

Concerns regarding the Remediation Framework for Women Victims of Sexual Violence by Porgera Joint Venture Security Guards¹

January 28, 2013

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) raise concern that the framework does not reflect best practice and is not sufficiently protective of the rights of the women who have been harmed by sexual violence at the hands of Barrick 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].

Two specific comments merit expansion here:

I) On consultation and trust building

Barrick's public release regarding the remediation framework, dated 23 October 2012, maintains that Barrick has adopted an approach that is 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)). It is unclear whether Barrick consulted with women who have been victims of violence by Barrick's security guards.² It is clear that Barrick chose **not** to consult the Akali Tange Association, a grassroots and 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 JPV security for many years. Similarly the Porgera Landowners' Association, as a representative body of the Porgera community and as an organization that has been publicly raising the issue of violence by PJV security guards for many years through its chairman Mr. Mark Ekepa, should have been consulted.

The lack of consultation and inclusion of these local organizations in the development of the Framework has consequences in terms of lack of trust in the remedy process.

Recommendations:

- The Framework should, minimally, provide a more comprehensive historical account of the efforts to alert Barrick to these abuses made by organizations, such as those named above, as well as the International Human Rights Clinic at Harvard and the Center for Human Rights 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, PLOA, and possibly victims of violence themselves, Barrick should commit to an immediate review of the remediation process by an independent panel, which should include local stakeholder groups.

II) Women should not be asked to sign away rights

The Framework is promoted by Barrick to female victims of violence as "upholding your rights and protecting your dignity". However, The Framework is more protective of Barrick's interests than of the rights of the women the process should serve. It does not conform to best practice. Nor does it conform to the United Nations Guiding Principles on Business and Human Rights (GPs) which Barrick references.

¹ This background text is modified from a brief prepared by claimants and their advisors involved in a complaint filed with the Canadian National Contact Point for the OECD Guidelines. See - http://oecdwatch.org/cases/Case_210

² The Framework notes that Barrick consulted with unspecified "community based organizations" (footnote p. 10) and with the Porgera Women's Development Association" (footnote p. 10).

Women should not be required 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 A** below.

Barrick maintains that remedies are independently determined by the Complaints Assessment Team (CAT) and an independent expert. This, of course, is necessary to the legitimacy of the process; it protects not only the victims, but Barrick. If fair remedies are provided, there will 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 states is to ensure the welfare and safety of the individuals who have been the victim of sexual assault by the PJV) provides: a) trauma response services; b) psychological counselling; or c) health care; only if the victim first signs a release of potential claims against Barrick.

Recommendations:

- Barrick should remove the requirement for women to sign away rights to future legal action against Barrick or PJV.
- Barrick should allow 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 offer female victims the opportunity to meet with advisors from the Harvard and NYU human rights clinics who have a long-standing involvement with the women victims of Porgera.

Summary of Concerns³

- The Framework should consistently refer to “sexual violence,” as defined in footnote 13, (as opposed to the narrower term “sexual assault”) so that it is clear which offences will be included in the remedy mechanism.
- The Framework maintains too narrow a definition of “employee.” The Framework should cover sexual violence by all employees of PJV including contractors.

³ This list is not comprehensive but rather highlights key concerns.

- The Framework and remediation mechanism should cover sexual violence by members of the Mobile Units in cases where these Mobile Units are housed, fed and financially supported by Barrick/PJV.
- The Framework should not limit the locality of offenses to the “Porgera mine site” a term that is not well defined and may not capture all offences that should be eligible for remedy.
- Given the significant hurdles that limit access to justice for women who have been subjected to sexual violence the remedial mechanism should not set an arbitrary deadline for the occurrence of incidents of December 31, 2010, after which cases may or may not be considered eligible on a ‘case by case’ basis, but should remain in place to handle any meritorious claims that may arise.
- Having failed to consult the local organizations Akali Tange Association and the Porgera Landowners Association, both of which have 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 these organizations are consulted about and have a meaningful role to play in the remediation mechanism, for example by representation in the governance structure.
- Barrick should put a system in place to improve consultation with Akali Tange Association and the Porgera Landowners Association about all aspects of violence related to Barrick’s personnel at the PJV mine.
- Women who participate in the remediation mechanism should either be provided a guarantee of confidentiality or should be informed that the process does not provide confidentiality. Given the very real dangers women face that come forward on such claims, more detail needs to be provided on measures that will be taken to ensure confidentiality.
- With regard to the independence of the PRFA management and assessors of the women’s claims we do not think the current language excluding employees and officers of Barrick/PJV is sufficient to ensure avoidance of conflict of interest. A more extensive conflict of interest policy needs to be adopted for all persons involved in the assessment process.
- The remediation process is overly complex and involves an unnecessary number of newly established bodies to administer the process.
- There are inconsistencies on the eligibility criteria as to whether the assault has to have occurred at the mine site or not. The wording in section 3.1 on page 11 stated that the assault must have taken place “at the Porgera mine site”. However, page 22 (under the heading “Eligibility”) stated that the assault was eligible “regardless of where the assault had occurred”.
- There should be a method to shortcut the process for victims where Barrick has already taken disciplinary action against security personnel for assaults. As Barrick already accepts that there is credible evidence of an assault (in order to have taken disciplinary measures), it should not require those victims to tell their story to a new interviewer, with the associated trauma which that involves.
- There is insufficient information regarding “claimant representation” as discussed on page 20 of The Framework. May legal representatives present claims for victims, or a community or NGP representative?
- There is a lack of information on the selection process for persons involved in the assessment of claims process. In particular there is no information on the role of community involvement.
- There is lack of information on the structure and composition of the PRFA management committee. Does this include representatives of all key stakeholder groups? Are stakeholder groups able to choose their own representatives? Best practice indicates the importance of having persons selected by all stakeholder groups involved in such processes.
- There is a lack of information about how the management committee will operate.
- There is a lack of information on the nature of the contract with the Independent Expert and of the Review Panel members and under what circumstances their tenure may be ended.
- The Expert Advisory Group should include a spectrum of organizations that have shown a concern for the issues of violence against women in Porgera, including those with which Barrick has failed engage in the past.

- There is a lack of information regarding the funding available for this process and guarantees (irrevocable funds etc.) that will ensure that the funding will be available to victims even in the case of non-compliance of PRFA.
- There is lack of information on how the process will ensure that the remedy victims receive is fair, proportionate to harm, and based on fully informed participation of the victims. How will CATs and key decision-makers be guided in awarding remedies (both the nature and quantum of compensation)? How will consistency be ensured for like claims? What sorts of payouts can claimants expect (eg is there a minimum or maximum cap)?
- There is a lack of information about whether Barrick consulted with victims about remedy options in developing The Framework.
- The preferencing (in terms of legitimacy criteria) of claims based on prior reporting to civil society group or investigation by Ila Geno disadvantages women who may have felt a legitimate need to keep silent but whose claim has merit.
- ACT officers appear to have conflicting responsibilities of assisting women in preparing and lodging a claim (page 20) and then making an assessment of the merit of the claim.

Appendix A

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.⁴

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

⁴ Newmont Ghana Gold Ltd., “Public Consultation and Disclosure Plan: Ahafo South,” at 38, (2005), available at http://www.newmont.com/sites/default/files/PCDP%20final%20082905_0.pdf.

⁵ Brenda Waugh, *Who Will Choose the End Words? Structuring Justice Amid Tragedy*, Washington University Law Journal of Law and Pol’y, 141-177, 141 (2011).

⁶ See Kenneth R. Feinberg, *Who Gets What, The Hokie Spirit Memorial Fund*, at 81.

Hewlett-Packard has established a grievance mechanism for HP Mexican factory workers to file complaints.⁷ 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.⁸ 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.⁹ The Kennedy School carried out five pilot tests with various companies that were interested in creating grievance mechanisms, and pulled lessons from the experiences.¹⁰ 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."¹¹

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 ex-gratia payment to each accepted claimant.

⁷ Human Rights and Business Dilemmas Forum, "Freedom of Association: Addressing Grievances in the Workplace," http://human-rights.unglobalcompact.org/case_studies/freedom-of-association/freedom_of_association/addressing_grievances_in_the_workplace.html

⁸ See generally Caroline Rees and David Vermijs, "Mapping Grievance Mechanisms in the Business and Human Rights Arena" at 15, John F. Kennedy School of Government (2008) available at http://www.hks.harvard.edu/mrcbg/CSRI/publications/Report_28_Mapping.pdf.

⁹ Caroline Rees, *Piloting Principles for Effective Company-Stakeholder Grievance Mechanisms:*

A Report of Lessons Learned. CSR Initiative, Harvard Kennedy School, 5 (2011) available at <http://www.business-humanrights.org/media/documents/ruggie/grievance-mechanism-pilots-report-harvard-csri-jun-2011.pdf>.

¹⁰ *Id.* at 32–92.

¹¹ *Id.* at 9 (underlines added).

See: http://www.atfrs.nsw.gov.au/frequently_asked_questions
http://www.dpc.nsw.gov.au/_data/assets/pdf_file/0016/15541/Guidelines_for_the_Administration_of_the_NS_W_Aboriginal_Trust_Fund_Repayment_Scheme_-_30_June_09.pdf

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: s34(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.