

December 4, 2015

Barrick would like to provide some brief preliminary observations on the comprehensive 127-page report by the Human Rights Clinics at Columbia and Harvard Law Schools on the Olgeta Meri Igat Raits ("All Women Have Rights") Remedy Framework at the Porgera Joint Venture ("PJV") gold mine in Papua New Guinea (the "Framework").

As the Clinics acknowledge, the Framework was one of the first operational-level grievance mechanisms established in accordance with the 2011 United Nations Guiding Principles on Business and Human Rights ("UNGPs") specifically to address human rights-related grievances.<sup>1</sup> It was established in response to reports of deplorable sexual violence against women in Porgera and in order to provide Porgeran women with a remedy that they otherwise would not have been likely to receive.

Barrick and the PJV have never claimed, and certainly do not claim today, that the Framework was entirely without flaw. Indeed, with the Framework now completed, we agree with the Report's commentary regarding the inherent challenges for any company to implement an independent claims framework consistent with human rights norms. We acknowledge the authors' observation that those challenges are exacerbated, and perhaps in some respects almost intractable, in an environment as difficult as Porgera. Despite the challenges, however, we have yet to identify a better avenue to providing remedy to potential victims in that locale that would remain consistent with the human rights norms and principles that we believe ought to apply in such cases. This is the regrettable reality of the Porgera context.

We have drawn this conclusion following a studied approach to the issues in 2011 that made clear that many affected women would be reluctant to seek remedy through the legal system or the PJV's existing grievance mechanism for fear of reprisal and re-victimization.

The Framework was therefore developed and implemented in good faith as a committed, meaningful and organized response to deplorable violence against women. It was developed in consultation with experts from PNG, including women's organizations in Porgera, and leading international experts, including the authors of the Report.<sup>2</sup> It was designed to be a sensitive, expeditious and culturally appropriate supplement to Papua New Guinea's judicial system and the existing PJV grievance mechanism, in which claimants could lodge claims in a confidential setting without requiring proof or evidence, and in which considerations about the legal merit of a claim were not taken into account.<sup>3</sup> Claimants receiving remedy packages signed a legal agreement indicating that they had resolved their claims against Barrick and the PJV. Thus, like all settlement agreements, the agreements reached through the

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<sup>1</sup> Columbia Law School Human Rights Clinic and Harvard Law School International Human Rights, *Righting Wrongs: Barrick Gold's Remedy Mechanism for Sexual Violence in Papua New Guinea* (Nov. 2015) ("Clinics' Report"), p. 1.

<sup>2</sup> Clinics' Report, pp. 14 and 46.

<sup>3</sup> The program was implemented independent of the PJV or Barrick, and led by three highly prominent Papua New Guineans: (1) Ume Wainetti, the National Convenor of the PNG Family and Sexual Violence Action Committee, a leading non-governmental organization (NGO) in PNG; (2) Hon. Dame Carol Kidu, a former Minister of Community Development and long-standing member of PNG's National Parliament, and a leader in the fight against gender discrimination and gender based violence in the region; and (3) John Numapo, a highly respected former Chief Magistrate in PNG.

Framework embodied a compromise for both sides; both sides chose the certainty offered by the Framework over the uncertainty that would have otherwise prevailed.<sup>4</sup>

The creation of the Framework has been lauded by many, including by the Report's authors, who note that the Framework stood in "contrast to the overall context of impunity in Papua New Guinea."<sup>5</sup> Others have affirmed the Framework's compatibility with the UNGPs, including the United Nations Office of the High Commissioner for Human Rights (OHCHR) in a 2013 opinion.<sup>6</sup> The Framework provided remedy to approximately 120 Porgera women.

The Clinics' recently-released Report argues that there are lessons, both positive and negative, to be learned from the Framework experience. We view the Report, like the Framework itself, as a source of continuous learning about ways in which Barrick and other corporations might improve grievance mechanisms generally and prevent future grievances and harms. We agree with many of the Report's messages about the criteria that make a human rights grievance mechanism effective and appreciate most of the Report's feedback, both positive and negative.

We note that some of the Report's more negative feedback is in its essence advocacy for the women who resolved their grievances through the Framework. Indeed, the Clinics are clear that they seek for those women: (1) the same amount of compensation which they say was received by 11 other women who settled their grievances outside of the Framework in connection with a threatened lawsuit overseas and who were represented by the non-governmental organization co-founded by one of the Report's authors, EarthRights International ("ERI"); and (2) cancellation of the agreements which confirmed that Barrick and the claimants who received remedy packages under the Framework had finally settled their claims.<sup>7</sup>

We will not respond in full to these or most of the Report's many other findings and recommendations here. As we have previously advised (see [here](#) and [here](#)), an independent review of the Framework is underway that will assess both the outcomes as well as the remedy process itself. Pending release of that report, for now we will offer brief preliminary comments on the three chapters of the Report entitled "Consultations and Rights-Holder Engagement," "Reparations" and "Waiver of Legal Rights and Access to Counsel."

## **A. The Framework Was Based on Consultations and Sensitive Rights-Holder Engagement**

The chapter of the Report entitled "Consultations and Rights-Holder Engagement" is largely complimentary about the Framework. It recognizes that, in designing the Framework, Barrick consulted widely, including with national and international NGOs, the author of the UNGPs, local police and medical experts, and the authors of the Report themselves. The consultations involved a wide range of experts in human rights and gender based violence in particular.

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<sup>4</sup> For more information on the design, development, and preliminary implementation of the Framework, see <http://www.barrick.com/files/porgera/Porgera-Joint-Venture-Remedy-Framework-Dec1-2014.pdf>

<sup>5</sup> Clinics' Report, p. 2.

<sup>6</sup> See: Allegations Regarding the Porgera Joint Venture Remedy Framework, at <http://www.ohchr.org/Documents/Issues/Business/LetterPorgera.pdf>

<sup>7</sup> ERI also represented some of the claimants who received remedies and agreed to finally settle their claims through the Framework.

The Report criticizes Barrick and the PJV for not directly consulting the alleged sexual assault survivors themselves about the design of the Framework. As we have previously explained, Barrick deliberately refrained from contacting likely claimants under the Framework before it was established upon the advice of a number of the experts on human rights and gender-based violence whom we did consult.<sup>8</sup> Those experts suggested that contacting the alleged victims directly would be inappropriate and inconsistent with the confidentiality and anonymity that the women would likely prefer and that would be necessary for the effective functioning of the Framework.

While the alleged victims themselves were not directly consulted on the initial Framework design, they were indirectly consulted by proxy through NGOs aware of their circumstances. Moreover, they were directly consulted once they had registered grievances, inasmuch as they were asked to provide feedback through the assessment team in a confidential matter (in particular through a group of senior claimants who called themselves the "Women Leaders"). As we have previously reported, adjustments were made to the Framework based on alleged victims' feedback during the Framework's operation.<sup>9</sup>

The Report also takes issue with a perceived failure to adequately consult with the Akali Tange Association (ATA), the Porgera Landowners Association (PLOA), and MiningWatch Canada during the design phase of the Framework. We had understood that issue to have been settled by the OHCHR, which in its 2013 opinion concluded that the decision to limit consultations with the ATA and PLOA at the outset did not render the Framework flawed within the meaning of the UNGPs. And while others, including Human Rights Watch<sup>10</sup> and local experts<sup>11</sup>, have expressed reservations about the legitimacy of the ATA and PLOA, the Framework was discussed with representatives of the ATA, PLOA and MiningWatch Canada in late 2012, nearly a year before any claim was resolved.

## **B. The Remedy Packages Provided Appropriate Compensation**

The Chapter of the Report entitled "Reparations" acknowledges that remedies under the Framework entailed all of the international law elements of reparations, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Nonetheless, the Report alleges that, in monetary terms, the amount of remedy the claimants accepted was insufficient, inconsistent and non-equitable.

The total monetary value of the remedy packages offered as a starting place for negotiations under the Framework was determined using PNG civil damage awards for sexual assault as a benchmark or floor.<sup>12</sup> The use of such a benchmark was one of the indicators that led an

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<sup>8</sup> See <http://www.barrick.com/files/porgera/Porgera-Joint-Venture-Remedy-Framework-Dec1-2014.pdf> at 4 & n.3.

<sup>9</sup> *id.*

<sup>10</sup> <http://www.barrick.com/files/porgera/Porgera-Joint-Venture-Remedy-Framework-Dec1-2014.pdf> at 32.

<sup>11</sup> *id.* at 39.

<sup>12</sup> Claims Process Procedure Manual at 6, at <http://www.barrick.com/files/porgera/Claims-Process-Procedures-Manual.pdf> ("According to the international law firm Allens Linklaters, published case law in PNG reflects that in the civil justice system in Papua New Guinea, damage awards for proven instances of rape, similar to those experienced at Porgera, have fallen within an upper range of between 20,000 to 25,000 Kina. In designing a tailored remediation package in conjunction with the Claimant, that range of civil damages awarded by PNG courts for proven instances of rape, similar to those experienced at Porgera, should be considered as a point of reference for the total value of the remediation package").

independent expert to conclude in 2014 that the mechanism was designed to be equitable.<sup>13</sup> Likewise BSR, which conducted an extensive mid-term review, also concluded that the remedy packages contemplated by the Framework, including the use of PNG civil damages awards as a floor, were appropriate and equitable.<sup>14</sup>

In addition, the authors of the Report were informed of the amounts contemplated at least as early as March 2013, more than six months before any claims were resolved. They raised no concern at the time.<sup>15</sup> Moreover, the OHCHR concluded that many of the possible outcomes and remedies under the Framework are "rights-compatible" within the meaning of the UNGPs.<sup>16</sup>

In practice, the claimants who resolved their cases through the Framework – more than 90% of all who received remedy for claimed sexual violence – agreed to remedy packages whose total value were at or above the floor established by reference to PNG judicial practice. All of those claimants also received an identical amount of supplemental compensation following the ERI settlement. The result was remedy packages that we believe are on a par with or generous in comparison to reparations ordered by international human rights bodies in cases involving sexual assault.

The Report does not propose an international norm or standard by which the monetary compensation agreed under the Framework should be judged, but rather claims that it was insufficient when compared with the amount obtained by other claimants outside of the remedy Framework. Specifically, it refers to the 11 individuals represented by ERI who, together with other claimants with non-sexual violence type claims, threatened overseas litigation and resolved their claims outside of the Framework.

However, the two categories of claimants – those who chose to resolve their grievances through the Framework and those who chose not to – are not in comparable situations. As discussed above, the object of the Framework was to create a non-judicial process, in which claims could be considered on an expedited, confidential manner. No proof was required. Claims were considered on an individual basis. Considerations of statutes of limitations and other defenses were not applied. The claims were not investigated. None of that is true for such a threatened legal action; the claims are not confidential, they are subject to a process in which evidence is required, investigation is typical, and legal defenses are evaluated.

The fact that a few others, in a legal action with other types of allegations, may have settled claims for different amounts does not suggest that the amounts received by the more than 90% within the Framework were insufficient, inconsistent or unfair. The Framework should be considered on its own merits, not by reference to a fundamentally different process.

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<sup>13</sup> See <http://www.barrick.com/files/porgera/Porgera-Joint-Venture-Remedy-Framework-Dec1-2014.pdf>, at 50.

<sup>14</sup> See A Summary of Recent Changes to the Porgera Remedy Framework at 1, at <http://www.barrick.com/files/porgera/Summary%20of%20Remediation%20Framework%20Amendments.pdf>

<sup>15</sup> See Letter of 26 March 2013 to Tyler Giannini & Sarah Knuckey; "we have insisted that the Framework participants involved in forming each distinct remediation package bear in mind the range of awards that have been rendered in the Papua New Guinea civil justice system for rape and sexual assault."

<sup>16</sup> See, e.g., <http://www.barrick.com/files/porgera/Porgera-Joint-Venture-Remedy-Framework-Dec1-2014.pdf>, at 49-50.

### **C. It Was Appropriate to Use a Legal Waiver to Settle the Claims With Finality**

In the chapter entitled "Waiver of Legal Rights and Access to Counsel," the Report acknowledges that the OHCHR's opinion indicated that the use of legal waivers to resolve human rights grievances is not incompatible with the UNGPs. However, the Report argues that waivers should be subject to heightened scrutiny and alleges that the waivers used to settle claims under the Framework do not withstand such scrutiny.

Like the standard used to set the floor for the monetary value of the remedy packages offered to the claimants, the waiver used under the Framework was subjected to considerable scrutiny by experts and adjustment during the design phase and during the operation of the Framework. Experts, including the authors of the Report, reviewed early versions of the Framework, and raised no objection to the waiver provision at that time.

The Clinics raised concerns about the waiver for the first time following the settlement by claimants represented by ERI outside the Framework. They now suggest that it be rescinded on the grounds that inadequate safeguards allegedly were in place to ensure that the waiver was rights-compatible.

Yet before signing, claimants had the opportunity to consult with advisors of their choosing (at the Framework's expense), or an independent legal advisor provided through the Framework. While the Report now criticizes this approach, its authors did not do so when initially assessing the design of the Framework and the OHCHR did not find fault with that design either. Moreover, some of the claimants who settled under the Framework were represented by ERI, which would seem to eliminate any representation concerns. Other claimants, according to the Report, spoke with the authors of the Report themselves during the process. Many also were expressly asked, weeks after they signed their agreements in Fall 2013, if they wished to rescind them and none expressed an interest in doing so.

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While we will reserve further commentary until after the release of the independent report, we wish to reiterate our strong commitment to respecting the human rights of the individuals and communities affected by the operations of PJV. This commitment includes providing access to remedy consistent with the UN Guiding Principles, even in the difficult environment of Porgera, which the Report concedes is one in which sexual violence is prevalent and there is limited access to judicial remedy.

We are continually striving to improve Barrick's grievance mechanisms to ensure that they are able to provide remedies in a fair, transparent and expeditious manner in response to acts of violence. We hope that those grievance mechanisms, as well as other future mechanisms, will be improved through the experience of the Porgera Framework and we appreciate the Clinics' own efforts in that regard.