Barrick Consultant Delivers Biased Report on Inequitable Remedy Mechanism for Rape Victims

This review critiques Enodo Rights' report and provides an independent assessment of key failures of Barrick's remedy framework and its implementation at the Porgera mine in Papua New Guinea

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March 14, 2016

In 2015, Barrick Gold chose consulting firm Enodo Rights (Enodo) to carry out a review, paid for by Barrick, of Barrick's controversial remedy mechanism for victims of rape[1] by mine personnel at the Porgera Joint Venture (Porgera) mine in Papua New Guinea (PNG). The recently released Enodo review is facing substantive criticism (see also here).

MiningWatch Canada has researched and exposed sexual violence and other forms of excessive use of force by Porgera mine security and police guarding the mine for a decade. Our work on these issues started years before Barrick acknowledged human rights abuses by mine security and continued through Barrick's implementation of a flawed remedy mechanism for rape victims. Barrick's remedy mechanism resulted in compensation that is contended by the rape victims and legal immunity for Barrick from civil suits by the victims.

Following unsatisfactory exchanges with Enodo and with Barrick concerning proposed methodology and scope for the assessment, MiningWatch Canada declined to be interviewed. Other international organizations with a similarly long history of engagement with the human rights abuses at the Porgera mine arrived at the same position (see critical statements from MiningWatch, and from faculty at the human rights clinics at Harvard and Columbia universities (the human rights Clinics) here and here).

Barrick and Enodo also rejected important advice offered by the Office of the High Commissioner for Human Rights (OHCHR) in 2013, while the remedy mechanism was being implemented. The OHCHR had recommended that:

> *...efforts should be made 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.*

[1] The remedy mechanism was supposed to accept claims from victims of sexual violence, but in practice it only considered victims of rape or gang rape.

Barrick chose to ignore this recommendation from the OHCHR for an interim review of the remedy program. However, the advice on *process* for such a review remains relevant.

The process for choosing reviewers suggested by the OHCHR provides a positive response to a long-standing concern regarding potential bias in environmental, and now human rights, assessments in which the assessors are chosen, as well as paid for, by mining companies. The value in following the OHCHR's advice should have been recognized by Enodo, particularly as it was raised early on by both MiningWatch and by experts at the human rights law clinics at Harvard and Columbia. Enodo was comfortable with being handpicked by Barrick with no input from the victims or from highly engaged and expert stakeholders. Apparently, so was the "External Committee" to the assessment process, also chosen by Barrick: Chris Albin-Lackey of Human Rights Watch; Lelia Mooney of Partners for Democratic Change; and Dahlia Saibil of Osgoode Hall Law School. The Enodo report says that their "guidance helped structure the assessment, sharpen our methodology, and hone the final report."

Before detailing our concerns with the Enodo report and with the remedy mechanism, and providing some recommendations, it is worth highlighting two previously published reviews of Barrick's remedy mechanism in Porgera by prominent human rights experts at Harvard and Columbia.[2] Unlike the Enodo report, these reviews are based on many years of fieldwork with victims of sexual violence in Porgera, both before and during the implementation of Barrick's remedy mechanism. These reviews provide detailed and strong critiques of the remedy program rooted in human rights principles and law. Both reviews also present a balanced and fair assessment of the various actors, including MiningWatch, that were involved in field assessments in Porgera and in raising awareness outside of PNG, first of the rapes conducted by security guards and police at Barrick's Porgera mine and, subsequently, of flaws in Barrick's remedy mechanism.

Patterned Bias, Factual Inaccuracy, and Unsubstantiated Opinion

In its first blog response to the Enodo assessment, EarthRights International notes Enodo's attacks on certain organizations: "why does Enodo target its vitriol at the efforts of NGOs – notably the advocacy group MiningWatch Canada… This seems like a deeply inappropriate swipe at a group that has been advocating on human rights issues in Porgera since the days when Barrick was denying that there were any problems." EarthRights' critique points to a pattern of bias that runs deep throughout the Enodo report's analysis and use of language.

Bias is expressed both in an overly positive appraisal of the Framework of the remedy program, designed by Barrick, and in unsubstantiated and prejudicial allegations against a plethora of "others" for the serious failures of the remedy mechanism. We take issue with both un-nuanced positions.

Key decisions made by Barrick and incorporated in the remedy Framework were non-rights compatible; others led to predictable non-rights compatible outcomes. Barrick stuck to these Framework provisions, even as independent assessments by MiningWatch the Harvard and Columbia human rights clinics and EarthRights International raised concerns based on outcomes they witnessed in Porgera. Many of the broad allegations Enodo makes against a wide number of "others" lack factual accuracy and substantiation and fail to recognize the value of the various roles these stakeholders played, including often freely providing independent critical assessments of the remedy Framework and its implementation.

Enodo's bias in favour of Barrick's Framework

[2] See also, Sarah Knuckey & Eleanor Jenkin (2015) Company-created remedy mechanisms for serious human rights abuses: a promising new frontier for the right to remedy?, The International Journal of Human Rights, 19:6, 801-827, DOI: 10.1080/13642987.2015.1048645. To link to this article: http://dx.doi.org/10.1080/13642987.2015.1048

Enodo's narrative is consistently one of noble intentions of Barrick, undermined by various "others." According to Enodo, Barrick's earnest good intent is reflected in the Framework document, the "design" of the remedy mechanism; "[d]esign refers to the Framework's blueprint in the foundational documents developed by Barrick" (p. 2). Enodo concludes that:

> *The Framework was conceived with sincere and considered commitment to the Guiding Principles [UN Guiding Principles on Business and Human Rights]. Barrick's design should be lauded for its rare ambition and meticulous attention to claimants' rights. (p.2 – for more praise of the Framework document see also pp's 3, 6, 30, 33, 34, etc.)*

Enodo's praise downplays serious non-rights compatible decisions Barrick made regarding the Framework, including the narrow scope of the remedy mechanism that focussed on victims of sexual violence by mine security alone, leaving out many women who had been sexually assaulted by police guarding the mine under an MOU between the mine and the PNG State, and also excluded men who were victims of excessive use of force by mine security and police guarding the mine. Barrick maintained this narrow focus even as its inequity was pointed out early in the mechanism's implementation by MiningWatch and others. Furthermore, the narrow focus on victims of sexual violence made women who accessed the program more vulnerable. Barrick's insistence on receiving legal waivers from all women who accepted a remedy package, forced the remedy mechanism to take on complex adjudicative structures and procedures that, unsurprisingly, failed and led to lack of procedural fairness for the claimants. We discuss these issues further below, as well as problems related to the remedy offered.

Enodo finding fault

While Enodo cannot ignore obvious failures of the remedy mechanism, Enodo commonly wicks blame for these failures away from Barrick and onto various "others" with a focus on the mechanism's flawed implementation. Enodo notes that:

> *The Framework's effectiveness with reference to GP 31 [Guiding Principle of the Guiding Principles on Business and Human Rights] and its design was compromised in a number of ways during implementation. These errors likely undermined the Framework's legitimacy. (p. 118)*

Some of those Enodo singles out for blame are the various agents chosen by Barrick, or by Barrick's consultants, to implement the remedy process: the Porgera Remedy Framework Association (PRFA), Cardno Emerging Markets (Cardno), the Claims Assessment Team (CAT), and the Independent Legal Advisor (ILA). Enodo notes:

> *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. (p.5)*

MiningWatch was aware of failures in the implementation of the remedy program; we raised these concerns repeatedly and publicly at the international level while the program was being implemented. Part of the mechanism's problem was the very complexity of the remedy program's structures and processes, which were set out in Barrick's Framework. These set the program up to fail even the narrow subcategory of victims of sexual violence it was designed to remedy (victims of sexual violence by mine security). These complex structures were a direct result of Barrick's desire to create an adjudicative mechanism that would make the legal waivers that Barrick sought from women at the end of the process unassailable.

Additionally, Enodo disparages the leadership of local male-led organizations. The grass roots human rights group Akali Tange Association (ATA) and the Porgera Landowners Association (PLOA) were aware of the remedy program at a very early stage through their long-term direct support of the rape victims and critical engagement with Barrick. Enodo does not acknowledge that the leadership of these two organizations had supported women raped by mine security and police guarding the mine, many of whom came to these organizations for help, for many years before Barrick acknowledged the rapes. Human rights experts Knuckey and Jenkin (2015) note of these organizations that:

> *Many of their members have been the most important local stakeholders advocating an end to and redress for security guard violence. It is indisputable that these groups have been the primary actors engaged on issues of human rights at the Porgera mine, are trusted by many victims, and deserve significant credit for the fact that international groups and Barrick itself even became aware of the abuse allegations. (p.806, emphasis in original)*

At least Enodo acknowledges that it "relied on the assistance" of the current leadership of ATA and one former leader in order "to ensure that unsuccessful claimants participated in the interviews" (p.25). This acknowledgement underscores an important fact that those who have researched and reported on sexual violence by mine security and police guarding the Porgera mine have always, whether directly or indirectly, relied on support of members of these organizations to be able to do their work, even when not all have been willing to acknowledge this fact.

Leaders from ATA and PLOA travelled to Canada four times in consecutive years, starting in 2008, to attend Barrick's annual shareholder meetings where they spoke directly to the assembled shareholders and Barrick's board of directors about the rapes, as well as about alleged killings by security forces at the mine, house burnings, and other serious problems associated with the mine's operations. They also met repeatedly with Canadian Members of Parliament, civil servants, and the Canadian media on the issues of the rapes, in an effort to get public attention for the problem in the years when Barrick maintained a position of complete denial. The OECD complaint ATA and PLOA filed in March 2011, with MiningWatch, included the rape issue. Enodo knows, and Barrick has oft repeated, that although Barrick did not consult the leadership of ATA or the PLOA in the drafting of the remedy Framework, Barrick did discuss it with them early in the implementation of the program. There is no doubt that without the support of ATA and PLOA even fewer eligible women would have accessed the remedy program.

Finally, Enodo regularly blames negative outcomes on "international stakeholders." Often these are broad swipes at unnamed organizations with no factual evidence or substantiation to back them up. In noting the sad fate of women who went through the remedy program Enodo says that:

> *…many were left disaffected, stigmatized and abused. Responsibility for these results is not the Framework's alone. It should be shared by international stakeholders whose errors of judgment and unwillingness to engage in good faith exacted a great toll on claimants. (p.2)*[3]

Presumably, Enodo is referring to MiningWatch Canada, the human rights Clinics and EarthRights International. The latter tried to represent a number of claimants in the remedy program and ultimately won much higher out of court settlements for 11 women. Each of these organizations receive disparaging treatment, individually or jointly, at different times in the report. Enodo fails to acknowledge and appreciate the services these organizations provided through their continuous work with rape victims and remedy mechanism claimants in Porgera and by reporting out on the problems with the remedy mechanism as it unfolded. It can hardly be held against these organizations that few of the serious issues they raised were resolved by Barrick as the program was being implemented resulting in the failures of the mechanism that Enodo must acknowledge.

Setting the record straight

[3] Enodo interviewed 62 of the 119 successful claimants.

As noted by EarthRights International, Enodo takes its bias against "international stakeholders" to a remarkable extreme in regard to MiningWatch; particularly in a malicious attempt to implicate MiningWatch in what Enodo recognizes as "horrific results" of Barrick's remedy program. In the report's executive summary Enodo states:

> *A number of women claim to be worse off now than before approaching the Framework: their families assaulted them, their money was taken, their husbands left them, and they are now pariahs in their community. Responsibility for these horrific results is not the Framework's alone. It must be shared with certain international stakeholders who helped ensure that the Framework was (i) known about by all men in Porgera and (ii) that Framework remedies would expose claimants to substantial risk of heinous abuse. In this regard, MiningWatch Canada played an important role. Despite the advice of women's leaders in Porgera that secrecy was essential to protect claimant security, MiningWatch publicized the Framework widely, facilitating community stigma for all claimants and exposing them to the risk of physical abuse for surviving sexual violence. (p.5)*

This statement is factually incorrect and the defamatory causal link Enodo conjures here between MiningWatch and abuse of rape victims is completely unsubstantiated in fact or in the Enodo report.

Firstly, MiningWatch **never "publicized the Framework widely"** in Porgera, nor its associated remedy mechanism. The very fact that MiningWatch was highly critical of the Framework and of its implementation, a fact recognized by Enodo, was reason enough for MiningWatch **not** to publicize the Framework or the remedy program in Porgera. In our ongoing interviews with victims of sexual violence by mine personnel and by PNG police guarding the mine, we encountered women who were unaware of the program. Notably, **lack of awareness** of the program was apparent to those of us conducting interviews with victims of sexual violence and is recognized as a concern by Enodo. In one village alone close to the mine Enodo discovered 13 women who had "never heard of the Framework or only heard of it relatively recently, and who believed they had legitimate claims" (p.76). In order to ensure that the women we interviewed were at least aware of all options available to them, we informed these women *privately* of the remedy mechanism, in spite of our misgivings about the program. Enodo's statement is further misleading by implying that MiningWatch ignored advice by "women's leaders in Porgera" regarding the need for secrecy. "[W]omen's leaders in Porgera" never communicated a need for secrecy to MiningWatch.

Secondly, MiningWatch's detailed written critiques of the remedy Framework started in January 2013, when the remedy program was already underway in Porgera and months after a Barrick official had communicated, in November 2012, that the full Framework document was among "public documents" that could be circulated. Previously, as Enodo notes, "information about the Framework was being posted online from at least 22 October 2012, when Barrick published the Framework Backgrounder" (p. 75). In January 2013 MiningWatch issued a joint press release with two other organizations and detailed our concerns with Barrick's Framework in a background document. Our ongoing written critiques of the Framework, and of the program's implementation, based on our ongoing human rights field assessments, shared space with numerous public communications by other organizations and individuals, including Barrick itself.

Enodo makes no effort to substantiate the slanderous innuendo in its executive summary. Enodo does not provide any evidence that anyone who abused a claimant did so as a result of any activity by MiningWatch.

Enodo knows better

It is unconscionable that Enodo tries to divert responsibility on to MiningWatch for the many decisions made by those **directly involved** in designing and implementing the program; including decisions that made women who participated in the program particularly vulnerable.

For example, as Enodo knows, the office to which women were to report to file their claims was off the main street in Porgera Station where their coming and going could be witnessed by all. This is significant in, as Enodo puts it, "an intimate community like Porgera, where nothing remains confidential" (p.4). The claimants visibility was further increased as the remedy program required that they return numerous times and even attend a five day workshop locally before receiving the remedy allotted to them in return for signing a legal waiver for Barrick. At one point, Barrick realized that the information the women had already received about Barrick's required legal waiver had to be changed, because it wrongly aimed to bar them from taking part in criminal action that may be brought by the PNG state, or any other state. This gaffe led to yet another approach to many of the women to get them to sign another document to acknowledge that they had been provided new updated information on the waiver.

Furthermore, as the program was restricted to victims of sexual violence, one of the features that MiningWatch consistently critiqued, there could be no doubt as to why the women were entering the office, greatly increasing their vulnerability. The Enodo report makes a further unsubstantiated assumption that, as staff in the office the rape victims reported to were locals, "they were likely to reveal to others in the community what they were doing" (p.75).

Remedy and Rights Compatibility

Remedy based on claimants' wishes

MiningWatch started to interview victims of rape by mine security and by police guarding the Porgera mine in 2008, years before Barrick admitted the rapes were occurring. Over the years we asked rape victims "what do you need to address the harm caused by your rape/gang rape," and, in addition to that, "what is a just compensation to you?" Two things stand out in the answers to these questions:

1) women's answers regarding what they needed as reparation for the harm caused by their rape varied considerably including, for example: emphasis on health care; the need for young girls to finish education; relocation out of the community; secure housing (as they had been forced out of their home); an independent source of income; 30 pigs to be able to pay compensation to the husband's family for the loss of a child that drowned in the mine waste while the woman was being gang raped;
2) in terms of compensation, **women nearly always said that just compensation should include pigs and cash.**

It was clear early on in its implementation that the remedy program was not tailoring remedy to individual needs, 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.

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." 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.

The Enodo report emphasizes advice experts gave Barrick not to include pigs or cash in the remedy packages offered in the Framework, for fear that this would expose the claimants to abuse by family members and others seeking to appropriate the women's remedy. Nonetheless, the 119 successful claimants ultimately received **mainly cash** through the remedy program, 20,000 Kina, in addition to a promised package of items such as medical care, counselling, school fees, and business training amounting to a value of another 3,630 Kina on average (there is some indication that these latter items are not all being delivered). Following completion of the remedy program (which was designed to be short term rather than open ended), Barrick provided the women with an additional 30,000 Kina "top up," which we discuss further below.

True to form, when Enodo expresses to be confused about why Barrick chose a particular course of action, the default is to point a finger at outside forces.

Enodo repeatedly points to "external pressure" (see for example p. 76) as the main reason the remedy ultimately included a large cash component stating that "international pressure appears to have changed the Framework's formal posture" (p.67) and "it is difficult to understand the change in policy save as a result of external 'pressures'" (p.67). Enodo mainly attributes the decision to provide victims cash to pressure from MiningWatch and the Harvard and Columbia human rights clinics and EarthRights International: "In terms of remedy, as discussed above, the award of cash as "culturally appropriate", was strongly encouraged by MiningWatch, the Clinics and EarthRights" (p.114). Furthermore, Enodo closely links this advocacy by "international stakeholders" to the abuse some of the women faced as a result: "[c]oncerted pressure on the Framework to issue cash compensation was even more pernicious for claimant security" (p.6).

Clearly, our reporting that victims' commonly requested cash as part of their compensation is in no way responsible for the way Barrick decided to implement a one-size-fits-all distribution of cash to claimants with apparently no consideration for individual victim's requirements or their own individual recommendations on how they might best receive these payments.

Furthermore, as we discuss below, there were, for Barrick, far more compelling reasons to provide cash payments than the interview findings of MiningWatch and the human rights Clinics that the victims commonly requested cash.

The real reason the claimants ultimately got cash

The weight of evidence points to much stronger forces at work that led Barrick to decide to provide cash to the victims, rather than MiningWatch's, the human rights Clinics', and EarthRights' concern for the victims' own wishes.

It is worth taking a closer look at this issue:

1) As noted above, Enodo does not dispute that the claimants themselves repeatedly asked for cash as part of their compensation: "[t]he request for cash from claimants was a constant" (p.67);
2) The final remedy Framework, designed by Barrick, notes: "there are compelling reasons for including awards of cash among the potential remedies";
3) Barrick's internal interim review of the program (the report was not released but some summary findings were made public) by consultant's BSR recommended "[i]ncluding cash compensation as part of the remedy";
4) Enodo quotes one of the independent arms-length implementers of the remedy program as saying: "[a]s a Board, we had never taken cash off the table; so, when women kept asking for it, we gave it to them" (p.67);

5) Once the program was being implemented, it became evident that it would be difficult to attain Barrick's lower value bar of 20,000 – 25,000 Kina by providing only the non-cash items on offer through the remedy program without a significant cash component. Enodo notes Barrick interposed in the supposedly independent implementation process and "emphasized to the PRFA [Porgera Remedy Framework Agreement, an implementation body] that cash should be an option and that the remedy packages should respect the Framework's threshold value" (p.67).
6) Enodo acknowledges that: "[f]rom a practical perspective, respecting the Framework's threshold award values may have been insuperably difficult without substantial cash or other fungible remedies" (p.67).
7) Enodo implicitly acknowledges that what really drove the cash payments was Barrick's ultimate desire to get legal indemnity through waivers from the rape victims:

> *The point here is not that the decision to award cash compensation was flawed from a Guiding Principles perspective. (**In light of the waiver, it can legitimately be argued that the award of cash was essential for the remedy to be rights compatible**)(p. 122, emphasis added).*

This information provided by Enodo more than adequately explains why the remedy packages ultimately relied heavily on cash payments as a direct result of legitimate demands made by claimants themselves and decisions made by Barrick to try to legitimize legal waivers. Points 5, 6, and 7 above are particularly important and are further examined in the following segment.

It is clear that Barrick's concern with meeting minimum value thresholds in the remedy packages was directly related to <u>Barrick's goal of making the legal waivers requested from each claimant unassailable.</u>

Sexual violence victims continue to demand remedy parity

Enodo's emphatic effort to link cash payments to actions by "international stakeholders" does a disservice to the critical agency of the rape victims themselves: an agency that continues to gather strength in the wake of the flawed remedy program.

As Enodo notes, EarthRights International represented 11 rape victims, some of whom had rejected the packages offered through the remedy program in order to seek justice through representation by independent legal counsel. Barrick settled with each of these women for a reported 200,000 Kina. As a result of subsequent pressure from the 119 successful claimants of the remedy program, who had each received approximately 20,000 Kina, Barrick arbitrarily provided these claimants with a subsequent "top up" of an additional 30,000 Kina, more than doubling the original cash payment. Presumably the women were again required to sign a legal waiver granting Barrick and PJV legal protection from future civil suits by these women.

Enodo's biased treatment of various actors is evident here again. Enodo carefully avoids smearing Barrick with the same accusations hurled at MiningWatch and other "international stakeholders," which Enodo implicates in abuse of some claimants following their initial cash payments. Enodo does not question why Barrick provides women – who Enodo says were abused as a result of a previous cash payment – with even more cash. Enodo avoids any comment by simply saying: "[f]or the purposes of this assessment, however, we do not consider the top-up payment as part of the Framework, as it was exogenously imposed in the wake of Barrick's settlement with the ERI Claimants" (p. 15). But in fact, the 30,000 Kina top-up was distributed through the remedy program on PRFA letterhead.

More significant than Enodo's preferential treatment of Barrick is the fact that Barrick's sudden 30,000 Kina top-up for the claimants was the result of very strong and concerted agency by many of the 119 claimants. These claimants have organized themselves, sometimes calling themselves "the 120," have taken joint action, such as occupying the grievance office, and they continue to demand remedy parity

with the 11 claimants represented by ERI. The women themselves achieved the 30,000 Kina top-up as a result of their own agency. Furthermore, in spite of apparent abuse suffered by some of the women as a result of their initial cash remedy, their agency continues as they are still pushing for true remedy parity.

Although Barrick maintained that there was "no ceiling" on what the women could receive through the "arms-length" remedy mechanism, Barrick has now imposed a ceiling by stating that the company will not provide any further funds to the claimants, leaving them at a clear disadvantage compared to women who benefitted from truly independent legal representation and received four times more remedy.

Enodo decides women have had enough remedy

Finally, Enodo develops an elaborate argument to assert that the remedy the women ultimately received is rights compatible. In making this case, Enodo includes the 30,000 Kina top up (p.106), which, as noted above, Enodo said (p.15) it would not consider in its review of the Framework.

Enodo's vigorous defence of the value of the ultimate compensation women got is integral to Enodo's equally vigorous defence of Barrick's use of legal waivers (see next segment).

Knuckey and Jenkin, however, point out that "the amounts offered through the mechanism and to which claimants agreed, were considerably smaller than those which would typically be awarded to victims of grave sexual assault in Barrick's home state of Canada, or in the United Kingdom, Australia, or US courts" (2015:810).

Based on human rights law and precedence, EarthRights International contests Enodo's arguments regarding the rights compatibility of the remedy noting that

The Problem of Legal Waivers

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.

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.

Human rights or corporate-centred realpolitik?

Enodo repeatedly asserts that Barrick's waiver requirement was in conformity with human rights. Enodo's position on the issue of the waiver relies heavily on a brief provided by the OHCHR in 2013 in response to MiningWatch's letters raising various concerns about the remedy mechanism. In regard to the waiver issue the statement of the OHCHR is contradictory in nature. Based on **human rights principles**, drawn from legal standards regarding post-conflict state-based remedy programs, the OHCHR notes that "the presumption should be that as far as possible, no waiver should be imposed on any claims settled through a non-judicial grievance mechanism." But then the OHCHR notes that this human rights principle can be set aside in order to address **corporate interests** by adding: "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."

Knuckey and Jenkin (2015) question "whether there is a legal basis for transplanting legal standards from post-conflict state-based reparations schemes directly to CHRMs [company-created human rights abuse remedy mechanism] (p.811). They also question "whether the factors posited in favour of finality in post-conflict state-based reparations schemes also apply to CHRMs," which they conclude "do not clearly map onto mechanisms created by corporations to provide remedies for human rights violations" (Knuckey and Jenkin 2015:811-812).

Enodo argues that "[t]he OHCHR concluded that the inclusion of the waiver clause in the settlement agreement did not infringe on the right to remedy under international law" (p.107) and that the value of the remedy offered makes the waiver acceptable in implementation: "We therefore find that the waiver did not adversely impact the right to remedy in implementation" (p. 107). It should be noted that the OHCHR did not pronounce on whether waivers were acceptable in the Porgera case specifically, as the OHCHR acknowledged not to have knowledge regarding the implementation of the remedy Framework.

The OHCHR's opinion posits that a human rights principle – the presumption against the use of waivers in non-judicial mechanisms – can be set aside on the basis of corporate interest alone. This position is coming under fire by human rights experts (see for example Knuckey and Jenkin 2015:208) and is clearly not the final say on this issue. Furthermore, as noted in the close of the previous section, EarthRights International disputes the arguments Enodo has put forward to assert that the value of the final compensation paid to the 119 rape victims is rights compatible making the waiver acceptable on that basis (see also here). Finally, the claimants themselves are clearly indicating that they are not satisfied with the remedy they received.

Both the opinion of the OHCHR, which weighs corporate interests in a discussion of the human rights of extremely poor and vulnerable victims of a gross violation of human rights, and Enodo's arguments that conclude that the Porgera rape victims have received enough remedy, regardless of the victim's own opinions, raise questions of how corporate power is influencing human rights discussions now that corporations are being asked to respect human rights.

Another example of this corporate-centred approach to human rights is Enodo's response to MiningWatch's position that the legal waivers only provide value to the Barrick, while they imposes an additional cost on the victims who lose the opportunity to pursue civil claims against Barrick. MiningWatch argued as early as January 2013, that the waivers are not necessary to protect Barrick from so-called "double dipping" by the rape victims, as there are numerous examples of non-judicial agreements that allow victims to subsequently pursue legal action under the understanding that any legal settlement achieved would be reduced by the amount of remedy previously received in the non-judicial setting. Knuckey and Jenkin also provide an example along these lines (2015: endnote 76).

The waivers are clearly of interest to Barrick purely for the protection they provide the company against potential legal action by the rape victims.

Enodo vigorously dismisses as "specious" MiningWatch's argument that the waivers hold no value for the claimants by pointing out that value for the victims derives from the fact that if corporations could not receive legal waivers they would not "invest the time and resources to develop an OGM [operational-level grievance mechanism]" (p. 41) seemingly regardless of, indeed unmotivated by, their human rights responsibilities. This argument exemplifies a *realpolitik* approach to human rights based on a power analysis that ultimately forms a rational for further disadvantaging the least powerful party and the party whose rights have been abused.

Human rights mechanism or corporate legal strategy?

Enodo ponders the specific limitations Barrick placed on the remedy mechanism's scope. Enodo acknowledges that Barrick's decision to limit the remedy program to historical victims of sexual violence (as opposed to **all** victims of **all** forms of excessive use of force by mine security and police guarding the mine) increased the vulnerability of the women who engaged with the program to stigma and abuse. But this narrow focus still needs to be explained.

Despite Enodo's access to Barrick executives and lawyers to answer this question, the best Enodo can come up with is that Barrick was probably responding to a Human Rights Watch (HRW) report of 2011 that focussed narrowly on "incidents of sexual violence" (p. 34). In fact, the HRW report followed, and was a result of, years of reporting on excessive use of force against both men **and** women by mine security **and** police guarding the mine by the human rights Clinics, MiningWatch and the local organizations PLOA and ATA. Furthermore, while the HRW report does focus on sexual violence, Enodo choses to overlook the fact that it also discusses other forms of violence and excessive use of force by mine security and police guarding the mine, including against men (see for example section II).

So, Enodo's weak attempt to explain Barrick's decision to focus the remedy program narrowly on victims of sexual violence is in fact not an explanation at all.

The other limitation in the remedy Framework's scope was in regard to the abusers. Barrick narrowed the scope to PJV employees, **excluding** mine contractors and police who guard the mine under an MOU between PJV and the PNG State.

Prior to the creation of the remedy Framework both MiningWatch and the human rights Clinics had documented and reported on cases of rape by police guarding the mine and Enodo recognized that:

> *In light of the Papua New Guinea police's reputation for "violent abuses" and the informal constitution of security contractors, we believe that the Framework may have attracted a broader array of claimants if the eligibility criteria were not limited to PJV employees. (P. 36)*

Enodo points out that these limitations in the program's scope run contrary to Barrick's own Human Rights Policy, which "provides that Barrick will consider mitigation and remediation measures when 'employees, affiliates or third parties acting on its behalf have caused adverse human rights impacts.'" **They also run contrary to Barrick's Guidelines for Remediation of Human Rights Impacts** that covers "'negative human rights impacts … directly or indirectly attributable to actions undertaken by Barrick or its employees, or third party contractors'" (P. 34). **Enodo also recognizes that these limitations ran contrary to Guiding Principle 22,** which states that: "Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes."

In spite of having access to Barrick personnel, Enodo is unable to get a satisfactory explanation for the limitations on the program imposed by Barrick. For example, with regard to the exclusion of sexual violence committed by police guarding the mine or by contractors, Enodo states:

> *Our concern is that we are unable to determine whether there was a principled basis to exclude sexual violence committed by such authorities from the Framework ex ante. (p. 35)*

Enodo notes that Barrick personnel pointed out that:

> *neither the OHCHR, nor the Guiding Principles experts they consulted when designing the Framework, nor BSR—the respected consulting firm they hired to conduct a mid-program assessment—raised the Framework's focus on employees as a design flaw. (p.34)*

However, Enodo fails to point out that as early as January 2013, when the remedy program was barely underway, MiningWatch Canada, Rights and Accountability in Development and EarthRights International raised the issue of the unreasonably narrow scope of the remedy program publicly in a press release and in a background document, of which Barrick was aware.

We reviewed the entire remedy Framework and provided a detailed critique of it. In the press release we said that:

> *"We are also concerned that Barrick is not offering remedy to those women who have been raped and gang raped by members of police Mobile Squads who are being housed, fed and supported by PJV on PJV property," says Tricia Feeney, Executive Director of Rights & Accountability in Development. (Press release, January 20, 2013)*

In the backgrounder we point out that:

> *• The Framework maintains too narrow a definition of "employee." The Framework should cover sexual violence by all employees of PJV including contractors.*
> *• 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. (Background Document to press release, January 30, 2013)*

We continued to raise these points in letters to the OHCHR in 2013, to which Barrick responded. So, it is simply not true that Framework flaws were not put in front of Barrick. It is unfortunate that Enodo entirely fails to acknowledge the value and validity of the critique that MiningWatch and others often freely provided throughout the entire lifetime of the remedy program.

But this then leaves us with the question of why Barrick scoped the Framework as narrowly as it did, and stubbornly stuck to that approach in spite of being aware of criticism of the Framework's narrow scope at an early stage of the remedy program.

An obvious possible answer that Enodo fails to examine is that the remedy Framework was in fact conceived as a way to get out from under a very particular looming legal liability. Before the remedy Framework was designed, and the remedy mechanism put in place, Barrick was very much aware of the fact that the human rights Clinics and MiningWatch had been spending years in Porgera interviewing and documenting human rights abuses perpetrated by its mine security and the police guarding the mine.

The greatest legal risks Barrick faced were associated with actions taken by the mine's direct employees.

One of the informants Enodo interviewed who was involved in the Framework's design explained the focus on employees by saying:

> *...the decision was based on Barrick's level of control, and that the company's "principal responsibilities lay with those cases which had been perpetrated by persons over whom it has a clear supervisory authority." (p.34)*

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.

Enodo makes an attempt to avoid such a line of reasoning by pointing out that Barrick is willing to "remedy adverse human rights impacts committed by non-employees in appropriate circumstances" (p. 34). However, the example Enodo provides to back this up in fact supports the argument that Barrick is using non-judicial grievance mechanisms specifically to evade or undermine judicial accountability. Enodo points to African Barrick Gold's (now Acacia Mining) North Mara mine in Tanzania, which is also plagued by high levels of violence related to mine security and police guarding the mine. Enodo notes that at North Mara the remedy program for victims "expressly extends to employees and police operating on the mine site" (p. 34). In fact, it does, and the remedy program at North Mara also extends beyond victims of sexual violence to male and female victims of excessive use of force by mine security and police guarding the mine. But this remedy program, which also requires waivers from claimants in return for non-rights compatible remedy, fully confirms the argument we are making here that **Barrick, and its subsidiaries, are using project level grievance mechanisms with waivers attached as a pre-emptive legal strategy to avoid potential judicial action, or, to undermine existing judicial action.**

As we have detailed elsewhere, the human rights grievance mechanism at the North Mara mine was secretly implemented at roughly the same time as the mechanism in Porgera, but only ***after*** legal proceedings had been initiated by UK-based law firm Leigh Day on behalf of alleged victims of excessive use of force (male and female) by mine security **and** by police guarding the mine. The existence of the remedy program in North Mara only became public in December 2013 when a waiver surfaced as a result of discovery in the law suit. As was publicized by lawyers for Leigh Day in 2014, staff of North Mara's project level remedy mechanism used the mechanism to pursue and target Leigh Day's clients in order to persuade them to leave the law suit, accept remedy through the grievance mechanism, and sign away their legal rights (see also here). This fact was also presented at the UN Forum on Business and Human Rights by Tanzanian human rights expert Evans Sichalwe who had worked with the victims at the North Mara mine. As the claimants represented by Leigh Day were alleged victims of **both** mine security **and** police guarding the mine, the remedy program had to cover alleged victims of both alleged perpetrators in order to persuade the victims to leave the law suit.

A narrow focus on grievance mechanisms as a corporate legal strategy to evade the highest potential risks of legal action at a particular project, or to undermine existing judicial procedures on behalf of victims, ensures that these mechanisms will be tailored to meet corporate needs to reduce risk and not to meet the needs of all victims. This is what we see in the Porgera and North Mara cases.

Not worth the paper…

Enodo repeatedly contends that the waivers Barrick insisted on, and received, in Porgera were justified. In this regard Enodo particularly elaborates on the equitable value of the remedy the claimants received:

> *...the decision to include a waiver, while justifiable under the Guiding Principles, significantly heightened the importance of equitability and forced the Framework to offer complete remedies under international human rights law to ensure rights-compatibility. (p.8)*

> *...the relevant question is whether the compensation offered was complete with reference to international human rights law. If so, the waiver did not adversely impact claimants' right to remedy; if not, it might have. (p. 107)*

Enodo concludes that "the financial reparations successful claimants received aligned with principles of equity under international human rights law" (p. 5).

As noted in the section on remedy above, **Enodo's arguments in regard to equity of the remedy are challenged by the women themselves, who seek remedy parity with the women who were represented by EarthRights International, and by EarthRights on the basis of international human rights law (see here and here).**

Additionally, concerns raised with regard to procedural fairness by MiningWatch and the human rights Clinics, while the remedy program was still underway, also call the validity of the waivers into question. Enodo confirms some of these concerns:

> *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. (p. 4)*

Among others, Enodo's findings point to:

1) General lack of good understanding of and communication about the remedy process by implementing staff, and lack of understanding of key aspects of the remedy process by the claimants:
   - "The claimants we interviewed expressed a shared lack of understanding of Framework processes, potential outcomes, and the settlement agreement." (p.4)
   - "The CAT, by its own admission, misunderstood the meaning of "sexual violence" and the proper role of the ILA." (p. 124)
   - "And the CAT would not have been forced to wrestle with a nuanced definition of sexual violence, which may have led to denial of access to Framework benefits to a number of eligible claimants." (p. 121)
   - "The result was that claimants were extremely vulnerable to CAT or ILA communication errors—the very errors that apparently materialized." (p.122)
2) Lack of clarity by claimants and mechanism staff on the remedy available:
   - "The vast majority of claimants believe they were treated unfairly and that they did not receive the remedies they were promised." (p.5)
   - "When it came to remedy options, the Framework's institutional ambivalence towards monetary compensation crippled any hope of predictability, particularly since CAT officers retained the original, anti-compensation posture even as the PRFA's policy towards compensation shifted. The result was a universal dissatisfaction by the claimants, whose legitimate expectations were left unmet." (p.86)
   - "Unfortunately, based on the claimants' confusion about the Framework's process and the CAT's divergent understandings of likely remedies, it does not seem that the information was clear, consistent or accurate." (p.85)
   - "…the change in remedy options compromised the Framework's predictability, because claimants had not been told by the CAT to expect such compensation. (p.122)
3) Lack of knowledge on behalf of claimants and lack of information provided to claimants that they had a right to independent legal counsel:
   - "First, none of the claimants we interviewed was informed that she could retain her own lawyer at the PRFA's expense. The CAT officers confirmed this account: they did not realize that claimants even had that option." (p. 90)
   - "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." (p.4)
4) The Independent Legal Advisor (ILA) did not behave as an independent advisor to the claimants:

- "…the waiver placed immense pressure on the ILA to explain a complex legal right to socio-economically disadvantaged women who may have had very little ability to understand it." (p. 123)
- "The ILA herself appears to have been remiss in performing her defined duties, particularly in guarding her independence." (p. 124)
- "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." (p.5)
- "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." (p. 5)
- "…by her own admission, the ILA found it very difficult to separate her role from that of the CAT and would sometimes act as an auxiliary CAT officer to confirm claimant accounts rather than as an independent advisor to the claimants. She considered that her responsibility was to determine the "truth" of their claims. At times, she would note on claimant files to be shared with the CAT and the Independent Expert that she thought they were lying. All the CAT officers we interviewed confirmed this account of her role. They each saw the ILA's role as one of truth assurance, and thus had no qualms discussing the merits of claims with her and taking into account her perception of claimant honesty. (The Manual specifically proscribes the CAT and the ILA from discussing the merits of individual claims.) In any event, it seems that the claimants themselves did not see the ILA as their advisor. 50 of 62 successful claimants recalled spending fewer than 5 minutes with her. Each of these 50 claimants stated that the ILA gave them no advice. Many recall that, at the first meeting, the ILA only asked them to swear on the Bible and sign a paper. When it came to signing the settlement agreement, 52 of 62 claimants said that the ILA did not explain its terms. The only advice many of them remember is that they would not be able to sue Barrick once they signed. A number of these claimants stated that they felt scared and that the ILA pressured them to sign the settlement agreements by telling them that they had virtually no chance of suing Barrick successfully. One of these claimants, who generally believed the process was clear from the outset, recalls that the ILA told her to sign the agreement because "Barrick has big hands and legs and you have short hands and legs" and "no lawyer will help you" to sue the company. Another recalls: "She never explained what was in the paper. She only asked me if I wanted to sue Barrick. She said you will not sue Barrick so sign the paper." We understand from Cardno that each unsuccessful claimant also had access to the ILA. Only 5 of 15 we interviewed recall meeting her; of these, only one said she was afforded "good time" with the ILA." (p.90/91)

It is clear that many, in fact it appears all, of the 119 successful claimants are unsatisfied with the remedy they have received.

The very serious issues complainants faced regarding due process in going through the remedy mechanism calls the legitimacy of the waivers they signed into question.

The waivers may be successfully challenged in court. Nonetheless, as this challenge would need to be mounted, they still form an imposed barrier to access to judicial remedy for the complainants.

MiningWatch calls on Barrick to relinquish the waivers and give the claimants a chance to seek more equitable remedy through judicial means.

Barrick and Ruggie: too few degrees of separation

In 2012, a year after the UN Guiding Principles on Business and Human Rights were endorsed by the Human Rights Council, lead-author of the UN GPs, John Ruggie, joined a newly created CSR Advisory Board to Barrick Gold's board of directors, a position he continues to hold.

Ruggie was consulted on the remedy Framework for Porgera providing expert advice in the "initial design process" of the remedy Framework (Enodo report p.12, see also p. 50). According to Enodo:

> *John Ruggie recalled that he was consulted at least twice, with detailed Framework drafts, and given the opportunity to provide substantial feedback. He remembers that most of his comments were integrated in the Framework. p.52*

Following a field assessment in March 2013, MiningWatch raised a range of concerns with respect to the remedy Framework and its implementation, including regarding the use of waivers, in a letter to the OHCHR in 2013. Barrick turned to in-house consultant Ruggie, who, as noted, had provided input on the remedy Framework's design. In his capacity as lead author and expert on the UN GPs, Ruggie assured Barrick the Framework design, in regard to the waivers, conformed to Principle 29 and related Commentary in the UN GPs (see Barrick's letter to the OHCHR p. 7).

Subsequently, the OHCHR, which is also advised by Ruggie on issues related to the UN GPs, issued its disputed opinion regarding the use of waivers noting that there should be a presumption against the use of waivers in non-judicial mechanisms, but that this presumption can be set aside on the basis of corporate interest (see discussion of this above p. 11).

The Enodo review sought advice from John Ruggie on the methodology for its review process (p.22), and subsequently interviewed Ruggie as one of the reviews "independent experts" who are quoted throughout the final report. The Enodo report found the remedy Framework to be fundamentally in alignment with the Guiding Principles.

Ruggie's strong commitment to project-level non-judicial grievance mechanisms as one way to address the remedy gap is reflected in the UN GPs as this issue takes up more space in the UN GPs than to any other single issue. Furthermore, by accepting a formal advisory role with Barrick, as the company was designing a project-level mechanism to deal with gross violations of human rights and criminal acts at the Porgera mine, Ruggie is also associated with the Porgera mechanism.

Ruggie's input on various comments and opinions on the Porgera remedy mechanism that have been produced by others, including by Enodo, is fairly transparent. Ruggie has been more circumspect about speaking directly and publicly to the core issues, including Barrick's use of waivers. For more direct insight into Ruggie's positions, we turn to personal communications. Within two hours of MiningWatch receiving the disputed OHCHR opinion on the Porgera remedy Framework from the OHCHR, on August 22, 2013, Ruggie wrote to say that: "On the matter of interpreting the Guiding Principles, I am in essential agreement with what they've [OHCHR] now said."[4] In response to a follow up request that he provide his *own* opinion on Barrick's use of waivers in the Porgera mechanism, Ruggie wrote on August 23, 2013: "If there were a "no waiver" stipulation, how many companies do you think would set up grievance mechanisms? My suspicion is very few."[5] It is hard to know to what extent Ruggie's personal *realpolitik* approach has led to similar positions from those he has advised, but there does seem to be a circling of the wagons among those who have sought Ruggie's advice on this issue with more critical opinions coming from, among others, Rights and Accountability in Development, the human rights Clinics, MiningWatch and EarthRights.

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[4] Personal e-mail communication from John Ruggie to Catherine Coumans of MiningWatch, with various others copied. August 22, 2013.

[5] Ibid. August 23, 2013.

In spite of Ruggie's commitment to the implementation of project-level grievance mechanisms as proposed in the UN GPs, and his personal involvement with Barrick and the Porgera mechanism, it is important that Ruggie, and others who have weighed in on the Porgera remedy mechanism, acknowledge the ways that the Porgera remedy Framework and its implementation have failed many victims of excessive use of force by mine security and police guarding the mine in Porgera.

It cannot be the case that a desire to protect the concept of project-level grievance mechanisms as a way to address the remedy gap, and a desire to praise Barrick's effort as one of the first to implement a project level remedy mechanism with direct reference to the UN GPs, takes precedence over acknowledging failures of the Framework and its implementation and ensuring that the human rights of the victims of excess use of force by mine security and police guarding the mine in Porgera are addressed.

Conclusions and recommendations

Addressing equitability failures as a result of lack of accessibility

As we have discussed above, flaws in both the Framework's design and implementation have resulted in victims of excessive use of force by mine security and police guarding the mine not receiving any remedy to date. The program's narrow scope, focussed only on sexual violence by mine security, made it inaccessible and therefore inequitable for women who had been subjected to sexual violence by police guarding the mine or by contractors (let alone for men who have suffered excess use of force by any of these parties). Furthermore, even women who should have received remedy through the remedy mechanism did not, as only victims of rape were processed by the remedy mechanism, as opposed to victims of all forms of sexual violence as set out in the remedy Framework. Additionally, the Framework's closed term meant that women who only heard of the program after it was closed down were unable to bring claims. Finally, reports out of Porgera make it clear that violence, sexualized and otherwise, against men and women, by mine security and police guarding the mine, is ongoing (see for example a recent article by Vice).

Recommendation – 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.

Addressing equitability failures with regard to remedy

As we have discussed above, the overall value of the remedy to be provided by the Porgera mechanism was determined by Barrick without consultation with the victims. An overall value of some 23,000 Kina for the remedy packages was established by Barrick with a cash component of some 20,000 Kina. Later the cash component was arbitrarily topped-up by Barrick by another 30,000 Kina. Although Barrick initially said that the 23,000 Kina amount was a floor and that the remedy amount the women could receive through the remedy program could be higher, Barrick has now said that the company will not provide the women additional remedy. It is widely reported in Porgera that Barrick provided 11 women who had independent legal counsel through EarthRights International (ERI) an out of court settlement of 200,000 Kina. The 119 women who received remedy through the remedy mechanism have organized and are seeking remedy parity with the ERI clients.

Recommendation – The Porgera grievance mechanism should accept claims for additional payments from the 119 women who received remedy through the now closed remedy program. The grievance

mechanism should provide any additional funds in a manner deemed safe by the women who are to receive them. Furthermore, future remedy for human rights abuses should be determined in consultation with the victims and not pre-determined by Barrick.

Addressing equitability failures as a result of demanding legal waivers in return for remedy

As discussed at length above, a key remedy Framework design flaw was the insistence by Barrick on legal waivers in return for providing remedy. This demand had significant consequences in terms of various aspects of Framework design, and consequently inequitable implementation, as it necessitated more complex structures and processes than the implementation staff could manage and complainants could understand. As discussed above, Enodo particularly singles out failures related to the "independent" legal advice provided to the victims by the remedy program. It is clear that the women did not receive the independent legal advice they required. None of the women interviewed by Enodo had even been told that they could obtain outside legal assistance at the expense of the program. The women were clearly disadvantaged compared to the eleven women who did receive independent legal counsel through EarthRights International. This is only one of numerous process flaws that relate back to Barrick's insistence on legal waivers, including constantly changing information to complainants, which affected predictability. Five pages from the end of the report, Enodo finally, obliquely, acknowledges the significance of the problems associated with demanding waivers, as the report advises against the use of waivers in dealing with future gender-based violence claims in Porgera:

> *...we would recommend, to the extent practical, against asking claimants to waive future civil actions for such claims. (...) Any waiver would unduly heighten the importance of independent advice and run the risk of adversely impacting claimants' right to remedy. (p.119).*

Recommendation – Barrick should publicly acknowledge the inequity that resulted from the company's insistence on legal waivers in return for remedy. Barrick should relinquish the waivers the 119 rape victims were required to sign in return for remedy. Barrick should ensure that future grievance mechanisms do not require waivers from victims in return for remedy.[6]

[6] For further recommendations see the review of Barrick's remedy mechanism in Porgera by human rights experts at Harvard and Columbia's human rights clinics.