



Re: Allegations regarding the Porgera Joint Venture remedy framework

The United Nations High Commissioner for Human Rights has been approached by the NGO MiningWatch Canada (MWC), the mining company Barrick and others in a series of letters and petitions regarding the *Olgeta Meri Igat Raits*, a framework of remediation initiatives developed by Barrick Gold Corporation (“Barrick”) and the Porgera Joint Venture (“PJV”) for women who have been victims of sexual violence by security personnel at the Porgera mine in Papua New Guinea. The programme was initiated by Barrick in response to a 2011 report by Human Rights Watch documenting sexual abuse by PJV security personnel.¹

This document provides an opinion from the Office of the United Nations High Commissioner for Human Rights (OHCHR) on some of the procedural and substantive issues raised in the letters and petitions concerning the Porgera remediation framework. OHCHR, in collaboration with the United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises, has been given a mandate by the UN Secretary-General to provide guidance and clarification on issues relating to the interpretation of the UN Guiding Principles on business and human rights.² The UN Guiding Principles provides an authoritative framework for company level grievance mechanisms such as the Porgera remediation framework. In the absence of an independent investigation by OHCHR, it is not possible to comment on the implementation on the Porgera framework on the ground. Instead, this opinion provides principled interpretive guidance based on the Guiding Principles. It is nevertheless hoped that this guidance will help to bring clarity with respect to the issues raised by the two parties and serve as a foundation for dialogue.

It should be noted that this opinion is limited to responding to the letters and petitions received by the High Commissioner and focuses exclusively on the Porgera remediation framework. The opinion letter therefore does not address the obligations of the Government of Papua New Guinea under international human rights law and standards to ensure reparation for victims and accountability of the perpetrators of the sexual violence that underlies the establishment of the Porgera remediation framework.³

¹ In February 2011, Human Rights Watch published the report “Gold’s Costly Dividend”, outlining the findings of its investigations into allegations of abuse at the mine. www.hrw.org/en/reports/2011/02/01/gold-s-costly-dividend.

² A/HRC/21/21, report of the Secretary-General on the contribution of the UN system to the advancement of the business and human rights agenda, para. 95.

³ See report by the Special Rapporteur on violence against women, its causes and consequences from a country visit to Papua New Guinea for a consideration of the Government’s obligations in this regard. http://www.ohchr.org/Documents/Issues/Women/A-HRC-23-49-Add-2_en.pdf

Background

In letters dated 19 March and 5 April 2013, MWC made a series of allegations regarding the individual reparations programme which forms part of the Porgera remediation framework. As part of a reparations settlement, the claimant is expected to sign an agreement not to pursue any further claim for compensation, or any civil legal action, that relates to the acts for which the reparations settlement is provided against the entities involved in the Porgera remediation framework.⁴ MWC asserted that such an agreement is contrary to the UN Guiding Principles on business and human rights and requested the High Commissioner to ask Barrick to remove this element from the individual reparations programme.

Other allegations made by MWC concerned process issues, such as alleged lack of transparency for the victims, lack of access to independent legal counsel and translations services for the claimants, as well as more substantive issues relating to the type of remedies offered through the programme. MWC also criticized Barrick for failing to consult two local organizations, Akali Tange Association (ATA) and the Porgera Landowners Association (PLOA), in the development of the remediation framework, thereby allegedly damaging the framework's credibility and legitimacy locally.

In their letter dated 5 April 2013, MWC further requested the High Commissioner to ask Barrick "to open the remedy process up to a truly public, transparent, inclusive and independent review aimed at resolving the issues raised."

The allegations made by MWC have been reiterated by a number of organizations and individuals in response to a public "action alert" issued by MWC.

In a letter to the High Commissioner dated 22 March 2013, and in a public statement issued on 16 April 2013, Barrick refuted both the procedural and substantive allegations made by MWC, and referred to on-going improvements to the Porgera remediation framework.⁵ Details were provided with regard to the 18-months process of research, analysis and consultation with leading national and international experts including on violence against women that led to the development of the framework, the provisions for independence of those involved in implementing the framework, and provisions for translation and legal services offered to claimants. Barrick emphasized that one of the objectives of the framework is to facilitate access to effective justice mechanisms where requested by a particular claimant, and that support is provided to pursue legal claims or report events to the PNG police, should a claimant choose to do so. Barrick stressed that a claimant retains the option of pursuing separate legal channels at all times during the claims consideration process. However, Barrick maintained that if a claimant is satisfied with an offer to resolve a grievance under the framework, "it is appropriate that claims against Barrick, PJV and PRFA should be released in order to bring finality to the process. In that circumstance, the independent legal advisor expressly explains the consequences of such a release before it is signed." According to Barrick, this is not in contravention with the UN Guiding Principles.

⁴ The language of the legal waiver clause has evolved since the first letter from MWC on this point. On 7 June 2013, Barrick posted a summary of recent changes to the Framework which included a revised version of the waiver clause. <http://www.barrick.com/files/porgera/Summary-of-Recent-Changes-to-the-Porgera-Remediation-Framework.pdf>. See for a detailed discussion of the waiver issue below.

⁵ Details were included in the 7 June 2013 posting, *ibid*.

In a letter to the High Commissioner dated 5 April 2013, Human Rights Watch issued a statement clarifying that MWC's allegations that Human Rights Watch had "relied heavily" on the local organizations PLOA and ATA in the preparation of its report on sexual violence at the Porgera Joint Venture mine was "inaccurate".

Furthermore, the High Commissioner received a letter dated 24 March 2013 (received on 8 April 2013) from Dame Carol Anne Kidu⁶, expressing support for the framework, and refuting some of the procedural allegations made by MWC, and alleging that its approach revealed limited understanding of the local context.

On 8 April 2013, the High Commissioner also received an undated letter from Ms. Ume Wainetti,⁷ who also expressed support for the framework and criticised MWC's approach on gender-based grounds, and disputed its allegations concerning the operation of the framework on the ground.

The last letter received from MWC, dated 14 May 2013, reiterated and elaborated on some of the points made in previous letters, and called on the High Commissioner to support the request that Barrick removes the legal waiver. This letter furthermore called on the High Commissioner to investigate the case of Barrick's remedy process in Porgera, and to provide an official statement of principles for project level non-judicial remedy programs.

A letter, co-signed by 77 non-governmental organizations from different parts of the world, was attached to the 14 May 2013 MWC letter, reiterating the calls made by MWC.

In an email to the High Commissioner dated 18 May 2013, Barrick attached a copy of the Claims Process Procedures Manual for the individual reparations program, which contains a final version of the the legal waiver provision contained in the agreement to resolve claims filed under the Porgera remediation framework. The manual has since been posted on-line.

Overview of the Porgera remediation programme

The key components of the remediation framework are set out in the document "Oleta Meri Igat Raits – A framework for remediation initiatives in response to violence against women in the Porgera Valley" ('the framework').⁸

The framework comprises both an individual reparations programmes, and community-wide projects to develop the capacity of the local community to address the issue of violence against women. This OHCHR opinion letter is responding to allegations made in relation to the *individual* reparations programme.

The individual reparations programme is intended to provide appropriate support and services to women who have been the subject of sexual violence committed by current or former employees of the PJV. Claims dating back to 1990,

⁶ A human rights activist in Papua New Guinea, as well as a member of the review panel for the remediation programme and a participant in preparing the community programming component of the reparation package that will follow the assessment of claims by individual victims under the programme.

⁷ A local gender expert and the National Convenor of the Papua New Guinea Family and Sexual Violence Action Committee which participated in the process that developed the Porgera remediation programme.

⁸ <http://www.barrick.com/files/porgera/Framework-of-remediation-initiatives.pdf>, updated on 16 May 2013.

when the mine first began operating (16 years before Barrick became involved in the operation), are eligible for assessment.⁹ The framework stipulates that support programmes and services will be chosen in consultation with the affected women, to help meet their specific needs. The programme is intended to operate with other aspects of the Remediation Framework, including community level initiatives, and Papua New Guinea public policy initiatives.

The Porgera remediation programme is run by the Porgera Remediation Framework Association Inc (PRFA), an association incorporated under the law of Papua New Guinea and independent of Barrick, the PJV or the PJV Contractors. Barrick provides funding for the framework through a Trust Fund managed by an independent Trustee.

According to Barrick, by 22 March 2013 approximately 170 women had been interviewed after filing potential claims under the individual reparations programme. Some 93 of those women are reported to have been assessed as having claims that meet the initial threshold eligibility criteria for consideration under the programme. At the time of writing, no claim has as yet proceeded to finalisation under the programme.

The UN Guiding Principles on Business and Human Rights and access to effective remedy

The UN Guiding Principles on Business and Human Rights provide an authoritative framework for how to prevent and address adverse human rights impacts linked to business. The principles on Access to Remedy recognize that effective judicial remedy is at the core of the international human rights framework and remains an essential part of the State's duty to protect human rights.¹⁰ They affirm the obligation of States, as derived from international human rights standards, to take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that those affected by business related human rights abuse have access to effective remedy.¹¹

According to the Guiding Principles, State-based judicial and non-judicial grievance mechanisms should form the foundation of a wider system of remedy. Within such a system, operational-level grievance mechanisms can provide early stage recourse and resolution.¹² This is particularly so in situations where victims of business-related human rights abuses may not have access to effective remedy through the court system. The Guiding Principles recognize that grievance mechanisms established by companies may fulfil an important role in enabling victims to have their grievances heard and in obtaining remedy for harm suffered¹³.

Where a business enterprise has identified that it has caused or contributed to adverse human rights impacts, the Guiding Principles state that it should provide for or cooperate in their remediation through legitimate processes.¹⁴ This is an indispensable part of the corporate responsibility to respect human rights, as laid down in the Guiding Principles.

⁹ Barrick acquired the Porgera operation in 2006.

¹⁰ Commentary to Guiding Principle 26.

¹¹ Guiding Principle 25.

¹² Commentary to Guiding Principle 25.

¹³ Guiding Principle 29.

¹⁴ Guiding Principle 22.

Notwithstanding situations where a business enterprise has identified its involvement with an adverse human rights impact, Guiding Principle 29 calls on all companies to establish or participate in operational-level grievance mechanisms in order to enable grievances to be remedied directly and at the earliest possible stage. The Commentary to Guiding Principle 29 further indicates that operational-level grievance mechanisms should not be used to preclude access to judicial or non-judicial grievance mechanisms. In other words, participation in an operational-level grievance mechanism must be without prejudice to individuals' right to go to court. At the same time, provided that both parties agree, they are entitled to settle a claim through such operational-level grievance mechanisms.

In all cases, any non-judicial grievance mechanism should comply with the effectiveness criteria set out in Guiding Principle 31. This principle requires that operational level grievance mechanisms should be:

- a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- c) Predictable; providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
- e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;
- f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;
- g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harm
- h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.¹⁵

The criteria are inter-related and should be taken as a whole. Excluding one will weaken the ability to meet others and make the mechanism as a whole less effective.¹⁶

¹⁵ Points a) to g) apply to all non-judicial grievance mechanisms; point h) is specific to operational-level mechanisms.

¹⁶ OHCHR Interpretive Guide, p. 75.

The Porgera remediation framework is an operational level grievance mechanism that was set up as a direct response to well-founded allegations of sexual violence against women residing in the Porgera Valley, perpetrated by men who were employed at the Porgera mine. The Porgera remediation framework and its individual reparations programme should comply with the provisions in the Guiding Principles, including the effectiveness criteria for non-judicial grievance mechanisms, as stated in Guiding Principle 31.

These effectiveness criteria provide a benchmark for designing, revising or assessing a non-judicial grievance mechanism like the Porgera remediation framework to help ensure that it is effective in practice¹⁷.

Where outcomes have implications for human rights, care should be taken to ensure that they are in line with internationally recognized human rights.¹⁸ In other words, assessing whether the programme is rights-compatible in terms of the outcomes and remedies it offers to the claimants, reference should be had to applicable international standards on remedy, such as the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation.¹⁹

Allegation concerning legal waivers

According to MWC, the process for finalisation of claims under the individual reparations programme, which include the release of claims against the companies involved upon acceptance of a remedy package, is contrary to the UN Guiding Principles. According to MWC, the claimants have not benefitted from any of the protections or safeguards provided by a legal procedure or a court of law and the program has no independent accountability mechanism.

The original wording of the legal waiver clause read as follows:

“the claimant agrees that she will not pursue or participate in any legal action against PJV, PRFA [Porgera Remediation Framework Association Inc.] or Barrick in or outside of PNG. PRFA and Barrick will be able to rely on the agreement as a bar to any legal proceedings which may be brought by the claimant in breach of the agreement.”

In its response to MWC’s initial letter, Barrick refuted the allegation that the release clause is inconsistent with the Guiding Principles, emphasising that “under the Framework a claimant is not required to release any right, at any time, to make a claim against the perpetrator of the violent act.” Barrick also noted that “Barrick and PJV fully expect that the Framework will continue to evolve in order to respond to legitimate issues and expectations that might arise during the course of its operations. Changes and clarifications already have been, and continue to be, implemented in response to engagement with stakeholders who have raised good faith concerns and comments.”²⁰

According to the Claims Process Procedures Manual, the release by the claimant of any further claim for compensation or any civil legal action is part of the

¹⁷ Commentary to Guiding Principle 31.

¹⁸ Ibid.

¹⁹ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>

²⁰ Barrick letter to the High Commissioner, 23 March 2013.

final agreement accepted by the claimant and signed by all parties stipulating the nature of the reparations settlement, and should be considered in the context of the overall process leading to the agreement (see below discussion of the allegations relating to the implementation of the process).

The final agreement is signed by the claimant, Barrick, and the Porgera Remediation Framework Association Inc. According to the template agreement contained in the Manual, the agreement recites that the claimant was the subject of sexual violence attributable to one or more current or former employees of the PJV (the Conduct). The agreement also states that “[w]hile not admitting any liability, Barrick acknowledges the Conduct, expresses its regret for the harm suffered by the claimant and encourages the claimant to pursue criminal and any other civil legal action against the alleged individual perpetrator(s) of the Conduct.”

On 16 May 2013, a revised wording of the waiver clause was posted on the Barrick website. The relevant clause now reads:

“The claimant agrees that, in consideration for the Reparations, on and from the date of signing this Agreement, she will not pursue any claim for compensation, or any civil legal action, that relates in any way to the Conduct [the claimant was the subject of sexual violence attributable to one or more current or former employees of the Porgera Joint Venture], against the Porgera Joint Venture, PRFA or Barrick in Papua New Guinea or in any other jurisdiction. This expressly excludes any criminal action that may be brought by any state, governmental or international entity. This agreement may be pleaded and tendered by Barrick, the PJV and the PRFS as an absolute bar and defence to any civil legal action relying on any acts related to the Conduct which the claimant may bring or participate in against Barrick, the PJV or PRFA in any form of dispute resolution process connected to such a legal proceeding.”²¹

Considerations regarding waiving further legal claims upon settling a claim through a non-judicial grievance mechanism

The Guiding Principles do not explicitly address the question of whether finality of a civil claim against a company which has identified its involvement with an adverse human rights impact can be achieved through operational-level grievance mechanisms.

The issue of waiving additional *civil* claims for grievances settled through an operational-level grievance mechanism is distinct from the issue of possible *criminal* proceedings: criminal proceedings against perpetrators of crime reflect the public interest in, and the State’s responsibilities for, prosecuting and punishing certain conduct deemed sufficiently harmful. The revised version of the waiver clause explicitly acknowledges that the individual reparations programme does not seek to bar participation in such proceedings. Further, a non-judicial grievance mechanism to address grievances against companies involved in human rights abuse which include the possibility of finalizing claims against the companies does not in any way relieve or diminish the obligations of States under international human rights law to pursue legal accountability of any actor involved in human rights abuses, including potential criminal liability.

The Commentary to Guiding Principle 29 that operational level grievance mechanisms “should not be used to preclude access to judicial or other non-judicial mechanisms” does not distinguish between access to either civil and criminal proceedings. It reflects the recognition in the Guiding Principles that state-based judicial and non-judicial grievance mechanisms form the foundation of a wider system of remedy,²² while also recognising important role of operational-level grievance mechanisms in providing direct remediation. A claimant should be free to pursue parallel proceedings and to leave the operational-level grievance mechanism process at any time, as in the case with the individual reparations programme.

Guiding Principle 31(f) states that outcomes and remedies of operational-level grievance mechanisms should be “rights-compatible”, that is they must be in line with internationally recognized human rights.²³ Consideration of rights-compatibility cannot be limited to the substance of the reparations agreement alone, but must include consideration of *any* human rights outcomes and implications of the agreement. This includes consideration of whether barring any further civil legal action related to the acts for an individual reparations agreement has been reached is in line with internationally recognized human rights standards

The international human rights legal framework does not explicitly address the issue of the final settling of human rights related grievances *against a company* through a non-judicial mechanism. For *state-based* remediation frameworks there is no consistent practice or jurisprudence on the issue from regional and national courts. The *OHCHR Rule of Law Tools for Post-Conflict States: Reparations Programmes*, while dealing specifically with post-conflict situations, states that “it is difficult to decide, in the abstract, whether it is desirable, in general, for [state-based] reparations programmes to be final [meaning extinguishing further civil claims]”.²⁴ It goes on to note that contextual factors may play a significant role in deciding on the desirability of making reparations programmes final, such as the functioning or not of legal systems; preventing anyone from receiving compensation twice for the same violation; and that the presumption should be to leave the possibility of accessing courts as un-curtailed as possible.

Based on the above, the presumption should be that as far as possible, no waiver should be imposed on any claims settled through a non-judicial grievance mechanism. Nonetheless, and as there is no prohibition per se on legal waivers in current international standards and practice, situations may arise where business enterprises wish to ensure that, for reasons of predictability and finality, a legal waiver be required from claimants at the end of a remediation process. In such instances, the legal waiver should be as narrowly construed as possible,²⁵ and preserve the right of claimants to seek judicial recourse for any criminal claims. This is particularly important for instances of gross human rights violations, such as rape and sexual violence. At no point, and in no circumstance, should such a waiver seek to preclude

²² Commentary to Guiding Principle 25.

²³ Commentary to Guiding Principle 31.

²⁴ Rule-of-law tools for post-conflict states – Reparations programmes, OHCHR 2008, p. 35.

²⁵ In a Press statement dated 7 June 2013, Barrick points out that “the legal waiver is narrowly framed to exclude criminal matters, exclude participation in the claims of others, and cover only instances where a claimant may seek a double recovery from the company for the same injury”.

criminal proceedings against the alleged perpetrator or the company, or prevent the victim from joining or participating in any criminal case.

In practice, agreements containing legal waiver clauses can be the subject of judicial proceedings in many jurisdictions for issues of contract law (for example, alleging fraud); and national courts may further be requested to rule on the admissibility of such a clause in a particular case and context.

Process-related allegations

As outlined above, several of the allegations made against the Porgera remediation framework relate to the process of its implementation, including when it comes to transparency, interpretation, and independence of legal advice provided to claimants.

The Claims Process Procedures Manual (“the Manual”)²⁶ for the Porgera Remediation Programme sets out in detail the various elements of the claims process. It directly touches upon a number of the issues raised by MWC and others, including

- Translation/interpretation into languages understood by the claimants:

The Manual stipulates that “at every step of the process, every claimant will be offered the services of a translator in a language of their choosing.”

- Information provided to claimants about the programme in a manner that can be understood:

The Manual stipulates that an initial meeting must be held with each Claimant, during which the overall process must be explained orally and in writing in a language that the Claimant can understand. The Claimant will also be advised to bring a support person and be assisted to access independent legal advice. Further information provided to the Claimant include the criteria for determining eligibility and legitimacy, the steps available to protect confidentiality, safety and privacy of the Claimant, and that the Claimant is encouraged but not required to report any criminal conduct to the police.

- Independence of legal advice:

The Manual furthermore stipulates that to participate in the Programme, a Claimant must have access to independent legal advice. If the Claimant does not have a lawyer, the Claims Assessment Team will facilitate access to an independent legal adviser. The claimant is informed that legal fees will be paid directly to the independent legal adviser by the programme.²⁷

²⁶ <http://www.barrick.com/files/porgera/Claims-Process-Procedures-Manual.pdf>

²⁷ MWC express concern that the independent legal representation is “paid for by Barrick”. It bears repeating that Barrick provides funding for the programme through a Trust Fund managed by an independent trustee. It is not clear from the letters who else MWC would expect to fund legal representation for victims in the process.

The content of the framework document and the Manual appear to indicate that efforts have been made to design the process in a manner that complies with the effectiveness criteria stipulated and defined in the Guiding Principles, including predictability, equitability and transparency.

However, the information received from MWC in relation to these points relate to the actual implementation in practice of the programme. In the absence of an independent investigation as to how the programme is applied and perceived by the claimants, OHCHR is not able to comment on the arguments made by MWC and Barrick respectively in relation to how the programme is implemented. OHCHR nevertheless recommends that Barrick take appropriate steps to ensure that the implementation of the programme is carried out in accordance with the procedural safeguards stipulated in the Manual, and in a manner consistent with the Guiding Principles.²⁸

OHCHR recognizes that the situation on the ground is very complex. It also recognizes that the state of relations between MWC and its two local partner organizations on the one hand, and Barrick on the other, may prevent any significant collaboration in addressing or clarifying the concerns raised.

OHCHR recommends that in addition to any further investigation by Barrick itself as to whether the implementation of the programme corresponds to what is stipulated in the Manual and is in conformity with the Guiding Principles, 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. If necessary, the review should identify possible areas for improvement in the implementation of the programme. The independent review should be focused on the perspectives of the victims of sexual abuse, and the implementation of the programme should be assessed against the effectiveness criteria for non-judicial remedy mechanisms as set out in Guiding Principle 31. An inclusive and transparent process for establishing and conducting such an independent review could help address any residual concerns stakeholders may have about the implementation of the programme.

Allegations concerning the nature of the remedies offered by the Porgera remediation programme

In its letter of 19 March 2013, MWC alleged that the remedy offered by the Porgera remediation programme is not tailored to the harm that has been suffered, and that the remedy is not culturally appropriate. Women interviewed by MWC were reported to have indicated a desire for forms of compensation that addressed the specific harms they had suffered as a result of the rape, such as loss of housing. One woman was reported to have requested a particular remedy from those offered, only to be told later that she would be receiving “chicklets”. Women were also reported to have said that a culturally appropriate form of compensation for a transgression as serious as rape would be pigs and the equivalent value of these pigs in cash, and that the remedies offered was not in alignment with what they would be offered through a traditional dispute resolution procedure.

²⁸ Barrick’s recent changes to the Framework appear to respond to some issues raised by MWC. Some of the changes were instituted following a review of the programme commissioned by Barrick and carried out by Business for Social Responsibility (BSR). The BSR review has not been made public.

According to the Manual, the Claims Assessment Team prepares a report on the eligibility and legitimacy of a claim. Where a claim is found to meet the criteria of the programme, the report will include recommendations of any programs that should be made available to the claimant as remedy. These programs will be chosen with the claimant during the follow-up meeting, and selected from a standard range of programmes available to claimants in general. These may include, but are not limited to: counselling, health care, education and training, appropriate financial reparations for personal harm or economic damage suffered (at levels reflecting those awarded for sexual offences in the civil justice system in Papua New Guinea), livelihood assistance, micro-credit or economic development grants, assistance with the payment of school fees for the claimant's children, assistance with returning to the home village or province, and support for making a complaint with the Royal Papua New Guinea Constabulary (RPNGC).

Guiding Principle 31 stipulates that non-judicial grievance mechanisms must be rights-compatible, meaning that outcomes and remedies accord with internationally recognized human rights. The UN Basic Principles and Guidelines on the Right to Remedy and Reparation²⁹ are instructive in offering a broad categorization of reparations measures:³⁰

- *Restitution* refers to measures which restore the victim to the original situation before the gross human rights violations occurred, for example return to one's place of residence.
- *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, such as lost opportunities and moral damage.
- *Rehabilitation* should include medical and psychological care as well as legal and social services.
- *Satisfaction* is a broad category of measures, ranging from those aiming at a cessation of violations, to truth-seeking and public apologies.
- *Guarantees of non-repetition* are another broad category which includes institutional reforms, human rights training and psychological and social services.

According to OHCHR's Interpretive Guide, remedies from an operational-level grievance mechanism can take a variety of forms and may include an apology, provisions to ensure the harm cannot recur, compensation (financial or other) for the harm, cessation of a particular activity or relationship, or some other form of remedy agreed by the parties. The Guide also clarifies that it is important to understand what those affected would view as effective remedy, in addition to the business enterprise's own view.³¹

²⁹ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>, see chapter IX.

³⁰ The examples are among those listed in the publication "Rule-of-law tools for post-conflict states – reparations programmes", OHCHR 2008, p- 7-8.

³¹ OHCHR Interpretive Guide, p. 64.

As described in the Manual, it appears that many of the possible outcomes and remedies offered by the Porgera remediation framework are “rights-compatible”, within the understanding above. However, efforts should be made to ensure that the list of possible remedies be comprehensive in terms of corresponding to the substantive elements of remedy under international human rights standards, and as reflected in the Guiding Principles.

In terms of the allegations made by MWC about the procedural and substantive aspects of effective remedy, it appears that there may be significant differences between what is stipulated in the Manual, and what is alleged about the practical application of the programme. OHCHR refers to what was said above in relation to the other procedural allegations, and recommends that Barrick take appropriate steps to ensure that the framework is implemented as stipulated in the Manual and in accordance with the Guiding Principles, and that the question of the remedies offered to claimants be included in a possible independent investigation. As mentioned above, the remedy offered should be agreed with the claimant based on their wishes, and be in line with what is considered a culturally acceptable form of civil or mediated remedy for violations of the same nature, i.e. rape and sexual violence. The consideration of this issue is separate from the question of any possible criminal liability and accountability. A claimant’s decision to accept a remedy package through the remediation framework should have no bearing on her ability to initiate or participate in any future criminal proceedings that may be brought against the perpetrators or the company.

Allegations concerning selective stakeholder engagement

According to MWC, the alleged flaws in the Porgera remediation programme could have been avoided “if Barrick had been willing to engage core local and international stakeholders in the design and implementation of the framework. In particular Barrick explicitly excluded from consultation the leadership of a grass roots human rights organization in Porgera, the Akali Tange Association (ATA), and the Porgera Landowners Association (PLOA), which represents the landowners in the mine lease area.”³²

For its part, Barrick referred to the “extensive consultation process” that was undertaken in the process of setting up the programme, and refers to concerns about the good faith and integrity of the two specific organizations named by MWC. In this regard, Barrick referred to the 2011 report by Human Rights Watch that led to the establishment of the Porgera remediation programme, and which is critical of PLOA.

Barrick’s position on this point appears to be supported by the letter from Human Rights Watch of 5 April 2013, which states that Human Rights Watch tried not to work with PLOA “because of serious concerns about the integrity and legitimacy of the organization’s leadership”. Human Rights Watch’s letter also says that “while we do not necessarily share the views of either [Mining Watch Canada or Barrick]...we think that critiques about Barrick’s refusal to work with these two groups are misguided and do not reflect the complexity of the situation.”

According to Barrick, both ATA and PLOA had an opportunity in 2012 to review the Framework and raise awareness of it. Barrick also referred to advice

³² MWC letter, 19 March 2013.

received from (unnamed) “local specialists”, who counselled against including such groups on gender related grounds.

The Guiding Principles require that every effort be made to consult with all relevant stakeholders, particularly those directly impacted by the company’s operations. Guiding Principle 31(h) stipulates that engaging with affected stakeholder groups about the design and performance of an operational-level grievance mechanism can help ensure that it meets their needs, that they will use it in practice, and that there is a shared interest in ensuring its success.

The situation on the ground in the Porgera valley is clearly complex, including when it comes to deciding who most legitimately can be said to represent or speak on behalf of the victims of sexual abuse. These two organizations were among those who consistently raised concerns about sexual abuse from an early stage. At the same time, doubts have been raised, including by Human Rights Watch, as to the legitimacy and role of these two organizations. Given this context, and the fact that both organizations had an opportunity to review the framework, not directly involving the two organizations in the development of the Porgera remediation framework by itself would not necessarily render the programme flawed and in breach of GP 31.

However, the antagonistic relationship between Barrick and the two organizations is likely not in the best interest of the victims of sexual abuse. As such, it is recommended that efforts be made to mediate the situation.

OHCHR

July 2013
