick created remedy mechanism “The Olgeta Meri Igat Raits” must be applied to the existing operational grievance mechanism at the Barrick PJV Mine Site to evaluate the allegations under the PJV Grievance Acknowledgment ID Number 3936.

Appendixes

Abbreviations and Acronyms

ADR	alternative dispute resolution
ATA	Akali Tange Association
BNL	Barrick Niugini Limited
CAO	The Office of the Compliance Advisor/Ombudsman
CBO	community-based organization
CLO	community liaison officer
CSR	corporate social responsibility
IFC	International Finance Corporation
NGO	nongovernmental organization
OECD	Organisation for Economic Co-operation and Development
OGM	Operational Grievance Mechanism
PJV	Porgera Joint Venture
PNG	Papua New Guinea
PS	Performance Standard
UN	United Nations
UNGP	United Nations Guiding Principles
UNHCHR	United Nations High Commissioner for Human Rights

Glossary

Accountability mechanism – An office within an institution with a mandate and/or standardized procedures, designated roles, and responsibilities to ensure that the entity adheres to and complies with external and/or internal laws, policies, procedures, or guidelines related to the institution's performance.

Arbitration – A private, and adjudicative process for resolving complaints or disputes. Arbitration may be voluntary or part of a contract or a prearranged, necessary step in a grievance process. Involved parties submit the contested issue(s) to a mutually acceptable and impartial intermediary—an arbitrator—to obtain either a nonbinding opinion or binding judgment.

Arbitrator(s) – An individual or panel that conducts an arbitration hearing and process to resolve a dispute or conflict.

Assisted negotiation(s) – Talks or bargaining conducted with the assistance of an intermediary or third party to help parties voluntarily resolve a complaint, grievance, or dispute. A facilitator or mediator commonly provides assistance by helping parties establish or build positive working relationships, conduct more effective negotiations, or provide nonbinding substantive advice.

Change agent – A person who leads a change project or business-wide initiative by defining, researching, planning, building business support, and selecting volunteers to be part of the change team.

Company-community grievance mechanism – Institutionalized approaches, procedures, and roles for the resolution of concerns or complaints at the project level raised by individuals or community groups concerning the performance or behavior of a company, its contractors, or its employees.

Complainant – An individual or group with an issue, concern, problem, complaint, or claim that he, she, or they want addressed and/or resolved.

Complaint – An issue, concern, problem, or claim (perceived or actual) that an individual or community group wants a company or contractor to address and resolve. Synonymous with grievance.

Compliance – Commitment to follow and/or implement—in both spirit and letter— relevant laws, rules, regulations, or negotiated agreements.

Compliance audit – An impartial assessment by an independent third party focused on whether an institution has complied with relevant policies, standards, guidelines, and procedures.

Conflict – A serious and potentially costly dispute over perceived or actual incompatible values or more tangible interests. When acted upon, conflicts are often damaging to all concerned in terms of relationship, time, personnel, and resource and opportunity costs required to resolve them. Often used synonymously with dispute.

Customary approaches for grievance resolution – Roles, procedures, standards, and criteria commonly found and used in traditional or indigenous communities to address and resolve differences or conflicts. Examples include use of community elders or chiefs as mediators or arbitrators and application of traditional norms to guide settlements or decisions.

Dispute – A disagreement over concerns or interests that takes the form of a claim between parties. Claims are often countered with rejections or denials, accusations, or counter-claims or charges. Often used synonymously with conflict.

Dispute resolution system – An institutionalized and organized method—consisting of specified roles, rules, and procedures—for systematically resolving complaints, grievances, disputes, or conflicts. Synonymous with grievance mechanism.

Distributive solutions/outcomes – Results of a collaborative problem-solving initiative, mediation, or third party decision-making process over complaints or disputes over limited resources that distributes benefits or costs between the involved parties.

Enforcement – Means and procedures to assure commitment to and/or implementation of relevant laws, rules, regulations, or negotiated agreements, regardless of the cooperation or will of involved parties.

External appeals process – Institutions and procedures external to a company-community grievance mechanism that provide complainants with an independent and impartial means to seek redress of complaints. These include, but are not limited to, private arbitration, governmental administrative hearings, or judicial proceedings and rulings.

Facilitation – A means of helping groups work together in meetings to accomplish their goals in ways that elicit participation, ownership, and creativity from all involved.

Governance structure – Roles, procedures, and institutional home for the management of a grievance mechanism.

Grievance – An issue, concern, problem, or claim (perceived or actual) that an individual or community group wants a company or contractor to address and resolve. Synonymous with complaint.

Grievance mechanism – An institutionalized and organized method consisting of specified roles, rules, and procedures for systematically resolving complaints, grievances, disputes, or conflicts. Synonymous with dispute resolution system.

Grievance mechanism components – Parts of a grievance mechanism implemented to accomplish specific tasks, such as grievance prevention, receipt and registration, monitoring, tracking, internal company deliberations, and third party assistance.

Interest-based negotiation/bargaining – A negotiation process focused on identification of parties' substantive, procedural, relationship, and/or psychological interests and development of mutually acceptable solutions that satisfy them to the greatest extent possible and result in joint gains for all concerned.

Intermediary/Intermediaries – Individuals or groups that are not a party to a complaint, grievance or dispute—such as facilitators, mediators, process coaches, fact finders, compliance

advisors, or community elders—who provide assistance to parties that enables them to reach voluntary agreements, secure nonbinding advice, or obtain a binding judgement to settle differences. Synonymous with third parties.

Internal company grievance mechanisms – Internal procedures for accepting a complaint concerning company performance or behavior, processing it, making a decision on its merit, and providing a response to the complainant.

International Finance Corporation (IFC) – A member of the World Bank Group that focuses on private sector projects in developing countries. It provides financing for private sector projects, helps private companies in the developing world mobilize financing in international financial markets, and provides advice and technical assistance to businesses and governments.

Mediation – A way of helping parties voluntarily resolve a dispute using the assistance of an acceptable, impartial, and neutral third party with no decision-making authority.

Receipt and registration – A simple process where local people can present concerns directly to the company, and if necessary, anonymously or through third parties.

Social license – An implicit contract between a company and society that constrains the company to meet societal expectations and avoid activities that societies deem unacceptable, whether or not those expectations are embodied in law.

Stakeholders – Persons or groups that are directly or indirectly affected by a project as well as those that may have interests in a project and/or the ability to influence its outcome, either positively or negatively. Stakeholders may include locally affected communities or individuals and their formal and informal representatives, national or local governmental authorities, politicians, religious leaders, civil society organizations, and other groups with special interests, the academic community, or other businesses

Stakeholder engagement – An umbrella term encompassing a range of activities and interactions between a company and community over the life of a project that are designed to promote transparent, accountable, positive, and mutually beneficial working relationships. Stakeholder engagement includes stakeholder identification and analysis, information disclosure, problem/conflict anticipation and prevention, ongoing consultation, formation of partnerships, construction of grievance resolution mechanisms, negotiated problem solving, community involvement in project monitoring, regular reporting forums and procedures, and other management functions.

Third party/third parties – See intermediary/intermediaries.

Unassisted negotiations – Talks or bargaining conducted by parties to resolve a complaint, grievance, or dispute without the assistance of an intermediary or third party.

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Examples of Community Driven-Grievance Mechanism

1. Ahafo South Mining Project Grievance Mechanism, Ghana

Local residents who file complaints with Ahafo South's Grievance Mechanism retain the right to pursue other forms of legal action at any time during the course of the complaint process.

2. The Hokie Spirit Memorial Fund at Virginia Tech

Following the 2007 Virginia Tech shooting spree in which a mentally ill student killed thirty-two classmates and faculty members, Virginia Governor Tim Kaine set up the Hokie Spirit Memorial Fund to compensate physically wounded victims and family members of the deceased.⁵ Victims and relatives were given three options for redress: compensation programs, restitution, and litigation. Families received \$100,000 compensation packages for a deceased family member, and injured victims were eligible to receive up to \$100,000 (this is Virginia state law's cap on personal injury claims). Furthermore, families of the deceased were able to seek extra money from a \$1.9 million fund created for restitution purposes. These forms of redress did not preclude litigation, as claimants in this compensation scheme "retain[ed] the right to sue in court."⁶ As Kenneth Feinberg's book *Who Gets What* explains, "[A]ll two hundred claimants who received compensation had every right to use the money to hire a lawyer and file a lawsuit against Virginia Tech, [though] only two chose to do so."

3. Hewlett-Packard, Mexico

The complaint process has a number of steps, and both the employee and the company retain the right to pursue litigation at any point throughout the process.

4. Gap, Inc.

Gap's Lesotho branch has grievance mechanisms in place for complaints of varying levels of seriousness and substance. Some of the complaints processes may be accompanied by lawsuits, whereas other sorts of complaints filed may not be. During the appeals process, "All parties can at any time take the dispute to the DDPR or the Labor courts if unhappy with outcomes from factory level processes or Gap Inc's engagement. An agreement under DDPR conciliation is written and becomes binding....It has the same force and effect as an order of a court of law. It can be taken for review by the Labour Appeal Court." The Labour Appeal Court is an institution of the government of Lesotho.

5. Harvard Kennedy School of Government Corporate Social Responsibility Initiative

See also a research paper written by Harvard Kennedy School of Government's Corporate Social Responsibility Initiative, titled "Piloting Principles for Effective Company-Stakeholder Grievance Mechanisms: A Report of Lessons Learned," for the Special Representative of the UN Secretary-General for Business and Human Rights John Ruggie. The Kennedy School carried out five pilot tests with various companies that were interested in creating grievance mechanisms, and pulled lessons from the experiences. The report recommends that entry into grievance mechanisms not preclude litigation. It states, "It is also important to note that while operational level grievance mechanisms can be important complements to wider stakeholder engagement and collective bargaining processes, they cannot, and should not, be used to

substitute for either. Equally important, they should not be used to undermine the role of legitimate trade unions in addressing labor-related disputes, or to preclude access to judicial or non-judicial grievance mechanisms.”

Additional Australian examples:

6. Aboriginal Trust Fund Repayment Scheme

The Aboriginal Trust Fund Repayment Scheme in New South Wales, Australia provides for a payment to indigenous persons or their descendants concerning wages and other money that was held in trust for them by the Aborigines Protection Board or Aborigines Welfare Board but never repaid to them. The scheme does not require claimants who receive a payment to sign away any legal rights. All claimants who receive a payment are still entitled to pursue legal action. This applies to both the initial 2006 scheme (which individually assessed the amount owed to an individual claimant) and the subsequent 2009 scheme which provided for a fixed exgratia payment to each accepted claimant.

7. Victim's Compensation Schemes

Victim's compensation's schemes in Australia generally provide for the payment of compensation to victims of serious crime, assessed by an independent tribunal and paid by the government. The payment of compensation does not affect the victim's right to bring legal proceedings (whether against the government or an individual): *Victims Support and Rehabilitation Act* 1996 (NSW) section 43(2). However, the compensation may be subject to a condition that the compensation be repaid from any subsequent award of damages in subsequent legal proceedings: 34(1) (c) and the government has a right to receive the compensation for any subsequent award of damages: *Victims Support and Rehabilitation Act* 1996 (NSW) section 43(3). Similar provisions apply in Victoria: *Victims of Crimes Assistance Act* 1996 (Vic) section 51 and South Australia: *Victims of Crime Act* 2001 (SA) sections 17 and 28.