

The Principles of Remedy: A Discussion with EarthRights International

Part I

This white paper focuses on the quantum of rights-compatible remedy. It is comprised of two responses to Marco Simons of EarthRights International (ERI), written in reaction to ERI's critique of our public assessment of a grievance mechanism (the Framework) at Barrick Gold's mine in Porgera, Papua New Guinea.¹ The exchange delves in detail into the issue of compensation under international human rights law, particularly as it pertains to Guiding Principle 31(f), which provides that operational-level grievance mechanisms should ensure that "outcomes and remedies accord with internationally recognized human rights."

Marco Simons of EarthRights International (ERI), a law firm and advocacy group, recently published a blog post criticizing Enodo's assessment on a few fronts: (1) our alleged miscalculation of equitable damages for survivors of sexual violence under international human rights law; (2) our critique of certain international stakeholders for potentially endangering survivors of sexual violence; (3) our alleged blaming of survivors for requesting cash compensation; and (4) our alleged inherent lack of independence.² The first of these criticisms may be the result of our decision not to provide an intricately detailed explanation of what we, perhaps mistakenly, believed were undisputed principles

of international law. I hope to remedy any lack of clarity in this paper. The second two criticisms, I fear, reflect a misunderstanding of what we have written. The last criticism relies, rather troublingly, on innuendo. I will address each issue in turn, with the bulk of this paper devoted to compensation under international law.

1. Compensation under International Human Rights Law

Marco's concern about compensation, and specifically our calculations based on the Inter-American Court of Human Rights' (IACHR) awards under equity, appears a sincere attempt to engage on the substance of our analysis. (For those interested, the relevant discussion in the report, on which this paper will hope to cast further light, is from pages 100 to 111.) He goes on an extended discursion on purchasing power parity (PPP) to illustrate his confusion about our valuation methodology, concluding that "they simply don't know what they are doing."³ I fear that Marco may have been distracted by a narrow understanding of an economic concept that is used by the world's leading international financial and development institutions in a number of different ways. I happily concede that the way he uses PPP is one way in which it is used. But, as I will elaborate below, that way is entirely, unquestionably

¹ *Pillar III on the Ground: An Independent Assessment of the Porgera Remedy Framework* (2016), Enodo Rights, <http://enodorights.com/wp-content/uploads/2015/05/YAftab-Pillar-III-on-the-Ground-FINAL.pdf> [*Enodo Porgera Assessment*].

² Marco Simons, *Many valuable lessons from Barrick's Remedy Framework*; "it's cheaper to rape poor women" should not be one of them (Jan. 22, 2016), Earthrights International, <https://www.earthrights.org/blog/many-valuable-lessons-barricks-remedy-framework-its-cheaper-rape-poor-women-should-not-be-one> [*Valuable Lessons*].

³ *Valuable Lessons*.

irrelevant when comparing damage awards for equity across countries. (I concede that the report was likely too terse in explaining how and why we used PPP as we did to assess the equitability of Framework remedies. I was—perhaps ironically given the length of our report—overcautious regarding prolix. I hope the text below addresses any residual misunderstandings of our discussion on the “rights-compatibility” of the Framework’s outcomes.)

- **Restitutio in integrum: *The purpose of reparations under international human rights law***

[NB: All emphasis below is mine]

Marco seems to agree with our suggestion that the appropriate metric for the adequacy of the Framework’s awards is their value relative to awards issued by international human rights tribunals (“Enodo’s report does something that Barrick never did, which is to try to benchmark the Remedy Framework awards against international standards.”). If I understand his critique accurately, it is that, when assessing that relative value for equity, respect for international human rights requires that no account be taken of the specific claimant’s economic circumstances and opportunities save how much of a basket of goods she would be able to buy in different countries after receiving an award (“Having comparable remedies on a PPP basis would mean that an award in different countries could buy a similar basket of goods.”). In other words, an appropriate award of damages under international human rights law is indifferent to a victim’s particular economic circumstances and reasonable opportunities prior to any human rights violation.

The weight of international jurisprudence is against such a proposition. Rather, the benchmark for reparations under international law in general, and international human rights in

particular, is always the victim’s pre-violation position. As we note in our report, “the right to remedy under international law considers a variety of **measures to restore, to the extent possible, the victim of a human rights violation to the position she enjoyed before the violation.**”⁴

Rather than being indifferent to the victim’s circumstances prior to a human rights violation, international law sets full restitution, or *restitutio in integrum*, of those very circumstances as the ideal end of effective remedy. This end applies to compensation as much as to any other type of remedy. The animating idea behind damages is to, “as far as possible, wipe out all the consequences of the illegal act and **reestablish the situation which would, in all probability have existed if that act had not been committed.**”⁵

Damages are, of course, a very crude measure of the impact of a human rights violation. As Shelton notes:

*Damages are incapable of restoring or replacing the rights that have been violated and, as a substitute remedy, are sometimes inadequate to redress fully the harm. One who is physically or emotionally disabled as a result of torture cannot, by the payment of money, have the means restored that were there originally. Damage awards, however, supply the means for whatever part of the former life and projects remain possible and may allow for new ones.*⁶

When coupled with the principle of proportionality, the restitution end of damages functions as both a floor and a ceiling: “[R]eparation measures should **neither enrich nor impoverish the victim of a human rights violation**, as they are intended to eliminate the effects of the violations that were committed.”⁷ Thus, unlike United States courts applying state common law, international human rights tribunals focus only on restorative, not punitive, justice: “**excessive amounts**

⁴ *Enodo Porgera Assessment* at 102. See also Dinah Shelton, *Remedies in International Human Rights Law* 315 (2006) (“[T]he aim of reparations ... is to restore the individual to a situation as close as possible to the position he or she would have enjoyed had the violation not occurred In other words, it may approximate *restitutio in integrum*.”).

⁵ *Case concerning the Factory at Chorzow*, Series A, 1928 I.C.J. 17 at 47, available at http://www.icj-cij.org/pcij/serie_A/A_17/54_Usine_de_Chorzow_Fond_Arret.pdf.

⁶ Shelton at 291.

⁷ Octavio Amezcua-Noriega, *Reparation Principles under International Law and their Possible Application by the International Criminal Court: Some Reflections* ¶ 15 (2011), University of Essex Transitional Justice Network, http://www.essex.ac.uk/tjn/documents/paper_1_general_principles_large.pdf.

will not be awarded in the nature of aggravated or punitive damages.”⁸

Against this backdrop, moral damages, based on non-pecuniary harm, can prove rather complicated to calculate. The measure of their appropriateness is nonetheless the victim’s specific circumstances and opportunities. The IACHR, on whom we rely because of the relative generosity of its compensation awards, has thus sought to value “**the options that an individual may have for leading his life** and achieving the goal that he sets for himself”⁹ In the specific context of sexual violence, the UN Secretary-General’s Guidance Note advanced a similar perspective, focusing on the victim’s “loss of opportunities and earning” as a referent for compensation:

Sexual violence can have serious consequences for the income potential of the victim who as a result of stigma and ostracism would not have access to the same opportunities she/he would have had if such violence had not taken place. While such loss is harder to prove and assess, all evidence should be taken into account to establish the loss of opportunities and earning to determine the compensation owed.¹⁰

Restitutio in integrum thus requires that tribunals pay close attention to the victim’s circumstances and opportunities before her rights were violated. That is the North Star of the right to remedy. An award that aspires to respect a claimant’s human rights should accordingly be based on individualized evidence drawing almost entirely on the victim’s own pre-violation circumstances and reasonable prospects:

In sum, a lawyer seeking a damage award where physical or mental injury has occurred due to a human rights

violation should present to the court at least the following information: the victim’s age, state of health, activities, interests and responsibilities; medical reports; occupation with pre-injury gross and net earnings; lost earnings; security of employment; likely future earnings and earning capacity; cost of past and future medical treatment, nursing care and other assistance or special equipment made reasonably necessary by the injury; benefits and other monies paid to the claimant by the state or by others; likely effect of government taxes on income from a lump sum award; pain and suffering.¹¹

At its best, this type of evidence can be relied on by a court to establish, with a reasonable degree of certainty, how exactly the particular victim’s life, with its particular circumstances and potential, was adversely affected, in pecuniary and non-pecuniary terms, by the human rights violation.

Where such specific evidence cannot be marshaled, however, international human rights tribunals are willing to rely on proxies to understand the reasonably likely impact of the violation based on the circumstances of similarly situated individuals.¹² “Many courts thus value the intangible interests by determining what amount of damages would **reasonably suffice for someone in the place of the victim** and presuming the victim suffered to that extent”.¹³ When identifying these amounts, the IACHR has considered the domestic economic environment as a proxy to assess the equitable level of damages: “Thus, when a calculation for the loss of earnings cannot be made because there are no bases to determine the income that the victim would have had if the violation had not taken place, **the [IACHR] has referred to the minimum wage applicable in the State where the violation occurred, to calculate such loss.**”¹⁴ In a similar vein, the IACHR in *Neira*

⁸ Shelton at 307. See also Amezcua-Noriega ¶ 6 (“An important consequence of the principle of proportionality is that reparations are not punitive in nature. This is so regardless of the gravity of the breach. Reparations should exclusively be aimed at remedying the damage committed through the wrongful act, and not conceived as an exemplary measure.”)

⁹ *Loayza-Tamayo v. Peru (Reparations and Costs)*, Series C, 1998 IACHR 42 ¶ 147, available at <http://hrlibrary.umn.edu/iachr/C/42-ing.html>.

¹⁰ *Guidance Note of the Secretary-General: Reparations for Conflict Related to Sexual Violence* (June 2014), United Nations Office of the High Commissioner for Human Rights, <http://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf>.

¹¹ Shelton at 331.

¹² *Enodo Porgera Assessment* at 103.

¹³ Shelton at 317-18.

¹⁴ Amezcua-Noriega ¶ 23.

Alegria v. Peru determined compensation, absent evidence of economic harm, with reference to “reasons of equity and in view of the **actual economic and social situation of Latin America.**”¹⁵

- **Restitutio in integrum and the Framework**

Applied to the particular circumstances of the Framework, these principles suggest that the Porgera Remedy Framework Association (PRFA) should have endeavored to understand the *status quo ante*—including income and opportunities—of each successful claimant to issue appropriate, individualized compensation. As we discuss in the report, that proved impossible—both because of the absence of any evidentiary thresholds and because of the Framework’s interest in legitimacy.¹⁶ The Framework was dealing largely with presumed, not proven, harm. Monetary remedies were inevitably standardized. Under Indicator 23 (“Did the range of outcomes and remedies under the Framework accord with international law on the right to remedy for sexual violence as adapted to the private sector?”), the relevant question is whether the standardized compensation was equitable on average. In the absence of particularized evidence, that equitability could only be assessed with reference to a proxy. Consistent with the pursuit of restitution and the IACHR’s practice, the best referent for equity is the “actual economic and social situation” of Papua New Guinea.

- **The role of precedent**

The IACHR’s precedents are helpful in this context to understand the correlation between an equitable award and the “actual economic and social situation”. These precedents will not provide mathematically precise measures etched in

stone; as we note in our report, equity is “notoriously ill-defined and highly individualized.”¹⁷ But they can provide a rough guide for an equitable award. Thus, for instance, the IACHR in *Rosendo Cantu, et al. v. Mexico* awarded the victim of sexual violence (and various other wrongs) US\$60,000 in equity.¹⁸ To understand what makes this award equitable, we would ask how the award compares to Ms. Cantu’s pre-violation circumstances. In the absence of particularized evidence, the comparator would be the economic circumstances and opportunities of the average resident of Mexico (of course, if there were reliable data on the average Mexican woman in similar circumstances to Ms. Cantu, those would be preferable; we would then, for this analysis, seek similar data for Porgeran women). That ratio of award value to pre-existing economic situation—and not the absolute award amount—is the best proxy for equitability with reference to the overriding principle of *restitutio in integrum*. The *ratio* is what can assist in determining rights-compatible remedy in Papua New Guinea, taking account, as human rights law requires we do, of the “actual economic and social situation” in the country.

- **The role of PPP**

This brings us to Marco’s “wonky” parenthetical. He critiques our conversion of Ms. Cantu’s award in Mexico into the relevant equivalent in Papua New Guinea for misapplying PPP (refresher: “purchasing power parity”). Unfortunately, Marco seems to have overlooked the myriad uses of PPP. He explains that PPP “is a conversion used to compare how much a theoretical ‘basket of goods’ costs in different economies.”¹⁹ This is partly true. The statement is untrue, however, to the extent Marco suggests that comparing baskets is the *exclusive* use of PPP.²⁰

¹⁵ *Neira Alegria et al. Case (Reparations)*, Series C, 1998 IACHR 29 ¶ 50, available at <http://hrlibrary.umn.edu/iachr/C/29-ing.html>.

¹⁶ *Enodo Porgera Assessment* at 56.

¹⁷ *Id.* at 105.

¹⁸ *Rosendo Cantú et al v. Mexico (Preliminary Objections, Merits, Reparations and Costs)*, Series C, 2010 IACHR 216 ¶ 279, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_216_ing.pdf.

¹⁹ *Valuable Lessons*.

²⁰ For in-depth commentary, see Kenneth Rogoff, *The Purchasing Power Parity Puzzle*, 34 J. Econ. Lit. 647 (1996), available at http://scholar.harvard.edu/files/rogoff/files/51_jel1996.pdf.

The PPP metric that Marco would like to use is *income independent*, reflecting only relative price levels. A more sophisticated use of PPP seeks to account for income *and* price levels. The latter use is for macroeconomic comparisons between countries while normalizing for exchange rate fluctuations.²¹ This is the type of PPP comparison used in the World Bank statistics we cite, which Marco himself references.²² It is also the way the UNDP calculates average income for its Human Development Index.²³ The reason economists adjust GDP per capita by PPP when comparing the economic situation between countries is because it provides a much better representation of relative welfare—accounting for income *and* prices—between countries than any nominal GDP per capita comparison: “Any analysis that fails to take into account these differences in the prices of nontraded goods across countries will underestimate the purchasing power of consumers in emerging market and developing countries and, consequently, their overall welfare. **For this reason, PPP is generally regarded as a better measure of overall well-being.**”²⁴

Marco’s application of PPP to understand how much (relatively) Ms. Cantu could have purchased with her award had she immediately moved to Papua New Guinea or the United States may be academically interesting. But it is irrelevant under international human rights law. At the risk of belaboring the point, the referent for equitable damages without particularized evidence is the “actual economic and social situation” where the victim lived before her rights were violated. A shallow “basket of goods” PPP analysis provides no relevant insight precisely because it is income independent. Rather, the best proxy for the victim’s relative pre-violation wellbeing is per capita GDP *adjusted* for PPP. As the OECD notes:

GDP is the aggregate used most frequently to represent the economic size of countries and, on a per capita basis, the economic well-being of their residents. Calculating PPPs is the first step in the process of converting the level of GDP and its major aggregates, expressed in national currencies, into a common currency to enable [inter-country] comparisons to be made.²⁵

- ***Pulling it all together to determine the Framework remedies’ “rights-compatibility”***

The purpose of compensation under international human rights law is always restitution. That does not change when the award is based on principles of equity rather than particularized evidence of harm. The relevant referent is *that particular* victim’s pre-violation welfare. *Her* income and opportunities—actual or probable—are the benchmark. As the most reliable proxy for average relative welfare, per capita GDP adjusted for PPP serves as the best referent for full restitution in the absence of particularized evidence. Deploying it allows us to deconstruct Ms. Cantu’s award to understand what made it equitable; once we have, we can apply that ratio to the Papua New Guinean context to assess whether the Framework’s remedies were equitable.

I may or may not agree with the implications of the principle of *restitutio in integrum* from the perspective of True Justice—we only undertook to understand what international human rights law *is*, not what it *ought* to be—but its authority as established law is virtually impossible to question. Notably, and appropriately, Marco does not try to question the authority of *restitutio in integrum*; he simply rejects it (“I absolutely reject this kind of reasoning”²⁶). I am not unsympathetic to his philosophical concerns, which appear to draw sustenance

²¹ Tim Callen, *Purchasing Power Parity: Weights Matter* (March 28, 2012), International Monetary Fund, <http://www.imf.org/external/pubs/ft/fandd/basics/ppp.htm>.

²² World Bank International Comparison Program Database, GDP per capita, PPP (current international \$), World Bank, <http://data.worldbank.org/indicator/NY.GDP.PCAP.PP.CD>; Valuable Lessons.

²³ *Human Development Index: Methodology and Measurement* (July 1994), United Nations Development Programme, <http://hdr.undp.org/sites/default/files/oc12.pdf>.

²⁴ Callen.

²⁵ *Purchasing Power Parities – Frequently Asked Questions*, OECD, <http://www.oecd.org/std/prices-ppp/purchasingpowerparities-frequentlyaskedquestionsfaqs.htm>.

²⁶ *Valuable Lessons*.

from US state common law. Under international human rights law (as well as the law of most countries), however, because the purpose of reparations is to restore the victim to *her prior situation*, identifying that situation, and the income-earning opportunities lost by virtue of the rights violation, is critical in order to respect her right to remedy.

2. Criticizing (Certain) International Stakeholders

Marco is also troubled by our critique of MiningWatch Canada for widely publicizing the Framework. He notes that our “vitriol” regarding MiningWatch’s decision to publicize the Framework widely—which we found facilitated community stigma and increased the risk of physical abuse for survivors of sexual violence—“makes no sense.”²⁷ He seems to think that we found that the Framework’s confidentiality was going to be breached no matter what MiningWatch chose to do. Beyond his sensitive understanding of “vitriol”, his reasoning suggests misapprehension of our factual findings. To be clear, this is what we found:

*We find no reasonable basis for the PRFA to have believed that the existence of the Framework would remain confidential. First, information about the Framework was being posted online from at least 22 October 2012, when Barrick published the Framework Backgrounder. **The publication of further information—and thus the erosion of any institutional confidentiality—was accelerated by MiningWatch, which apparently did not accept the PRFA’s claimant-focused reason for discretion.***²⁸

*Institutional confidentiality was virtually certain to be breached, **particularly once MiningWatch became involved.***²⁹

*Due to the inability to protect the Framework’s confidentiality, **particularly in the wake of international***

stakeholder involvement, claimants themselves were exposed to serious risks for participating in the Framework.³⁰

MiningWatch’s involvement was not ancillary or marginal. To the contrary. Our findings suggest that, alone among the international stakeholders involved, MiningWatch’s publicity efforts were indiscriminate and indifferent to the risk that men—the very men that the local women’s rights experts warned should not know about the Framework; the very men that the human rights clinics of Harvard and NYU said should not know about the Framework; the very men who would subsequently, predictably, brutalize survivors of sexual violence out of prejudice or avarice—would know about the Framework. This is not vitriol. This is our finding of fact.

3. Allegedly Criticizing Claimants

I fear that Marco’s belief that we have criticized claimants who have suffered so very much is also based on a simple misunderstanding. In advancing this claim, he quotes at some length from our Executive Summary:

*Concerted pressure on the Framework to issue cash compensation was even more pernicious for claimant security. Claimants themselves first applied the pressure. International stakeholders magnified it. ... The cash-oriented position of this alliance contravened the advice of every single expert in sexual violence in Papua New Guinea Barrick consulted In this oppressive social context, they argued, cash compensation would largely benefit claimants’ male relatives at the expense of claimants themselves. ... The pressure from international stakeholders and claimants led the PRFA to make cash the lion’s share of all remedy packages.*³¹

Marco seems to misread this excised excerpt as suggesting that the “alliance” to which we advert was between claimants

²⁷ *Id.*

²⁸ *Enodo Porgera Assessment* at 75.

²⁹ *Id.*

³⁰ *Id.* at 76.

³¹ *Valuable Lessons*, citing *Enodo Porgera Assessment* at 6.

and international stakeholders. His misapprehension may be remedied by replacing the ellipses with the words we actually used:

*Concerted pressure on the Framework to issue cash compensation was even more pernicious for claimant security. Claimants themselves first applied the pressure. International stakeholders magnified it. **In doing so, a few of these international stakeholders allied themselves with two local, male-run, self-styled human rights organizations whose interest in women, let alone in survivors of sexual violence, appears instrumental and recently minted. The credibility of both groups had previously been questioned by Human Rights Watch. (When discussing sexual violence, a prominent member of one of these groups callously joked, in front of two survivors, about gang rape by dogs.)** The cash-oriented position of this alliance contravened the advice of every single expert in sexual violence in Papua New Guinea Barrick consulted **when designing the Framework, including (i) representatives of UN Women, (ii) government officials, (iii) human rights defenders, and (iv) Porgeran women's leaders. Each of these experts warned that women in Porgera are commodified subjects of a customary patriarchy. In this oppressive social context, they argued, cash compensation would largely benefit claimants' male relatives at the expense of claimants themselves. Their prescience haunts this assessment.***

The pressure from international stakeholders and claimants led the PRFA to make cash the lion's share of all remedy packages.³²

We at no point criticize the survivors of sexual violence who live in this oppressive environment. Indeed, it is their suffering that haunts us. We raise the stakeholder pressure exerted on the Framework to illustrate the “impossible complexity” facing the Framework’s implementers in protecting claimants

from the risk of abuse. To the extent we criticize international stakeholders, it is only those who allied themselves with “two local, male-run, self-styled human rights organizations whose interest in women, let alone in survivors of sexual violence, appears instrumental and recently minted.” We elaborate on our apprehensions about the credibility of both these organizations in Section 6.C of the report. In particular, we find the following regarding the Akali Tange Association (ATA), which was championed by a small subset of vocal international stakeholders:

Based on the [ATA's] repeated homicidal threats, dearth of female representatives, absence of women's initiatives, and complete insensitivity to the extreme vulnerability of survivors of sexual violence, we see no principled basis to suggest that the ATA approximates credibility as representatives or fiduciaries for the rights of survivors of sexual violence in Porgera.³³

We certainly respect and admire international stakeholders who seek to give voice to vulnerable and marginalized women. We, along with many of the stakeholders and experts we interviewed, have less patience for international stakeholders who discount the advice of all local human rights defenders, experts in gender-based violence, government officials, and UN Women to promote the agenda of patriarchal groups with little demonstrable interest in protecting survivors of sexual violence.

4. Independence

Marco's last critique is more ominous allusion than criticism. It is accordingly slippery, feeding only on insinuation and conjecture about our motivations and ethics: “If a firm like Enodo depends on corporations to hire it, it will always have an interest in keeping that clientele satisfied.”³⁴ It is rather disheartening that Marco assumes for civil society a monopoly on integrity. But even if we discount the possibility that human rights consultants might have convictions and ethics no less integral to being than our civil society counterparts, our pure self-interest lies in protecting our legitimacy with stakeholders.

³² *Enodo Porgera Assessment* at 6.

³³ *Id.* at 50.

³⁴ *Valuable Lessons*.

We cannot effectively assist businesses without it. And, for a firm like Enodo—which has worked, and looks forward to working again, with UN Global Compact, Canadian Business for Social Responsibility, UNICEF, the International Institute for Child Rights and Development, and Global Witness—losing credibility would deal a far more devastating blow than losing a corporate client.

Throughout the assessment process, we have therefore jealously guarded our independence. We explain how on the very first page of our report and then in more detail under Section 4.A, “Measures to Ensure Legitimacy”.³⁵ We also explained these procedural protections at some length to Marco and his colleagues when ERI shared its very helpful insight regarding the Framework. The chief protection—glaringly ignored by Marco’s post—is the advisory and peer review role of the External Committee comprised of Chris Albin-Lackey of Human Rights Watch, Lelia Mooney of Partners for Democratic Change, and Dahlia Saibil of Osgoode Hall Law School. We were accountable to this group of respected human rights experts throughout the assessment process. We presume that ERI has also read about the other protections—including contract terms, funding structure, and public commitments made by Barrick and Enodo—in our report, which embraces an unprecedented level of transparency precisely to allow all observers clearly to assess our conclusions for themselves. (Even a cursory review of the report demonstrates that it does not shy away at any point from finding fault with Barrick, the PRFA, or Cardno.)

We do not presume perfection. But we have aspired rigorously to integrity. Our assessment was not “independent”. It was independent.

Conclusion

As we recognize in the conclusion to our report, our assessment makes a number of methodological choices “that will likely not be universally endorsed.”³⁶ We were transparent about every one of these choices, so that all interested readers could thoroughly assess our conclusions—ideally judging the report only on its content. We were transparent because we welcome good faith questioning of each of our conclusions, as we firmly believe that debate about them is necessary to advance the discipline of business and human rights so as better to protect the rights of the most vulnerable. We would welcome all further questions or concerns about our methodology or conclusions. Please do not hesitate to contact me directly at yusuf.aftab@enodorights.com.

³⁵ *Enodo Porgera Assessment* at 23-24.

³⁶ *Id.* at 117.

The Principles of Remedy: A Discussion with EarthRights International

Part II

This paper is a continuation of the discussion with Marco Simons of EarthRights International (ERI) regarding Enodo's Guiding Principles-aligned assessment of the Porgera Remedy Framework (the Framework).³⁷ We will consider, in some depth, the quantum of rights-compatible remedy under GP 31(f) of the Guiding Principles.

Marco's last post on how to assess damages for non-pecuniary harm under international human rights law provides considered insight into a thorny issue.³⁸ I recommend it to everyone interested in understanding the right to remedy. Ultimately, it seems we are very close in our understanding of the applicable principles of international law. That said, our difference has significant implications for the design and implementation of operational-level grievance mechanisms (OGMs) under the Guiding Principles.

I realize that Enodo's assessment applied international law in a manner that some consider unsettled. I remain confident in our interpretation and our application of fundamental principles of the right to remedy to the Framework. But I recognize that reasonable observers, including Marco, may disagree. I am by no means wedded to a flawed approach. Because understanding the practical meaning of rights-compatible remedy is so critical to operationalizing Pillar

III of the Guiding Principles, I believe an open discussion, involving as many voices from the business and human rights community as possible, is essential.

I would therefore like to use this (very, very long) paper to five ends. *First*, to identify as precisely as possible where Marco and I disagree in our interpretation of international law. *Second*, to frame the discussion regarding rights-compatible remedy by explaining the role international law played in our assessment of Guiding Principle 31(f). *Third*, to explain the jurisprudential reasons in support of our interpretation. *Fourth*, to explain the policy reasons why any residual ambiguity in international law should be resolved in the manner we did. *Fifth*, to invite experts in international law, human rights, and the Guiding Principles to share their views on how to assess OGM compensation for rights-compatibility.

[NB: This paper should be read in conjunction with our assessment and my last paper. I will endeavor not to repeat myself unless necessary.]

Where Marco and I disagree

I have spent much time this week trying to understand where exactly Marco and I differ in interpreting international human rights law. I have also been corresponding with Professor

³⁷ *Enodo Porgera Assessment*. For Marco Simons' earlier posts, see *Valuable Lessons; International human rights law does not support giving less compensation to claimants from poorer countries* (Jan. 29, 2016), Earthrights International, <https://www.earthrights.org/blog/international-human-rights-law-does-not-support-giving-less-compensation-claimants-poorer> [*ERI Less Compensation*].

³⁸ *ERI Less Compensation*.

Shelton to confirm and understand her views; she has asked that I not make the content of that correspondence public for now. In this paper, I will therefore not be considering any views she has expressed outside of her published materials.

If I understand him correctly, Marco and I are very close in our understanding of compensation under international human rights law. We agree that the aim of reparations is full restitution. We agree that this overarching aim necessarily animates compensation as a subset of reparations. We agree that compensation for economic (or pecuniary) losses should thus be with reference to the victim's standard of living and opportunities *before* the rights violation; a victim with a higher initial standard of living will accordingly ordinarily receive higher compensation for economic losses flowing from the violation. We only disagree on the measure of ideal compensation for non-economic (non-pecuniary) harm.

The difference in our positions is whether it is possible—and if so how—to determine what makes an international tribunal's award of compensation for non-pecuniary harm equitable in the *absence of evidence*. Marco submits that compensation for non-pecuniary harm cannot be benchmarked against equity at all: "That makes assessing non-pecuniary damage into something of a dark art; it's impossible to come up with any kind of formula."³⁹ If we are (optimistically) going to attempt to benchmark OGM remedies for equity, however, the "dark art" is with reference to some objective, globally valid, absolutely defined basket of goods: "adjustments for purchasing power parity (PPP) are appropriate when converting relevant awards between countries."⁴⁰

Under his approach, one might say, for instance, that a human rights violation of a certain gravity warrants a certain number of staple foods, like milk, eggs, and loaves of bread. (This is simply to illustrate how Marco's PPP analysis would work; we do not mean to diminish in any way the impact of a human rights violation or the value of remedies.) After we determine

what's in the remedy basket, we would then find out how much that basket costs in different countries, and award every victim of the same type and gravity of human rights violation the amount necessary to buy that basket in whatever country that victim happens to live. In other words, the non-pecuniary impact of a human rights violation can be determined objectively and independently of a victim's (presumed or actual) individual perception, standing in the community, or reasonable opportunities.

By contrast, I submit that the proper measure of equitable compensation for non-pecuniary harm is with reference to the subjective, individual circumstances of the victim of a human rights violation. So, for instance, I would say that, rather than an absolute, globally applicable basket of goods for a particular human rights violation, international tribunals should aspire to understand the impact of the violation in terms that make sense to the victim: the value *she places* on stigma; the value *she places* on anxiety and distress; the value *she places* on the impairment of her life. Dinah Shelton's guidance on the valuation and calculation of damages provides some support for this view:

*The problem of calculating damages is complex. ... Various economic methods of valuing human life may be used to calculate damages for loss of life. ... Economists measure **how much people in society are willing to pay or willing to forgo** to reduce their chances of dying ... The measurement does not mean that a person would willingly exchange their life for that amount of money, but it represents **the balancing point people use to assess whether a given risk is worth the extra income or benefits.***⁴¹

Neither Shelton nor I are suggesting that this cold calculation approximates True Justice for victims of grave human rights violations. Rather, the lesson is that *restitutio in integrum* is necessarily subjective: "The ECtHR has observed that non-

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Shelton at 328-30.

pecuniary damage is the applicant's subjective measure of the distress he had endured because of a violation of his rights and, 'by its nature, is not amenable to proof.'⁴²

Underlying it all, and rather philosophically, I understand the disagreement with Marco as flowing from divergent conceptions of equality and dignity. His basket-of-goods metric has the virtue of uniformity. The conception of equal treatment I am advancing is relative and proportional.

I certainly understand the philosophical merits of the position Marco is advancing. And I recognize where he might find support for this position in the reasoning of the IACHR and the ECHR. As all commentators have noted, international human rights jurisprudence on equity is, at best, opaque.⁴³

Framing the discussion in the context of the assessment

The discussion with Marco flows from our decision to assess the rights compatibility of the Framework's remedies with reference to international human rights law. That decision was based on the language, structure, and objectives of the Guiding Principles. In benchmarking the Framework against international human rights law, however, we necessarily lost the certainty of local, contextualized legal precedent. There is no international human rights tribunal whose jurisdiction extends to Papua New Guinea.

That meant we had to engage in a thought experiment. We had to ask: how would such a tribunal rule if it existed? To consider that question, we had to make certain assumptions.

First, we assumed that it would ask of a business the types of remedies that the UN Human Rights Committee has said are generally expected of states who commit human rights abuses, namely, compensation and guarantees of non-repetition. In assessing the sufficiency of these, we therefore assumed away the value of the other remedies Barrick provided—including health care, school fees, counseling, and training.

Second, we assumed that our hypothetical tribunal would follow the compensation precedent of the most generous international human rights tribunal, widely accepted to be the IACHR.⁴⁴ *Third*, we assumed that this hypothetical tribunal would be happy to award reparations without evidence of any harm, let alone causation.

No international human rights tribunal actually behaves this way. Even generous tribunals have evidentiary thresholds. Their absence from the Framework meant that there were likely many successful false claims: "everyone involved with the Framework's implementation—including an independent doctor and the local NGO most critical of the process—believes that the process was so open and accessible that the PRFA awarded remedies for many fabricated claims."⁴⁵

We then had to ask what principles such a generous, evidence-indifferent tribunal would apply. That led to equity, which is vague and possibly arbitrary: "It is rare to find a reasoned decision articulating principles on which a remedy is afforded. One former judge of the European Court of Human Rights privately states: 'We have no principles'. Another judge responds, 'We have principles, we just do not apply them.'⁴⁶

⁴² Attila Fenyves, *Tort Law in the Jurisprudence of the European Court of Human Rights* (2011) (emphasis added) (citation omitted). See also Shelton at 343 ("There is no objective test to measure the severity of a victim's pain, yet common human experience recognizes the reality of physical and emotional suffering." (emphasis added)).

⁴³ See Shelton at 343 ("There are few developed principles for calculating awards of non-monetary injuries like pain and suffering, fright, nervousness, grief, anxiety, and indignity. While these injuries constitute recognized elements of damages, they are particularly personal and therefore difficult to measure." (emphasis added)); Fenyves ¶ 2/238 ("Additionally, the Court mostly prefers *globally-intuitively* to invoke a general equity basis without highlighting the material circumstances for the concrete assessment and to show itself satisfied therewith. *Even in comparable situations ... the sums awarded thus remain largely opaque in their relation to each other*". (emphasis added)).

⁴⁴ Shelton at 299 ("the Court's judgments have provided the most wide-reaching remedies afforded in international human rights law to date, both in compensatory and noncompensatory forms.").

⁴⁵ *Enodo Porgera Assessment* at 5.

⁴⁶ Shelton, as quoted in Rosalind English, *Guidance from the Supreme Court on human rights damages* (May 2, 2013), UK Human Rights Blog, <https://ukhumanrightsblog.com/2013/05/02/guidance-from-the-supreme-court-on-human-rights-damages/>.

Faced with this reality, we had two choices: (1) presume that international tribunals use some consistent, non-arbitrary and discernible benchmark for their equitable decisions; or (2) decide that we have no basis on which to judge whether the Framework's remedies were rights-compatible under Guiding Principle 31(f). The latter option might have been a more honest assessment of how international human rights tribunals make their decisions. As Marco writes:

*In fairness, however, the task of calculating non-pecuniary damage is extremely difficult. I should note that Prof. Shelton opposed the very idea of 'benchmarking' awards to examples from international tribunals, because every case needs to be assessed on its own terms, and the facts of every case are different. **That makes assessing non-pecuniary damage into something of a dark art; it's impossible to come up with any kind of precise formula.** But, in my view, that's another reason to object to Enodo's conclusion that the Remedy Framework awards were equitable under international law."⁴⁷*

The inexorable result of such a position, however, would be perpetual uncertainty: no objective observer could ever say whether any awards issued by an OGM are rights-compatible. No one could ever reasonably respond to the accusation hurled repeatedly against the Framework: "We don't know how much, but it should definitely have been more!" Were we to have taken that path, we would have critically undermined the assessment's completeness. If we could not evaluate the rights compatibility of the Framework remedies, we could not judge the effect of the waiver, and we could not make any recommendations for what to do next. Such a decision would not have been in the interests of stakeholders or businesses. In pursuit of certainty and completeness, we therefore presumed that there is a basis on which to understand what makes international tribunals' awards of compensation for sexual violence equitable. That choice, however, would require us to deconstruct awards to try to determine, with as much certainty and precision as reason would allow, what made them

just. To fill in any blanks, we would need to reason from first principles rather than taking the precedent directly and as-is.

All this to say: we were not trying to recreate the process claimants would have faced and the outcomes they would have expected had they actually gone before an international human rights tribunal. Given the evidentiary burdens all such tribunals apply, most claimants would probably have received nothing. We were also not trying to recreate the reasoning such tribunals apply when issuing awards. As everyone agrees, they are unhelpful. Marco's objection that no international human rights tribunal has ever considered GDP per capita adjusted on a PPP basis is therefore beside the point. We had no choice but to seek to unearth the principles that we must assume are present if the decisions are non-arbitrary.

Jurisprudence on standard of living and non-pecuniary compensation

Since Marco's last post, I have sought to test our approach against the logic applied by the ECHR, which has well-developed jurisprudence on equity's demands in countries with disparate standards of living. My purpose in considering ECHR jurisprudence was to understand whether different standards of living played any role in explaining differential award quantum for non-pecuniary harm flowing from human rights violations of similar gravity. If awards under equity did not vary between rich and poor countries based on standard of living, it would suggest that the ECHR embraced Marco's absolute conception of equal treatment and equity. If they did, however, it would support our belief that equity is proportional to the victim's pre-violation economic context.

The starting point of our analysis was the ECHR's Practice Directions, which implicitly underlie the reasoning of every ECHR decision. In particular, we considered how the Court determines "just satisfaction". The Practice Directions provide that, in determining what "satisfaction ... is considered to be 'just' (équitable in the French text) in the circumstances ... **the Court will normally take into account the local economic circumstances.**"⁴⁸

⁴⁷ *ERI Less Compensation* (emphasis added).

⁴⁸ *Practice Directions: Just satisfaction claims* (Jan. 1, 2016), European Court of Human Rights, http://www.echr.coe.int/Documents/PD_satisfaction_claims_ENG.pdf (emphasis added).

These instructions are indeterminate on two fronts. First, we do not know if the reasoning as it applies to satisfaction overall applies in particular to non-pecuniary compensation, which is simply a subset of reparations and thus of just satisfaction. Second, we do not know what is meant, exactly, by “local economic circumstances”. It could be standard of living. But it could also be comparative prices of equivalent baskets of goods.

At the outset, we found that the ECHR generally tries to benchmark its non-pecuniary damage awards against domestic civil awards, which would implicitly account for standard of living: “An important general rule on the extent of non-pecuniary damages is given in particular by No 65: *Z. v. Finland*: the respective domestic practice of assessing the amount of non-pecuniary damages in comparable cases is not binding but it can offer assistance.⁴⁹ We then turned to the ECHR’s jurisprudence to see (i) if “local economic circumstances” had expressly been considered with non-pecuniary harm, and (ii) if the Court had added any particularity to the definition of “local economic circumstances”. In both these regards one detailed and comprehensive text, *Tort Law in the Jurisprudence of the European Court of Human Rights* (2011), proved invaluable. The authors repeatedly and consistently note (i) that the ECHR considers “local economic circumstances” in determining compensation for non-pecuniary harm and (ii) that “local economic circumstances” means “standard of living”:

Arguments concerning the ‘standard of living’ and ‘economic indicators’ are important in light of the ECtHR’s duty to take into consideration its judgments in similar cases when awarding damages for non-pecuniary loss ... The criteria of ‘standard of living’ and ‘economic indicators’ allow the ECtHR to both differentiate and

*refer to similar cases at the same time when assessing damages for non-pecuniary loss.*⁵⁰

*From the analysis of the ECtHR jurisprudence it can be taken that the ECtHR acknowledges the relevance of a standard of living criterion in the assessment of non-pecuniary damages. For example, in Svetoslav Dimitrov v. Bulgaria and Kostadinov v. Bulgaria the ECtHR noted the applicant’s arguments in respect of the positive changes in the economic indicators of Bulgaria and the improvement in the standard of living of its citizens.*⁵¹

*[In several cases against Italy decided on the same day, the ECHR provided] “the following detailed criteria for an equitable assessment of non-pecuniary damage sustained as a result of the length of proceedings ... The basic award will be reduced in accordance with ... (iv) the basis of the standard of living in the country concerned...”*⁵²

The ECHR’s ruling in *Cocchiarella v. Italy* explicitly confirms the authors’ conclusions: “As regards equitable assessment of the non-pecuniary damage sustained ... the basic award will be reduced ... on the basis of the standard of living in the country concerned.”⁵³

Three experts in European human rights law—Silvia Atwicker-Hàmori, Tilmann Altwicker and Anne Peters—have also conducted a wide-ranging, empirical study of the effect of standard of living on equitable awards for non-pecuniary harm across relatively rich and poor EU countries.⁵⁴ Their research confirms that the ECHR’s awards for non-pecuniary harm for the same type of violation correlate with the relative wealth of the country in which the harm occurred.⁵⁵

⁴⁹ *Fenyves* ¶ 2/186.

⁵⁰ *Id.* ¶ 11/151 (emphasis added).

⁵¹ *Id.* ¶ 11/152 (emphasis added).

⁵² *Id.* ¶ 11/209 (emphasis added).

⁵³ *Cocchiarella v. Italy*, no. 64886/01 ¶ 26, ECHR 2004, available at <https://lovdata.no/static/EMDN/emd-2001-064886-1.pdf> (emphasis added).

⁵⁴ Szilvia Altwicker Hámori, *Measuring Violations of Human Rights: An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage under the European Convention on Human Rights*, available at http://www.mpil.de/files/pdf4/Quant_Human.Rights1.pdf.

⁵⁵ *Id.* at 40.

To be fair, the empirical study is flawed in that it does not seek to distinguish between “standard of living” and “price levels”. The authors appear to assume that the two terms are equivalent: “we assume, in line with the equity-principle, that in countries with a lower price level a smaller amount in respect of non-pecuniary damage will be awarded for violations.”⁵⁶ The countries that they group together—“new” member states, “old” member states, and Turkey—could, however, just as easily be described, respectively, as relatively poor, relatively rich, and Turkey.⁵⁷

The authors’ legal reasoning for differentiating empirically between different countries suggests that they are using price levels as a proxy for standard of living: “The purpose of awards in respect of non-pecuniary damage is to (although imperfectly) compensate the individual for immaterial harm suffered *taking into account the specificities of his or her situation*. **This necessarily context-specific determination of the award is a normative argument against identical treatment of individuals (irrespective of, e.g., their country of residence).**”⁵⁸ The “specificities of his or her situation” would hardly be accounted for if, in fact, the only relevant comparator was a universal basket of goods.

The combination of the ECHR’s specific and explicit use of “standard of living” to determine compensation for non-pecuniary harm and the empirical demonstration that, in fact, awards for non-pecuniary harm do correlate to the relative wealth of the victim’s state of residence suggests that, under international law, equity is not absolute. It is relative. That suggestion is only further bolstered by the proportionality principle: “[R]eparation measures should **neither enrich nor impoverish the victim of a human rights violation**, as they are intended to eliminate the effects of the violations that were committed.”⁵⁹

In other words, to the extent equity is non-arbitrary, a hypothetical international human rights tribunal with jurisdiction over Papua New Guinea would reach its conclusions regarding the quantum of award for non-pecuniary harm—particularly in the absence of evidence—with reference to the standard of living in the country. Assuming that such a hypothetical international tribunal sought to be as generous as possible, it would benchmark its award against the IACHR’s awards for human rights abuses of similar gravity. Assuming further that this hypothetical tribunal endeavored to be as rigorous, principled and transparent as possible in its calculations, it would issue an amount that was of the same award-to-GDP-per-capita ratio as the IACHR award’s ratio in a country with vastly different “local economic circumstances”. To arrive at this amount while “taking into account the specificities of [the claimant’s] situation”, that tribunal would thus rely on the authoritative benchmark for relative standards of living: the World Bank’s comparison of GDP per capita adjusted for PPP.

Policy considerations in favor of a certain and consistently relative measure of equity

Marco also takes a valuable turn to public policy reasons to object to our measure of equitability as applied to the Framework. While I think the turn to policy is absolutely right, I fear the reasoning misapprehends the relevant issues.

Marco engages in an “economic” incentive-driven analysis of why the costs to Barrick of rape in Papua New Guinea should be equivalent, or higher, to those the law would afford in the United States or Canada: “But corporations are economic animals, and they respond to economic incentives.”⁶⁰ I will assume for the purposes of this paper that the analysis is “economic” and valid. Even if everything Marco says is true, however, it is only relevant to discussions of how international human rights tribunals should rule in the future should

⁵⁶ *Id.* at 29.

⁵⁷ See World Bank International Comparison Program Database, Price level ratio of PPP conversion factor (GDP) to market exchange rate, World Bank, <http://data.worldbank.org/indicator/PA.NUS.PPPC.RF>; World Bank International Comparison Program Database, GDP per capita, PPP (current international \$), World Bank, <http://data.worldbank.org/indicator/NY.GDP.PCAP.PP.CD>.

⁵⁸ Hāmori at 21 (emphasis added).

⁵⁹ Amezcua-Noriega ¶ 15.

⁶⁰ *ERI Less Compensation*.

they gain jurisdiction to issue awards against multinational corporations. (It may also be relevant to tort law reform and home state regulation of multinational corporate behavior.) It has no bearing on what the Guiding Principles—voluntary standards for corporate conduct—mean or should be interpreted to mean.

This distinction is critical. The Framework was not imposed by law. The company could easily and legitimately have said: “We will cooperate with the Papua New Guinean public authorities and will not contest in any way the jurisdiction of Papua New Guinean courts.” Because local and international stakeholders have reasonable apprehensions about the justice available in those courts, Barrick voluntarily designed the Framework and empowered an independent entity to adjudicate sexual violence claims against the company.

The voluntariness of the Guiding Principles has two important policy implications for businesses and international stakeholders interpreting “rights-compatible” remedy: we should aim for certainty; and we should privilege practicality.

- **Certainty**

In order to encourage businesses to align with the Guiding Principles and implement OGMs, certainty is critical at two levels. *First*, the business itself will need to have some reasonable idea of what is expected if it is going to commit voluntarily to meet that expectation. *Second*, precisely because the Guiding Principles are not legally binding (directly), stakeholders will be the ones responsible for holding businesses to account; to do so, they will need some certainty regarding what they expect.

Stakeholders are going to need to take a fixed position on what would be enough. No business can reasonably be expected to accommodate stakeholder concerns if those

concerns are not formulated with any consistency or precision. In the context of his last post alone, Marco seemed to take three different positions:

1. There is no way to assess whether an award of compensation for non-pecuniary harm is equitable and thus rights-compatible: “That makes assessing non-pecuniary damage into something of a dark art; it’s impossible to come up with any kind of precise formula. But, in my view, that’s another reason to object to Enodo’s conclusion that the Remedy Framework awards were equitable under international law.”⁶¹
2. Actually, awards issued by voluntary OGMs should endeavor to be higher than those issued by international human rights tribunals (even if any comparison is fundamentally inappropriate): “Given that corporations may be even more responsive to economic incentives than governments are, this argument is worth serious consideration in determining appropriate compensation in corporate-involved abuses.”⁶²
3. Actually, we should take international tribunals’ precedents and adjust them with reference to baskets of goods: “To be clear, I agree with Yousuf on a fundamental point—adjustments for purchasing power parity (PPP) are appropriate when converting relevant awards between countries.”⁶³

That’s just his last post. When the Framework was operating, ERI’s public pronouncements (with which Marco may have disagreed) never made reference to the awards of any specific international tribunals. Rather, ERI simply said: “Providing manifestly inadequate benefits in exchange for waivers of legal rights—especially for unrepresented women, most of whom are extremely impoverished, with little formal education—is inconsistent with international human rights standards, which require remedies that are proportional to the gravity of the abuses.”⁶⁴ They did not specify what made the awards

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *FACTSHEET: Abuse by Barrick Gold Corporation*, Earthrights International, <https://www.earthrights.org/legal/factsheet-abuse-barrick-gold-corporation>.

manifestly inadequate, save with reference to undefined “cultural appropriateness”; they did not specify what bearing the relative poverty of the claimants had on what would make awards adequate; they did not specify what “proportionality” would require; and they did not identify a single legal precedent that might be used as a benchmark.⁶⁵

I certainly understand and admire the mission animating these positions. My point is not at all to criticize advocacy on behalf of vulnerable claimants. I only mean to suggest that a stake must, at some point, be put in the ground. Without it, critics and objective observers of corporate behavior risk losing credibility for the discipline of business and human rights as a whole. More problematically, from the perspective of voluntary OGM creation, the absence of certainty would be a significant disincentive for businesses to pursue OGMs in the first place.

For that reason, I think we forsake our duty as observers, aides, stakeholders, and critics if we simply throw up our hands and say: “We’ll never know what equity requires. And nor, Barrick, will you. But we reserve the right to criticize you for not respecting its dictates.” The burdens of such a Kafkaesque universe will ultimately only be borne by the most vulnerable stakeholders.

- **Practicality**

Another inevitable corollary of the Guiding Principles’ voluntariness is the need for practicality. While we should never compromise the responsibility to respect human rights, we should endeavor to interpretations that are reasonable and practical. Thus when we consider the quantum of damages that the business would need to issue against itself (or voluntarily empower an independent body to issue against it), we should keep the reasonableness of outcomes in mind.

One of Marco’s positions on appropriate remedy is that it should be determined absolutely with reference to a

universally defined basket of goods for violations of the same type and severity. Presumably, in this case, that would mean tossing out Rosendo Cantu as the benchmark (\$60,000 USD; 0.6 on straight basket-of-goods PPP) and substituting it with the ECHR’s award in **Maslova v. Russia** (70,000 Euro; 0.5 PPP).⁶⁶ The straight conversion would result in approximately 240,000 Kina at today’s rates. Adjusting for PPP would actually mean multiplying that amount by 1.6, resulting in an “equitable” amount of approximately 400,000 Kina. That is approximately 64 times the average per capita GDP in Papua New Guinea. And we have not adjusted for inflation yet.

From the perspective of True Justice, we might say: “Hell yes! That’s exactly what Barrick should be made to pay for this egregious crime.” Remember, though, that the Framework did not ask for proof. There was no evidence. Everyone involved with the Framework believes that many claims were fabricated. So, what we would be saying to Barrick is that it should voluntarily impose on itself the obligation to pay the highest conceivable award under international law—with an absolute measure of equity anything lower would be inequitable—for any *allegations* of harm that might *sound* quite egregious.

The company’s other, conventional, option would simply be to wait for the country’s courts to act. (We discount, for the moment, the transnational tort possibility because of negligible chances for success.) That range of civil remedies for equivalent violations, according to Allens Linklaters, is approximately 1/16th the award that Barrick would have to pay if it were to establish its own Guiding Principles-aligned grievance mechanism. Claimants’ chances of success would be lower because Papua New Guinea courts ask for evidence. And we have yet to account for the substantial costs avoided of actually designing and implementing a grievance mechanism in the first place.

We can try our hand at some rough incentive analysis here. For simplicity, we will assume that there is just one claim.

⁶⁵ *Id.*

⁶⁶ *Nalbandov v. Russia*, no. 839/02, ECHR 2008, available at <http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/Maslova%20and%20Nalbandov%20v%20Russia%20%28Application%20no.%20839-02%29.pdf>.

Option 1: OGM

Expected expense = (probability of finding fault) * (likely amount of compensation) + costs to design and implement the OGM (high sunk cost, limited marginal cost; estimate using what Barrick actually spent)

That would be, in this case: (1—allegation is sufficient) * (400,000) + (10,000,000) = 10,400,000 Kina

Option 2: Court

Expected expense = (probability of finding fault) * (likely amount of compensation) + costs of defense (assume the 600 Kina/hour * 1000 hours). [NB: 600 Kina an hour is for very expensive attorneys in Port Moresby; 1000 hours would be an absurdly high amount to spend on this defense.]

That would be, in this case: (0.5) * (25,000) + 600,000 = 612,500 Kina

(Obviously, hiring an attorney in this case is economically irrational given the likely award quantum. We keep her only to preserve the fiction of a reasonable choice.)

Even if Barrick were definitely going to lose in court, its expected cost of committing to a voluntary OGM is 15 times the expected cost of doing nothing. That is not even factoring in the cost of the expected reputational attacks for having wrongly designed the OGM in the first place with reference to Kafkaesque metrics.

All this to say, if we are going to pick a metric for equity that should inform the interpretation of rights-compatibility, that metric should not work to decimate any incentive for a business to invest in an OGM in the first place.

Request for assistance

As I noted at the outset, while I am confident in how we arrived at our metrics to assess the rights-compatibility of Framework remedies, I recognize that reasonable observers may disagree. Given the importance of getting this issue right, and of providing certainty to businesses who are struggling with how to develop Guiding Principles-aligned OGMs, I invite all experts with thoughts on what the appropriate metric for rights-compatible remedy should be to participate in this discussion. We would be happy to publish selected contributions on our website. I hope ERI would be willing to consider the same.

My only request is that, rather than simply suggesting what's wrong with different approaches, we all try to find a precise and practical solution.

[NB: Marco makes a valid point that we should have more clearly expressed how we reached the conclusion about equivalence between damage awards in Mexico and Papua New Guinea (“I think Enodo’s description of its approach needs to be changed, even if they stand by their methodology.”⁶⁷) I tried to clarify our approach by describing it in some detail in our last paper.⁶⁸

Every time I read the assessment, I find improvements that I would reverse time to make. Actually making those changes, however, seems to me ethically questionable. Our assessment is public precisely so that it may be subject to review and questioning and criticism. In that context, it would be inappropriate for it to be a moving target. I will continue to address comments and provide clarifications on this blog and in other public fora.]

⁶⁷ ERI Less Compensation.

⁶⁸ Part I, “Rights Compatible Remedy: A Response to ERI”, above.