

**COURT OF APPEAL OF ONTARIO**

**B E T W E E N :**

**SOPHIA MATIKO JOHN, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD, KELVIN; ANACRETUS MARINGO GIMANWA; ESTA GEORGE RANGE, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILDREN JOSEPH, GODFREY, FILEMON AND REBEKA; ELIZABETH MATIKO IRONDO; NEEMA STEPHEN JOHN, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILDREN JOHN, MIRIAM, ESTA AND TIMOTHY; MASWI MARWA MOHABE; DOTTO WILLIAM ITAMA, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD CHRISTINA; LYIMO ITAMA MACHELA; ITAMA MACHELA MAX; CHARLES DANIEL NYAKINA; BHOKE HAGALE MARO; DANIEL NYAKINA GHATI; DICKSON JULIUS SISE; SIBORA MARWA MWITA; EMMANUEL NYAKORENGA MBURI; RYOBA ELIAS KEBWE; PASCO MAREMBELA MWITA; NYAHELI MARWA NYAKORENGA; CHRISTOPHER JHOMU MAKENDE; RANGE MWITA RANGE; AND FREDY CHACHA WAMBURA LEMA**

Plaintiffs  
(Appellants)

and

**BARRICK GOLD CORPORATION**

Defendant  
(Respondent)

And Between

**ESTER NYANGI PETRO, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD LUCIA; LEONIDA RUBEN JOSHUA, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILDREN MACHUGU, NEEMA, AND DANIEL; ABEL SAIMA MACHUGU NYAMARUNGU; CLEMENSIA PROTAS MARWA; MACHERA KIMIRA W ANKA; CHARLES IKAYA MGAYA; MAHERI MWITA NTORA; AND CHARLES MWITA MSETI**

Plaintiffs  
(Appellants)

and

**BARRICK GOLD CORPORATION**

Defendant  
(Respondent)

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This is **Exhibit "6"** referred to in the Affidavit of Grant Beringer sworn by Grant Beringer, stated as being in the Kayes Region, Mali, before me at the City of Washington, in the District of Columbia, United States of America on 1 October, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read 'MAURA O'SULLIVAN', with a long horizontal flourish extending to the right.

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*Commissioner for Taking Affidavits (or as may be)*

**MAURA O'SULLIVAN**

## Who we are

The Voluntary Principles Initiative is a membership-based global multi-stakeholder platform dedicated to sharing best practices and mutually supporting the implementation of the Voluntary Principles.

## How we are governed and operate

Members of the Initiative are organized into three pillars: corporate, government, and NGO. We also have a category of Observers, which are admitted if they meet certain criteria such as demonstrating relevant expertise in human rights or in the industries that are the focus of the Voluntary Principles. A Steering Committee, formed by participants of all three pillars, is responsible for the Initiative's executive decisions. The Annual Plenary meeting, attended by all members, is the main decision-making body of the Voluntary Principles Initiative. The day-to-day administration of the Initiative is conducted by a Secretariat based in Ottawa, Canada. The Voluntary Principles Association, domiciled in the Netherlands, is the entity that addresses the financial and administrative needs of the initiative.

## Our Members

### Governments

- Argentina
- Australia
- Canada
- Colombia
- Ghana
- Switzerland
- United Kingdom
- United States

## — Companies

[Agnico Eagle](#)  
[Alphamin Bisie Mining SA](#)  
[Anglo American](#)  
[AngloGold Ashanti](#)  
[Barrick Gold Corporation](#)  
[BHP Billiton](#)  
[BP](#)  
[Chevron](#)  
[ConocoPhillips](#)  
[Dinant](#)  
[Eni](#)  
[Equinor](#)  
[ExxonMobil](#)  
[Freeport-McMoRan Inc.](#)  
[Frontera Energy](#)  
[Galp Energia](#)  
[Gemfields](#)  
[Glencore](#)  
[MMG](#)  
[Newcrest Mining Limited](#)  
[Newmont](#)  
[PanAust](#)  
[Repsol](#)  
[Rio Tinto](#)  
[Shell](#)  
[Sherritt International](#)  
[TotalEnergies SE](#)  
[Tullow Oil](#)  
[Vale](#)  
[Woodside Energy](#)

## — NGOs

[CDA Collaborative Learning Projects](#)  
[COMPPART](#)  
[The Fund for Peace](#)  
[Green Advocates](#)  
[Human Rights Watch](#)  
[IMPACT](#)  
[International Alert](#)  
[LITE-Africa](#)  
[New Nigeria Foundation](#)  
[Pact](#)  
[PAX](#)  
[Search for Common Ground](#)  
[UNICEF Canada](#)  
[West Africa Network for Peacebuilding, Ghana – WANEP \(Engaged\)](#)

## — Observers

[CME – Seguridad y Derechos Humanos](#)  
[DCAF – Geneva Centre for Security Sector Governance](#)  
[ICMM – International Council on Mining & Metals](#)  
[ICoCA- International Code of Conduct Association](#)  
[ICRC – International Committee of the Red Cross](#)  
[IFC – International Finance Corporation](#)  
[IHRB – Institute for Human Rights and Business](#)  
[IPIECA](#)  
[OECD – Organisation for Economic Co-operation and Development](#)

This is **Exhibit "7"** referred to in the Affidavit of Grant Beringer sworn by Grant Beringer, stated as being in the Kayes Region, Mali, before me at the City of Washington, in the District of Columbia, United States of America on 1 October, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read 'Maura O'Sullivan', with a long horizontal flourish extending to the right.

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*Commissioner for Taking Affidavits (or as may be)*

**MAURA O'SULLIVAN**

## HUMAN RIGHTS POLICY

### 1. Mission Statement

We respect the human rights of all individuals impacted by our operations, including employees, contractors and external stakeholders. Wherever we operate, we seek to avoid causing or contributing to human rights violations and to facilitate access to remedy. While governments have the primary responsibility to protect against human rights violations, we understand and accept our responsibility to respect human rights.

We consider “human rights” to be all internationally recognized human rights in the International Bill of Human Rights and the International Labour Organization (ILO) Declaration of Fundamental Principles and Rights at Work.

### 2. Our Approach

In fulfilling our mission, we are guided by several principles that help define our approach:

- We are committed to and always strive to act in accordance with the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises, and the Voluntary Principles on Security and Human Rights.
- We do not tolerate violations of human rights committed by our employees, affiliates, or any third parties acting on our behalf or related to any aspect of one of our operations.
- We do not tolerate the use of child labour, prison labour, or any form of forced labour, slavery or servitude.
- We believe in fair employment practices and in a workplace in which all individuals are treated with dignity and respect. We do not tolerate discrimination against individuals on the basis of race, colour, gender, religion, political opinion, ethnicity, age, nationality or social origin, sexual orientation, or union membership.

- We aim to pay all employees and contractors fairly. We will enforce working hours to the best of our ability aligned with ILO standards, and provide fairly compensated overtime and pay for periodic holidays and time off.
- We respect the freedom of expression and right to associate of our employees and contractors, including their right to establish and to join organizations of their own choosing to bargain collectively and advance their occupational interests without our previous authorization or unreasonable interference.
- We do not tolerate threats, intimidation, or attacks against human rights defenders.
- In our relationships with host governments, contractors and third-party service providers, we do our utmost to avoid being complicit in adverse human rights impacts, including benefitting from the human rights violations caused by others.
- We monitor and try to continuously improve our human rights performance.

### 3. Steps We Take

To try and meet those commitments, we will aim to take several steps:

- Develop and implement supporting policies, procedures, training and internal reporting structures to embed this Policy throughout our company.
- Provide training on our human rights expectations to all new employees and all relevant existing employees.
- Provide a safe and healthy workplace for all staff, contractors and subcontractors.
- Follow the Voluntary Principles on Security and Human Rights in our dealings with public and private security providers, local communities and potential victims of human rights violations.
- Comply, and demand that all suppliers and contractors comply, with all national laws, the International Bill of Human Rights, and the ILO Core conventions.

- Conduct human rights due diligence for all new projects and significant modifications to existing operations where there is the potential for negative human rights impacts, and seek to employ reasonable measures to mitigate those impacts.
- For relevant suppliers and third-party service providers, perform reasonable due diligence, insist that human rights terms and conditions be included in contracts (including compliance with this Policy), and require periodic human rights reporting, certifications and/or training.
- Promote human rights by contributing to public debate, supporting international agreements and commitments, and identifying opportunities to constructively engage on human rights issues relevant to the countries in which we operate.
- Only employ people above the minimum employment age set by national law or by ILO Convention 138, whichever is the higher. We will avoid employing individuals below 18 years of age in work that is likely to harm their health, safety or morals.
- Promote fair competition, including respect for property rights.
- Respect the history, culture and traditional ways of indigenous peoples, their standing as distinct, self-determining peoples with collective rights, and their interests in land, waters and the environment.
- Meaningfully engage with the local communities and other stakeholders affected by our operations to create and maintain transparent relationships built on mutual respect and trust.
- Establish and maintain a grievance mechanism for human rights complaints to be reported and addressed without any prejudice to the aggrieved person(s). We will report publicly on how complaints have been managed.
- Prevent, mitigate, and, where appropriate, remedy negative human rights impacts that are caused, or contributed to, by our company. In situations where we are directly linked to negative human rights impacts because of activities in our value chain, we will seek to use our leverage to prevent or mitigate those impacts.
- Take appropriate action where we identify violations of this Policy by employees or contractors.

- Conduct periodic audits and reviews at different sites, of different operating units, and of different contractors, to give us confidence that we are meeting the letter and spirit of this Policy. We may conduct those audits ourselves, or use external third parties. Where appropriate, we will establish performance improvement action plans to respond to the findings of these audits and reviews.
- Communicate this policy to our employees, partners, contractors and sub-contractors and make it available to the public.
- Report on our performance against our human rights objectives and targets.

#### 4. Scope of Policy

The Policy is applicable to our entire workforce of Barrick, including senior executives, financial officers, contractors and members of the Board of Directors, at every site that we operate. Certain of our affiliates and joint ventures, such as Barrick Niugini Limited, maintain their own distinct human rights policies and approaches, however we will use all rights and powers at our disposal as significant shareholders to achieve policies that will, in principle, align with this policy.



Mark Bristow  
President and Chief Executive Officer

## HUMAN RIGHTS POLICY - APPENDIX A

### FREQUENTLY ASKED QUESTIONS

#### 1. What is a “human right”?

For purposes of our human rights approach, the term “human rights” includes rights to:

- Life;
- Physical safety;
- Own and enjoy property;
- Fair and appropriate treatment in the workplace and in society, including protections for children;
- Fair treatment in the legal system;
- Associate with others for peaceful and lawful purposes;
- Practice and enjoy one’s culture, nationality and religion;
- Maintain individual thoughts and reasonable expression;
- Privacy and familial rights;
- And other rights as spelled out in relevant policies and procedures.

#### 2. What kinds of activities constitute human rights violations?

The kinds of activities vary greatly and can include murder, extrajudicial killing, and physical abuse such as torture, beatings, rape, assault, kidnapping, or attacking peaceful lawful protestors. Violations of rights in the legal system, such as abuse in prison, arbitrary arrest, or the denial of a fair trial, or related to labour, such as child labour, forced labour, or labour trafficking, as well as certain workplace conditions, can all be violations of human rights. Activities violating human rights can also include property related issues, such as forced evictions, denying individuals the right to own or enjoy property, land grabbing, or denial of access to water in certain situations. Measures that prevent people from practicing their religion or having a family, or discriminating against people based on their nationality, sex, race, or other characteristics can also violate human rights.

#### 3. What is the difference between a human rights violation and a domestic legal violation?

There are differences between human rights violations and domestic legal violations. Human rights violations, for purposes of our approach, are defined by international standards, and tend to involve rights that most countries around the world agree upon. Domestic legal violations normally are broader in scope than human rights violations; that is, human rights generally are a subset of domestic

legal provisions. In most instances, conduct that constitutes a human rights violation will also violate domestic laws. Under our policies and procedures, information that could suggest human rights violations or domestic legal violations must be reported.

#### **4. What does it mean to be complicit in a human rights violation?**

Complicity can mean different things, depending on the circumstances. In many locations, knowingly providing practical assistance to a legal violation defines complicity. Our goal is to avoid contributing to, encouraging, benefitting from or facilitating any human rights violation, and to take steps to help others acting on our behalf do the same.

#### **5. What are the penalties for human rights violations?**

The legal penalties for committing human rights violations vary. The penalties largely are defined by domestic legal codes, and so will depend on the countries whose laws may apply, and the nature of the incident. However, most human rights violations bring the potential for severe penalties, which, depending on the circumstances, can apply to individuals and companies. For individuals, the penalties can include lengthy jail terms and harsh monetary fines. For companies, the penalties can include fines, loss of licenses, and other measures. For employees, if you are complicit in human rights violations or serious criminal acts, you should expect your employment to be terminated. Given the seriousness of human rights violations, employees who either fail to report human rights violations about which they have direct knowledge, or who hinder investigations into human rights violations by, for instance, misleading investigators, also should expect to be terminated. Our third party contractors and suppliers likewise will be expected to avoid committing or being complicit in human rights violations, to report human rights violations of which they are aware, to avoid hindering human rights investigations, and to institute appropriate remedial actions where they are complicit in or otherwise commit a human rights violation.

#### **6. How are human rights obligations enforced?**

There are different enforcement mechanisms in different locations. First, host governments may take action. Second, most countries have laws that can apply outside of their borders, and these sometimes cover human rights. That can include countries where the victim or perpetrator lives or is a citizen, or even countries that may not have an obvious connection to the event. These countries, too, may take action. Third, the international community has a web of enforcement mechanisms that may apply, depending on the facts. Finally, we also may take commercial action in the face of actions that implicate human rights concerns,

whether through discipline of employees, reevaluation of contracts, or other means.

**7. If I have questions about whether something may constitute a human rights violation under our policy, whom should I contact?**

We have resources to provide guidance on whether an action could violate relevant human rights or domestic laws. But you always should consider contacting your supervisor, the Human Resources department, the Country Executive Director, the General Manager, any In-House Legal Counsel, any Compliance Personnel, or the Office of the General Counsel. If you have any doubts about whether an incident may implicate human rights, err on the side of reporting.

**8. How do I know if something is a human rights violation that should be reported?**

It is not important whether you know that something is, or is not, a human rights violation. If you hear information suggesting that conduct by an employee or third party could violate our Code of Business Conduct and Ethics, our Human Rights Policy, or other relevant policies, report the conduct regardless of whether you know or believe it is a human rights violation. If you hear information suggesting that conduct by an employee or third party could be part of any type of legal violation, or that someone's legal rights were violated in any way, report the conduct regardless of whether you know or believe it is a human rights violation. We do not expect you to report what law or what human right may have been violated. We do expect you to report information related to conduct that seems wrong or improper.

**9. How much information must I hear or learn about to report it? Is a simple rumor that I hear enough to report?**

Given the serious nature of the issues, a simple rumor of misconduct that you don't know to be true or untrue is enough to report. There is no minimum threshold for relevant reportable information. Rumors can be examined to assess their truth. Other individuals also may report relevant facts that may shed light on a rumor. Any information that could implicate a human rights issue, or a violation of the law, should be reported. Do not try to apply any subjective judgment to determine whether the rumor is or is not credible.

**10. What information should I report?**

Report whatever factual information you have gathered. In particular, it is important to note the identities of relevant individuals, whether they are witnesses, victims, or perpetrators. It also is important to include details about any incidents, including

relevant times and locations, to permit further investigation. We do not expect you to identify rights that you think may have been violated, but only what you may have perceived – that is, what you may have seen, heard, or read. Note that we may, depending on the situation, report information about human rights violations to relevant government agencies.

**11. What may happen if I do not report information of a potential human rights violation?**

An individual's failure to report information related to a crime can, in some circumstances, itself violate the law. We believe it is critical to know about and review human rights concerns, and the consequences to us for failing to do so can be severe. And we may not be excused from failing to know about or look into human rights or other legal issues because we do not learn of them. So if an employee fails to report a human rights violation or serious crime about which they have direct knowledge, the employee should expect to be terminated – just as an employee who is complicit in a human rights violation or serious crime should expect to be terminated. If an employee misleads or hinders investigators looking into possible human rights violations or serious potential crimes, the employee should expect to be terminated.

For contractors, if you or any of your employees commit or are complicit in a human rights violation or serious crime, you will be expected to take appropriate remedial action, and/or your contract may be re-evaluated. If you or any of your employees know of a human rights violation or serious crime by a third party and fail to report it, you will be expected to take appropriate remedial action, and/or your contract may be reevaluated. If you or your employees hinder or mislead investigators making inquiries into human rights violations or serious crimes, you are expected to take appropriate remedial action, and/or your contract may be reevaluated.

**12. Are there any exceptions to reporting potential human rights violations (e.g., are there instances where I should not report information I hear about a potential human rights violation)?**

There are no exceptions to reporting.

**13. Can I report anonymously?**

Yes, reports through the Compliance Hotline can be anonymous. It is important to understand that there will be no adverse employment consequences for people who timely report information in good faith related to possible human rights concerns. We will take reasonable measures to try to protect individuals who report in good faith, in a timely manner, from reprisals by third parties.

**14. How will human rights violations be investigated?**

Reviews of possible human rights violations may be conducted in different ways, using internal or external resources. Findings of serious human rights violations will be reported to senior management and potentially members of the Board of Directors.

**15. What kind of auditing and assurance will be performed to determine compliance under the human rights compliance program?**

We may use internal and external audit processes. Some of the auditing may take place by our internal audit group. Some may take place through external specialists, who may analyze discrete elements of the human rights program. Ultimately, we will use varied approaches, general and specific, internal and external, to assess programmatic effectiveness.

**16. Who will receive human rights training?**

Training will be provided, at a minimum, to all new employees, and all employees who may impact human rights, receive reports or complaints on human rights, and who may oversee programs involving human rights. These will involve management, legal personnel, human resources, security personnel, community relations personnel, individuals involved in administering the supply chain and overseeing third parties, and others.

**17. What information will be tracked and reported internally and externally?**

The information to be tracked may include the type and frequency of reports related to human rights violations, how a report was resolved, whether the report was deemed credible, how long it took to be resolved, and other similar factors. Some of this information may be released publicly in aggregated form.

**18. How will we seek to engage with host governments, as appropriate, consistent with the Human Rights Policy?**

The nature of that engagement will differ with each government, and each site. The engagement may include activities such as training, financial or in-kind support, program design and advice, physical infrastructure projects, community relationship-building, capacity building, and advisory work in drafting laws and regulations.

**19. Who will oversee the Policy?**

This Policy is overseen by the Group Sustainability Executive, under the direction of the Audit and Risk Committee of the Board of Directors, which receives regular updates on our human rights performance. Responsibility and accountability for implementing the Policy rests with the General Managers and Executive Directors in the countries where we operate.

**20. What policies and procedures are relevant to our human rights approach?**

The Code of Business Conduct and Ethics, Environmental Policy, Safety and Health Policy, Anti-Bribery and Anti-Corruption Policy, and Supplier Code of Ethics are some of the policies relevant to the human rights compliance program.

This is **Exhibit "8"** referred to in the Affidavit of Grant Beringer sworn by Grant Beringer, stated as being in the Kayes Region, Mali, before me at the City of Washington, in the District of Columbia, United States of America on 1 October, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read 'MAURA O'SULLIVAN', with a long horizontal flourish extending to the right.

---

*Commissioner for Taking Affidavits (or as may be)*

**MAURA O'SULLIVAN**

# Human Rights Report



At Barrick, we respect the human rights of all individuals impacted by our operations, including employees, contractors and external stakeholders. We seek to avoid causing or contributing to human rights violations and to facilitate access to remedy, wherever we operate. While governments have the primary responsibility to protect against human rights violations, we understand and accept our responsibility to respect human rights. We do not tolerate violations of human rights committed by employees, affiliates, or any third parties acting on our behalf or related to any aspect of a Barrick operation.

## Barrick Human Rights Mission Statement

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Please note, certain photos in this report were taken prior to the Covid-19 pandemic, and as such the wearing of masks and social distancing was not necessary or required. Credit to M Whellams and M Forget for certain photos used in this report.

# Letter from our President and CEO

Recognizing and respecting human rights have long been a fundamental value for Barrick. It is one of the four key pillars of our sustainability vision and strategy, and our Human Rights Policy was one of the first we updated following our transformational merger with Randgold at the start of 2019 (the 'Merger'). With 17 mines across 13 countries and exploration projects in another three countries, spanning five continents, we must manage a range of divergent human rights impacts and risks which are critical to our continued social license to operate and business success. But more than that, recognizing and respecting human rights is simply the right thing to do.

The importance of human rights as a core value at Barrick is demonstrated in our Sustainability Scorecard. The scorecard, which we developed as part of our 2019 Sustainability Report, uses our performance on human rights as one of the key metrics. Our overall performance on the scorecard is linked to



25% of the long-term incentive compensation for our senior leaders as part of the Barrick Partnership Plan. In 2021, further human rights indicators will be added to the scorecard.

This Human Rights Report, our first since the Merger, sets out in detail how we manage these diverse risks and challenges. It tracks our progress in embedding respect for human rights at our operations, through our supply chain, and in the communities and countries in which we operate.

Our policy, simply put, is to respect the human rights of all individuals impacted by our operations, including employees, contractors and external stakeholders. Wherever we operate, we seek to avoid causing or contributing to human rights violations and to facilitate remedial action. The policy is guided by our philosophy of partnership: building mutually beneficial relationships with our local communities.

Recognising and respecting human rights has long been a fundamental value for Barrick. It is embedded as one of the four key pillars of our sustainability vision and strategy

## Progress since the merger

Since 2019, we have worked to roll out a new Human Rights Policy across our sites. Last year, that meant working with independent human rights experts Avanzar to develop online training modules. While online training can never fully replace in-person training, it helped ensure our commitment was not hampered by Covid-19 related travel restrictions. We also developed 'train the trainer' programs to empower our site security leadership with the knowledge and skills to deliver long-term training to their teams and local public security forces. These programs were successfully implemented at our North Mara and Bulyanhulu operations in Tanzania during 2021.

We also revised, updated and restarted our Human Rights Program, under which our operations conduct human rights assessments on a 2–3 year cycle. Every operation evaluates the actual, potential and perceived human rights risks and impact of the mine in the first year. Independent assessments are conducted in the second year at operations deemed to have medium and high exposure to human rights risks. During 2020 and in the first half of 2021, independent assessments were undertaken at North Mara and Bulyanhulu.

On the policy side, we have also revised, updated and developed several human rights-related standards. These include our Use of Force Standard and our Voluntary Principles on Security and Human Rights Standard.

## Lots done, lots still to do

The management of human rights was not something we always got right prior to the Merger. This Report also reflects on actions we have taken to remedy these legacy situations, as well as the systems we have or are putting in place to prevent any recurrence. The Merger has also afforded us the opportunity to reset relationships which were impacted by legacy issues. By applying our community-centred model, underpinned by a philosophy of shared benefits, open and honest communication, listening and transparent disclosure, we have been able to resolve many of these old grievances and to restore many damaged relationships. Nowhere is this progress more evident than at North Mara, where community relations have been radically repaired. The mine now has a fully functional Community Development Committee which guides us in our investments in development projects.

**Mark Bristow**  
President and Chief Executive Officer

**PERFORMANCE  
& PROGRESS****100%**grievances  
resolved in 2020**Monitoring and reporting on resettlement outcomes**

Given the diverse nature of each resettlement, each site has a unique site- and resettlement-specific monitoring process in place. However, corporate due diligence procedures will still apply. For example, our corporate Human Rights Assessments review the resettlement processes at high-risk sites through a human rights lens.

**Papua New Guinea**

Our resettlement planning for two communities in Porgera was halted when the mine was placed on care and maintenance.

**Democratic Republic of Congo**

In 2016, the Kibali mine resettled 1,400 project affected peoples. Compensation was paid for both physical improvements on the land and crops. Compensation rates were determined in consultation with the local authorities. The project affected people had the option to have the company build a replacement home or receive payments to build their own homes. Payments were divided into four tranches and were released depending on the progress made on building the house. Those opting to receive payments were also provided with

financial literacy and planning training. The process was monitored for one year after the houses were completed to determine the displaced persons standard of living. The majority of complaints lodged in the grievance mechanism were related to level of compensation. Six years later, almost 100% of the complaints have been closed since the compensation rates were developed in such a robust manner.

**Tanzania**

At North Mara, the community of Matongo was resettled in mid-2020 as part of a commitment that was made previously under Acacia's management. The resettlement agreement defined the relocation process for approximately 1,500 people along with the school and the dispensary. As of 2021, almost everyone has now moved from the original location, but the primary school has not yet been relocated. The 2021 Human Rights Assessment found that the school children must now walk to the old school, which is approximately 7 kilometers away from the resettled community. As a result, the site will expedite the construction of the school in compliance with the resettlement agreement.

Kokiza was a village we created as part of a Resettlement Action Plan for the Kibali mine in the DRC.



## Security and Human Rights

To ensure the continuity of our operations and to protect our assets, Barrick operations employ private security and receive support from public security. We have implemented a comprehensive security and human rights program to ensure that these security operations respect the rights of our communities, contractors, and employees.

**Managing Security and Human Rights Risks****Voluntary Principles Standard**

Since 2010, we have been a member of the Voluntary Principles on Security and Human Rights (VPSHR). Our Human Rights Policy commits us to comply with the VPSHR, and it is the central tenet of our security management system. Our Voluntary Principles Standard sets out the responsibilities across the company for managing security and human rights related risks and the process used to assess the specific risks and mitigation measures for each mine site. The standard also requires that each mine engage with neighboring communities, civil society, host country, private security, and public security to consult on the nature of these risks and how best to address these issues. In 2020, our Voluntary Principles Standard and related procedures were revised to ensure alignment with the latest international guidelines, principles related to security and human rights and findings from past Voluntary Principle compliance assessments. The procedures were cross referenced with ICMM, IFC, UNICEF, ICRC, and IPIECA guidance for the implementation of the VPSHR, and industry best practice. By streamlining these procedures and aligning them with our Human Rights Policy, we are facilitating site adoption and implementation.

**Supporting procedures**

We have created a series of procedures to ensure implementation of the expectations outlined in the VPSHR Standard. For example, the Arrest and Detention procedure outlines how to carry out an arrest in a manner that complies with international human rights law and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the UN Code of Conduct for Law Enforcement Officials. The procedure for Managing Relationships/Agreements with Public Security (Police/Military) details how to best engage with public security to comply with the VPSHR, the Foreign Corrupt Practices Act and our Anti-Bribery and Anti-Corruption policies. The Security Code of Conduct outlines the minimum standards for the treatment of others by private security personnel and sets standards for ethical and lawful behavior by all employees. The Use of Force Procedure establishes the way force can be used by security personnel to comply with international standards and law.

**Training**

We require all employees and contractors to complete human rights training that focuses on how to prevent and mitigate negative human rights impacts, and promote the respect for human rights in their area of operations. We continue to provide security personnel specific training on human rights, the VPSHR and Barrick’s Use of Force Procedure. In 2019, 4,800 security personnel were trained. However, due to the pandemic, our training decreased in 2020 to 3,500 private and public security personnel. During 2020, all employees who completed the Code of Business Conduct and Ethics refresher training also received updated training on human rights as part of the course.

In 2020, we contracted Avanzar to develop online training for Human Rights and the VPSHR. The shift to online training reflects the need to continue our training despite the restrictions presented by Covid-19. We do however recognize the limitations of online training and we provide supplemental in person training to security personnel. This includes a train-the-trainer workshop which is provided at all high-risk sites so that security supervisors learn how to go through the online training with their security guards in an interactive manner and carry out additional participatory learning activities to put theory into practice.

We have also worked with Avanzar to develop and facilitate in-person human rights workshops that include a specific section on security and human rights, for managers and supervisors at each high-risk mine site. The workshop provides interactive exercises to understand, identify, report, and prevent human rights risks and impacts. We plan to roll out these training to most high-risk sites throughout 2021.

We require all employees and contractors to complete human rights training that focuses on how to prevent and mitigate negative human rights impacts, and promote the respect for human rights in their area of operations.

**PERFORMANCE & PROGRESS**

**Security and human rights training<sup>8</sup>**



<sup>8</sup> Covid-19 restrictions limited the amount of in-person training we were able to provide in 2020.



**Stakeholder engagement**

At a corporate level, we engage with the Voluntary Principles Initiative through the corporate pillar member working group to share best practice and promote the implementation of the VPSHR. We have also participated in the meetings of the ICMM Security and Human Rights Working Group, and the WGC’s ESG taskforce.

Since the merger, we have also redoubled our efforts to engage with our local communities, authorities and governments around the issues that matter to them. We have established CDCs at most sites to channel information and consultation discussions, including security. Our partnership with the CDCs includes a commitment to assist in reduced tensions and conflict. We see our work with the CDCs as our first line of security. We also work with local authorities to create awareness of the dangers of trespassing, artisanal mining, and the use of mercury.

**PERFORMANCE & PROGRESS**

The risk of an excessive use of force by private security personnel was substantially reduced with the removal of all weapons from all sites in 2019.

Established a comprehensive MOU with Tanzania police that aligns with the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the VPSHR.

**Monitoring and reporting on security and human rights impacts**

The Security Function uses the Human Rights Investigation and Reporting Procedure whenever an allegation of human rights abuses surfaces about private or public security personnel. We also commission Voluntary Principles on Security Human Rights assessments conducted by a third party. Since our last stand-alone Human Rights Report in 2018, assessments have been conducted at the North Mara, Bulyanhulu and Veladero mines. Three more high risk sites will be assessed in 2021.

Whenever an allegation of a human rights abuse occurs (such as an excessive use of force), the personnel involved are removed from the site pending the investigation. Some guards are allowed back after receiving training, depending on the level of the offense.

At Bulyanhulu, while the mine was on care and maintenance in 2020, more than 10,000 artisanal miners who operated informally on our lease area were removed by the authorities in a peaceful manner without any incident when the mine restarted its operations.

In Veladero, an external assessment found that Veladero achieved a high compliance with the VPSHR. Now the goal will be to achieve and maintain full compliance.

**Case study  
Improving the security  
at North Mara**

Since our last stand-alone human rights report in 2018, Barrick security and human rights related incidents linked to our relationships with private and public security have occurred at our North Mara mine. These incidents occurred under the previous Acacia management, prior to Barrick acquiring the minority share of Acacia and taking operational control of Acacia’s assets in Tanzania. In September 2019 when we assumed operational control of North Mara, major changes were implemented both in terms of the standards used, and monitoring. Further to this in line with our local partnership philosophy a new local private security company was hired; we increased the amount of training provided, and we have worked to improve the relationship between the mine and the community. Other actions include reviewing the relationship with the local police to establish clear boundaries. Police now only enter the mine site when requested by senior management to engage on criminal matters. There have been no new security-related human rights incidents raised to group level in the two years since Barrick acquired the remaining minority interest in Acacia.



# **BARRICK**

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Court File No. CV-22-00690649-0000

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

SOPHIA MATIKO JOHN, IN HER PERSONAL CAPACITY AND AS  
LITIGATION GUARDIAN FOR HER MINOR CHILD, KELVIN;  
ANACRETUS MARINGO GIMANWA; ESTA GEORGE RANGE, IN HER  
PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER  
MINOR CHILDREN JOSEPH, GODFREY, FILEMON AND REBEKA;  
ELIZABETH MATIKO IRONDO; NEEMA STEPHEN JOHN, IN HER  
PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER  
MINOR CHILDREN JOHN, MIRIAM, ESTA, AND TIMOTHY; MASWI  
MARWA MOHABE; DOTTO WILLIAM ITAMA, IN HER PERSONAL  
CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD  
CHRISTINA; LYIMO ITAMA MACHELA; ITAMA MACHELA MAX;  
CHARLES DANIEL NYAKINA; BHOKE HAGALE MARO; DANIEL  
NYAKINA GHATI; DICKSON JULIUS SISE; SIBORA MARWA MWITA;  
EMMANUEL NYAKORENGA MBURI; RYOBA ELIAS KEBWE; PASCO  
MAREMBELA MWITA; NYAHELI MARWA NYAKORENGA;  
CHRISTOPHER JHOMU MAKENDE; RANGE MWITA RANGE; AND  
FREDY CHACHA WAMBURA LEMA

Plaintiffs

and

BARRICK GOLD CORPORATION

Defendant

**AFFIDAVIT OF SEBASTIAAN BOCK  
(SWORN OCTOBER 1, 2023)**

I, **JOHANN SEBASTIAAN BOCK**, of the Town of Stellenbosch, in the Western Cape Province of South Africa, **MAKE OATH AND SAY:**

1. I am the Chief Operating Officer, Africa and Middle East, of Barrick Gold Corporation ("**Barrick**" or the "**Company**"). In that capacity, I have overall responsibility for overseeing operations at Barrick's mines and mining projects in Africa and the Middle

in a number of African countries. Its shares were traded over the London Stock Exchange. As Group General Manager Finance, I led the corporate and operations finance functions of the company. I was also a member of Randgold's Executive Committee and Treasury Committee.

6. In 2014, I completed the General Management Program at Harvard Business School.

7. Effective January 1, 2019, Barrick merged with Randgold. I accepted a position as Senior Vice President, Chief Financial Officer for Africa and Middle East of Barrick as of that same date. In July 2022, I was promoted to my current position of Chief Operating Officer, Africa and Middle East. I am one of the Company's most senior executives and sit on its Executive Committee. I report directly to the Chief Executive Officer of Barrick, Dr. Mark Bristow.

8. Throughout my time with Randgold, and now with Barrick, I have continued to reside in South Africa. My predecessor as Barrick's Chief Operating Officer, Africa and Middle East, Willem Jacobus Jacobs, is also a resident of South Africa.

## **B. BARRICK'S DECENTRALIZED STRUCTURE**

9. Barrick is a leading gold mining company, with producing mines and mining projects around the world. The Company does not, however, directly own or operate these mines and projects. Rather, the mines and projects are owned and operated by local subsidiaries or affiliates domiciled in the countries in which the mines and projects are located. It is therefore somewhat of a misnomer to refer to "Barrick's" mines and

24. As noted above, NMGML's local team at North Mara receives support from Barrick's regional team for Africa and the Middle East. Key members of the regional team in this regard include a Country Manager for Tanzania and a General Manager Operations—Central and East Africa. The Country Manager for Tanzania is responsible for, among other things, government relations. The General Manager Operations—Central and East Africa is involved in the oversight of mining activities at various African and Middle Eastern mines in Barrick's portfolio. From approximately April 2021 to October 2022, the Country Manager for Tanzania was Georgia Mutagahywa. In October 2022, Ms. Mutagahywa shifted into the role of Corporate Communications and Country Liaison Manager, and was replaced as Country Manager by Melkiory Ngido. Ms. Mutagahywa and Mr. Ngido are both citizens and residents of Tanzania. The current General Manager Operations—Central and East Africa is Tahirou Ballo, who has held the role since August 2019. Mr. Ballo is also a resident of Tanzania.


25. With respect to sustainability-related matters, the Mine has a local sustainability team and receives additional support from the Regional Sustainability Lead for Africa and the Middle East. The Regional Sustainability Lead reports to Grant Beringer, the Group Sustainability Executive of Barrick, and to me.

26. Ultimately, the business and affairs of NMGML are overseen by its Board of Directors. There are five Directors of NMGML. Two of the Directors of NMGML are Tanzanian government officials. Both of them reside in Tanzania. The other three are appointees of Barrick, in its capacity as the indirect majority shareholder of NMGML. I am one of the Barrick appointees to the Board. The other appointees of Barrick are Dr.

Bristow and Simon Bottoms (who is Executive Vice President, Mineral Resource Management & Evaluations at Barrick). None of the members of the Board of NMGML is a resident of Ontario. Dr. Bristow resides in Mauritius and Mr. Bottoms resides in England.

27. The Board of Directors of NMGML meets on a quarterly basis. These meetings take place in-person in Tanzania. To my knowledge, no meeting of the Board of Directors of NMGML has occurred in Toronto, in Ontario or elsewhere in Canada.

**SWORN BEFORE ME** remotely )  
 by Johann Sebastiaan Bock, stated as being in )  
 the City of Bamako, Mali, on )  
 October 1, 2023 in accordance O.Reg )  
 431/20, Administering Oath or Declaration )  
 Remotely. )



Maura O'Sullivan



Johann Sebastiaan Bock

Notary Public / Lawyer

Name and Address:

Maura O'Sullivan  
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 CANADA

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

SOPHIA MATIKO JOHN, IN HER PERSONAL CAPACITY AND AS  
LITIGATION GUARDIAN FOR HER MINOR CHILD, KELVIN;  
ANACRETUS MARINGO GIMANWA; ESTA GEORGE RANGE, IN HER  
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MARWA MOHABE; DOTTO WILLIAM ITAMA, IN HER PERSONAL  
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CHRISTINA; LYIMO ITAMA MACHELA; ITAMA MACHELA MAX;  
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NYAKINA GHATI; DICKSON JULIUS SISE; SIBORA MARWA MWITA;  
EMMANUEL NYAKORENGA MBURI; RYOBA ELIAS KEBWE; PASCO  
MAREMBELA MWITA; NYAHELI MARWA NYAKORENGA;  
CHRISTOPHER JHOMU MAKENDE; RANGE MWITA RANGE; AND  
FREDY CHACHA WAMBURA LEMA

Plaintiffs

and

BARRICK GOLD CORPORATION

Defendant

**AFFIDAVIT OF APOLINARY LYAMBIKO  
(SWORN OCTOBER 1, 2023)**

I, **APOLINARY LYAMBIKO**, of the City of Dar es Salaam, in the United Republic of Tanzania, **MAKE OATH AND SAY:**

1. I am an employee of North Mara Gold Mine Limited (“**NMGML**”) and the General Manager of the North Mara Gold Mine (“**North Mara**” or the “**Mine**”). I have held that role since July 2021. As General Manager, I am the most senior leader of the Mine and have

26. The grievance mechanism at North Mara has been effective in resolving grievances in a timely and appropriate manner to the satisfaction of dozens of members of local communities. In 2022, NMGML received 41 grievances and resolved 32 of them. The majority of the 41 grievances related to land acquisition, encroachment and compensation issues. None of them pertained to alleged violations of human rights.

27. Although I was appointed General Manager of North Mara in July 2021, in the course of my responsibilities I have informed myself concerning the use by local residents of the grievance mechanism in the period preceding my appointment. Not one of the grievances received in the period since 2019 has related to alleged violations of human rights.

### **C. SECURITY AT NORTH MARA**

#### ***(i) Trespassing and Illegal Mining***

28. For many years, North Mara has contended with significant security concerns. Unfortunately, the Mine is targeted regularly by trespassers who illegally invade the Mine site seeking to steal gold-bearing rock and other property, including fuel and equipment. Two ore stockpiles—the larger of which is in the area of the Nyabirama Pit and the smaller of which is in the area of the Gokona site—have been a particular focus of trespassers. Ore mined from open pits or the underground operations is stockpiled temporarily at these locations before being transferred to a facility known as the run-of-mine pad. Ore is then moved to the processing plant, where it is processed into saleable metal products. Trespassers also frequently make illegal and dangerous incursions into the pits and underground mine.

Gokona underground mine; (iii) drowned; and (iv) placed themselves at risk of significant or fatal injury from falling rocks.

32. In these circumstances, NMGML has prioritized securing and maintaining the integrity of North Mara for the protection and benefit of the Mine and its employees, contractors and property, as well as to guard against the risk that illegal trespassers will be injured or killed. In the period since late 2019, NMGML has been successful in reducing the number of security incidents at the Mine site, reducing the number of trespassers, and improving relationships with members of local communities surrounding the Mine Site. The steps and measures that have been taken have included, among other things:

- (a) the construction of a security perimeter around North Mara consisting of sections of concrete wall, electric and barbed wire fencing, lockable gates and sirens;
- (b) the installation of signs, both in Swahili and in English, warning of the risks of entering the Mine site;
- (c) engaging a third-party security contractor, at significant expense to NMGML, to provide security officers trained in non-lethal methods of repelling intruders;
- (d) the design and implementation of safety-related education programs in local communities, in order to improve the understanding among local community members of the dangers associated with trespassing, theft and illegal mining at North Mara;
- (e) the installation of an extensive network of closed-circuit television, thermal and infrared cameras around the Mine site, and the employment of specially trained personnel to monitor these video feeds;
- (f) the employment of trained personnel who have oversight over, and serve as points of contact for, employees of the Mine's third-party security contractor; and
- (g) engagement with residents and leaders of local communities in the area of the Mine through various corporate social responsibility programs, in order

40. The Security Services Agreement between NMGML and Nguvu Moja was entered into in Tanzania by Tanzanian parties, pertained to the provision of services by Tanzanians in Tanzania, contemplated the payment of fees by NMGML to Nguvu Moja in Tanzania by depositing the amounts in question into the bank account of Nguvu Moja in Tanzania, and was governed by Tanzanian law.

41. Pursuant to the Security Services Agreement, Nguvu Moja undertook to indemnify NMGML in respect of claims arising from, among other things: (i) breaches of the Agreement; (ii) gross negligence, wilful misconduct or unlawful acts or omissions of Nguvu Moja or its personnel; and (iii) the death or injury of any person arising out of or in connection with the provision of security services under the Agreement or the entry onto, and activities undertaken on, the Mine site by Nguvu Moja or its personnel.

***(iii) Relationship with the Tanzanian Police Force***

42. The main law enforcement agency of Tanzania is the Tanzanian Police Force. It is a sovereign, independent police force that operates under its own chain of command throughout the country, including at and in the vicinity of North Mara.

43. In view of significant and repeated safety and security challenges at North Mara, NMGML has had no choice but to develop a working relationship with the Tanzanian Police Force. NMGML is a significant employer of Tanzanian nationals, and relies upon the Tanzanian Police Force to protect not only its property but also the safety and security of its employees, as well as employees of third-party contractors that provide services at the Mine. NMGML believes that as a Tanzanian company, it is entitled to seek the

protection and assistance of the Tanzanian Police Force in keeping the Company's employees safe and its property secure. NMGML is similar to other Tanzanian citizens and companies in this regard.

44. The terms of the relationship between NMGML and the Tanzanian Police Force have been prescribed by Memoranda of Understanding concerning the provision of security services by the Police in the area of the Mine. Barrick Gold Corporation is not a party to the Memoranda of Understanding. Nor is Barrick a party to the other Agreements referred to above, including the Security Services Agreement between NMGML and Nguvu Moja.

45. As the Memoranda of Understanding affirm, NMGML has no authority over, and in no way supervises, directs or controls the activities of, the Tanzanian Police Force.

46. To be clear, the Tanzanian Police Force would operate in the area of North Mara even in the absence of the Memoranda of Understanding. As a sovereign, national police force, the Tanzanian Police Force is responsible for public security and safety throughout the country.

47. The Memoranda of Understanding provide for supplemental policing in the area of the Mine, and for NMGML to provide allowances to the Tanzanian Police Force in respect of their deployment. These allowances are denominated in Tanzanian Shillings and paid to a bank account in Tanzania in the name of the Inspectorate General of the Police. Significantly, the Memoranda of Understanding are the means by which NMGML has obtained commitments from the Tanzanian Police Force that officers assigned to the area

Court File No. CV-22-00690649-0000

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

SOPHIA MATIKO JOHN, IN HER PERSONAL CAPACITY AND AS  
LITIGATION GUARDIAN FOR HER MINOR CHILD, KELVIN;  
ANACRETUS MARINGO GIMANWA; ESTA GEORGE RANGE, IN HER  
PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER  
MINOR CHILDREN JOSEPH, GODFREY, FILEMON AND REBEKA;  
ELIZABETH MATIKO IRONDO; NEEMA STEPHEN JOHN, IN HER  
PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER  
MINOR CHILDREN JOHN, MIRIAM, ESTA, AND TIMOTHY; MASWI  
MARWA MOHABE; DOTTO WILLIAM ITAMA, IN HER PERSONAL  
CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD  
CHRISTINA; LYIMO ITAMA MACHELA; ITAMA MACHELA MAX;  
CHARLES DANIEL NYAKINA; BHOKE HAGALE MARO; DANIEL  
NYAKINA GHATI; DICKSON JULIUS SISE; SIBORA MARWA MWITA;  
EMMANUEL NYAKORENGA MBURI; RYOBA ELIAS KEBWE; PASCO  
MAREMBELA MWITA; NYAHELI MARWA NYAKORENGA;  
CHRISTOPHER JHOMU MAKENDE; RANGE MWITA RANGE; AND  
FREDY CHACHA WAMBURA LEMA

Plaintiffs

and

BARRICK GOLD CORPORATION

Defendant

**REPLY AFFIDAVIT OF APOLINARY LYAMBIKO  
(SWORN APRIL 4, 2024)**

I, **APOLINARY LYAMBIKO**, of the city of Dar es Salaam, in the United Republic of Tanzania, **MAKE OATH AND SAY:**

1. On October 1, 2023, I swore an Affidavit in connection with this proceeding. As I explained in that Affidavit, I am an employee of North Mara Gold Mine Limited (“**NMGML**”)

and the General Manager of the North Mara Gold Mine (“**North Mara**” or the “**Mine**”). I therefore have personal knowledge of the matters referred to in this Affidavit, except where I make such statements based on information and belief, in which case I state the source of my information and believe it to be true.

2. I am swearing this additional Affidavit in response to certain assertions that I understand are made in the evidence relied upon by the Plaintiffs in this proceeding. In particular, I will address:

- (a) the incorrect suggestion advanced by a number of the Plaintiffs’ witnesses in their Affidavits and Expert Reports that lawyers in Tanzania are now or would be reticent to act for clients in litigation against NMGML; and
- (b) the inaccurate assertion made by Elizabeth Matiko Irondo and Charles Daniel Nyakina in their Affidavits that the Tanzanian Police Force has failed to investigate alleged police-related shootings that have supposedly occurred at or in the vicinity of the Mine.

3. I do not propose to respond to all of the various other assertions made in the Affidavits and Expert Reports relied upon by the Plaintiffs. My silence with respect to any particular matter should not be taken as agreement with the Plaintiffs’ evidence concerning that matter.

**A. NMGML IS FREQUENTLY SUED IN TANZANIA**

4. As General Manager of North Mara, I have oversight responsibilities in respect of legal disputes that involve NMGML. I have not observed any “chilling effect” that has

allegedly prevented or deterred parties from bringing legal proceedings against NMGML. Nor have I observed any such effect that has prevented or deterred lawyers from acting against NMGML or taking positions adverse to the interests of NMGML.

5. To the contrary, NMGML is routinely subject to all manner of legal disputes, including proceedings before the Tanzanian courts. As of the date of this Reply Affidavit, there are nearly 70 active disputes to which NMGML is currently a party. Although a number of those matters are in mediation, the substantial majority are before the Tanzanian courts (including 10 cases currently before the Court of Appeal of Tanzania).

6. The active cases to which NMGML is a party involve an array of different subject matters and claims, including contractual disputes, wrongful termination claims and tort claims.

7. By way of recent example only:

- (a) In October 2021, a corporate claimant commenced a proceeding against NMGML in 2021 in the High Court of Tanzania (Commercial Division) concerning a dispute relating to equipment;
- (b) In May 2022, an appeal was taken to the Court of Appeal of Tanzania (Musoma) from a Decision of the High Court that dismissed a claim relating to 100 acres of land in the Tarime Region as time-barred;
- (c) In August 2022, a group of 32 residents of the Komarera village in the Tarime Region commenced an application against NMGML in the High Court in Musoma, alleging that NMGML had failed to compensate them

sufficiently for their lands. In December 2022, the residents obtained a temporary injunction preventing NMGML from using the lands in question pending resolution of the dispute. The High Court has since decided a number of other preliminary and interim issues in connection with this matter. The case is expected to be heard on the merits in the first half of 2024;

- (d) In March 2023, an appeal was taken to the Court of Appeal of Tanzania (Mwanza) from a Decision of the High Court that dismissed a claim alleging that NMGML had unlawfully interfered with the claimant's performance of a loan agreement;
- (e) In July 2023, a group of more than 150 claimants commenced an application against NMGML in the High Court in Musoma, seeking among other things an injunction preventing NMGML from continuing operations on lands spanning approximately 40 acres; and
- (f) In August 2023, an individual claimant commenced an appeal in the Court of Appeal of Tanzania (Musoma) from a Decision of the High Court that dismissed his claim for compensation from NMGML in respect of alleged nuisance and pollution.

8. There is no truth to any suggestion that parties involved in legal proceedings against NMGML, or who wish to assert claims against NMGML, are unable to retain competent counsel. The opposing parties in the nearly 70 proceedings that NMGML is

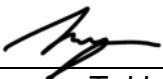
currently involved in have retained a range of different Tanzanian lawyers and law firms to represent them.

**B. POLICE INVESTIGATIONS OF SECURITY-RELATED INCIDENTS**

9. In the period since I became General Manager of North Mara, the Tanzanian Police Force has conducted investigations into various security-related incidents that have occurred at the Mine. Indeed, I note that Barrick has issued press releases disclosing the existence of such investigations. By way of example, I have attached to this Affidavit as **Exhibits 1, 2 and 3** copies of press releases issued by Barrick on September 28, 2023, November 27, 2023 and December 19, 2023. I understand that copies of these press releases are also attached to the Affidavit of Jeanine Alphonse sworn February 1, 2024.

**SWORN** remotely by Apolinary Lyambiko, stated as being located in the city of Dar es Saalam, Tanzania, before me at the City of Toronto, in the Province of Ontario, on the 4th day of April, 2024, in accordance with O. Reg 431/20, Administering Oath or Declaration Remotely.

}

  
 Commissioner for Taking Affidavits  
 (or as may be)

**APOLINARY LYAMBIKO**

**MAYA CHURILOV**

This is Exhibit "1" referred to in the Affidavit of Apolinary Lyambiko sworn by Apolinary Lyambiko of the city of Dar es Salaam, in the United Republic of Tanzania, before me at the City of Toronto, in the Province of Ontario, on April 4, 2024 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



---

*Commissioner for Taking Affidavits (or as may be)*

**MAYA CHURILOV**

LSO# 87190A

## North Mara Intruder Incidents

**Dar es Salaam, Tanzania, 28 September 2023** – On 21 September an incident occurred where approximately 100 intruders unlawfully invaded the mine property during heavy rainfall.

Unarmed private security contractors responded in an attempt to repel the armed invaders but subsequently requested police intervention to remove the aggressive intruders from the mine site. Seven intruders were arrested and based on initial police findings, some had sustained injuries as a result of fighting amongst themselves. Another intruder, injured in the fighting amongst themselves, was found unconscious by the police but later succumbed to his injuries while being transported to the Tarime District Hospital.

On 22 September a second incident occurred where police assistance was once again requested to engage with aggressive armed invaders in an attempt to prevent them from illegally entering the Gena Pit. During the incident, a policeman discharged his firearm and wounded an intruder. The intruder was transported to the Musoma hospital where he succumbed to his injuries on 27 September.

The police have launched investigations into both incidents.

### Barrick Enquiries

#### *Investor and media relations*

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Email: barrick@dpapr.com

#### *Corporate communications and country liaison manager*

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This is Exhibit "2" referred to in the Affidavit of Apolinary Lyambiko sworn by Apolinary Lyambiko of the city of Dar es Salaam, in the United Republic of Tanzania, before me at the City of Toronto, in the Province of Ontario, on April 4, 2024 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



---

*Commissioner for Taking Affidavits (or as may be)*

**MAYA CHURILOV**



**NEWS**

NOVEMBER 27, 2023

**Intrusion at North Mara Results in Casualty**



North Mara Gold Mine, Tanzania – On 26 November 2023 during heavy rain, approximately sixty (60) intruders gained access to Nyabigena Open Cast Pit at North Mara, overwhelming the unarmed private security contractors.

Police found an intruder injured on one of the pit’s working benches and transported the injured person to a nearby hospital for treatment, where he unfortunately passed away due to his injuries.

The nature of the deceased’s injury and the cause of his death have not yet been established, however it appears that the deceased suffered injuries after falling approximately 10m from the pit’s working benches onto the bench below. Further investigation is underway.

**Enquiries**

*Investor and media relations*

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Email: barrick@dpapr.com

*Corporate communications and country liaison manager*

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This is Exhibit "3" referred to in the Affidavit of Apolinary Lyambiko sworn by Apolinary Lyambiko of the city of Dar es Salaam, in the United Republic of Tanzania, before me at the City of Toronto, in the Province of Ontario, on April 4, 2024 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



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*Commissioner for Taking Affidavits (or as may be)*

**MAYA CHURILOV**

### Intrusion of North Mara Results in One Casualty

 [Press Release](#)

December 19, 2023

At 1240hrs, on 18 December 2023 approximately twenty-eight (28) intruders cut through the fence and illegally accessed the Airstrip Waste Rock Dump at the mine. The unarmed private security contractors were unable to repel the intruders and subsequently requested the police to enter the site to remove the intruders from the mine as the intruders refused to leave when requested to do so.

During this operation, the police identified an injured intruder. The police transported him to a nearby hospital for treatment, where he unfortunately succumbed to his injuries.

The nature of the deceased's injury and the cause of his death have not yet been established. Further investigation is underway.

**Enquiries:**

*Investor and media relations*

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SOPHIA MATIKO JOHN et al.  
Plaintiffs

-and- BARRICK GOLD CORPORATION  
Defendant

Court File No. CV-22-00690649-0000

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT  
TORONTO

**REPLY AFFIDAVIT OF APOLINARY LYAMBIKO**

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Email: mosullivan@dwpv.com  
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Lawyers for the Defendant,  
Barrick Gold Corporation

This is Exhibit "3" referred to in the Affidavit of Iulia Fetila Fasié sworn by Iulia Fetila Fasié of the City of Thornhill, in the Regional Municipality of York, before me at the City of Toronto, in the Province of Ontario, on September 25, 2024 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

*Karen Lam*

---

*Commissioner for Taking Affidavits (or as may be)*

Dated \_\_\_\_\_ May 2022

MEMORANDUM OF UNDERSTANDING

between

TANZANIA POLICE FORCE

and

NORTH MARA GOLD MINE LIMITED

Concerning

PROVISION OF SECURITY SERVICES AND MAINTAINING LAW AND ORDER IN  
THE AREA OF NORTH MARA GOLD MINING SITES

2022



## MEMORANDUM OF UNDERSTANDING

**THIS MEMORANDUM OF UNDERSTANDING** (together with the attached schedules which form part of this memorandum of understanding (the "MoU") is made on \_\_\_\_\_ day of May 2022 between:

- (1) **THE TANZANIA POLICE FORCE**, the sole law enforcement agency of the United Republic of Tanzania established by CAP 322 R.E 2002, and its headquarters at 4 Postal Street P.O. Box 961, 40483 Dodoma, Tanzania (hereinafter referred to as the "TPF" of the one part); and
- (2) **NORTH MARA GOLD MINE LIMITED** a company incorporated under the laws of the United Republic of Tanzania having its registered office at Plot number 34/1 Ursino South, New Bagamoyo Road, P.O. Box 1081 Dar es Salaam, Tanzania (the "Company"),

together referred to as the "Parties".

**IT IS ACKNOWLEDGED** that:

- (A) TPF is legally tasked with the duty of protecting life and properties throughout the United Republic of Tanzania by virtue of the Police Force and Auxiliary Services Act, 2002.
- (B) The Company is a joint venture company between East African Gold Mines PTY Limited and CayCo TZ Limited of the first part, and the Government of the United Republic of Tanzania (the "Government") of the second part.
- (C) The Company holds certain mineral claims and mining licenses within the Mara Region of Tanzania (the "License Area") and operates a gold mine and infrastructures and ancillary facilities (the "Mine Site") (together with the License Area, the "Area"). The existing boundaries of the Mine Site, as increased or reduced from time to time, are shown on the map attached as Schedule A (*Map of the North Mara Gold Mine and Environs*).
- (D) The Company has established significant infrastructure, including a plant and equipment, at the Mine Site, which is operated and maintained by both its own employees, various contractors who reside at the Mine Site and by residents in the local communities.
- (E) The Company and its Affiliates (together "BARRICK") conducts (or may conduct in the future) gold exploration or mining activities throughout the Area and has employees, contractors, equipment and vehicles at various mineral exploration sites.
- (F) The Mine Site together with the mine exploration work undertaken by the Company and BARRICK make a considerable contribution to improve peace and economic prosperity of the Area and in Tanzania, particularly by the creation of jobs among the local communities, the provision of training for local staff and the creation of direct and indirect commercial opportunities for local businesses and other stakeholders throughout Tanzania. The Mine Site demonstrates to the international investment and banking communities that the sovereign and political risks associated with operating exploration and mining projects in the Area can be managed successfully to the benefit of all stakeholders.
- (G) Consistent with:
  - (i) the Constitution of the United Republic of Tanzania;
  - (ii) laws of the United Republic of Tanzania; and
  - (iii) the Voluntary Principles on Security and Human Rights, published on 4 December 2000 ("Voluntary Principles"), to the extent that the Voluntary Principles do not contain any provisions that are in conflict with Tanzanian legislation currently in force,

- the Government of Tanzania has the primary responsibility with maintenance of law and order in Tanzania. In or around the Area, the Government of Tanzania discharges such responsibility through the TPF, and such other Government security forces, as the Government of Tanzania deems necessary from time to time.
- (H) The villages of Kerende, Kewanja, Nyakunguru, Mantongo, Mjinikati, Nyabichune, Nyangoto, Komalela, Nyamwaga, Genkuru and Msege, which are located within a 45 kilometre radius of the Area (the "**Community**"), as shown on the map attached as Schedule A (*Map of North Mara Gold Mine and Environs*), have a fundamental need for security and the right to be treated with respect and dignity, and are entitled to expect that the TPF will be held accountable to the public by the Government of Tanzania for any misconduct.
- (I) As a matter of principle the Company and BARRICK will not be involved whatsoever in any policing, military activities, paramilitary activities, or armed conflicts that may occur anywhere in the vicinity of the Company's operations, or anywhere in the Area.
- (J) The Company and BARRICK are mining companies and their plant, equipment and assets have been brought into the Area specifically for exploration and mining purposes. Consistent with the laws of Tanzania and the Voluntary Principles, it is the Company's strict policy that it and BARRICK's employees, suppliers and contractors (their respective employees and subcontractors) together with the Company's security personnel, in each case do not carry firearms that contain hard munitions. As further detailed in Recital (K) below, the TPF are responsible for preserving law and order in the Area and are the lawful entity allowed to bear firearms within the Area. Consistent with the laws of Tanzania, the TPF shall only enter inside the perimeter of the Mine Site when requested by the Company, depending on the significant security threat arises, or pursuant to a lawful criminal investigation.
- (K) According to the Tanzania laws, TPF are vested with the responsibility of ensuring public security and safety; protecting life and property; preserving order and preventing the commission of offenses; bringing offenders to justice through investigation, apprehension, detention and processing of persons suspected of criminal offences; and involving the community in the policing process to create an environment that builds an effective working relationship between the community and the TPF and which has respect for human rights and fundamental freedoms.
- (L) The Area is in a remote part of Tanzania and the TPF have limited resources to dedicate to the Area with required security, and thus TPF desire to increase their presence and strengthen their capacity to preserve law and order, prevent and solve crime and provide community policing and the Company desires TPF to provide supplemental support to the TPF in the Area on a voluntary basis, in particular along the outside perimeter of the Mine Site.
- (M) The TPF are required to abide by the Tanzanian law and international legal obligations in relation to respect for human rights and fundamental freedoms, and to cooperate with the Tanzanian Commission for Human Rights and Good Governance ("**CHRAGG**").
- (N) The Company is or may be required to abide by various legal obligations and non-legal standards applicable to international mining companies in Tanzania and elsewhere, including but not limited to:
- (i) The Prevention & Combating of Corruption Act 2007 (Tanzania); the Foreign Corrupt Practices Act (United States of America); the Corruption of Foreign Public Officials Act 1999 (Canada); and the Bribery Act 2010 (United Kingdom) (together "**Anti-Bribery Legislation**"); and
  - (ii) The Voluntary Principles, the United Nations Guiding Principles on Business and Human Rights (endorsed by the United Nations Human Rights Council in resolution 17/4 of 16 June 2011), ("**UNGPs**") (together "**Human Rights Standards**" which are attached as Schedules C (*Voluntary Principles*) and D (*Guiding Principles*), respectively.
- (O) The Company will maintain relevant records relating to any and all support it may provide, and will make such records available to the TPF, the Government or any other relevant domestic or foreign public authority as may be required or as the Company may determine. To that end, all support provided shall be open and transparent, and the Company may disclose information in its

possession regarding such support to third parties, including government or non-governmental organizations, as it considers appropriate.

- (P) The Parties to this MoU are committed to exercising their rights and discharging their responsibilities according to the rule of law as it is reflected in the domestic law of Tanzania and in accordance with international protocols and instruments to which Tanzania also adheres and subscribes to, which include the following:
- (i) the United Nations Universal Declaration of Human Rights (adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948);
  - (ii) the United Nations Code of Conduct for Law Enforcement Officials (adopted by General Assembly resolution 34/169 of 17 December 1979);
  - (iii) the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990);
  - (iv) the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises adopted by a meeting of its Ministerial Council in Paris on 27 June 2000;
  - (v) the Voluntary Principles; and
  - (vi) the UNGPs,

together, the "**Applicable Human Rights Principles**".

- (Q) In addition, while the Parties have a shared interest in ensuring that the TPF have the means to protect the lawful interests of both the Area, the Company and its Affiliates, the Parties recognise and agree that:
- (i) the TPF must act independently of the Company and its Affiliates, BARRICK, the BARRICK Group, and the Personnel, in accordance with the Applicable Human Rights Principles and in compliance with applicable national and international law including, where applicable, international humanitarian law as well as human rights law, including any internationally accepted standards of conduct in managing armed civil disturbances, conflicts and uprisings; and
  - (ii) the Company and BARRICK: (a) operate independently of the Government of Tanzania and are not state agencies or instrumentalities notwithstanding that the Government of Tanzania has a carried (indirect) interest in North Mara; and (b) have no authority and shall not supervise, direct or control any mission, assignment or function of the TPF. The TPF will operate, at all times, under their own chain of command and nothing in this MoU shall be construed to suggest that the TPF, or any of its members, are the agents, partners, employees, or representatives of the Company or BARRICK in any capacity. Further, in providing the support identified herein, the Company has not agreed and neither does nor will agree to assist in any operation assignment or function in any manner, logistical or otherwise.
  - (iii) the arrangements between the Company and Tanzania and/or the TPF, and any assistance, services or support provided by either Party, shall under no circumstances: (a) create any kind of employment, agency or joint venture relationship between the Company, Tanzania, the TPF, or any individual TPF officer, whether under Tanzanian tax laws, employment laws, or any other applicable law; (b) create any duty of care by the Company to the TPF, its members, any other person associated with the deployment or any third parties with whom the TPF, its members or any other person associated with the deployment may interact; or (c) render it reasonably foreseeable that any violations of national law or international human rights may occur because of such assistance, services or support that the Company may provide.

The Parties agree as follows:

1. **Defined terms**

In this MoU the following terms have the following meanings:

**"Affiliates"** means a company in the same Group as the Company or BARRICK (as the case may be).

**"Allowances"** means the amounts paid in accordance with clause 6.1 (*Allowances*).

**"Anti-Bribery Legislation"** has the meaning to given to it in Recital (N) and which includes any other anti-bribery or anti-corruption law, rule, or regulation, in any applicable jurisdiction.

**"Armed Violence"** means any uprising, riot, civil disobedience, disturbance or hostile activity of any kind initiated by armed individuals not acting with the legal authority of:

- (a) the Government of Tanzania; or
- (b) any national or international armed forces invited by the Government of Tanzania, which threatens, or has the potential to threaten, the security or safety of the Mine Site (or any operations of BARRICK) and any Personnel.

**"Applicable Human Rights Principles"** has the meaning given to it in Recital (P).

**"Assets"** mean any vehicles (but not any aircraft) in the Area owned or operated by the Company, BARRICK or any of contractors and suppliers of the Company or BARRICK.

**"Associated Person"** means in relation to any entity, a person who (by reference to all the relevant circumstances) performs services for or on behalf of that entity in any capacity and including employees, agents, subsidiaries, representatives and subcontractors.

**"Community"** has the meaning given to it in Recital (H).

**"Company's Asset Protection Manager"** means the manager designated to that role by the Company from time to time who shall be located at the Mine Site.

**"Effective Date"** has the meaning given to it in clause 18 (*Effective Date*).

**"Exceptional Event"** has the meaning given in clause 22 (*When Permitted Support may be requested*).

**"General Manager"** means the general manager of the Mine Site.

**"Group"** means any persons, corporations or other forms of enterprise (including direct and indirect parent and subsidiary companies), which directly or indirectly controls, is controlled by, or is under common control with, a Party hereto and each of such entities' successors and assigns. For the purposes of the preceding sentence, "control" means possession, directly or indirectly, of the power to direct or cause direction of management and policies through ownership of voting securities, contract, voting trust or otherwise.

**"Mine Site"** has the meaning given to it in Recital (C).

**"Natural Disaster"** means any flood, earthquake, hurricane, typhoon, volcanic activity, outbreak of an epidemic or pandemic, famine, or other natural disaster which has resulted in the need for intervention by the Government of Tanzania to provide humanitarian aid and relief.

**"North Mara Gold Mine Office"** means the address set out in clause 13.1(a).

**"NGO" or "Non-Governmental Organisation"** means any voluntary private association, union, or institute; or group of individuals, private citizens, or corporate bodies which participates in international affairs and enjoys international personality.

**"Permitted Security Presence"** has the meaning given to it in clause 5.1.

**"Permitted Support"** means in respect of an Exceptional Event the use by the TPF of the Assets, fuel, food, water, medical supplies and medical assistance for the evacuation of wounded or otherwise injured of TPF, military or civilian personnel from the Area.

**"Personnel"** means any person or persons employed by, contracted to or otherwise providing services to:

- (a) the Company or to BARRICK; or
- (b) to any of the Company's or BARRICK's contractors or suppliers (and any sub-contractors or suppliers).

**"Regional Police Commander"** means the Regional Police Commander of the Tarime-Rorya Special Police Zone and the Regional Police Commander of Mara Region.

**"Senior Police Officers"** means the Regional Police Commander, Staff Officer, Operation Officer, Regional Crime Officer, Officer Commanding Field Force Unit, Officer Commanding District, Officer Commanding Criminal Investigation District, and Officer Commanding Station.

**"TPF Vehicles"** means each of the following vehicles utilised by the TPF in accordance with this MoU in the Area:

- (a) Toyota Land Cruiser Hard top [REDACTED]
- (b) Toyota Land Cruiser Pick-up [REDACTED]
- (c) Toyota Land Cruiser Trooper [REDACTED]
- (d) Toyota Land Cruiser Pick-up [REDACTED]
- (e) Toyota Land Cruiser Trooper [REDACTED]
- (f) Toyota Land Cruiser Trooper [REDACTED]
- (g) Toyota Land Cruiser Trooper [REDACTED]
- (h) Toyota Land Cruiser Trooper [REDACTED]
- (i) Toyota Land Cruiser Trooper [REDACTED]
- (j) Toyota Land Cruiser Trooper [REDACTED]
- (k) Toyota Land Cruiser Hard top [REDACTED]
- (l) Toyota Land Cruiser 76 Series [REDACTED]
- (m) Toyota Land Cruiser Trooper [REDACTED]
- (n) Toyota Land Cruiser Pick-up [REDACTED]
- (o) Toyota Land Cruiser Pick-up [REDACTED]
- (p) Toyota Land Cruiser Pick-up [REDACTED]
- (q) Toyota Hilux Pick-up [REDACTED]
- (r) Toyota Land Cruiser Pick-up [REDACTED]
- (s) Toyota Land Cruiser Pick-up [REDACTED]
- (t) Toyota Land Cruiser Pick-up [REDACTED]

## 2. When Permitted Support may be Requested

- 2.1 The right of requisition of an Asset for the Permitted Support is restricted to the strict and immediate needs of the TPF and may be exercised only when the required assets or services cannot be obtained by agreement from third parties.
- 2.2 Notwithstanding clause 2.1 and consistent with the Voluntary Principles, the TPF and the Company, as appropriate, will seek to assist in having medical care promptly provided to anyone receiving physical injuries resulting from an event of a violent confrontation involving the TPF in and around the Area.
- 2.3 Subject to clause 2.2, a request may be made to the Company or to BARRICK (as the case may be) to provide the Permitted Support, where:
- (a) there is an Armed Violence within 20 kilometres of the principal administration building of the Mine Site, or within 20 kilometres of any operation of BARRICK, as the case may be;
  - (b) TPF, military and/or civilian personnel are wounded or otherwise injured as a result of any Armed Violence within 20 kilometres of the principal administration building of the Mine Site or within 20 kilometres of any operation of BARRICK (as the case may be), and the TPF, military, or civilian personnel require immediate medical attention;
  - (c) the Personnel require evacuation from where there is an Armed Violence, or a Natural Disaster;
  - (d) there is a Natural Disaster within 30 kilometres of the principal administration building Mine Site, and/or within 30 kilometres of the principle administration building of any operation of the Company and BARRICK (as the case may be), and where the TPF's assistance has been ordered by the Government of Tanzania or the Regional Police Commander, for the purpose of providing humanitarian aid for the local population affected by that Natural Disaster; or
  - (e) there is a specific and likely threat to the Personnel or to members of the local community surrounding the Mine Site from an Armed Violence or a Natural Disaster,

each of the above is an "Exceptional Event".

## 3 Request for Permitted Support from the Company

### 3.1 Procedure

Where the Permitted Support is required in respect of an Exceptional Event, the following procedure must be followed:

- (a) The Regional Police Commander responsible for the Exceptional Event, must inform the following:
  - (i) The Commissioner of Police responsible for Operation at Police Headquarters; and
  - (ii) The General Manager,

that an Exceptional Event has occurred or is likely to occur and that the TPF are unable to deal with that event adequately without the Permitted Support, specifying the nature of the Permitted Support required and the duration for which it will be needed.
- (b) If the Commissioner for Operation of Police Headquarters determines that there is a need for the Permitted Support, the Commissioner of Police responsible for Operation at Police Headquarters shall provide a request in writing for the Permitted Support to the Regional Police Commander.
- (c) On receipt of the request in writing for the Permitted Support from the Commissioner for Operation of Police Headquarters, the Regional Police Commander must prepare a formal request to the General Manager at the North Mara Gold Mine Office for the Permitted

Support ("**Formal Request**"), which will adhere with Clause 3.2 (*Contents of a Formal Request for Permitted Support*).

- (d) The General Manager will make a determination as quickly as possible whether the Permitted Support in respect of the Exceptional Event is to be provided, and in any event will provide its decision to the Regional Police Commander in writing in English and/or Swahili within 24 hours of the formal request being received. Where this procedure is impossible in the circumstances due to imminent risk of harm, the decision shall be communicated by any means possible and reduced to writing as soon as possible thereafter, and no later than 24 hours after receipt by the General Manager of the request in writing for the Permitted Support.

### 3.2 Contents of a Formal Request for Permitted Support

The Regional Police Commander will ensure that any formal request for the Permitted Support delivered to the General Manager at the North Mara Office, will:

- (a) specify the nature and precise location of the Armed Violence or Natural Disaster for which the Permitted Support is required;
- (b) specify the purpose for which the Permitted Support is required, including the type and use of any Assets to which access is requested and the locations in which those Assets will be deployed;
- (c) specify the anticipated duration for which the Permitted Support will be required and the anticipated date on which the relevant Assets will be returned to the Company, or BARRICK (as the case may be);
- (d) provide details of any applicable written law (if any) of Tanzania relied upon in making the formal request for the Permitted Support;
- (e) if possible, considering the circumstances of the Exceptional Event, provide details of the name, rank and other relevant details of the responsible TPF officers who intend to use the Assets;
- (f) be signed on behalf of the Regional Police Commander.

### 3.3 Assets Provided Pursuant to Law

The Assets will only be provided to the TPF for the Permitted Support in accordance with this MoU or any applicable Law as in force when the Exceptional Event occurs. No Support shall be provided in connection with, in furtherance of, or conditioned on any specific assignment the TPF may undertake when deployed to the Area.

### 3.4 Unwarranted Requests for Permitted Support

If the General Manager determines that a request for Permitted Support is not warranted in the circumstances, he must notify the Regional Police Commander in writing.

## 4 Use and Control of Weapons and Equipment

The Company and BARRICK shall not be required to, and the TPF shall not request that, the Company or BARRICK provide lethal weaponry, including hard munitions, or make any payment in order to procure such weapons, weaponry or ammunition. TPF agree that no support provided by the Company or BARRICK, including any Allowances, shall be used for lethal weaponry or other lethal equipment. TPF agree that any equipment provided by the Company or BARRICK will not be used for any other purpose than that contemplated by this MoU and will only be used when TPF officers or other TPF personnel deployed to the Area are on duty, or as otherwise specified in this MoU.

## 5 Permitted Security Presence

- 5.1 The TPF shall deploy to the surroundings of the Mine Site the following TPF officers to maintain law and order (a "**Permitted Security Presence**"). Each deployed TPF officer shall be identified on a duly authorised duty roster provided by the TPF to the Company, and selected by a Staff Officer (designated by the Regional Police Commander) and who shall report to the Officer Commanding District ("**OCD**") based in Nyamwaga:
- (a) Officer Commanding Operations ("**OC**"), who shall be located at the Barracks;
  - (b) One hundred and forty-two (142) TPF officers, who shall focus on the maintenance of law and order in relation to the Mine Site (subject to clause 5.2) and report directly to the OC;
  - (c) Two (2) TPF officers, whose focus shall be to undertake with criminal investigations at the Mine Site;
  - (d) Six (6) Traffic TPF officers for assisting with traffic control in the Area (excluding the Mine Site), including with respect to the Mine Site vehicles and the haul road/village intersections; and
  - (e) Three (3) TPF Liaison officers, each operating an eight-hour shift (in every 24-hour period) in a designated office provided by the Company which will be located at the Mine Site and reporting to the OC.
- 5.2 Save as expressly allowed under law or under this MoU, TPF officers shall access the Mine Site only upon request of the Company.
- 5.3 Where security situation requires the presence of additional TPF officers in the Area other than as set out in this MoU, the TPF shall provide such additional TPF officers and other resources necessary to ensure the maintenance of law and order in the Area. The Allowances set out in clause 6.1, shall be paid to any such additional TPF officers so deployed to the Area, who are listed on a duly authorised duty roster provided by the TPF to the Company.
- 5.4 The Commissioner of Operations at Police Headquarters shall approve any request for additional TPF officers in writing before that increase in TPF officers is informed by the Regional Police Commander to the Company.
- 5.5 The Company's Asset Protection Manager may request the termination of a Permitted Security Presence at the Mine Site, or anywhere in the Area, at any time by notice in writing to the Regional Police Commander. Upon receipt of such notice, the Regional Police Commander shall procure the removal of the TPF from the location set out in the notice (or as otherwise requested by the Company's Asset Protection Manager) within 14 days of receipt.
- 5.6 The Company Asset Protection Manager and the Regional Police Commander (or such other Senior Police Officer) shall meet regularly to discuss the security situation in the Area, any complaints levied by third parties in connection with the deployment, whether the complaints are received by the Company or any governmental entity, and the implementation of this MoU. At the meeting, the Regional Police Commander (or such other Senior Police Officer) shall also provide updates on the investigation of complaints previously raised (if any) and provide such other information as may reasonably be required by the Company Asset Project Manager to ascertain compliance with the terms of this MoU. Upon request from the TPF Headquarters (which shall not be made more than twice in each 12-month period), the Company shall facilitate such TPF officers from TPF Headquarters to the Mine Site to meet with the Company's Asset Protection Manager to discuss the implementation of this MoU, and complaints levied in connection with the deployment, and the security situation in the Area. The Company may deduct the cost for facilitating such visits from the amounts paid in accordance with clause 6(d).
- 5.7 If there are any complaints levied against individual TPF officers based on conduct occurring while assigned to the Area, whether raised by the Company or any third party, those complaints will be fully investigated according to the established TPF or the Government's procedures, and any individuals under investigation for potential violation of TPF duties, policies or the laws of Tanzania will be suspended from providing security in the Area pending the outcome of such investigation. The Company also notes that if it receives complaints or feedback related to the

deployment, the TPF agrees to process such complaints or feedback through its established grievance mechanism. Complaints or feedback that relate to the conduct or actions of TPF officers will be conveyed to the TPF or the Government's other agencies, as may be appropriate.

## 6. Allowances and in kind support

6.1 The Company shall pay the following allowances in respect of the Permitted Security Presence, in accordance with applicable TPF duty rosters reflecting appropriate rates:

### (a) Operational Daily Fee

A daily operational fee payable to each designated TPF officer who is listed on the TPF duty roster and is deployed to the Area regardless of rank shall be of TZS 100,000 (Tanzania Shillings One Hundred Thousand).

Payment of the daily operational fee (subject to the below deductions) will be paid to an official TPF government bank account (the "**TPF Bank Account**") for and on behalf of the TPF officers deployed at the Area. On receipt, the TPF, through the Regional Police Commander, will make available a payment voucher to each TPF officer so deployed in an amount in aggregate equal to the daily operation fee less the below deductions.

The Regional Police Commander shall keep a payment voucher register which shall record each operational daily fee payment voucher issued under this MoU and be signed by each individual TPF officer in receipt of the payment voucher together with a third party witness confirming that the daily operational fee (less the below deductions) was provided and received. A copy of the payment voucher register will be made available to the Company on a monthly basis.

The Company shall pay the daily operational fee (less the below deductions) to the TPF Bank Account as set out in clause 6.1(c) and the Company shall incur any reasonable banking charges with respect to the transfer of said daily operational fee to the TPF Bank Account.

The daily operational fee shall be rolled-up and paid every two-week period or at such other period as the Parties shall agree.

### (b) Daily Per Diem

A daily per diem to each TPF officer deployed to the Area who appears on the TPF duty roster shall be of TZS 50,000 (Tanzania Shillings Fifty Thousand) which shall be deducted from the amount payable in clause 6.1(a).

Payment of the per diem shall be made to the TPF Bank Account for and on behalf of the TPF officers deployed at the Area. On receipt, the TPF, through the Regional Police Commander, shall make available a payment voucher to each individual TPF officer so deployed in an amount in aggregate equal to the per diem.

The Regional Police Commander shall keep a payment voucher register which shall record each per diem payment voucher issued under this MoU and be signed by each individual TPF officer in receipt of the payment voucher together with a third party witness confirming that the daily operational fee (less the deductions set out herein) was provided and received. A copy of the payment voucher register will be made available to the Company on a monthly basis.

The Company shall pay the per diem to the TPF Bank Account as set out in clause 6.1(c) and the Company shall incur any reasonable banking charges with respect to the transfer of the per diem to the TPF Bank Account, signed by the individual officer and a third party witness confirming that the per diem was provided and received.

The per diem shall be rolled-up and paid every two-week period or at such other period as the Parties shall agree.

## (c) Operational Administration Fee

There shall be an operational administration fee of TZS 10,000,000 (Tanzania Shillings Ten Million) deducted from the amounts payable in clause 6.1(a) which shall be rolled-up and paid for the period of every two-week or at such other period as the Parties shall agree

## (d) Mode of payments

A daily per diem to each TPF officer deployed to the Area as per clause 6.1 (b) and Operational Administration Fee shall be paid to the TPF Bank Account, the details of which are set out below:

Bank Name: CRDB Bank Plc

Bank Address: P.O.Box 2, Tarime

Bank Account Name: [REDACTED]

Account Number: [REDACTED]

SWIFT: [REDACTED]

## (e) Administrative Fee

There shall be administration fees, rolled-up and paid on a monthly basis on or around the first week of each month or such other period as the Parties shall agree, which shall inter alia used to support the smooth running of the Force and discharge of duties under this MoU, to be paid to the Office of the Chief of Police Force (Inspector General) vide official government account set out below, from the balance in excess of clause 6.1(c), following deductions made over clauses 5.4, 6.1(a) and 6.1(b) (as the case may be).

Bank Name: Bank of Tanzania

Bank Address: Mirambo Street, P. O. Box 11884, Dar es Salaam

Bank Account Name: [REDACTED]

Account Number: [REDACTED]

(f) The Parties, from time to time, not less than every twelve months, may review the operational administration fee as set out in clause 6.1(c), and upon agreement may make an increase of not more than 10 percent in any financial year.

## (g) Additional Senior Police Officer Fee

Where it is necessary for additional TPF officers to be deployed to the Area in accordance with clause 5.3, and where as a consequence any additional Senior Police Officers are also required to be deployed to the Area, an additional Senior Police Officer Fee shall be paid to each such Senior Police Officer so deployed and appearing on a duty roster (up to a maximum of 8 Senior Police Officers) (in accordance with the Public Service Circular No. 2 of 2014), of TZS 30,000 (Tanzania Shillings Thirty Thousand) per day. The additional Senior Police Officer fee shall be paid to the TPF Bank Account (on behalf of each Senior Police Officer) by the Company as per the banking details set forth in clause 6(c):

The additional Senior Police Officer fee shall be rolled-up and paid on a monthly basis on or around the first week of each month or such other period as the Parties shall agree.

6.2 The TPF warrant that the bank account details referred to in clauses 6(c) and 6(d) are true and accurate (or will be true and accurate when provided to the Company's Asset Protection Manager), are official governmental accounts, and no person has access to the relevant bank account other than the formally designated TPF representative.

6.3 During the Permitted Security Presence, the Company shall:

- (a) provide to the TPF fuel for TPF Vehicles utilised for the Permitted Security Presence, in the Area. Not more than 520 litres of fuel per month per TPF Vehicle shall be made available by the Company to the TPF for any one TPF Vehicle.
- (b) repair, maintenance and engine servicing of TPF Vehicles utilised for the Permitted Security Presence. The Company may (but shall not be obliged to) subcontract the repair, maintenance and servicing of the TPF Vehicles to a third party. The Company shall ensure proper records are maintained in respect of any repairs, maintenance and servicing that is undertaken on a TPF Vehicle. It is the TPF's sole responsibility at all times to ensure any vehicles used for the Permitted Security Presence is road worthy and safe to operate. The Company is providing all vehicle support on an "as-is, where is" basis, and makes no warranties of any type as to the fitness or condition of the provided or directly procured support; and
- (c) bear the costs of the third-party service provider, chosen amongst the communities living nearby the Mine Site, that provides food to the individuals listed on the TPF duty rosters in the canteen facilities at the Barracks (see clause 17). Not more than TZS 18,000 (Tanzania Shilling Eighteen thousand) per day per individual listed on the TPF duty roster shall be supported by the Company.

Notwithstanding the above, it is the responsibility of the TPF to provide any day-to-day support needed for the operation of the Assets whenever they are utilised for the Permitted Support or the Permitted Security Presence.

#### 7 Deemed Conditions Relating to a Request for Permitted Support or the Provision of Permitted Security Presence

A request for Permitted Support for any Exceptional Event and the provision of Permitted Security Presence will, on each occasion, be deemed to include the following:

- (a) The TPF warrant to the Company that:
  - (i) any TPF officer deployed is at least 18 years of age and has joined the Police at his or her own independent volition.
  - (ii) any TPF officers or other TPF personnel deployed to the Area have been provided with training on the Applicable Human Rights Principles and international humanitarian law and International Security and Human Rights Standards related to the use of force (e.g. UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials) in accordance with the guidance set out in the attached Schedule C (*Voluntary Principles Training*).
  - (iii) the TPF officers or other TPF personnel deployed to the Area will use force only when strictly necessary, will always use the least force necessary to address a security threat, and will use force in a manner proportionate to the threat and consistent with national law and International Security and Human Rights Standards or consistent with international humanitarian law when applicable.
  - (iv) the TPF officers or other TPF personnel deployed to the Area will use lethal force only where there is an imminent threat to human life or consistent with international humanitarian law as applicable.
  - (v) the Company will communicate its policies regarding ethical conduct and human rights to the TPF. The TPF officers or other TPF personnel deployed to the Area will strive to act consistent with those policies in and around the Area.
  - (vi) no TPF officer or other TPF personnel that has faced credible allegations that he or she has committed violent crimes or was involved in human rights abuses is assigned to duties in connection with the Permitted Support and/or the Permitted Security Presence.
  - (vii) the TPF officers or other TPF personnel will have received suitable and adequate training in accordance with the TPF training methods and requirements before being

deployed in the Area. This training will include how to implement the International Security and Human Rights Standards, including the Core Competencies set out in Schedule B (*Voluntary Principles Training*).

- (v) the TPF officers and other TPF personnel will be adequately and properly supervised by their own chain of command, and without the involvement of the Company or its Personnel.
  - (vi) the TPF will report to a Senior Police Officer any incident that has caused any injury, death, or substantial damage to property, who in turn will notify the assigned TPF liaison.
  - (viii) the Personnel will not be involved in the operation of the Assets whilst the Assets are utilised with the Permitted Support or Permitted Security Presence.
- (b) an acknowledgement by the TPF that the Company, and BARRICK reserves unconditionally the right:
- (i) to take whatever they determine appropriate in order to comply with its obligations under all applicable laws of Tanzania, and the Applicable Human Rights Principles, without being liable to any adverse reaction by the TPF, the Government of Tanzania or any other agency of the Government of Tanzania; and
  - (ii) to cooperate appropriately with and support any subsequent investigation into the circumstances surrounding the request for and provision of Permitted Support or Permitted Security Presence conducted under the laws of Tanzania or any international agreements or treaties to which Tanzania is a party.

#### **8 Personnel to be Maintained on Site**

The Company's Asset Protection Manager may maintain such Personnel at the Mine Site as he deems necessary during any Armed Violence or Natural Disaster.

**9 Contact with United Nations, NGOs and Local Community**

- 9.1 The Company may liaise with the United Nations and African Union representatives in Tanzania, and other officials of local and international NGOs to keep them informed of relevant developments and activities in respect to any Exceptional Event, Permitted Support or Permitted Security Request.
- 9.2 The Company and the TPF agree to meet jointly with the local communities in the Area on a regular basis (and at least quarterly in any 12-month period), to discuss the security situation and in particular the nature of intrusions at the Mine Site, and to work together with the local communities to identify areas of security concerns and to seek resolution of those concerns and any other security and policing related issues.

**10 Contact with Public Reporting of an Exceptional Event**

- 10.1 The TPF acknowledge that BARRICK as a publicly listed company has legal obligations to its shareholders and other stakeholders, the international community and other applicable governments to inform of all extraordinary events that may arise in connection with this MoU, including any Exceptional Event.
- 10.2 As a consequence of clause 10.1, BARRICK (and/or the Company) may issue such public press releases or make such public statements as it considers appropriate on any extraordinary event that may arise in connection with this MoU. In no way, however, will such a release or statement disclose military secrets or endanger the internal or external security of Tanzania.
- 10.3 The Company may also make such public announcements or statements to the local community in connection with the MoU as it thinks appropriate to protect and serve the Company's or BARRICK's interests, but in doing so the Company will take in account any concerns expressed by the Government of Tanzania as to the security and safety of the TPF officers, other TPF personnel and the efficacy of the operations of the TPF.
- 10.4 This MoU may be made available in the public domain to adhere with the international principles of transparency and good governance, or in connection with any litigation or other legal proceedings.

**11 Security Incidents**

The TPF agree:

- (a) to promptly advise the Company's Asset Protection Manager of any security incident involving use of weapons or use of force, and of any alleged human rights violation or abuse in which TPF officers or other TPF personnel are involved while performing their duties in the Area, or at any other operation which may have consequences to the Company or to BARRICK.
- (b) to promptly investigate, report, and resolve all such incidents, potential violations or abuses in accordance with applicable national and international law and to keep the Company's Asset Protection Manager informed of all such investigations. During the course of any investigation or proceedings, the TPF agree to suspend the TPF officer or other TPF personnel under investigation or being prosecuted as a result of their actions.
- (c) following any investigation which finds that a TPF officer or other TPF personnel used disproportionate force, violated or contravened any Applicable Human Rights Principles, human rights and/or international humanitarian law, or agreements on use of weapons or other equipment, to promptly take such proportionate and appropriate disciplinary action against the TPF officer or TPF personnel or take such other preventative measures to ensure that there is no reoccurrence of the offending conduct.
- (d) permanently remove a TPF officer or other TPF personnel from the Area on receipt of a request from the Company and to not redeploy to the Area any Police officer or other Police personnel found guilty of any Applicable Human Rights Principles, human rights and/or international humanitarian law, or agreements on use of weapons or other equipment.

- (e) that the Company may report any credible allegations of human rights violations to the appropriate authorities and agencies, and it shall investigate as contemplated by clause 11(b) any complaints the Company receives against a TPF officer or other TPF personnel.

## 12 Illegality, Anti-Bribery and Corruption and Sanctions

12.1 Each Party represents and warrants to each other, that, with respect to any activities that are undertaken pursuant to, and/or otherwise connected with, this MoU and any actions contemplated thereunder, it will:

- (a) comply with, and will use reasonable endeavours to ensure that it complies with all applicable Anti-Bribery Legislation and sanctions requirements; and
- (b) not take any action, and will use reasonable endeavours to ensure that it does not take any action, that causes the other Party, or in the case of the Company any member of the BARRICK group of companies, to violate any applicable Anti-Bribery Legislation or sanctions requirements.

12.2 Each Party has implemented and must at all times maintain adequate procedures designed to comply with its obligations under clause 12.1 above.

12.3 At all times from the commencement of negotiations concerning this MoU, the TPF warrant that none of the Company, BARRICK or any other member of the BARRICK group of companies, has sought to influence, reward, offer, or promise the TPF, or any person acting for the TPF, or any Government Official, to act in breach of a duty of good faith, impartiality, or trust, or to reward you or any person acting for you or any Government Official for acting improperly, in circumstances where the recipient would be acting inappropriately by receiving a thing of value.

12.4 For the purposes of this Clause 12, the following definitions shall have the following meanings:

**"Government Official"** means an individual who is employed by or acting on behalf of a Government Agency.

**"Government Agency"** means a Governmental agency, tribunal, department or commission, or other body or organ, or any person acting on behalf of the Government, government-controlled entity, regulatory body or public international organisation.

## 13 Communications

For the purposes of notices and other communications under this MoU, the relevant contact details are:

(a) **North Mara Gold Mine Limited:**

Georgia Mutagahywa, BARRICK Country Manager  
 North Mara Gold Mine Limited  
 Tan House Tower  
 Plot No. 34/1  
 New Bagamoyo Road  
 P O Box 1081  
 Dar es Salaam  
 Tel: + [REDACTED]  
 Email: [REDACTED]

(b) **The TPF:**

[REDACTED] Commissioner of Police, for Operation and Training  
 P.O.Box 961 Dodoma -Tanzania  
 Tel : [REDACTED]  
 Email : [REDACTED]  
 c/o

Planning and Budget Department

[REDACTED]-ASP

Tel + [REDACTED]

E-mail [REDACTED]

Legal Department

[REDACTED]

Tel [REDACTED]

E-mail [REDACTED]

#### 14 Objects of this MoU

Each Party to this MoU must do all that is reasonably required to give effect to the objects of this MoU as they appear from the preamble and from its terms, and must give all such lawful directions and orders as may be necessary from time to time to give it full effect on accordance with those objects.

#### 15 Review and Authority

- (a) This MoU may be reviewed in good faith at least every year from the Effective Date or as required by circumstances. Whether or not such a review is conducted, this MoU remains in full and effect until superseded.
- (b) If there is a change in law or other circumstances requiring the terms of this MoU to be amended, the parties agree to negotiate in good faith an amendment to this MoU.

#### 16 Limitation on Liability

The Company and the Personnel will not be liable for any claim of liability regarding damage or loss to the TPF, its members, any other Government Official associated with the deployment or any third party (or in any way related to support the Company may provide to the TPF). To the extent that any third party files any type of legal claim or lawsuit seeking monetary damages alleging that acts of the TPF, its members or any other government official associated with the deployment are attributable to the Company (or Company Personnel), in whole or in part, as a result of the deployment or any support provided by the Company to the TPF, the TPF or relevant government agencies will (i) lodge a formal objection in the court or forum where the claim is made at the Company's request, (ii) otherwise reasonably assist the Company in defending that allegation, and (iii) indemnify the Company for any monetary payment the Company may make or be obligated to make, whether through a legal judgment or settlement.

#### 17 Conditions Subsequent

The Company agrees within 180 days of the Effective Date, to:

- (a) Subject to contract, execute all appropriate documents necessary to effect the transfer the legal title of the TPF barracks located at Nyamongo Police station ("**Barracks**"), to the TPF or to such other party as the TPF may nominate; and
- (b) Arrange for the construction of canteen facilities at the Barracks up to a value of TZS 96,468,160 (Tanzania Shilling Ninety six millions, four hundred sixty eight thousands and one hundred sixty).

#### 18 Effective Date

This MoU comes into effect immediately upon all Parties' having signed it.

#### 19 Termination

The Company may terminate its voluntary support at any time with a prior notice of three working days. In particular, the Company may terminate its support if it is determined to be in violation of any law applicable to the Company or that such support subjects the Company to any sanction or penalty under any such law.

**20 Governing Law and Dispute Resolution**

- 20.1 This MoU and any obligations connected with it shall be governed by and construed in accordance with the law of Tanzania.

The Parties irrevocably agree to seek amicable resolution of all disputes arising under or in connection with this MoU, or in connection with the negotiation, existence, legal validity, enforceability or termination of this MoU. To the extent the Parties cannot amicably resolve such disputes, they shall be settled by arbitration in accordance with the UNCITRAL rules and the procedure set out in clause 15.3 (*Arbitration*) of the Framework Agreement dated 24 January 2020 (as amended from time to time) between inter alios the Company and the Government.

- 20.2 The Parties consider and accept that the terms stated herein are consistent with Tanzanian law and public policy. No challenge to the validity or legality of this MoU in Tanzania by way of proceedings brought in that jurisdiction by any of the Parties, shall be deemed to suspend or in any other way affect such Party's obligations under this MoU. Provided that in the event any provision of this MoU is in anyway determined to be void or unenforceable, such provision shall be construed to be separable from the other provisions which shall retain full force and effect.

- 20.3 This MoU is prepared in the English language and shall be translated to Swahili. If there is any ambiguity between the English language version of this MoU and any translation, the terms of the English language version of this MoU shall prevail.

*[Signatures on the next page]*



EXECUTION

IN WITNESS whereof the Parties hereto have caused this MoU to be duly executed in three original as of the date first above written.

**The Company**

Signed by

NORTH MARA GOLD MINE LIMITED



\_\_\_\_\_  
**Dr Willem Jacobs**  
Director

17 May 2022

\_\_\_\_\_  
Date



\_\_\_\_\_  
**Sebastiaan Bock**  
Director

17 May 2022

\_\_\_\_\_  
Date



\_\_\_\_\_  
**Apolinary Lyambiko**  
General Manager

24 May 2022

\_\_\_\_\_  
Date

**The Tanzania Police Force**

Signed by

TANZANIA POLICE FORCE  
[Redacted Signature]

Commissioner of Police for Operations  
Authorised Signatory

24<sup>th</sup> May 2022

\_\_\_\_\_  
Date

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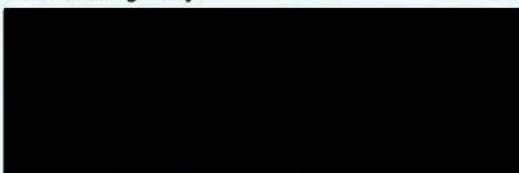


Chief Legal and Training  
Witness

24/05/2022

Date

Acknowledged by:



Commanding Officer Mara Region

24/05/2022

Date

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**SCHEDULE A**

**Map of the North Mara Gold Mine and Environs**

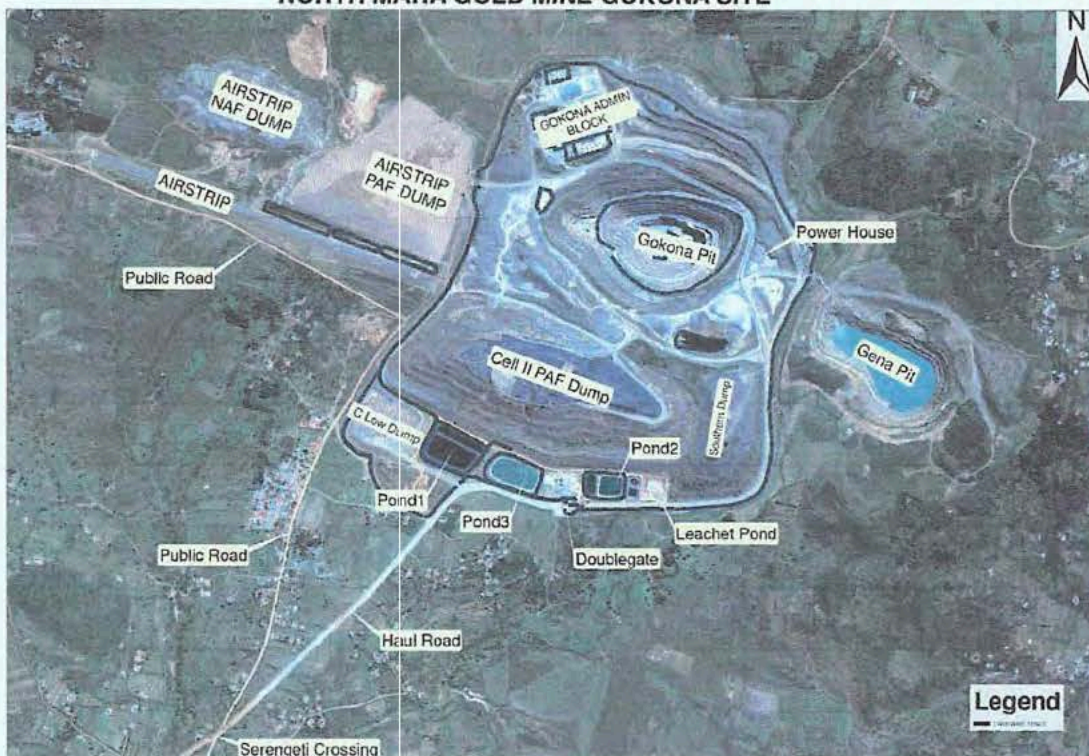
**(Mine Site boundaries in black)**

*[See next page]*

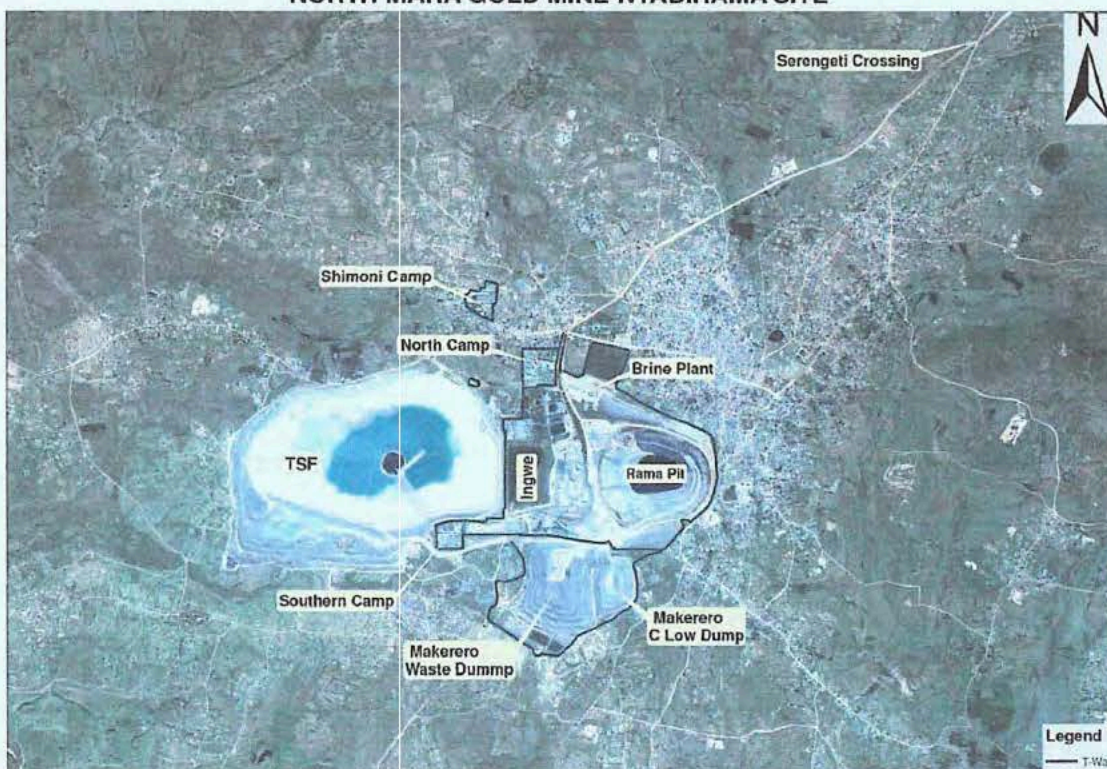
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W

**NORTH MARA GOLD MINE-GOKONA SITE**



**NORTH MARA GOLD MINE-NYABIRAMA SITE**



BA

H

**SCHEDULE B****Voluntary Principles Training**

Any training on the Applicable Human Rights Principles, international humanitarian law, International Security and Human Rights Standards related to the use of force (e.g. the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials) will include how to implement the Security and Human Rights Standards, including the following Core Competencies: (i) an awareness of the Security and Human Rights Standards as they apply to Government Security Force personnel, including international human rights and humanitarian law and international law enforcement principles; (ii) an understanding of, in the event of any violation or abuse of human rights, the legal consequences for the particular individuals involved, the Government Security Force, and Company; (iii) knowledge of common scenarios in which violations and abuses of the law and international protocols and conventions might take place; and (iv) awareness of and an ability to apply the procedures that Government Security Force personnel should follow in order to avoid such violations and abuses, including practical steps to take in the context of security incidents, protests, or strikes on, in the vicinity of, or related to the project area. Government Security Force agrees to share information with Company upon request that demonstrates that Government Security Force personnel received the training and met the Core Competencies.

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**SCHEDULE C**  
**Voluntary Principles**

[See next page]

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**SCHEDULE D**  
**Guiding Principles**

[See next page]

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25

This is **Exhibit "1"** referred to in the Affidavit of Mohamed Chande Othman sworn before me at the City of Toronto, in the Province of Ontario on 2 October, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



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*Commissioner for Taking Affidavits (or as may be)*

**ALISA McMASTER**

**EXPERT REPORT OF  
MOHAMED CHANDE OTHMAN**

October 2, 2023

67. Section 7(2) of the *Judges (Remuneration and Terminal Benefits) Act, 2007* provides that “The President may, upon the recommendation of the Commission, add to or modify the benefits specified in the Schedule but such modification shall not have the effect of curtailing or reducing any of the benefits specified in the Schedule”. Thus, as with the salaries of Justices and Judges, benefits they are entitled to under the Schedule to this statute are guaranteed and cannot be lowered.
68. Salaries, allowances and retirement benefits payable to Justices and Judges are exempt from income tax pursuant to section 41 of the *Public Service Social Security Fund Act, 2018* and section 4(3) of the *Judges (Remuneration and Terminal Benefits) Act, 2007*.
69. The salaries, allowances and benefits payable to Magistrates and other judicial officers, as well as the terms and conditions of their employment, are determined and reviewed by the Judicial Service Commission in accordance with Sections 29 and 30 of the *Judiciary Administration Act, 2011*, Regulation 27 of the *Judiciary Administration (General) Regulations 2021* and Part VII of the *Judiciary Administration (Service Scheme), 2021*.

#### **(4) Immunity**

70. Justices, Judges, Magistrates and other judicial officers in Tanzania are immune from criminal charges and civil claims for acts or omissions carried out in good faith in the performance of their judicial functions. They cannot be prosecuted or held liable in connection with such acts or omissions. This immunity is affirmed in several statutes: (i) Section 65A of the *Judiciary Administration Act, 2011*, as amended by Act No. 6 of 2020; (ii) Section 16 of the *Penal Code* [Cap. 16 R.E. 2022]; (iii) Section 66 of the *Magistrates’ Courts Act*; and (iv) Section 3(5) of the *Government Proceedings Act*.
71. This immunity ensures that members of the Tanzanian Judiciary can dispense justice fairly and dispassionately, without concern that they will be exposed to criminal or civil consequences for doing so.

#### **(iii) Judicial Oversight over the Tanzania Police Force**

72. Despite the independence and impartiality of the Tanzanian Judiciary, I note that paragraph 73 of the Statement of Claim in this proceeding asserts that “Since at least as early as 2010, Barrick has been aware or should have been aware that the local prosecuting authority and judiciary lacked the capacity to hold the Mine Police responsible for human rights abuses”. I understand that the Statement of Claim uses the term “Mine Police” to refer to members of the Tanzania Police Force who provide policing services in the area of the North Mara Gold Mine.
73. To the extent that the Plaintiffs are suggesting that in 2023 the Tanzanian Judiciary is unable or unwilling to hold members of the Tanzania Police Force legally accountable for their conduct, or to render fair justice in cases involving the alleged

misconduct of members of the Tanzania Police Force, I respectfully but firmly disagree. The fact that the alleged incidents complained of by the Plaintiffs pertain to conduct of members of the Tanzania Police Force would be no obstacle to the Plaintiffs in commencing and pursuing claims in Tanzania, whether against individual Police officers, the Tanzania Police Force itself or against private actors. As explained below, the Courts of Tanzania have a demonstrated track record of exercising proper oversight in respect of Police conduct, and of imposing criminal or civil consequences as appropriate in cases involving members of the Tanzania Police Force.

### (1) Criminal Proceedings

74. Any contention that prosecutors lack the capacity to pursue criminal cases against members of the Tanzania Police Force, or that the Tanzanian judiciary is incapable of upholding the law in such cases, is simply wrong. As a result of my career as a Judge of the High Court, a Justice of Appeal and ultimately the Chief Justice of Tanzania, I am aware of a number of criminal proceedings brought against members of Tanzania Police Force.
75. One such case is ***Director of Public Prosecutions v. ACP Abdallah Zombe and 8 others***, [2016] TZA 562 (16 September 2016), which was decided by the Court of Appeal during my tenure as Chief Justice. Three senior members of the Tanzania Police Force, including an Assistant Commissioner of Police, were charged criminally and prosecuted in the High Court in connection with the deaths of four civilians they arrested on suspicion of robbery (10 other members of the Tanzania Police Force were also charged and prosecuted). One of the accused died; the case against the remaining 12 proceeded to trial. After the prosecution closed its case, the High Court determined that three of the accused had no case to answer. The remaining nine accused were acquitted at the conclusion of the trial. The Director of Public Prosecutions appealed to the Court of Appeal, and ultimately pursued the appeal with respect to four of the accused. On appeal, one of the three senior members of the Tanzania Police Force was found guilty of murder. The acquittals of the other accused were upheld on appeal.
76. Another recent example is the case of ***Ex. G2434 PC George v. R***, [2022] TZCA 609, in which a Police officer was convicted of drug-related charges and sentenced to life imprisonment. His appeal to the Court of Appeal was dismissed.

### (2) Civil Proceedings

77. The Government of Tanzania and its various departments and institutions, including the Tanzania Police Force, enjoy no immunity from civil claims. As noted above, the *Government Proceedings Act* prescribes procedures for suits against the Government, including the Tanzania Police Force.
78. In fact, the Courts of Tanzania regularly adjudicate cases against State or Public departments and institutions. In my experience, the Courts do so fairly and

impartially, even where the conduct at issue may be unflattering of, embarrassing to or result in a finding of significant liability against the Tanzania Police Force or another State actor.

79. By way of example only, significant cases in which claims have been successfully prosecuted against the State include the following:
- (a) ***The Attorney General v. Roseleen Kombe (High Court of Tanzania, Moshi, Civil Case No. 80 of 1999; Court of Appeal of Tanzania, Civil Appeal No. 80 of 2002)***. In this case, a widow (who was also the administratrix of the estate of the deceased) sued the Government of Tanzania on her own behalf and on behalf of her five daughters, the deceased's mother, and two grandchildren, following the killing of her husband (the former Director-General of Intelligence of the armed services) by two members of the Tanzania Police Force in the course of their employment. The High Court awarded damages of TZS 300 million in favour of the Plaintiff against the Government. On appeal, the Court of Appeal varied the award of damages to TZS 200 million.
  - (b) ***Sheikh Mohammad Nassoro Abdulla v. Regional Police Commander, Dar es Salaam and 2 others***, [1985] TLR 1. In this case, the High Court quashed a deportation order issued by the President of Tanzania and ordered the release of the Applicant from Police custody.
  - (c) ***Elizabeth Ndambala v. Police Force and Others (High Court of Tanzania, Dar es Salaam, Misc. Civil case No. 39 of 2020)***. In this case, the Applicant commenced proceedings against a number of Government departments in connection with the allegedly unlawful termination of her employment. The Applicant was awarded costs, as well as certiorari and mandamus orders against the Respondents.
  - (d) ***Baco and Ayub Co. Ltd. v. The Permanent Secretary, Ministry of Defence and National Service and Others (High Court of Tanzania, Commercial Division, Commercial Case No. 40 of 2015)***. In this case, a local company in Tanzania successfully sued the Army for breach of contract for supply of "ready to eat" meals. The High Court awarded the Plaintiff more than TZS 5 billion plus interest.
  - (e) ***JV Tangerm Construction Co. Ltd. & Technocombine Construction Ltd v. Tanzania Ports Authority and the Attorney General (High Court of Tanzania, Commercial Division, Commercial Case No. 117 of 2015)***. In this case, two construction companies successfully sued the Tanzania Ports Authority ("TPA"), a Government entity, for breach of contract in connection with the construction of container depots at ports in Dar es Salaam and Tanga. The Court ordered the TPA to pay the Plaintiffs a total of approximately TZS 15.1 billion plus interest.

- (f) ***Laemthong Rice Co. Ltd. v. Principal Secretary, Ministry of Finance, Zanzibar (Court of Appeal of Tanzania, Civil Appeal No. 259 of 2019).*** In this case, the Court of Appeal ordered the Government of Zanzibar through its Principal Secretary, Ministry of Finance to pay a company approximately US\$69 million plus interest for rice that had been supplied 37 years earlier but had not been paid for.

80. The procedure for the execution of a decree against the Tanzania Police Force is governed by the *Government Proceedings Act*. Pursuant to Section 16 of that statute, such a decree is treated as a decree against the Government and is satisfied by submitting the decree to the Permanent Secretary of Treasury or other Government accounting officer as may be appropriate, who is required to pay the relevant amount along with any interest that is lawfully due.
81. The Government of Tanzania is obligated to honour Orders made against it, save where a stay of execution is granted either by the High Court or by the Court of Appeal pending appeal. In my experience, the Government abides by that obligation.

**(iv) Access to Justice**

82. Articles 13(3) and (6) of the Constitution guarantee access to justice and to a fair hearing as part of the basic rights of all Tanzanians. This constitutional guarantee is, in my experience, borne out in the actual operation of the legal system and of the Judiciary.
83. In my view, the Plaintiffs in the Ontario proceeding would have ready access to justice in Tanzania if they chose to pursue it. There are no significant hurdles that would prevent them from commencing and pursuing claims in the Courts of Tanzania. Three aspects of access to justice are particularly relevant to my opinion in this regard: (i) the availability of the judicial network and resources throughout Tanzania, including in remote areas, such that litigants can commence and participate in legal proceedings; (ii) the costs of accessing the legal system; and (iii) the timeliness of judicial proceedings in Tanzania. I discuss each of these aspects below.

**(1) Availability of the Judicial Network and Resources**

84. I have been asked by Davies to assume that that the damages sought by the Plaintiffs in the Ontario proceeding will be greater than the upper limit of the pecuniary jurisdiction of the subordinate courts of Tanzania. As a result, if the Plaintiffs were to assert claims in Tanzania in respect of the alleged incidents, those claims would be heard and adjudicated in the High Court. I note as well that if the Plaintiffs were to assert claims against the Tanzania Police Force (and the Attorney General) as co-defendants, the High Court would have exclusive jurisdiction to determine those claims.

application by a party, allow proceedings to be conducted remotely”. Rule 5(1) further provides that the Court may direct a remote hearing “where a party, his representative or a witness lives outside or within the jurisdiction of the court and his attendance cannot be procured without undue delay or unreasonable cost”. Remote hearings may also be directed for health reasons or “for any other reason that the court considers necessary and appropriate”.

92. Where a proceeding is conducted remotely, the Court can appoint a remote proceedings assistant to guide the parties or witnesses in using technological devices so that the hearing can proceed efficiently and effectively. The appointment and functions of a remote proceedings assistant are governed by Rules 6 and 7 of the *Judicature and Application of Laws (Remote Proceedings and Electronic Record) Rules, 2021*. As set out in Rule 17, the Court may direct that proceedings be recorded electronically and preserved in electronic devices or facilities approved by the Judiciary that assure the accuracy and trustworthiness of the proceedings.

## (2) Costs of Accessing the Legal System

93. In my opinion, the Plaintiffs’ economic means will not preclude them from commencing legal proceedings in Tanzania.
94. In *Julius Ishengoma Francis Ndyanabo v. Attorney General*, [2004] TLR 14, the Court of Appeal of Tanzania interpreted the right of access to justice broadly by holding that this right should not be curtailed by the requirement to pay a Court fee or to deposit security for costs. The Court of Appeal further held that indigent parties should not be denied the right to access the judicial system in Tanzania due to their economic inability to pay a Court fee or to deposit security for costs.
95. High Court fee rates are prescribed by the *Court Fee Rules, 2018* and are generally affordable. Moreover, indigent parties may apply for a waiver in whole or in part of Court fees, pursuant to Rule 6 of the *Court Fee Rules, 2018*. In my experience, such waivers are granted whenever a party can demonstrate that they do not have the financial means to pay a prescribed fee. A party who is receiving legal aid is automatically exempted from paying Court fees associated with legal proceedings instituted by that party, as set out in Rule 9 of the *Court Fee Rules, 2018*.
96. Parties who cannot afford to retain counsel can seek legal aid by approaching legal aid providers directly, or by asking the relevant Court to appoint a free legal aid provider for them. The provision of legal aid in civil proceedings is governed by the *Legal Aid Act, 2017* [Cap. 21 R.E. 2019] and the *Judicature and Application of Laws (Legal Aid in Civil Proceedings) Rules, 2019*. Notably, legal aid is not restricted to criminal matters. Courts can also assign a legal provider to provide legal aid to an indigent party in a civil matter.
97. There are several legal aid providers in the country. They include, without limitation, the Legal and Human Rights Centre, Tanzania Women Lawyers

Association, Women in Law and Development in Africa, Women’s Legal Aid Centre, National Organisation for Legal Assistance, Comprehensive Community Based Rehabilitation in Tanzania, Lawyers Environmental Action Tanzania, Legal Services Facility Tanzania, University of Dar es Salaam Legal Aid Committee, and the Tanganyika Law Society.

98. Legal aid providers in Tanzania are funded by various organizations and entities, both local and international. Based on the Legal Aid Report 2017 published by the Tanzania Network of Legal Aid Providers, in the past one international source of funding has been the Canadian International Development Agency.<sup>1</sup>
99. In my experience, legal aid providers in Tanzania prioritize granting legal aid to vulnerable litigants whose claims raise allegations of human rights abuses. Because of the nature of the claims asserted by or on behalf of the Plaintiffs in the Ontario proceeding, there is high likelihood the Plaintiffs would obtain legal aid—either directly or by asking the High Court to appoint a legal aid provider—if they were to assert claims in Tanzania in respect of the alleged incidents in question. That is so even if the Plaintiffs cannot demonstrate that they are indigent.
100. Although a “loser pays” costs rule is applicable to civil proceedings in Tanzania, a party granted legal aid cannot, by virtue of Section 31 of the *Legal Aid Act, 2017*, be required to pay costs if they lose a case other than in exceptional circumstances. However, Section 30 of the *Legal Aid Act, 2017* gives a party under legal aid or otherwise exempted from payment of Court fees the right to claim costs if they are successful in litigation, provided that the legal aid provider may deduct from any such award costs incurred by the provider to represent the indigent party.

### (3) Timeliness of Justice

101. Timely justice is a constitutional right in Tanzania. The Courts are required by Article 107A (2)(b) of the Constitution “not to delay the dispensation of justice without reasonable ground”.
102. This constitutional right is reflected in procedural rules governing legal proceedings, the operations and policies of the Tanzanian Judiciary, and applicable laws.
103. To give effect to the constitutional right to timely justice and to reduce case backlogs, court-annexed alternative dispute resolution has been made compulsory in civil proceedings in accordance with Part C of Order 8 of the *Civil Procedure Code* [Cap. 33 R.E. 2002]. Order 8, Rule 22(3) of the *Civil Procedure Code* mandates that proceedings must be judicially concluded within 24 months of the date of failure of alternative dispute resolution. Section 28 of the *Civil Procedure Code* imposes a duty on the courts to deliver their decisions within a period of 90 days from the date of conclusion of the relevant proceedings and within 60 days in

<sup>1</sup> The Legal Aid Report is accessible online at [www.tanlap.or.tz/publications/publications/](http://www.tanlap.or.tz/publications/publications/). The relevant excerpt of the Legal Aid Report is also included in Appendix B to this Report.

in Tanzania. Even though the Defendants did not have a contract with the Plaintiff, the High Court took jurisdiction and decided the suit in favour of the Plaintiff.

112. The Courts of Tanzania have, on any number of other occasions, taken jurisdiction in cases involving foreign defendants. In the case of **Commissioner General, Tanzania Revenue Authority v African Barrick Gold Plc** (Court of Appeal of Tanzania, Civil Appeal No. 144 of 2018), for instance, the Court of Appeal determined that even though the Defendant was a holding company incorporated in the United Kingdom, it was a resident of Tanzania for the purposes of the *Income Tax Act, 2004*. In **Shose Sinare v Stanbic Bank Tanzania Ltd and ICB Bank PLC** (High Court of Tanzania, Civil Case No. 34 of 2016), the High Court was prepared to assert jurisdiction over a limited liability company incorporated in the United Kingdom under the laws of England, holding that the place where a cause of action arose extended to a place where the effect of the wrongful act was felt. The High Court determined, however, that it lacked pecuniary jurisdiction to entertain the matter.
113. In addition, there are a number of cases in which the Courts of Tanzania have taken jurisdiction over local affiliates of foreign mining companies and found them liable for wrongful acts or omissions. For instance:
- (a) **North Mara Gold Mine Limited v. Emmanuel Mwita Magesa (Court of Appeal of Tanzania, Civil Appeal No. 271 of 2019)**. In this case, the Respondent pursued a claim against North Mara Gold Mine Limited based on injuries he had allegedly suffered due to the actions of employees of the company. While the Respondent ultimately was unsuccessful before the Court of Appeal, the Judgment of the Court of Appeal makes clear that his claims were thoroughly scrutinized and considered carefully by multiple levels of Court in a fair and even-handed manner.
  - (b) **John Barnaba Machera v. North Mara Gold Mine Limited (Court of Appeal of Tanzania, Civil Appeal No. 204 of 2019)**. In this case, the Appellant filed a land claim against North Mara Gold Mine Limited but lost due to the expiry of a limitation period. The Court of Appeal allowed the appeal and ordered the Appellant's suit against North Mara Gold Mine Limited to be heard on the merits.
  - (c) **Hussein Said Kayagila v. Bulyanhulu Gold Mine Limited (Court of Appeal of Tanzania, Civil Appeal No. 508 of 2021)**. In this case, the Appellant was successful in a wrongful dismissal action against Bulyanhulu Gold Mine Limited. In an initial arbitral proceeding, the Appellant was awarded six months' pay, or approximately TZS 9.9 million. He applied unsuccessfully to the High Court to have the award revised upward. On appeal, however, the Court of Appeal found that the sum awarded to the Appellant at trial was insufficient and, relying on domestic and foreign authorities, ordered 20 months' salary as remuneration.

(d) ***North Mara Gold Mine Limited v. Sinda Nyamboge Ntora (Court of Appeal of Tanzania, Civil Appeal No. 457 of 2020)***. In this case, North Mara Gold Mine Limited was successfully sued in a dispute over residential property, and was ordered by the High Court of Tanzania to pay the Respondent damages of TZS 144 million plus interest at the rate of 7% per annum from the date of judgment until the date of payment in full. Although North Mara Gold Mine Limited attempted to appeal the judgment, its appeal was struck out for being time-barred.

114. I understand that North Mara Gold Mine Limited and Bulyanhulu Gold Mine Limited own the North Mara Gold Mine and Bulyanhulu Gold Mine, respectively, and that both are partly owned by the Government of Tanzania pursuant to an agreement that was announced publicly in late 2019. The cases referred to above provide further confirmation that members of the Tanzanian Judiciary can and do rule against the interests of the State in civil proceedings.
115. In my view, the Courts of Tanzania would take jurisdiction if the Plaintiffs in the Ontario proceeding were to commence civil proceedings in Tanzania in respect of the alleged incidents. That is particularly so if they were to name one or more members of the Tanzania Police Force, the Police Force itself and/or North Mara Gold Mine Limited as Defendants. I reach this conclusion based on my understanding that: (i) the Plaintiffs were and are residents of Tanzania; (ii) the Plaintiffs who claim to have been injured sustained their injuries in Tanzania; (iii) all of the deceased persons that are the subject of claims in the Ontario proceeding were residents of Tanzania and died in Tanzania; (iv) the incidents in question are said to have occurred in Tanzania; (v) the claims pertain to the alleged acts and omissions of members of the Tanzania Police Force and/or North Mara Gold Mine Limited; and (vi) the North Mara Gold Mine is operated by North Mara Gold Mine Limited, which is a Tanzanian company.

#### **F. Dependants of Deceased Persons Can Assert Wrongful Death Claims**

116. There is no doubt that the Plaintiffs who claim to be relatives and dependants of deceased persons would be able to assert wrongful death claims in Tanzania.
117. The ability of relatives of deceased persons to advance wrongful death claims is governed by the *Law Reform (Fatal Accidents and Misc. Provisions) Act*. This statute provides standing for dependants of a deceased person to pursue claims for damages the deceased person would otherwise have been entitled to in circumstances where the deceased person's death has been caused by a wrongful act. The term "dependant" is defined broadly in this statute to include the wife, husband, father, mother, grandfather, grandmother, step-father, step-mother, son, daughter, grandson, granddaughter, step-son, step-daughter, brother, sister, half-brother and half-sister of the deceased person, as well as an infant child whom the deceased person had accepted as a member of their family and every other person who was, on the death of the deceased, entitled to succeed to the property of the deceased (otherwise than under will) in accordance with the law of succession

## H. Requests for Assistance from the Courts of Ontario are Unlikely to Be Enforced

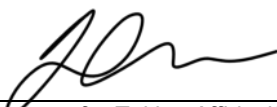
124. It is highly uncertain, and in my view unlikely, that the Courts of Tanzania would compel residents of, or organizations in, Tanzania to produce documents or submit to examinations in connection with foreign civil litigation. To the extent that the Courts of Ontario were to issue a Letter of Request or commission addressed to the Courts of Tanzania for assistance in compelling the production of documents or oral testimony from members of the Tanzania Police Force or other residents of Tanzania, any effort to enforce or give effect to such a Letter of Request or commission before the Courts of Tanzania would likely fail.
125. To my knowledge, there is no precedent in Tanzania for seeking judicial assistance in connection with foreign civil proceedings, much less precedent in which a request for such assistance issued by a foreign court has been enforced. Throughout my judicial career as a Judge of the High Court, Justice of Appeal and Chief Justice of Tanzania, I never presided over a case or heard an appeal from a decision in which a litigant asked the Courts of Tanzania for relief of this nature. Nor am I aware of any such case or appeal having been brought before and decided by my judicial colleagues during my tenure as a member of the Judiciary.
126. It is important to understand that the first step that Courts of Tanzania typically ask litigants in civil proceedings is to identify the source of the Court's power or jurisdiction to entertain the relief being requested. A party that comes before a Tanzanian Court for relief is, in fact, required to identify the source of the Court's power or jurisdiction.
127. In this regard, Tanzanian law differentiates between "enabling" provisions of statutes—which confer upon the Courts the authority to do something, or upon parties the right to ask for something or to bring a particular type of proceeding—and "prescriptive" provisions, which simply describe the process the Courts or litigants must follow in respect of a given step or proceeding. Put another way, enabling provisions permit a given request to be brought before the Court, whereas prescriptive provisions describe what must occur assuming that the step or proceeding has properly been brought before the Court.
128. A litigant that seeks relief in a civil proceeding must identify a relevant enabling provision of Tanzanian law, rather than merely prescriptive provisions. Failure to identify a relevant enabling provision will result in the striking out of the proceeding or rejection of the relief sought.
129. To my knowledge, there is no enabling provision of Tanzanian law that authorizes the Tanzanian Courts to enforce requests for assistance issued by foreign courts in connection with foreign civil proceedings. Nor is there an enabling provision that permits the Courts of Tanzania to otherwise compel residents of (or organizations in) Tanzania to produce documents or submit to oral examinations in connection with such foreign litigation.

130. To be clear, Part III (Sections 56 to 59) of the *Civil Procedure Code* contemplates the use of commissions to obtain evidence. In my opinion, however, these provisions do not empower the Courts of Tanzania to provide assistance in connection with foreign civil proceedings.
131. Section 56(a) of the *Code* states that “Subject to such conditions and limitations as may be prescribed, the court may issue a commission ... to examine any person”. This is an enabling provision that authorizes the Tanzanian Courts to issue commissions in order to compel the evidence of witnesses residing in Tanzania.
132. Section 57 is likewise an enabling provision that permits a Court in Tanzania that receives a commission from another Tanzanian Court to execute on it.
133. Section 58 states that “In lieu of issuing a commission, the court may issue a letter of request to examine a witness residing at any place outside of Tanzania”. This is best characterized as a prescriptive provision that provides guidance to Tanzanian Courts as to the manner in which to seek assistance from a foreign court—i.e., by Letter of Request rather than by commission. It does not address the enforcement by a Tanzanian Court of Letters of Request that emanate from courts in foreign jurisdictions.
134. Section 59 states that “The provisions as to the execution and return of commissions for the examination of witnesses shall apply to commissions issued by foreign courts for the examination of persons residing in Tanzania”. To my knowledge, Section 59 has never been applied by a Tanzanian Court. Although I acknowledge that this provision contemplates the possibility of commissions being issued by foreign courts to obtain the evidence of residents of Tanzania, this provision is in my view prescriptive rather than enabling in nature. It prescribes the process that applies to commissions issued by foreign courts, but in my opinion does not authorize the Tanzanian Courts to enforce commissions or other requests for assistance issued by foreign courts in connection with civil proceedings pending outside Tanzania.
135. My view in this regard is strengthened by the fact that Tanzania is not a signatory to The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. Nor does Tanzania have any bilateral or other treaty or arrangement with Canada in respect of judicial cooperation in connection with civil proceedings.
136. Put somewhat differently, as far as I am aware there is no provision of Tanzanian law that explains the manner in which a request for judicial assistance in aid of foreign civil proceedings would be brought before the Courts of Tanzania. For instance, there is no provision that creates or identifies a Central Authority to which Letters of Request issued by foreign courts are to be directed, or that vests such an Authority or a private party with the power or ability to commence a proceeding

in Tanzania to enforce a Letter of Request or commission issued by a foreign court in connection with a civil proceeding pending outside Tanzania.

137. In this regard, foreign civil proceedings and foreign criminal proceedings are treated differently under Tanzanian law. Tanzania and Canada, as members of the Commonwealth, are both parties to the Revised Scheme Relating to Mutual Legal Assistance in Criminal Matters within the Commonwealth (also known as the Harare Scheme). The Scheme addresses cooperation between participating countries for the purposes of criminal matters. Among other things, the Scheme requires each participating country to designate a Central Authority, whose functions may include “making, receiving and transmitting requests for assistance and executing or arranging for the execution of such requests”. The Harare Scheme has been domesticated and accepted into Tanzanian law by virtue of the *Mutual Assistance in Criminal Matters Act*.
138. To a non-Tanzanian, it may appear incongruous or unusual that the *Civil Procedure Code* contains a prescriptive provision that contemplates commissions issued by foreign courts, but that there is no enabling provision that confers upon the Courts of Tanzania the power to compel residents of (or organizations in) Tanzania to produce documents or submit to examinations in connection with foreign civil proceedings. In reality, however, these sorts of lacunae arise from time-to-time in Tanzania, and are not particularly surprising having regard to Tanzania’s colonial history. The *Civil Procedure Code* came into effect in 1967—after Tanganyika’s independence from England, and after the establishment of modern-day Tanzania through the union of Tanganyika and Zanzibar—but contains many vestiges from England’s colonial laws in India, which were received into Tanzania in 1920 following the transition from German colonial control to English colonial control. As a result of the colonial origins of the *Civil Procedure Code*, it contains a number of prescriptive provisions that have no functional effect because Tanzania has never passed a corresponding enabling statute.
139. I note that the same concerns regarding access to documentary and oral evidence from residents of, and organizations in, Tanzania would not exist if the Plaintiffs in the Ontario proceeding instead elected to pursue civil claims in Tanzania. The High Court of Tanzania has the power under the provisions of Order XVI of *the Civil Procedure Code* to issue a summons to any person residing in Tanzania to appear before the Court for the purpose of giving evidence or producing documents. Where necessary, a Tanzanian Court also has the power to summon and examine any person not called by the parties as a witness, where the Court is of the opinion that it is in the interests of justice to do so.
140. The power of the Courts of Tanzania to compel the attendance of witnesses and the production of documents in connection with civil proceedings applies to members of the Tanzania Police Force in the same manner as it applies to other Tanzanians, regardless of whether the Police Force or Attorney General are named as parties to the proceedings in question.

This is Exhibit "1" referred to in the Affidavit of Mohamed Chande Othman sworn by Mohamed Chande Othman of the City of Dar es Salaam, Tanzania, before me at the City of Toronto, in the Province of Ontario, on April 5, 2024 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



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*Commissioner for Taking Affidavits (or as may be)*

**JACQUELINE HOUSTON**

LSO# 85990N

## REPLY EXPERT REPORT OF CHIEF JUSTICE OTHMAN

### I. INTRODUCTION

1. I delivered an Expert Report in connection with this proceeding on October 2, 2023.
2. I have reviewed the three responding Expert Reports relied upon by the Plaintiffs. I will largely confine this Reply Report to addressing the most glaring errors contained in the Expert Report of Donald Omondi Deya. I take exception to Mr. Deya's efforts to impugn the independence and integrity of the Tanzanian judicial system. His assertions do not accord with my extensive first-hand experience.
3. I have listed in Appendix A the materials I have relied upon in reaching the conclusions set out in this report.
4. My silence with respect to any specific statement made by Mr. Deya, Mr. Kambole or Mr. Oleshangay should not be construed as agreement with that statement.

### II. ROLE OF THE PRESIDENT IN JUDICIAL APPOINTMENTS

5. The unfortunate approach taken by Mr. Deya is perhaps best exemplified in paragraph 98 of his Expert Report, in which he speculates that "one cannot rule out the possibility of interference in cases in which the powerful have an interest, be they the government, or the country's political, bureaucratic or economic elite". That speculative assertion is divorced from the reality I experienced as a member of the judiciary of Tanzania for more than 12 years, including nearly nine years on the Court of Appeal and more than six years as Chief Justice of Tanzania.
6. A central complaint advanced by Mr. Deya is that the President of Tanzania appoints senior judicial officers, including the Chief Justice, Justices of Appeal, High Court judges, Chief Court Administrators, Chief Registrar, Registrar of the Court of Appeal, the High Court Registrar and majority of the members of the Judicial Service Commission. That complaint lies at the core of his argument that "by its very establishment under the Constitution of the

United Republic of Tanzania, the Judiciary is not capable of being fully independent”.<sup>1</sup>

7. Mr. Deya likewise finds fault with the notional role played by the President in: (i) fixing the compensation of judicial officers; and (ii) appointing the judicial officers that sit on committees responsible for the discipline of judges. With respect to the former, Mr. Deya points to section 4(1) of the *Judges (Remuneration and Termination Benefits) Act, 2007*, which provides that “The Chief Justice, a Justice of Appeal, a Principal Judge and a Judge, shall be entitled to such salaries, allowances and other benefits as may be determined by the President”.<sup>2</sup> With respect to the latter, Mr. Deya notes that the Judges Ethics Committee and Judicial Officers Ethics Committee are composed of members who are “direct or indirect appointees of the President”, and that the Regional Judicial Officers Ethics Committees and District Judicial Officers Ethics Committees are “predominantly constituted by members of the Executive arm of the government”.<sup>3</sup>
8. Mr. Deya’s complaints concerning the appointment-making powers and other roles of the President are misplaced, and his overall argument concerning the Tanzanian judiciary is incorrect. The appointment-making powers and roles accorded to the President under the Constitution and applicable legislation do not render the judiciary non-independent.
9. This is so for a number of reasons, some of which were referred to in my initial Expert Report of 2023 and therefore will not be repeated in detail. For instance:
  - a. Articles 107A and 107B of the Constitution of Tanzania protect the independence of the judiciary and mandate judicial impartiality. These are not only theoretical ideals but rather are abided by in practice.<sup>4</sup>
  - b. Section 4(3) of the *Judiciary Administration Act, 2011* prohibits employees of the Judicial Service, in the performance of their functions, from receiving directions from any authority outside the Judicial Service.<sup>5</sup>

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<sup>1</sup> Expert Report of Donald Omondi Deya (“**Deya Report**”) at para. 98.

<sup>2</sup> Deya Report, paras. 129-133.

<sup>3</sup> Deya Report, paras. 129-133.

<sup>4</sup> Expert Report of Mohamed Chande Othman (“**First Othman Report**”), paras. 38-41.

<sup>5</sup> First Othman Report, para. 60.

- c. The Judicial Service Commission, which provides advice and makes recommendations to the President in respect of judicial appointments, is an independent constitutional body that is not accountable to the Executive or the Legislature. In practice, the President invariably selects candidates recommended by the Judicial Service Commission when making judicial appointments.<sup>6</sup>
- d. The remuneration of Justices of Appeal and Judges of the High Court is constitutionally guaranteed. Moreover, although the President has final authority concerning salary scales, allowances and other benefits paid to judicial officers, in practice the President invariably accepts the recommendations made by the Judicial Service Commission with respect to these issues.<sup>7</sup>
- e. Justices of Appeal and Judges of the High Court cannot be removed unless a special tribunal recommends removal, and as a practical matter this has rarely occurred. These tribunals operate independently and free from interference by the President or other Government officials, and their recommendations are binding on the President.<sup>8</sup>
- f. The Judges Ethics Committee does not deal with complaints against Justices of Appeal and Judges of the High Court that raise a possibility of removal. Rather, this Committee deals with less serious allegations of misconduct. The members of the Judges Ethics Committee are appointed by the Chief Justice of Tanzania, and I have never observed them to have carried out their responsibilities other than in an independent and fair manner.<sup>9</sup>
- g. The removal and discipline of other judicial officers fall within the rubric of the Judicial Service Commission.<sup>10</sup> The Judicial Officers Ethics Committee and the Regional and District Judicial Officers Ethics Committees exercise delegated authority granted by the Judicial

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<sup>6</sup> First Othman Report, paras. 46-50.

<sup>7</sup> First Othman Report, paras. 61-63.

<sup>8</sup> First Othman Report, paras. 52-54.

<sup>9</sup> First Othman Report, para. 55.

<sup>10</sup> First Othman Report, paras. 56-57.

Service Commission.<sup>11</sup> These Committees do not have any disciplinary authority over judicial officers. They are only advisory and make recommendations to the Commission. Their primary function is to receive complaints and inquiries, investigate allegations of misconduct made against judicial officers and report back to the Commission.

10. Mr. Deya does not engage with my evidence on any of these matters. He also fails to appreciate or address a number of other important considerations that cannot be reconciled with his portrayal of an “imperial presidency” that somehow controls the judiciary of Tanzania. I discuss these considerations below.

**A. *Appointment and Role of the Chief Justice***

11. In paragraph 113 of his Expert Report, Mr. Deya opines that “Under Article 118(2) [of the Constitution] it is the sole prerogative of the President to appoint the Chief Justice”. Mr. Deya asserts that the President “does not have to consult any person or institution at all”.
12. Although it is correct that the President appoints the Chief Justice pursuant to Article 118(2) of the Constitution, it is a deep-rooted practice in Tanzania for the departing Chief Justice to recommend to the President a shortlist of Justices of Appeal, and for the President to pick the new Chief Justice from among those candidates. In this way, the judiciary itself plays a significant role in selecting its Head.
13. In my particular case, the previous Chief Justice received feedback from all Judges of the High Court and Justices of Appeal in preparing his recommendations to the President. In 2010, with his tenure as Chief Justice coming to an end, during an Annual Judges Conference held in Arusha, Tanzania he sought and obtained from each Judge and Justice of Appeal in attendance, as well as from Judges and Justices of Appeal who were absent, a confidential list of three names of candidates eligible to be his successor. This feedback was among the factors he considered in arriving at the final shortlist of candidates he recommended to the President. I was on that final shortlist.
14. When I made my own recommendations to the President concerning who should succeed me as Chief Justice, I took into account factors such as

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<sup>11</sup> *Constitution of the United Republic of Tanzania* (the “**Constitution**”), Article 112(4); *The Judiciary Administration Act, 2011*, s. 33 (2) (a), (b) and (c).

seniority and leadership experience. I also consulted senior members of the judiciary, including the Chief Justice of Zanzibar, in formulating the shortlist of suitable candidates I provided to the President. My successor, Ibrahim Hamis Juma, was on that shortlist.

15. Contrary to the insinuations advanced by Mr. Deya in his Expert Report, it is the Chief Justice of Tanzania—not the President—who is the Head of the judiciary. This is clear in Article 118(2) of the Constitution. Article 4(2) likewise makes clear that judicial powers in Mainland Tanzania are vested in the judiciary, rather than in the Executive or Legislative branches. Moreover, it is the Chief Justice—not the President—who is the Chairperson of the Judicial Service Commission, who admits advocates to the bar, and who oversees the performance of judicial functions and the disposal and management of cases (see Article 112(2)(a) of the Constitution, sections 8(3) and (4) of the *Advocates Act* and sections 24(1)-(2) and 25 of the *Judiciary Administration Act, 2011*).

#### **B. *Appointment of Justices of Appeal***

16. As a preliminary matter, I wish to correct an inadvertent error made in my previous Report. In paragraph 48 of my previous Report, I stated that the Judicial Service Commission makes independent recommendations regarding the appointment of Justices of Appeal, judges and other judicial officers who, by law, are appointed by the President. This paragraph should have instead stated that *with the exception of Justices of Appeal*, the Judicial Service Commission makes independent recommendations regarding the appointment of judges and other judicial officers who, by law, are appointed by the President.
17. In paragraph 114 of his Expert Report, Mr. Deya notes that “Under Article 118(3) of the Constitution, the Judges of the Court of Appeal of Tanzania are appointed [by the President] ‘after consultation with the Chief Justice’, who is the President’s direct appointee”. Mr. Deya then claims in paragraph 115 of his Expert Report that the Constitution does not prevent the President from disregarding the advice of the Chief Justice, refusing to appoint a person recommended by the Chief Justice, and instead appointing a person not recommended by the Chief Justice.

18. Once again, Mr. Deya focuses on portions of the wording of one provision of the Constitution but fails to consider the manner in which the appointments to the Court of Appeal are made in practice.

19. Article 118(3) of the Constitution states:

The other Justices of Appeal [i.e., other than the Chief Justice] shall be appointed by the President after consultation with the Chief Justice, from amongst persons who qualify to be appointed Judges of the High Court of the United Republic as provided for in Article 109 of this Constitution, or from amongst persons who qualify to be appointed Judges of the High Court of Zanzibar in accordance with the laws applicable in Zanzibar and have possessed such qualifications for a period of not less than fifteen years.

20. The President is therefore not constitutionally authorized to appoint any lawyer to be a Justice of Appeal. Rather, the President is constitutionally constrained to appointing qualified and experienced candidates. In practice, Justices of Appeal have generally been appointed from among the Judges of the High Courts of Tanzania Mainland and Tanzania Zanzibar.

21. I should point out as well that under Article 116(2) of the Constitution, the Chief Justice of Tanzania must consult with the Chief Justice of Zanzibar concerning the appointment of a Justice of Appeal.

22. What Mr. Deya ignores or is unaware of is that it is a well-established practice in the appointment process of Justices of Appeal for the Chief Justice to obtain feedback from all then-current Justices of Appeal. The Chief Justice obtains from each Justice of Appeal a confidential list of three Judges of the High Court that the Justice of Appeal recommends for appointment to the Court of Appeal. The Chief Justice considers that input along with other criteria (such as credentials, seniority, leadership, gender, integrity and ethics, and others) when making recommendations to the President as part of the consultation required by Article 118(3) of the Constitution.

23. During my term as Chief Justice of Tanzania, not once did the President appoint a Justice of Appeal from outside the list of short-listed candidates I recommended.

**C. *Judicial Service Commission and the Appointment of Judges of the High Court***

24. In paragraphs 116 to 119 of his Expert Report, Mr. Deya makes a number of assertions concerning the power of the President to appoint Judges of the High Court. He states that:
- a. although the President appoints the Principal Judge and other Judges of the High Court “after consultation with the Judicial Service Commission” pursuant to Article 109(1) of the Constitution, all of the members of the Commission are direct or indirect appointees of the President;
  - b. the President is not required to accept the advice of the Judicial Service Commission, and indeed can disregard its advice, refuse to appoint candidates recommended by the Commission, and appoint persons not recommended by the Commission;
  - c. pursuant to Article 109(8) of the Constitution, the President can “dispense with minimum constitutional requirements and ... appoint as a Judge a person who does not meet those minimum requirements, merely ‘after consultation with the Judicial Service Commission’”;
  - d. “Article 109(9) [of the Constitution] allows the President to appoint an Acting Principal Judge without consulting any person or institution”; and
  - e. “there is actually no requirement in the Constitution for a Judge of the High Court to be a person of high moral or ethical standing”.
25. I address each of these points in turn below. By way of summary, Mr. Deya has yet again omitted portions of the provisions of the Constitution he is relying upon, while ignoring other relevant legislation entirely. He also fails to address the manner in which High Court appointments are made in practice.
- (i) Independence of the Judicial Service Commission**
26. As set out in Article 112(2) of the Constitution, three of the six members of the Judicial Service Commission are senior members of the Judiciary: (i) the

Chief Justice; (ii) a Justice of Appeal, appointed by the President on recommendation by the Chief Justice; and (iii) the Principal Judge of the High Court. The other three members are the Attorney General and two persons appointed by the President.

27. I was a member of the Judicial Service Commission for approximately two years before I became Chief Justice. I then served as Chairperson of the Commission throughout my approximately six-year tenure as Chief Justice.
28. It is a time-honoured and well-known practice that the two President-appointed members of the Commission are appointed from a list of candidates recommended to him by the Chief Justice, and that that list is drawn from names of senior Advocates recommended by the Tanganyika Law Society and/or academics recommended by the University of Dar es Salaam. This practice stems from a recognition of the importance that these two constituencies have input on the composition of the Judicial Service Commission. Throughout my tenure as Chairperson of the Judicial Service Commission, I recommended candidates exclusively from that list, and the President only ever appointed candidates I recommended to him.
29. This practice helps ensure that the two President-appointed members are, in fact, independent (just as the three judicial members are).
30. The First Schedule to the *Judiciary Administration Act, 2011* prescribes a number of the procedures applicable to the Judicial Service Commission. Significantly, section 3(1) states that although the Commission makes decisions by majority vote, in the event of a tie the person presiding at the meeting has a second vote and can break the tie. This is important because section 1(3) provides that the Chief Justice of Tanzania presides at every meeting at which the Chief Justice is present (if the Chief Justice does not attend a meeting, the members who are present appoint one of themselves to preside). Thus, the three judicial members of the Commission effectively form a majority, in the sense that if they all vote in favour of a decision and the three other members vote against it (or vice versa), the Chief Justice casts a deciding vote. Throughout my tenure as Chief Justice, I never missed a meeting of the Judicial Service Commission and therefore presided over all of its meetings.
31. Section 7 of the First Schedule provides that “Subject to the provisions of this Schedule, the Commission may regulate its own proceedings”. The Commission’s ability to establish its own procedures is an important element

in protecting its independence. Throughout my time as a member and as Chairperson of the Commission, the Commission acted in a fair and independent manner.

32. The longstanding practice of the Judicial Service Commission is to follow the following process with respect to the appointment of Judges of the High Court: (i) sourcing candidates by soliciting feedback from justice sector stakeholders and inviting expressions of interest; (ii) initial screening and longlisting of candidates; (iii) oral and written interviews; (iv) shortlisting of candidates; (v) vetting shortlisted candidates; and (vi) formulating advice and recommendations to the President.
33. During my time as a member and then as Chairperson of the Commission, the Commission used the following criteria in arriving at recommended candidates for appointment to the High Court: (i) merit (*i.e.*, credentials and legal acumen); (ii) experience; (iii) age (*i.e.*, years remaining until before mandatory retirement); (iv) integrity and ethics; (v) oral and written fluency in English; (vi) gender (*i.e.*, it was important to ensure that women were appointed to the High Court); and (vii) representativeness and membership in professional groupings (*i.e.*, it was important that appointees come from suitably diverse backgrounds, including Advocates, Magistrates, State Attorneys, academics, Chairpersons of adjudicative Tribunals, Secretaries of Constitutional and Statutory Commissions, and the like).
34. Many of those criteria are consistent with the *Lilongwe Principles and Guidelines in the Selection and Appointment of Judicial Officers* adopted in October 2018 by the Southern Africa Chief Justices Forum.<sup>12</sup>

## **(ii) Recommendations of the Judicial Service Commission**

35. There is deep institutional support in Tanzania for the work and role of the Judicial Service Commission. As alluded to above, during my tenure as Chief Justice and therefore as the Chairperson of the Commission, the President always acted on the recommendations made by the Judicial Service Commission in exercising his appointment authority under Article 109(1). No candidate outside the Commission's shortlist was ever appointed to the High Court.

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<sup>12</sup> Southern Africa Chief Justices Forum, October 30, 2018, [www.SACJF.ORG](http://www.SACJF.ORG).

**(iii) Dispensing with Minimum Constitutional Requirements**

36. To the extent that Mr. Deya is opining that the President can simply sidestep the typical requirements to be appointed to the High Court and select anyone the President chooses, he is incorrect.
37. Mr. Deya has not quoted Article 109(8) of the Constitution in its entirety. The entire provision reads as follows:

Where the President is satisfied that a person holding one of the special qualifications has not held that qualification for a period of not less than ten years, but that that person has the ability, knowledge and in every respect is suitable for appointment as a Judge of the High Court, and there are reasons which make such person deserve to be so appointed, then the President may dispense with the requirement that such person shall have held the special qualifications for a period of not less than ten years, and may, after consultation with the Judicial Service Commission, appoint that person Judge of the High Court.

38. The “special qualifications” referred to in Article 109(8) are listed in Article 109(7). A person with “special qualifications” is someone who “holds a degree in law from a University recognized by the accreditation authority in Tanzania”, and has either been a Magistrate, “has held an office in the public service while possessing qualifications of attorney or has been a private advocate” or “possesses qualifications for enrolment as an advocate” and has done so for a continuous period of at least 10 years.
39. The effect of Article 109(8) is not to permit the President to appoint someone who does not have one of the “special qualifications”. Rather, it is to permit the President to dispense with the temporal requirement created in Article 109(6) that a candidate have held at least one of the “special qualifications” for a period of 10 years or more.
40. In any event, this power has limited to no practical effect precisely because the President invariably appoints candidates recommended by the Judicial Service Commission. During my tenure as Chairperson of the Commission, we never recommended candidates who did not hold at least one of the “special qualifications” for more than 10 years. The vast majority of

candidates who were appointed Judges held at least one of the “special qualifications” for between 15 to 20 years.

**(iv) Appointment of an Acting Principal Judge**

41. In asserting that “Article 109(9) [of the Constitution] allows the President to appoint an Acting Principal Judge without consulting any person or institution”, Mr. Deya again fails to quote that provision in its entirety.

42. Article 109(9) states:

In the event that the office of Principal Judge falls vacant or that the Principal Judge is for any reason unable to perform the functions of his office, then, those functions shall be performed by one of the Judges who shall be appointed by the President for that purpose and that Judge so appointed shall perform those functions until a new Principal Judge is appointed and assumes the office of Principal Judge or until the Principal Judge who was unable to perform his functions resumes office.

43. Thus, the Acting Principal Judge cannot simply be anyone. It must be a then-current Judge of the High Court—in other words, a judicial officer who has already gone through the vetting process described above and has already been recommended by the Judicial Service Commission to be appointed to the Court.

**(v) The Ethics of Judges of the High Court**

44. Although it is true that the Constitution does not explicitly state that appointees to the High Court must be persons of “high moral or ethical standing” (to use Mr. Deya’s words), ethical considerations are central to the appointment process.

45. The “special qualifications” that a person must hold to be appointed to the High Court refer to academic qualifications and experience. Those are not, however, the only competences and qualities required of a Judge. As explained above, the Judicial Service Commission considers numerous objective criteria in evaluating candidates and arriving at its recommendations, including ethics and integrity. The vetting process includes

an assessment of whether candidates have ethical shortcomings, security-related issues or have engaged in any work-related conduct that may be disqualifying.

46. Notably, in May 2021, when 21 new appointees to the High Court took their oaths of office, Chief Justice Juma marked the occasion by delivering a speech in which he noted the importance of ethics to the appointment process. The Chief Justice stated in this speech that candidates who had ethical challenges were dropped from the process.<sup>13</sup>

**D. *Judicial Oaths and Code of Conduct***

47. Leaving aside the appointment process, there are additional safeguards that protect the independence of judicial officers. Mr. Deya fails to address these safeguards in reaching his incorrect conclusion that the Tanzanian judiciary “is not capable of being fully independent”.
48. Importantly, all Judges of the High Court and Justices of Appeal are constitutionally required to take and subscribe to an oath of office pursuant to Articles 111 and 121 of the Constitution. In my experience, judicial officers take their oaths of office seriously and comply assiduously with them. The taking of a judicial oath of office is no small or perfunctory matter.
49. At the time that they swear their oaths of office, newly-appointed Judges of the High Court also pronounce and sign an Ethics Statement before the Commissioner for Ethics. In addition, under the *Public Leadership Code of Ethics Act*, Cap. 398, judicial officers are required to submit at the end of each calendar year and at the end of the appointee’s term in office a Declaration of Assets and Liabilities.
50. Likewise, Mr. Deya ignores or fails to address important safeguards found in the *Code of Conduct and Ethics for Judicial Officers, 2020*.
51. The *Code* is a Regulation promulgated under the *Judiciary Administration Act*, and has the force of law. As the “Purpose” provision of the Code makes clear, the Code is intended “to provide guidelines for and prescribe ethical conduct for all judicial officers in Tanzania Mainland”. In its section concerning the “Construction of Statement and Rules”, the Code affirms that:

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<sup>13</sup> Speech by Chief Justice Ibrahim Juma, May 17, 2021, Dar es Salaam.

An independent Judiciary is the right of every person in Tanzania. A judicial officer shall be free and be seen to be free to decide honestly and impartially on the basis of the law and the evidence, without external pressure or influence and without fear or interference from anyone. Nothing in these Statements and Rules is intended to limit or restrict judicial independence in any manner. Judicial officers have the duty to uphold and defend judicial independence, not as a privilege of judicial office but as a Constitutionally guaranteed right of everyone to have their disputes heard and decided by impartial judicial officer.

52. Rule 1 the *Code* states that:

(1) A judicial officer shall exercise his judicial functions independently and free of extraneous influence.

(2) A judicial officer shall firmly reject any attempt to influence his decisions in any matter before the court outside the proper process of the court.

(3) A judicial officer shall encourage and uphold all such arrangements and safeguards to maintain and enhance the institutional and operational independence of the Judiciary.

53. Rules 6 to 10 of the *Code* prescribe the obligations of judicial officers to be impartial. Of particular note, Rule 8 mandates judicial officers to refrain from taking part in political activities. This prohibition strengthens the independence and impartiality of the judiciary by requiring judicial officers not to engage in partisan politics. It is worth noting that this Rule 8 is consistent with Article 113A of the Constitution, which (as noted in my initial Expert Report of October 2023) prohibits judicial officers from joining any political party.<sup>14</sup>

#### **E. *Judicial Tenure and Retirement***

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<sup>14</sup> First Othman Report, para. 44.

54. Mr. Deya also appears to criticize the discretion conferred by the Constitution on the President to extend the service of Justices of Appeal or Judges of the High Court past their mandatory retirement age (of 65 years old and 60 years old, respectively), as well as to decline to permit a Judge of the High Court to retire early (at 55 years old). Mr. Deya opines in paragraphs 127 and 128 of his Expert Report that this means the President can keep Justices of Appeal and Judges of the High Court in office even if they no longer wish to serve.
55. With the greatest of respect, Mr. Deya is simply wrong. The Constitution does not permit the President to subject judicial officers to compelled service, either indefinitely or at all.
56. With respect to Justices of Appeal, Mr. Deya relies upon Article 120(2) of the Constitution but, crucially, makes no mention of Article 120(3). That latter provision makes clear that the President can only direct a Justice of Appeal to continue in office despite reaching the age of 65 where “the President considers it to be in the public interest ... **and the Justice of Appeal agrees in writing to continue in office**” (emphasis added). In other words, a Justice of Appeal can serve past retirement age only where the Justice agrees to do so. Article 120(2) cannot be read in isolation from Article 120(3), and does not vest in the President a separate power to require Justices of Appeal to remain in office against their will.
57. With respect to Judges of the High Court, Mr. Deya asserts that “Article 110(3) allows the President to keep a Judge past the ordinary retirement age ‘for any period which may be specified by the President’, meaning that the President can keep a Judge in office indefinitely”. Unfortunately, Mr. Deya has quoted from Article 110(3) of the Constitution selectively. The provision actually reads as follows:
- In the event that the President considers it to be in the public interest that a Judge who has attained sixty years of age continue in office, **and the Judge agrees in writing to continue in office**, then the President may direct that the judge continue in office for any period which may be specified by the President. (emphasis added)
58. Thus, as with Justices of Appeal, Judges of the High Court can serve past retirement age only where they specifically consent to doing so.

59. To my knowledge, the Presidents of Tanzania have never attempted to force a Justice of Appeal or a Judge of the High Court to continue in office past retirement age without their written consent. As a practical matter, only in a handful of cases over the years has the President extended the judicial tenure of a Justice of Appeal or Judge post retirement age with his or her written consent. In each case, this has been done on the recommendation of the Chief Justice, and the extension has only been for a few years.
60. It is somewhat surprising that Mr. Deya made this error in the face of paragraph 51 of my initial Expert Report. In that paragraph, I referred explicitly to Articles 110 and 120 of the Constitution and stated that “The President of Tanzania can extend the tenure of Judges and Justices for a specified period beyond their respective retirement ages, as long as the Judge or Justice in question agrees in writing to continue in office”. Mr. Deya does not acknowledge this in his Expert Report.
61. Mr. Deya is also incorrect in asserting that the President’s discretion to decline a request from a Judge of the High Court for early retirement is tantamount to the power to require a Judge to remain in office until the retirement age of 60. He fails to appreciate that there is a difference between retirement and resignation. Presidential approval is required for early retirement, which carries with it all of the retirement benefits that retirement at the age of 60 carries with it. Judges of the High Court who wish to leave office early can do so at any time, however, by resigning—including before they reach the age of 55.

**F. *Independence in Judicial Decision-Making***

62. In view of Mr. Deya’s comments about decisional independence, I wish to emphasize that throughout the entirety of my tenure as a Judge of the High Court, Justice of Appeal and Chief Justice, I never felt any improper or outside pressure or influence to reach a particular outcome in any given case, including cases that the Government was involved in or had an interest in. Nor was I aware of any judicial officer being subjected to such pressure or influence. I certainly never applied such pressure or influence, and never witnessed or became aware of any other judicial officer doing so. Had I witnessed or become aware of such conduct, I would have referred the matter for potential discipline.

63. Moreover, I have never encountered an instance of a judicial officer's salary or compensation being used as leverage to extract rulings in favour of the Government.
64. The reality is that the Courts of Tanzania have routinely rendered rulings that may be adverse to the political, economic or other interests of the Government in power at any given time. For instance:
- a. ***Zakaria Kamwela & Others vs The Minister of Education & Vocational Training & Another (Civil Appeal 3 of 2012) [2013] TZCA 256 (12 July 2013).*** In this case, I quashed and set aside a Circular issued by the Minister of Education directing Education Establishments to compel students to sing the Tanzanian National Anthem. I did so on the basis that this requirement contravened the religious freedom rights and other constitutional rights of the students, as enshrined in Articles 19(1) and 29(1) of the Constitution. Moreover, I did so despite the high political sensitivity of the case and its implications on the Government's efforts to promote patriotism in schools and among school-aged children.
  - b. ***Zitto Zuberi Kabwe vs President of the United Republic of Tanzania, the Attorney General and Two Others (Misc. Civil Cause of 8 of 2022) [2022] TZHC 15339 (5 December 2022).*** In this case, the High Court held that the removal of the Controller and Auditor General of Tanzania by the President and Head of State and Government was unconstitutional. This was a highly politically sensitive case that impugned directly the actions of the President.
  - c. ***Aidan F.L. Eyakuze vs Commissioner General of Tanzania Immigration Services Department (TISD), The Commissioner of Citizenship and Passport and the Attorney General, of TISD and Two Others (Civil Appeal No. 13 of 2020) [2020] TZCA 1884.*** In this case, the Court of Appeal ordered the Government respondents to return to the Executive Director of a prominent nongovernmental organization his passport and allow him to acquire a new one in the event it had expired. In doing so, the Court of Appeal demonstrated its willingness and ability to issue prerogative orders against the Government and its officials in a politically sensitive context.

- d. ***Attorney General v. Jeremia Mtobesya (Civil Appeal 65 of 2016) [2018] TZCA 347 (31 January 2018)***. In this case, the Court of Appeal upheld a Decision of the High Court that had declared section 148(4) of the *Procedure Act*, Cap 20 unconstitutional, null and void. The impugned provision precluded an arrested person from receiving bail pending trial or appeal if the Director of Public Prosecutions certified in writing that granting bail would likely prejudice the safety or interests of the Republic of Tanzania.
- e. ***Leighton Offshore PTE Ltd vs Tanzania Ports Authority and The Attorney General, (Commercial Case No. 114 of 2017) [2023] TZHCCoMD 346 (27 October 2023)***. In this case, the High Court ruled in favour of a Singapore company that sued the Tanzania Ports Authority in respect of an alleged breach of contract. The Court awarded the Plaintiff more than USD\$11.5 million. This was directly adverse to the economic interests of the Government. Furthermore, the High Court dismissed with costs the Respondents' subsequent application to set aside that ex-parte judgment.
- f. ***Joran Leechburg Bashange vs Minister for Constitutional Affairs and the Attorney General (Misc. Civil Cause No. 12 of 2023) [2024] TZHC 774 (13 March 2024)***. In this case, the High Court declared unconstitutional and void sections 44(1) and (2) of the *Law of Limitation Act*, Cap 89 RE. 2019 that empowered the Minister responsible for Justice to grant an extension of the time limit to file a suit in court. This Decision was adverse to the interests of the very Minister who presents the Judiciary's annual budget estimate to Parliament for its approval and appropriation under the *Judiciary Administration Act* (section 59(2)) and the *Budget Act* (section 23(1), 24(1) and 27).
65. In all of the cases summarized above, the Government of Tanzania respected and abided by the decisions. In the cases of *Zitto Zuberi Kabwe* and *Leighton Offshore PTE Ltd*, the Government party has appealed to the Court of Appeal and those appeals remain pending.

### III. ALLOCATION OF CONSTITUTIONAL CASES

66. In paragraph 153 of his Expert Report, Mr. Deya asserts that “There has been a systematic practice of ensuring that constitutional cases are assigned to specific judges”. He goes on to state that those judges “invariably deliver judgment in favour of the government, and in most instances using technicalities to dismiss cases in preliminary stages, quite often by allowing Preliminary Objections by State Attorneys, often amplifying alleged defects in supporting Affidavits by Applicants”. Mr. Deya cites no cases or other authorities in support of these accusations.
67. Mr. Deya is simply wrong. The Government does not win in all constitutional cases, as is clear from the handful of cases summarized above.
68. Moreover, there is no systematic practice of allocating constitutional cases to specific members of the judiciary. The assignment of cases to judicial officers is currently governed by the Chief Justice’s Circular, which states that once cases are admitted they are assigned to judicial officers by the Principal Judge and Head of the High Court and subordinate courts, the Judge in Charge (*i.e.*, the Head of the High Court Centre or Division) and the Magistrate in Charge (*i.e.*, Head of the Resident or District Court).
69. Only the Principle Judge of the High Court can assign constitutional cases, and must do so to a panel of three Judges. This is the required quorum for deciding constitutional cases on the merits (interim matters can be decided by one Judge). These Judges are often sourced from the Dar es Salaam Registry, which has the highest concentration of Judges.
70. In any event, if the Plaintiffs in the Ontario proceeding were to sue Barrick or North Mara Gold Mine Limited in Tanzania, the matter would not be a constitutional case.

#### **IV. COMPARATIVE ASSESSMENT OF OTHER AFRICAN CONSTITUTIONS**

71. In paragraph 99 of his Expert Report, Mr. Deya asserts that:

The Constitution of the United Republic of Tanzania is the oldest and most archaic in the East African region, and the one with the least built-in safeguards, or checks and balances. It was promulgated in 1977, with specific amendments in 1984, and minor amendments thereafter, many of which are perceived to be weakening, rather than

strengthening, the separation of powers and the rule of law.

72. Mr. Deya opines in paragraph 100 of his Report that “In contrast to Tanzania, its neighbouring Partner States have much more modern Constitutions”. The “Partner States” he lists are Burundi, the Democratic Republic of Congo, Kenya, Rwanda and Uganda. Nowhere in his Report, however, does Mr. Deya describe or assess relevant provisions of the Constitutions of those countries.
73. I do not agree with Mr. Deya’s characterization of the Constitution of Tanzania as “archaic” compared to those of other countries in East Africa. Nor do I agree with Mr. Deya’s suggestion that the Constitutions of Burundi, the Democratic Republic of Congo, Kenya, Rwanda and Uganda better protect judicial independence than does the Constitution of Tanzania.
74. In this regard, although I am not qualified to practice law in those countries, I have significant experience in the Constitutions and legal systems of countries across Africa. This experience includes, without limitation, the following:
  - g. my service from 1996 to 2000 with the United Nations International Criminal Tribunal for Rwanda;
  - h. my service from 2008 to 2009 as a member of the Advisory Committee on the Archives of the International Criminal Tribunals concerning Rwanda and the former Yugoslavia;
  - i. my service from 2008 to 2010 as the Independent Expert appointed by the United Nations Human Rights Council concerning the human rights situation in Sudan;
  - j. my service as a member of the Executive Committee of the Southern Africa Chief Justices Forum, from 2014 to 2016 (in my capacity as Chief Justice of Tanzania at the time);
  - k. my service in 2019 as a member of a fact-finding missions conducted by the African Judges and Jurists Forum into judicial independence in Lesotho;
  - l. my service since 2020 as Chairperson of the Administrative Council of the African Institute of International Law;

- m. my appointment in December 2022 as the Chairperson of the International Commission of Human Rights Experts on Ethiopia; and
  - n. my membership in the Elders Council of the African Judges and Justice Forum, as well as in the African Group for Justice and Accountability.
75. Against this backdrop, it is important to understand at the outset that although there are national, regional and international best practices and guidelines concerning the appointment, tenure and removal of judges, there is no one-size-fits-all approach to these issues. Nor is there a single mechanism or model that is universally endorsed as the best or only viable one for protecting judicial independence.
76. Notably, Tanzania is far from the only jurisdiction in which a Judicial Service Commission is involved in the appointment of judicial officers. Commissions of this nature are commonplace around the world. A comparative study of Commonwealth jurisdictions prepared in 2007 found that in 81% of those jurisdictions a judicial appointments commission played a role in shortlisting candidates or appointing judicial officers, whereas in 19% of jurisdictions appointments were made solely by the executive. In 21% of jurisdictions there was some legislative involvement in the appointment of judges, usually by way of confirmation of candidates selected by the commission.<sup>15</sup>
77. Moreover, a review of the Constitutions of a number of countries in Africa reveals: (i) Government involvement in the process of judicial appointments; and (ii) similarities to the Constitution of Tanzania in respect of the issue of judicial appointments. This includes countries referred to by Mr. Deya as having “much more modern Constitutions” than that of Tanzania.
78. In Burundi, for example, Judges of the Supreme Court are appointed by the President on recommendation by the Minister for Justice.<sup>16</sup> The High Council of the Magistracy (*Conseil Supérieur de la Magistrature*) is chaired by the President of the Republic, assisted by the Minister of Justice.<sup>17</sup> The Council

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<sup>15</sup> Commonwealth Secretariat, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles, A Compendium and Analysis of Best Practice* (London: British Institute of International and Comparative Law, 2015), paras. 1.4-1.6.

<sup>16</sup> *Constitution of the Republic of Burundi, 2018*, Article 228.

<sup>17</sup> *Constitution of the Republic of Burundi, 2018*, Article 224.

has disciplinary authority over judicial officers, among other functions. This means that there is more direct Government involvement in the High Council than is the case with the Judicial Service Commission in Tanzania, since the Constitution of Tanzania makes clear that Members of Parliament are not eligible for appointment to the Commission.<sup>18</sup>

79. In Rwanda, the Constitution provides that the President and Vice President of the Supreme Court, the President and Vice President of the High Court and the President and Vice President of the Commercial Court are appointed by the President after consultation with the Cabinet and the High Council of the Judiciary.<sup>19</sup> The High Council of the Judiciary established under Article 149 of the Constitution “is the supreme governing organ of the judiciary”.<sup>20</sup> The High Council of the Judiciary includes, among others, one representative of the Ministry of Justice appointed by the Minister of Justice.<sup>21</sup>
80. Article 142(1) of the *Constitution of the Republic of Uganda, 1995* provides that the Chief Justice, Deputy Chief Justice, Justices of the Supreme Court and Court of Appeal and Judges of the High Court shall be appointed by the President on the advice of the Judicial Service Commission. This is very similar to the power conferred on the President under Article 109(1) of the Constitution of Tanzania to appoint Judges of the High Court and its Principal Judge after consultation with the Judicial Service Commission. The Chairperson of the Uganda Judicial Service Commission is a person who is qualified to be appointed as a Justice of the Supreme Court, but is not the Chief Justice, Deputy Chief Justice or Principal Judge.<sup>22</sup>
81. Article 171(2)(g) of the *Constitution of the Republic of Kenya* provides that one person nominated by the Public Service Commission, a constitutional body, is to be member of the Judicial Service Commission. The Judicial Service Commission promotes independence and accountability of the judiciary by, among other things, recommending persons for appointment as judges to the President.<sup>23</sup> Article 233(1) establishes the Public Service

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<sup>18</sup> Constitution, Article 112(3).

<sup>19</sup> *Constitution of the Republic of Rwanda, 2015*, Article 154.

<sup>20</sup> *Constitution of the Republic of Rwanda, 2015*, Article 149.

<sup>21</sup> *Constitution of the Republic of Rwanda, 2015*, Articles 149; *Law Determining the Organisation and Functioning of the Judiciary*, Law no 12 of 2018, Article 6(17).

<sup>22</sup> *Constitution of the Republic of Uganda, 1995*, Articles 146 (4) and 146(2) (a).

<sup>23</sup> *Constitution of Kenya, 2010*, Article 172(1)(a).

Commission, whose functions include the establishment and abolition of offices in the public service, disciplinary control over persons in the public service, and the monitoring and evaluation of the administration of the public service. Both its Chairperson and Vice Chairperson and are appointed by the President.<sup>24</sup>

82. Article 152 of the *Constitution of the Democratic Republic of Congo* establishes the High Council of the Judiciary (*Conseil Supérieur de la Magistrature*). The Council's functions include the appointment and promotion of judges and the exercise of disciplinary powers. Its members include two public prosecutors from each Court of Appeal District and a prosecutor from each Military District Court.<sup>25</sup> The President appoints three out of the nine members of the Constitutional Court, which is the highest court in the country, on his own initiative.<sup>26</sup>
83. In South Africa, members of the Judicial Service Commission, a constitutional body established by Article 178 of the Constitution, include: the Cabinet Minister responsible for Justice; a member of the Executive branch; four people designated by the President as Head of the national executive, after consulting the leaders of all the parties in the National Assembly; and six persons designated by the National Assembly, at least three of whom must be members of opposition political parties represented in the Assembly.<sup>27</sup> Among the Commission's key functions is to advise the Government on the Judiciary and the administration of justice, to advise the President on candidates for appointment to the bench and to deal with complaints against judicial officers for contravening the Code of Judicial Conduct.<sup>28</sup>
84. In The Gambia, the Chief Justice is appointed by the President after consultation with the Judicial Service Commission.<sup>29</sup> By Article 138 (3) of the Constitution, all Judges of superior courts (*i.e.*, the Supreme Court, the Court of Appeal and the High Court, except the Special Criminal Court) shall be appointed by the President on the recommendation of the Judicial

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<sup>24</sup> *Constitution of Kenya*, 2010, Article 233(2).

<sup>25</sup> *Constitution of the Democratic Republic of Congo*, Article 155.

<sup>26</sup> *Constitution of the Democratic Republic of Congo*, Article 158.

<sup>27</sup> *Constitution of the Republic of South Africa*, Article 178(1) (d), (h), (j); *Judicial Service Commission Act, 1994*, s. 14(1).

<sup>28</sup> *Constitution of the Republic of South Africa*, Article 178(5).

<sup>29</sup> *Constitution of the Gambia, 1977*, Article 138(1).

Service Commission. The Commission includes one person appointed by the National Assembly.<sup>30</sup> The Commission, chaired by the Chief Justice,<sup>31</sup> advises the President on the appointment of judges, appoints judicial officers and court staff, and makes proposals on the improvement of the administration of justice.<sup>32</sup>

85. In Botswana, Article 96 (1) of the Constitution provides that the Chief Justice shall be appointed by the President. This is the same as in Tanzania, as described above. Article 96(2) directs that Judges of the High Court are appointed by the President acting in accordance with the advice of the Commission, which the Court of Appeal of Botswana interpreted in *Law Society of Botswana & Another v President of Botswana and Others*<sup>33</sup> to mean that the President is not entitled to reject the recommendation of the Judicial Service Commission on the appointment of a judge.
86. In Namibia, Article 82 of the Constitution states that all appointments of Judges to the Supreme Court and the High Court shall be made by the President on the recommendation of the Judicial Service Commission. The Commission is established under Article 85(1) of the Constitution and is chaired by the Chief Justice. Members of the Commission include the Deputy Chief Justice, the Attorney General as an *ex officio* member and two members of the legal profession.<sup>34</sup>
87. The Constitution of Tanzania is also not unique with respect to judicial tenure and removal. For example, Articles 97(2), 97(4), 101(2) and 101(4) of the *Constitution of Botswana* and Articles 144(2) and 144(3) of the *Constitution of the Republic of Uganda, 1995* provide that a judge can be removed by the President on specified grounds, including inability to perform functions of the office either due to illness or any other cause (*e.g.*, incompetence) or misbehavior. Removal decisions are only made after an inquiry by an independent tribunal, composed of a panel of high judicial officers, whose recommendation is binding on the President.
88. I should add that the requirements in Article 109(7) of the Constitution of Tanzania concerning the “special qualifications” for being appointed a Judge

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<sup>30</sup> *Constitution of the Gambia, 1977*, Article 143(3)(f).

<sup>31</sup> *Constitution of the Gambia, 1977*, Article 145(1)(1).

<sup>32</sup> *Constitution of the Gambia, 1977*, Articles 146 and 147.

<sup>33</sup> Court of Appeal Civil Appeal No. CACGB-031-16.

<sup>34</sup> *Constitution of Namibia*, Article 85(1).

of the High Court are strikingly similar to provisions in other Constitutions of countries in Eastern and Southern Africa. For instance, the Constitutions of Malawi (Articles 112(1) and (2)), Botswana (Articles 96(3)(a)-(d)) and Uganda (Articles 143(1) and (2)) also do not express all the of competences and qualities required of judicial appointees, but only the required academic credentials and experience.

## V. THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

89. The African Court sits in the city of Arusha in northeast Tanzania, near the country's border with Kenya. Tanzania is a member state of this Court, having ratified the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of African Court on Human and Peoples' Rights ("Protocol") in 2006. The current President of the Court is a Tanzanian who is a senior Judge of the High Court of Tanzania.
90. Cases can be filed with the African Court by member states, by the African Commission on Human and Peoples' Rights, and, for countries that file a Declaration under Article 34(6) of the Protocol, individuals and nongovernmental organizations.
91. Tanzania deposited such a Declaration in 2010, with a reservation that "such entitlement should only be granted to such NGOs and individuals once all domestic legal remedies have been exhausted and in adherence to the Constitution of the United Republic of Tanzania".<sup>35</sup> Perhaps because of the physical proximity to the African Court, Tanzanian individuals have been the single largest group of nationals to file cases directly with the Court.
92. It is true that Tanzania withdrew its Article 34(6) Declaration in 2019. The Protocol explicitly permits Member States to do so, and does not require Member States to provide an explanation. Tanzania is not unique in its decision to withdraw its Article 34(6) Declaration. Rwanda—one of the countries that Mr. Deya states has a "much more modern" constitution than Tanzania—withdraw its Article 34(6) Declaration in 2016. Likewise, Benin and Cote d'Ivoire withdrew their Article 34(6) Declarations in March and April 2020. The other four countries Mr. Deya identified as having "much more modern" constitutions than Tanzania—being Burundi, the Democratic Republic of the Congo, Kenya and Uganda—have all ratified the Protocol but

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<sup>35</sup> United Republic of Tanzania, Minister of Foreign Affairs and International Cooperation, Declaration, March 9, 2010.

have never deposited an Article 34(6) Declaration. In other words, they have never permitted individuals and nongovernmental organizations to file cases against them before the African Court. The same is true of numerous other countries in Africa, including South Africa, Senegal and Nigeria. Today, out of 55 African States, 34 have ratified the Protocol and only eight have deposited a Declaration that remains in effect.

93. Although individuals in Tanzania have not been able to file cases directly before the African Court since the withdrawal of Tanzania's Article 34(6) Declaration, some of the cases filed during the period from 2010 to 2019 were still being heard as of 2023. The withdrawal of an Article 34(6) Declaration does not have a retroactive effect.
94. Mr. Deya notes that in its Annual Report of 2022, the Court reported that Tanzania has not complied with a number of its Orders for Provisional Measures, Judgments and Final Orders. He acknowledges, however, that 34 out of the 35 Judgments and Final Orders in question relate to fair trial rights under Article 7(1) of the African Charter. These cases involve allegations of unjust detention or the right to choose counsel for criminal defendants.<sup>36</sup>
95. I cannot offer any opinion concerning the merits of those allegations. Whatever their cause, and whether or not they have merit, they are not relevant to the fairness of civil proceedings in Tanzania against a corporate defendant or to the independence of the Tanzanian judiciary in presiding over such proceedings. Cases of that nature do not involve matters of unjust detention or failure to provide for counsel in a criminal case.

## **VI. LAW DAY SPEECH OF PRESIDENT MAGUFULI**

96. In paragraphs 135 to 138 of his Expert Report, Mr. Deya appears to fault me for not expressly responding to and “opposing” statements made in a speech given by President John Magufuli on Law Day in February 2016.
97. Mr. Deya's criticisms are unfair and misguided for at least two reasons.
98. *First*, before the President delivered his speech, I delivered a Law Day speech of my own in which I discussed: (i) the Judiciary's plans to establish a Corruption and Economic Crimes Division of the High Court; and (ii) the application of strict accountability measures at all levels of courts, including

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<sup>36</sup> Report of the African Court on Human and Peoples' Rights for the Year 2022, Annex II.

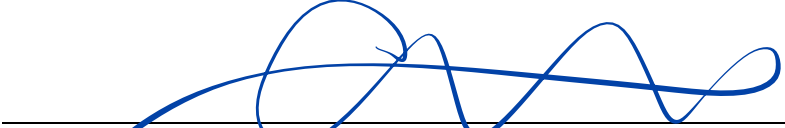
the establishment of 140 dedicated phone hotlines at the District, Resident Magistrates and High Court levels for handling public complaints. Any suggestion that I followed a direction issued by the President in his speech “to crack down upon, and take stern action against, laziness, bureaucracy and corruption amongst the rank and file of Judges and judicial officials” (to use Mr. Deya’s words) is incorrect.

99. In addition, during my speech I criticized the Government for what I viewed as a failure to provide adequate funding for the Judiciary’s development budget.<sup>37</sup>
100. *Second*, it would have been highly inappropriate, contrary to the ethical obligations of judicial officers, and against all applicable notions of etiquette and civility to respond directly to the President’s speech.

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<sup>37</sup> Law Day Speech of February 4, 2016, Chief Justice Othman.

This is **Exhibit "1"** referred to in the Affidavit of Leonard Paulo Shaidi sworn before me at the City of Toronto, in the Province of Ontario on 2 October, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



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*Commissioner for Taking Affidavits (or as may be)*

**ALISA McMASTER**

## **EXPERT REPORT OF PROFESSOR LEONARD PAULO SHAIKI**

### **PART I - INTRODUCTION AND TERMS OF REFERENCE**

#### **A. SCOPE OF MY MANDATE**

1. I have been retained by Davies Ward Phillips & Vineberg on behalf of Barrick Gold Corporation as an independent expert on matters pertaining to Tanzanian law and the Tanzanian judicial system. In particular, I have been asked to consider and provide my opinion on the following specific issues:
  - a. the independence of the Judiciary of Tanzania;
  - b. the impartiality of the Judiciary of Tanzania in cases involving claims against the Tanzania Police Force or the State;
  - c. the legal status of the Tanzania Police Force and its independence as a matter of Tanzanian law;
  - d. the types of records that Tanzania Police Force are legally required to create and maintain in connection with investigations into police-related deaths, the location of those records and the manner in which access to those records can be obtained; and
  - e. key characteristics of the Tanzanian legal process that bear on access to justice. These include issues such as the location of courthouses and their proximity to villages surrounding the site of the North Mara Gold Mine, the ability of local judges to hear evidence and submissions in Swahili, the

69. Under Order XI of the *Civil Procedure Code*, parties to civil proceedings in Tanzania may, with leave of the Court, deliver interrogatories in writing for the examination of opposite parties. Any party may also apply to the Court for an order directing any other party to any suit to make discovery on oath of documents which are or have been in their possession or power relating to any matter in question in the proceeding. In this regard, Order XI Rule 12 states: “It shall be lawful for the court, at any time during the pendency of any suit, to order the production by any party thereto upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit, as the court shall think right; and the court may deal with such documents when produced, in such manner as shall appear just”.
70. Thus, if the Plaintiffs in this proceeding were to elect to pursue claims in Tanzania and name the Attorney General and Tanzania Police Force as parties, the Plaintiffs would encounter no difficulty in obtaining the production of relevant records held by the Tanzania Police Force. Even if neither the Attorney General nor the Tanzania Police Force were named as a party, there is a readily available mechanism in civil proceedings in Tanzania to obtain Police records.
71. By contrast, it is difficult to imagine how the parties could obtain records of the Tanzania Police Force—or, indeed, the records of any resident of Tanzania who is not a party—in connection with foreign civil litigation in Canada.
72. I understand that the Courts of Ontario could issue a commission or Letters of Request to seek assistance from the Courts of Tanzania in compelling the

production of documents and/or testimony from non-party witnesses located in Tanzania. I am unaware of any legal mechanism by which such a commission or such Letters could or would be enforced by the Courts of Tanzania.

73. As noted above, I have practiced civil litigation in Tanzania for decades. I am unaware of any precedent in which a Tanzanian Court has been asked to render assistance of this nature to a foreign court in aid of civil proceedings pending in another country. In considering this issue, I have conducted research in the High Court Library as well as in the Office of the Solicitor and the Attorney General, and could not locate a single case in which a request from a foreign court was presented to a Court in Tanzania to compel a resident of Tanzania to provide documents or oral testimony for the benefit of foreign civil proceedings.

#### **PART VII - CHARACTERISTICS OF THE TANZANIAN TRIAL PROCESS**

74. In my opinion, the Plaintiffs could pursue claims in the High Court of Tanzania in respect of the various incidents alleged in the Ontario proceeding, and do so in an efficient manner. This is so for several reasons:
- a. As stated above, the High Court of Tanzania has a sub-registry based in Musoma, which is the regional capital of the Mara Region in which the North Mara Gold Mine is located. Prior litigation against North Mara Gold Mine Limited, including *North Mara Gold Mine Limited v. Sinda Nyamboge Ntora* (Court of Appeal of Tanzania, Civil Appeal No. 457 of 2020), has been conducted in the Musoma High Court Centre. Indeed in that case, not only was the litigation filed and heard in the High Court in Musoma, but the Court

of Appeal also convened a hearing there in respect of a subsequent appeal in the same case. I have personal knowledge of both the Tarime District in which the Mine is located, and the Mara Region more broadly, having lived in the area during my youth and also having returned on numerous occasions as a visitor. The Musoma High Court Centre is accessible to residents of local communities in the area of the Mine. Litigants and witnesses who live in those communities could easily travel to the Court, provide their testimony, and return home in the same day provided that they have access to an automobile.

- b. To the extent necessary, the presiding Judge would be able to visit the *locus in quo* if litigation proceeds in the High Court in Musoma. This is a normal practice in Tanzania. Visits to the place where alleged events are said to have occurred may be made at the discretion of the Court during trial where reasonably requested by a party.
- c. I anticipate that if the Plaintiffs in the Ontario proceeding were to pursue claims in the High Court of Tanzania, they would not be confronted with language barriers. Court proceedings in Tanzania are typically conducted in Swahili. Moreover, where a litigant does not speak Swahili or English, it is the duty of the Court to provide a competent interpreter to assist the litigant. To my knowledge, all Judges of the High Court of Tanzania are, at a minimum, fluent in both Swahili and English.

- d. To the extent that the Plaintiffs were to require legal assistance in pursuing their claims in Tanzania, there are a number of organisations in Tanzania that actively provide legal aid services (including the Legal and Human Rights Centre).
- e. The Courts of Tanzania are equipped and willing to receive evidence by videoconference where necessary or appropriate. The Musoma High Court Centre is a modern and well-developed facility that provides all of the translation, interpretation and secretarial services required to facilitate the fair and effective conduct of civil proceedings.
- f. As described above, the trial process in proceedings before the High Court is efficient. If they elect to pursue claims in the High Court of Tanzania, the Plaintiffs would likely be able to obtain a judicial determination on the merits within two years of filing their claims.
- g. The procedure for instituting a suit in Tanzania is simple and straightforward. Order VII of the *Civil Procedure Code* requires a suit to be initiated by way of a document known as a *Plaint*, the contents of which are similar to the *Statement of Claim* filed by the Plaintiffs in Ontario. It would require relatively little additional effort for the Plaintiffs to prepare a *Plaint* and file it with the High Court in Musoma.

This is Exhibit "1" referred to in the Affidavit of Leonard Paulo Shaidi sworn by Leonard Paulo Shaidi in the City of Dar es Saalam, Tanzania, before me at the City of Toronto, in the Province of Ontario, on April 5, 2024 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



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*Commissioner for Taking Affidavits (or as may be)*

**JACQUELINE HOUSTON**

LSO# 85990N

**REPLY EXPERT REPORT**  
**OF PROFESSOR LEONARD PAULO SHAIKI**

**D. Attorney Fees**

22. Mr. Oleshangay and Mr. Kambole are correct that contingency fee arrangements are prohibited in Tanzania.<sup>3</sup> This does not mean, however, that no forms of litigation funding are permissible. To the contrary, Tanzanian law expressly permits an advocate's fees and expenses to be paid by someone other than the advocate's client. Rule 78 of the *Advocates (Professional Conduct and Etiquette) Regulations 2018* provides that: "Where an advocate's fees and expenses are being paid by someone other than the client, such as a legal aid agency, a borrower or a personal representative, the written consent of such other person shall first be obtained".
23. The assertion at paragraph 29 of Mr. Kambole's Expert Report that it is illegal in Tanzania for an advocate to charge a fee below the scales prescribed under the *Advocates Remunerations Order* is incorrect.
24. The 3% fee scale prescribed under Schedule IX to the *Advocates Remuneration Order 2015* which Mr. Kambole references at paragraph 25 of his Expert Report is the *maximum* fee an advocate is allowed to charge in respect of claims in excess of Tsh 400,000,000. Order 13 of the *Advocates Remuneration Order* bars advocates from charging or accepting remuneration that is over and above the prescribed scale. It is unlawful for an advocate to charge a fee that exceeds the 3% fee scale provided—not the opposite as Mr. Kambole suggests.
25. This is reflected in the case of **Sugar Board of Tanzania v. Mhango and Company Advocates, Consolidated Civil Reference No. 5 and 16 of 2019**. In

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<sup>3</sup> Expert Report of Jebra Kambole, at para. 26; Expert Report of Joseph Oleshangay, at para. 66.

36. Although these witnesses may believe that the Tanzania Police Force has not conducted such investigations, I am struggling to understand the basis for that belief. The fact that Ms. Karume, Ms. Irondo and Mr. Nyakina do not know whether the Police have investigated a particular matter does not mean that no such investigation has occurred. As a general matter, there is no way for members of the public to know what matters the Tanzania Police Force have investigated or are now investigating. The Police are under no legal obligation to disclose publicly the existence or details of specific investigations, and generally do not do so. Nor am I aware of any law or guideline in Tanzania that would require the Police, as a standard practice, to apprise alleged victims of crimes, their relatives or witnesses to an incident of investigative steps the Police have taken, might take or intend to take.
37. In addition, the absence of criminal charges or convictions in respect of a particular incident does not mean that the matter was not the subject of a Police investigation.
38. In this regard, the final decision to charge or not to charge an individual following the conclusion of an investigation lies with the Director of Public Prosecutions (“DPP”). It does not lie with the Tanzania Police Force. Decisions by the DPP not to charge and prosecute a particular person are generally not communicated to victims, family members, witnesses or members of the public. Typically the DPP informs only the investigating agency of decision not to bring a prosecution.
39. Communications of that nature between the DPP and the Police are confidential. As a matter of practice, police case files are forwarded to the DPP with a covering

This is Exhibit "1" referred to in the Affidavit of Scott Dodson sworn by Scott Dodson of the City of San Francisco, in the State of California in the United States of America, before me at the City of Toronto, in the Province of Ontario, on April 4, 2024 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



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*Commissioner for Taking Affidavits (or as may be)*

**MAYA CHURILOV**

LSO# 87190A

**EXPERT REPORT OF  
PROFESSOR SCOTT DODSON**

April 4, 2024

13. Since 2015, I have been a registered arbitrator for the Financial Industry Regulatory Authority. I have been selected as an arbitrator and presided over more than a dozen arbitrations, which have included deciding discovery and evidentiary issues. Already in 2024, I have presided over and adjudicated two final hearings.
14. I have submitted expert testimony for both plaintiffs and defendants in civil proceedings. Recently, I was accepted by the Royal Court of Jersey as a neutral expert, and offered my opinion on how that Court should understand California procedural law.

### INFORMATION RELIED UPON

15. I have been provided with and have reviewed the following materials in preparation of this report:
  - a) Statement of Claim, No. CV-22-00690649-0000 (Nov. 23, 2022);
  - b) Statement of Claim, No. CV-24-00714148-0000 (Feb. 5, 2024);
  - c) Notice of Motion (May 17, 2023);
  - d) Expert Report of Leonard Paulo Shaidi (Oct. 1, 2023);
  - e) Expert Report of Mohamed Chande Othman (Oct. 2, 2023);
  - f) Expert Report of Joseph Oleshangay (Feb. 1, 2024);
  - g) Expert Report of Advocate Jebra Kambole (Feb. 1, 2024); and
  - h) Publicly available legal materials.

I have listed in Appendix B the materials I have relied upon in reaching the conclusions set out in this report.

16. In forming my opinions, I have relied on my understanding of discovery in civil proceedings in Tanzania, which is based on the materials listed in Appendix B. Although I am a scholar of comparative civil procedure and have studied the discovery regimes in place in many jurisdictions around the world, I am not offering an opinion on the meaning of Tanzanian law. Rather, I am seeking to assist the Court by assessing the Tanzanian discovery process through a comparative lens.

### OPINIONS

#### **A. Discovery in Tanzanian civil courts is within globally accepted norms for adequate and effective civil justice.**

17. Based on my review of the materials, Tanzanian discovery is of a scope comparable to German discovery, and is more extensive than Italian discovery. It is similar to discovery provided for in most recognized forms of arbitration.
18. Tanzanian discovery is more limited than that available in the United States or Ontario. That is because the United States and Ontario are unusually permissive, rather than because Tanzania is unusually restrictive. The United States and Ontario are global outliers; Tanzania, by contrast, is within the global norm.

36. It is my understanding that Ontario also has quite broad discovery. In Ontario, parties must automatically disclose all relevant documents in the party's power, possession, or control, and must produce all such documents upon request unless privilege is claimed. Ont. R. 30.02(1) and (2). A party may examine an opposing party without leave of court by either oral deposition or interrogatories. Ont. R. 31.02(1).
37. These broad systems of discovery are exceptional compared to other systems around the globe, including other common-law systems. According to one commentator, "no common law countries other than the United States and (parts of) Canada liberally allow pre-trial depositions for the purpose of gathering evidence." Thomas O. Main, *Global Issues in Civil Procedure* 34 (Thomson West 2006).
38. It is true that Tanzania has no procedure comparable to Ontario Rule 30.02(1), which requires party to a lawsuit to automatically disclose or produce all relevant documents that are in his power, control or possession. *See Oleshangay Rep't ¶¶ 19, 26*. But, as far as I am aware, few, if any, countries have a procedure comparable to Ontario Rule 30.02(1). Not even the United States has such a broad automatic-disclosure requirement. The fact that Tanzania does *not* have a requirement similar to Ontario Rule 30.02(1) means that Tanzania is solidly within the global norm.
39. For these reasons, I conclude that Tanzanian civil discovery is within globally accepted norms for civil lawsuits.

**B. Discovery in Tanzanian civil courts appears to be adequate to permit the fair adjudication of civil disputes.**

40. Outlier systems of discovery, like those of the United States and Ontario, ought not be criticized just because they are outliers. Instead, they should be understood in context. American litigation, for example, features the adversarial system and passive judges. America's lax pleading standards demand more extensive discovery to identify facts in dispute. And the American system prioritizes litigation with full knowledge of the facts over rights of information privacy. In the United States, as elsewhere, the discovery rules reflect the civil-litigation system's culture, values, and incorporation of other procedural rules. The evaluation of any system's discovery rules must be made with those considerations in mind.
41. Those considerations mean that discovery should be just one part of the overall assessment of civil justice. Discovery is a tradeoff. More discovery offers greater opportunities for informed argument and decision making. But it also increases litigation cost, delay, and intrusiveness. As one commentator has stated, "the American system of discovery, while credited for leaving no stone unturned, is also notorious throughout the world for its inefficiency and intrusiveness." Main, *supra* para. 34, at 33.
42. Different jurisdictions can justifiably adopt justice systems with more limited opportunities for discovery in exchange for other litigation virtues—such as low cost and minimal

This is Exhibit "1" referred to in the Affidavit of Ulimboka Mwasomola sworn by Ulimboka Mwasomola of the City of Dar es Salaam, Tanzania, before me at the City of Toronto, in the Province of Ontario, on April 12, 2024 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



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*Commissioner for Taking Affidavits (or as may be)*

**JACQUELINE HOUSTON**

LSO# 85990N

before the High Court at Dar es Salaam. A copy of the Court's decision of May 2023 is included in Appendix B to this Report.<sup>17</sup>

- b. The Committee is currently assisting families in Dar es Salaam who claim they have been subjected to water, air and noise pollution by an investor operating under the Economic Processing Zone Authority (EPZA). The EPZA is an autonomous government agency that promotes investment in Tanzania and administers export processing and special economic zones.
  - c. Since 2013, the Committee has represented persons living with HIV who claim they were subjected to improper drug trials in military hospitals in Tanzania, in proceedings against respondents including the Ministry of Health and the Attorney General.
55. Other legal aid providers are also frequently involved in public interest litigation matters, either by providing legal services to parties involved or by participating directly in the litigation as a party. The Legal and Human Rights Centre has, for instance, initiated or represented persons in several constitutional cases. One example is ***LHRC & Others v. Attorney General*** [2006] TZHC 66, a copy of which is included in Appendix B to this Report.

### (iii) ***Funding***

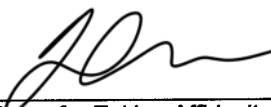
56. Mr. Oleshangay and Mr. Kambole are correct that the *Legal Aid Act* does not require the Government of Tanzania to fund legal aid providers.<sup>18</sup>
57. Legal aid services in Tanzania are provided principally by nongovernmental organizations, community-based organizations, faith-based organizations, institutions of higher learning, by orders of the judiciary and through other institutions. These entities are typically funded by donors, development partners or membership contributions (though the judiciary is funded by the Government).

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<sup>17</sup> Jackson Rwehumbiza & Others vs The Permanent Secretary Ministry of Natural Resources & Tourism & Others (Land Case No. 13 of 2023) [2023] TZHC LandD 16476 (16 May 2023).

<sup>18</sup> Oleshangay Report, para. 86; Kambole Report, para. 33.

This is Exhibit "1" referred to in the Affidavit of Audax Vedasto sworn by Audax Vedasto of the City of Dar es Salaam, Tanzania, before me at the City of Toronto, in the Province of Ontario, on April 5, 2024 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



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*Commissioner for Taking Affidavits (or as may be)*

**JACQUELINE HOUSTON**

LSO# 85990N

14. For the sake of transparency, I should note that I am currently acting for a client in connection with a legal proceeding against North Mara Gold Mine Limited (“**NMGML**”) in the High Court of Tanzania.
15. A copy of my curriculum vitae is attached to this Report as Appendix A.

**C. Discovery in Civil Proceedings in Tanzania**

16. As stated above, I disagree with any contention that the scope of discovery rights in Tanzania deprives parties to litigation of the ability to put forward their cases fairly and effectively. In my view, the discovery regime is entirely adequate and proportionate, and functions appropriately.
17. In conducting the analysis and arriving at my conclusions I have relied upon the materials listed in Appendix B to this Report.

**(i) *Documentary Discovery Obligations***

18. In paragraph 26 of his Report, Mr. Oleshangay asserts that:

In the Tanzanian legal system, there are no procedures under the Civil Procedure Code comparable to Rule 30.02(1) [in Ontario,] which requires [a] party to a lawsuit to automatically disclose or produce all relevant documents that are in his power, control or possession to the adverse party including internal document[s] that are otherwise private and confidential. The only documents which parties have an absolute right to obtain are those referred to in an opposing party’s pleadings.

19. Mr. Kambole provides a similar opinion in paragraph 14 of his Report, where he states that in Tanzania “there is no requirement for the parties to produce all relevant documents in their possession” and therefore “no requirement to produce documents injurious to a party’s legal position”.
20. It is correct that there is no freestanding obligation, absent an order of the relevant court, for any party to a civil proceeding in Tanzania to produce every single potentially relevant document in the party’s power, control or possession. This is so of both plaintiffs and defendants, and therefore does not in my view create an uneven playing field in favour of defendants. Moreover, in my view there is a sound rationale for the approach taken in Tanzania’s *Civil Procedure Code*: Litigation would become far more expensive and time-consuming if every litigant were automatically required to search for, collect, review, disclose and produce every single document in their possession, control or power that may be relevant to any matter in issue. Moreover, doing so is rarely necessary to achieve justice in civil disputes, most of which turn on or involve a relatively small number of documents.
21. The *Civil Procedure Code* prescribes procedures for obtaining pre-trial documentary discovery.
22. In this regard, Section 25 of the *Code* states:

Subject to such conditions and limitations as may be prescribed, **the court may, at any time**, either of its own motion or on application of any party—

invoke these provisions to prevent disclosure of documents which could prove extra-legal conduct by the police.

54. Mr. Kambole offers a similar opinion in paragraph 17 of his Expert Report. Although he concedes that he is “not aware of any reported cases dealing with interpretation of the provision”, he asserts that “[a] Minister can block production of the documents whether the government is a party or not” and expresses that view that “in a case like this one against an important private company regarding responsibility for alleged police abuses, there is a strong risk that a Minister would block access to relevant documents”.
55. Respectfully, it is difficult to understand how Mr. Oleshangay could conclude that the Government would seek to block documentary discovery if the Plaintiffs in the Ontario proceeding were to instead commence a civil proceeding against NMGML (or Barrick) in Tanzania. Nor do I understand how Mr. Kambole could reach his slightly less unequivocal conclusion that that there is a “strong risk” the Minister would block disclosure. Neither Mr. Oleshangay nor Mr. Kambole cites any authority on this point.
56. It appears no such authority exists. The concerns expressed by Mr. Oleshangay and Mr. Kambole are more theoretical than real. In preparing this Expert Report, I could not find a single case in which the relevant language of Order XI Rules 10 and 12 was invoked to prevent disclosure or production of documents from being made. This is so even though Order XI Rules 10 and 12 have been part of the *Civil Procedure Code* since the *Code* first came into force more than 57 years ago on January 1, 1967.
57. To the contrary, there have been numerous cases against the Government in which production issues have arisen without a Minister invoking the “blocking” power described above. For example, in the matter of *Ernest Munishi* that I referred to above, the Plaintiff filed Miscellaneous Land Application No. 127 of 2020 asking the Court to make a discovery order against government institutions. No Minister produced a certificate to block discovery and the Court made the order requested by the Plaintiff.
58. I should note that section 18 of the *Government Proceedings Act* would have no application in a case solely against Barrick and/or NMGML.

**(v) Oral Discovery**

59. I agree with Mr. Oleshangay and Mr. Kambole that there is no procedure in Tanzania for conducting an oral examination for discovery of a party prior to trial.
60. I do not, however, agree with their opinions that: (i) leave to deliver interrogatories will not be granted in respect of matters that the party can address in cross-examination; and (ii) interrogatories cannot be used to obtain evidence to help a party’s case or undermine the opposite party’s case. Mr. Oleshangay advances these opinions in paragraphs 45 to 47 of his Expert Report, and Mr. Kambole advances these opinions in paragraph 21 of his Expert Report. Both of them rely upon the decision of the High Court in *Gomba Estates* in support of the former proposition, and on the decision of the High Court in *Moto Matiko Mabanga vs. Ophir Energy PLC and 2 Others* in support of the latter proposition.
61. *Gomba Estates* does not lay down an inviolable rule that leave to deliver interrogatories will be refused where the matters in question can be cross-examined upon at trial. It is correct that one of the reasons the High Court rejected the request to deliver interrogatories in that case was that “some of the questions intended to be raised in the

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Court File No. CV-22-00690649-0000  
ONTARIO  
SUPERIOR COURT OF JUSTICE  
B E T W E E N:  
SOPHIA MATIKO JOHN, IN HER PERSONAL CAPACITY AND AS  
LITIGATION GUARDIAN FOR HER MINOR CHILD, KELVIN;  
ANACRETUS MARINGO GIMANWA; ESTA GEORGE RANGE, IN  
HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN  
FOR HER MINOR CHILDREN JOSEPH, GODFREY, FILEMON AND  
REBEKA; ELIZABETH MATIKO IRONDO; NEEMA STEPHEN  
JOHN, IN HER PERSONAL CAPACITY AND AS LITIGATION  
GUARDIAN FOR HER MINOR CHILDREN JOHN, MIRIAM, ESTA  
AND TIMOTHY; MASWI MARWA MOHABE; DOTTO WILLIAM  
ITAMA, IN HER PERSONAL CAPACITY AND AS LITIGATION  
GUARDIAN FOR HER MINOR CHILD CHRISTINA; LYIMO ITAMA  
MACHELA; ITAMA MACHELA MAX; CHARLES DANIEL NYAKINA;  
BHOKE HAGALE MARO; DANIEL NYAKINA GHATI; DICKSON  
JULIUS SISE; SIBORA MARWA MWITA; EMMANUEL  
NYAKORENGA MBURI; RYOBA ELIAS KEBWE; PASCOMAREMBELA  
MWITA; NYAHELI MARWA NYAKORENGA; CHRISTOPHER  
JHOMUMAKENDE; RANGE MWITA RANGE; AND  
FREDY CHACHA WAMBURA LEMA

Plaintiffs,

- and -

BARRICK GOLD CORPORATION

Defendant.

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--- This is the Cross-Examination of APOLINARY  
LYAMBIKO, upon his Affidavit sworn October 1, 2023,  
and his Reply Affidavit sworn April 4, 2024, taken  
via Veritext Legal Solution Canada's Zoom virtual  
platform, with all participants attending remotely,  
on the 18th day of May, 2024.

1 "Respect for human rights is a  
2 central pillar of our sustainability  
3 vision with zero tolerance for human  
4 rights violations wherever we  
5 operate."

6 See that?

7 A. Yes.

8 132 Q. And again, would you agree with me  
9 that that is a fair statement of Barrick Gold  
10 Corporation's sustainability vision?

11 A. Yes.

12 133 Q. And that that would also apply to  
13 North Mara Gold Mine Limited?

14 A. Yes.

15 134 Q. And if we go back to page 14 of  
16 this report, you have the "Message from the  
17 President and CEO," you see that?

18 A. Yes.

19 135 Q. And again, that's Mr. Bristow  
20 that's depicted here?

21 A. Yes.

22 136 Q. And then you'll see the heading  
23 "ESG: a clear roadmap towards realistic targets."

24 A. Yes.

25 137 Q. You see that statement "ESG: a

1 clear roadmap towards realistic targets"?

2 A. Yes.

3 138 Q. Sir, we're looking at page 14 of  
4 the Barrick Gold Corporation Annual Report for  
5 2020. Correct?

6 A. Can I -- can I see the page?  
7 Okay.

8 139 Q. And that, the individual depicted  
9 on this page is Mr. Mark Bristow, the President and  
10 CEO of Barrick Gold Corporation; is that correct?

11 A. Yes.

12 140 Q. And I'm directing you to the  
13 heading "ESG: a clear road map towards realistic  
14 targets." Do you see that?

15 A. Yes.

16 141 Q. What does ESG stand for?

17 A. It's environment and social  
18 governance.

19 142 Q. And you'll see that Mr. Bristow  
20 writes:

21 "For most, environmental,  
22 social and governance is an issue  
23 that has only recently moved from  
24 the margins to the core of  
25 investment decision-making and hence

1 operational management. For  
2 Barrick, however, sustainability has  
3 long been an integral part of the  
4 way we do business. In fact, its  
5 principles are deeply embedded in  
6 our organizational DNA."

7 Do you see that statement?

8 A. Yes.

9 143 Q. Is that a fair statement of  
10 Barrick's sustainability philosophy?

11 A. Yes.

12 144 Q. And then it goes on to read:

13 "The effectiveness of Barrick's  
14 ESG strategy - which is powered at  
15 all levels by a long established  
16 partnership philosophy and our close  
17 relationships with all stakeholders,  
18 from investors to host communities -  
19 was a key factor in the past year's  
20 performance."

21 Do you see that?

22 A. Yes.

23 145 Q. Let me take you next to the Annual  
24 Report from 2021, that will be Exhibit B from  
25 Alphonse's Affidavit No. 1. Do you recognize this

1 to be Barrick Gold Corporation's Annual Report for  
2 2021?

3 A. Yes.

4 146 Q. If I could take you to page 8, the  
5 "Letter from the Executive Chairman," you see that?

6 A. Yes.

7 147 Q. Is it your understanding that in  
8 2021 the executive chairman of Barrick Gold  
9 Corporation was Mr. John Thornton?

10 A. Yes.

11 148 Q. And Mr. Thornton states at the  
12 bottom of the page, you'll see the statement:

13 "Our rigorous focus on  
14 performance and execution against  
15 our sustainability strategy enables  
16 us to develop and maintain long  
17 trusted partnerships with all our  
18 stakeholders and host companies."

19 (As read).

20 Do you see that statement?

21 A. Host countries, just to correct.

22 "Our rigorous focus on  
23 performance and execution against  
24 our sustainability strategy enables  
25 us to develop and maintain long

1 trusted partnerships with all our  
2 stakeholders and host companies."

3 MR. FRANKEL: Sorry, I'm going to have  
4 to intervene. Apolo, please keep your voice up and  
5 loud so the reporter can catch what you're saying  
6 and so Mr. Fiorante can catch what you're saying.

7 BY MR. FIORANTE:

8 149 Q. Okay. He goes on to refer to a  
9 sustainability scorecard. Do you see that? It  
10 says:

11 "The third of these scorecards  
12 will appear in the 2021  
13 Sustainability Report..."

14 A. Okay.

15 150 Q. Are you familiar with that  
16 scorecard?

17 A. Yes.

18 151 Q. And then he states that it's part  
19 of Barrick's embedded commitment to environmental  
20 and social governance and leadership. Do you see  
21 that reference in the last sentence?

22 A. Yes.

23 152 Q. If you turn to page 12, a "Message  
24 From the President and CEO," yes, you'll see the  
25 paragraph:

1 "The creation of long-term  
2 value, which is Barrick's prime  
3 objective, requires a sustainable  
4 strategy. Our operations all have  
5 business plans for the next 10 years  
6 and beyond - plans based not on  
7 wishful thinking but on geological,  
8 engineering and commercial  
9 realities."

10 See that statement?

11 A. Yes.

12 153 Q. And it carries on:

13 "Deeply embedded in those plans  
14 is our long-standing commitment to  
15 the principles of ESG, which informs  
16 all of our business decisions."

17 Do you see that statement?

18 A. Yes.

19 154 Q. And then if we could carry on into  
20 the management discussion and analysis section, at  
21 page 56 of the MD&A, which is deep into the  
22 document so give us a minute.

23 You have in front of you now on the  
24 screen, "Management discussion and analysis,  
25 environmental, social and governance."

1 A. Yes.

2 155 Q. And the first statement is:

3 "At Barrick, sustainability is  
4 entrenched in our DNA."

5 Do you see that?

6 A. Yes.

7 156 Q. Would it be fair to say that

8 Barrick Gold Corporation has taken measures to  
9 imbed its sustainability philosophy throughout the  
10 entire organization?

11 A. Yes.

12 157 Q. And that includes the commitment  
13 to respect human rights?

14 A. Yes.

15 158 Q. And that's a philosophy that comes  
16 from the highest levels of the company, from  
17 Mr. Thornton as chair?

18 A. Yes.

19 159 Q. To Mr. Bristow as the president  
20 and CEO of Barrick Gold Corporation?

21 A. Yes.

22 160 Q. Right down to the mine level at  
23 North Mara Gold Mine Limited, correct?

24 A. Correct.

25 161 Q. Let's turn next to the Barrick

1 Sustainability Report for 2021. That is Exhibit X  
2 of Alphonse Affidavit No. 1. Okay. So we've  
3 already looked at this document. Let's turn up  
4 page 17. You have the page entitled "Governance of  
5 Sustainability."

6 A. Yes.

7 162 Q. And the last paragraph states:

8 "Our group sustainability  
9 executive..."

10 Pardon me, it's the next page. Let's  
11 start at page 18, "Environmental and Social  
12 Oversight." Are you familiar with this committee?

13 A. Yes.

14 163 Q. So this, here it's stated:

15 "Our senior management-level  
16 body dedicated to sustainability is  
17 the Environmental and Social  
18 Oversight Committee."

19 I take it that's referred to as the E&S  
20 committee; is that fair?

21 A. Yes.

22 164 Q. And it meets on a quarterly basis?

23 A. Yes.

24 165 Q. And it connects site level  
25 ownership sustainability to the executive officers

1 of Barrick Gold Corporation?

2 A. Yes.

3 166 Q. And then on to the board of  
4 directors of Barrick Gold Corporation?

5 A. Yes.

6 167 Q. And it's the board of directors of  
7 Barrick Gold Corporation who have ultimate  
8 responsibility for its sustainability performance;  
9 is that fair?

10 A. Is that your statement or is what  
11 is written?

12 168 Q. I'm asking you if the statement  
13 written here:

14 "The E&S committee connects  
15 site-level ownership of  
16 sustainability to our executive  
17 officers and our board of directors,  
18 who have ultimate responsibility for  
19 our sustainability performance."

20 I'm asking you if that is an accurate  
21 statement?

22 A. Yes.

23 169 Q. So it's the board of directors of  
24 Barrick Gold Corporation that have ultimate  
25 responsibility for sustainability performance,

1 right?

2 A. Yes.

3 170 Q. Now, the E&S committee is chaired  
4 by the president and CEO of Barrick Gold  
5 Corporation; is that right?

6 A. Yes.

7 171 Q. And that's Mr. Bristow, correct?

8 A. Yes.

9 172 Q. And then it also includes chief  
10 operating officers for each region?

11 A. Yes.

12 173 Q. And at present, for the Africa and  
13 Middle East region, the COO is Mr. Bock; is that  
14 correct?

15 A. His name is Sebastiaan Bock.

16 174 Q. And prior to Mr. Bock, that  
17 position of chief operating officer for Africa and  
18 Middle East was held by Mr. Willem Jacobs,  
19 J-A-C-O-B-S; is that right?

20 A. That's right.

21 175 Q. The group, I'm looking now at the  
22 depiction, the graphic showing people sitting  
23 around the boardroom table at the bottom right-hand  
24 corner. Do you see that diagram?

25 A. Yes.

1 176 Q. Moving across the page, the group  
2 sustainability executive at present is Mr. Grant  
3 Beringer; is that correct?

4 A. Yes.

5 177 Q. And then the next group is all  
6 mine general managers; do you see that?

7 A. Yes.

8 178 Q. So for the North Mara Mine, that  
9 would include you as general manager of North Mara  
10 Gold Mine Limited?

11 A. Yes.

12 179 Q. And then I'll move one category  
13 over, in-house legal counsel, that is referring to  
14 the in-house legal counsel of Barrick Gold  
15 Corporation; is that correct?

16 A. I am not aware of that.

17 180 Q. So, I just want to be clear.  
18 Let's just deal with when was the last E&S  
19 committee meeting that you attended as general  
20 manager of North Mara Mine?

21 A. It was in April of this year.

22 181 Q. April of this year. And do you  
23 recall whether anyone holding the title in-house  
24 legal counsel was present?

25 A. I can't recall that. Sorry, I

1 will speak louder. I can't recall that.

2 182 Q. And then the last person or the  
3 last position depicted is independent  
4 sustainability consultant. Do you see that?

5 A. Yes.

6 183 Q. And at your last meeting in April  
7 2024, did someone participate as the independent  
8 sustainability consultant?

9 A. I'm not aware of that.

10 184 Q. Do you have any knowledge of the  
11 individuals that may have served as independent  
12 sustainability consultants to the E&S committee?

13 A. Yes.

14 185 Q. Who do you recall serving in that  
15 capacity?

16 A. Graham Trusler.

17 186 Q. Pardon me?

18 A. Graham Trusler.

19 187 Q. Can we get a spelling?

20 A. Graham.

21 188 Q. Graham.

22 A. G-R-A-H-A-M T-R-U-S-L-E-R.

23 189 Q. And do you know which company he  
24 is with or firm he is with?

25 A. No.

1 190 Q. Is he based in Tanzania?

2 A. No.

3 191 Q. And do you know how long he has  
4 served in the role of independent sustainability  
5 consultant for the E&S committee?

6 A. Not really.

7 192 Q. Do you recall there being any  
8 change since you became general manager of the  
9 North Mara Mine and started attending these E&S  
10 meetings of who fulfilled the role of independent  
11 sustainability consultant?

12 A. No.

13 193 Q. Sir, is it your understanding that  
14 it's the president and CEO of Barrick Gold  
15 Corporation who reviews the reports of the E&S  
16 committee with Barrick's board of directors,  
17 environmental and social governance committee?

18 A. Sorry, can you repeat the  
19 question.

20 194 Q. Let's turn up Exhibit E to the  
21 Alphonse Affidavit No. 1, it's the 2022 Annual  
22 Information Form of Barrick Gold Corporation, and  
23 if we could try to find page 49. Okay. Do you  
24 have page 49 in front of you, sir?

25 A. Yes.

1 195 Q. And I'll just tell you, all I'm  
2 trying to establish here is that there is a  
3 management committee entitled the E&S committee  
4 that we just discussed, right?

5 A. Yes.

6 196 Q. That's something that you  
7 participate in as the general manager for North  
8 Mara Mine?

9 A. Yes.

10 197 Q. Do you also understand that there  
11 is a committee of the board of directors of Barrick  
12 Gold Corporation called the environmental and  
13 social oversight committee; are you familiar with  
14 that?

15 A. I'm not familiar with that.

16 198 Q. Fair enough. If we could go back  
17 to the discussion, then, of the E&S committee that  
18 you participate in.

19 A. Yes.

20 199 Q. Would it be fair to say that that  
21 committee involves generating data on the company's  
22 progress towards achieving its sustainability  
23 goals?

24 A. Yes.

25 200 Q. And that that results in a regular

1 upward cascade of data so that everyone in the  
2 company, from the site to the regional to the group  
3 level, is aware of the performance on  
4 sustainability matters?

5 A. Yes.

6 201 Q. And that necessarily, given the  
7 role of the committee, would include data relating  
8 to human rights and security matters?

9 A. Yes.

10 202 Q. I'd like to turn next to --

11 THE REPORTER: Can we take a short  
12 break?

13 MR. FRANKEL: Yes, of course. Apolo,  
14 as you and I have discussed, during the break you  
15 remain under cross-examination.

16 THE WITNESS: Yes.

17 MR. FRANKEL: You are not to speak with  
18 anybody about the case or the substance of your  
19 evidence, including me, so you're on your own, and  
20 we will reconvene in approximately 10 minutes,  
21 okay? Go off the record.

22 -- RECESS AT 4:01 A.M. --

23 -- UPON RESUMING AT 4:13 A.M. --

24 BY MR. FIORANTE:

25 203 Q. I want to take you back to Exhibit

1           232                   Q.    Mr. Lyambiko, we should have on  
2                               the screen in front of you Exhibit BB to the  
3                               Alphonse No. 1 affidavit, "Barrick Gold Corporation  
4                               2021 Annual Report to the Voluntary Principles."  
5                               Do you see that?

6                               A.    Yes.

7           233                   Q.    And you're familiar with this  
8                               report?

9                               A.    Yes.

10          234                   Q.    Thank you.  And if we could look  
11                              at page 3, you should see a heading in the middle  
12                              of the page "Engagement in the VPI."  Do you see  
13                              that?

14                              A.    Yes.

15          235                   Q.    And the first sentence reads:  
16                                        "In 2021, Barrick's Group  
17                              Sustainability Executive  
18                              participated in the Voluntary  
19                              Principles on Security and Human  
20                              Rights plenary and Corporate Pillar  
21                              meetings."

22                              Do you see that?

23                              A.    Yes.

24          236                   Q.    And in 2021, Barrick's group  
25                              sustainability executive would be Mr. Beringer,

1 correct?

2 A. Yes.

3 237 Q. Is it also fair to say that no one  
4 from North Mara Gold Mine Limited participated in  
5 the Voluntary Principles on Security and Human  
6 Rights plenary or Corporate Pillar meetings in  
7 2021; is that fair?

8 A. Yes.

9 238 Q. And then if we could just move to  
10 Exhibit AA in the same affidavit, it's the 2022  
11 Annual Report, and again, sir, you should have on  
12 the screen "Barrick Gold Corporation, 2022 Annual  
13 Report to the Voluntary Principles on Security and  
14 Human Rights." You see that?

15 A. Yes.

16 239 Q. And are you familiar with this  
17 report?

18 A. Yes.

19 240 Q. I'm going to take you down to,  
20 again, page 2, "Engagement in the VPI." And again  
21 it states:

22 "In 2022, Barrick's Group  
23 Sustainability Manager participated  
24 in the VPI plenary and Corporate  
25 Pillar meetings."

1 Do you see that?

2 A. Yes.

3 241 Q. So again, that would have been  
4 Mr. Beringer, correct?

5 A. Yes.

6 242 Q. And again, no one from North Mara  
7 Gold Mine Limited participated in the VPI Plenary  
8 or Corporate Pillar meetings in 2022, correct?

9 A. Yes.

10 243 Q. At page 3 under the heading,  
11 number 2, "Promotion of the VPs throughout the  
12 organization," do you see that heading?

13 A. Yes.

14 244 Q. At the bottom of that section it  
15 reads:

16 "At North Mara, Barrick also  
17 worked with a local NGO to provide  
18 regular human rights and security  
19 training to private and public  
20 security."

21 A. Yes.

22 245 Q. And was that training provided by  
23 Tawla, T-A-W-L-A?

24 A. Yes.

25 246 Q. And when did that training take

1 MR. FIORANTE: Sorry, we need one  
2 minute here.

3 MR. FRANKEL: Let's just go off the  
4 record.

5 -- OFF THE RECORD --

6 BY MR. FIORANTE:

7 258 Q. Sir, we're still dealing with  
8 section 8 of the 2022 report on the Voluntary  
9 Principles, and we're discussing the Barrick human  
10 rights investigation procedure, and do you see the  
11 statement in the first paragraph:

12 "See Barrick's 2021 Annual  
13 Report to the Voluntary Principles  
14 for more detail on the procedure."

15 Do you see that statement?

16 A. Yes.

17 259 Q. Okay. So let's turn to the 2021  
18 report, that's Exhibit BB that we looked at a  
19 minute ago. It should be on page 6, section 6.  
20 You should have on the screen in front of you  
21 section 6 of the 2021 Annual Report on the  
22 Voluntary Principles, heading:

23 "Company procedure or mechanism  
24 to report security-related incidents  
25 with human rights implications by

1 public/private security forces  
2 relating to the company's  
3 activities."

4 Do you have that section in front of  
5 you?

6 A. Yes.

7 260 Q. Okay. And then it states:

8 "Barrick's Human Rights  
9 Reporting Procedure provides sites  
10 with detailed guidance on how to  
11 effectively report human right  
12 impacts or allegations."

13 See that?

14 A. Yes.

15 261 Q. And then it says:

16 "Once a potential human rights  
17 violation is reported to designated  
18 local management, the reporting  
19 contact must within twenty-four  
20 hours of becoming aware of the  
21 report notify the Head Country  
22 in-House Legal Counsel or the  
23 General Counsel." (As read).

24 Do you see that?

25 A. Yes.

1           262                           Q.    First of all, can we agree that  
2   this human rights reporting procedure was developed  
3   by Barrick Gold Corporation and that it applies at  
4   all of its sites; is that correct?

5   A.    Yes.

6           263                           Q.    Okay.  And part of the procedure  
7   is that local management at the mine level must,  
8   within 24 hours of becoming aware of a report --

9   -- Reporter's Note:  Technical issues.

10          264                           Q.    Try it again.  Let's take a close  
11   look at section 8 on page 6 of the 2021 Voluntary  
12   Principles Report.  It reads:

13   "Once a potential human rights  
14   violation is reported to designated  
15   local management, the reporting  
16   contact must within twenty-four  
17   hours of becoming aware of the  
18   report notify the Head In-Country  
19   Legal Counsel or the General  
20   Counsel."

21   See that statement?

22   A.    Yes.

23          265                           Q.    And my question to you is, in this  
24   context, general counsel refers to the general  
25   counsel of Barrick Gold Corporation, correct?

1                   A.    No.  The general counsel that is  
2                   being referred here is from the region.

3       266           Q.    From the region?

4                   A.    Yes.

5       267           Q.    Okay, thank you.  Sir, and you're  
6                   referring now to the regional general counsel of  
7                   Barrick Gold Corporation, correct?

8                   A.    Of Africa and Middle East.

9       268           Q.    So I'll just get this clear.  The  
10                   document we're looking at, when it refers to  
11                   general counsel, that is a reference to the  
12                   regional general counsel for the Africa and Middle  
13                   East region of Barrick Gold Corporation, correct?

14                   A.    So, I'm not aware if he works for  
15                   Barrick Gold Corporation.

16       269           Q.    But the regional general counsel  
17                   does not work for North Mara Gold Mine Limited,  
18                   correct, does he?

19                   A.    No.

20       270           Q.    At present, general counsel for  
21                   the Africa and Middle East region is Mr. Antoine  
22                   Thibaud; is that correct?

23                   A.    Yes.

24       271           Q.    And prior to him, that position  
25                   was held by Martin Welsh; is that correct?

1 A. Right.

2 272 Q. Thank you. And then, back to page  
3 6, continuing on:

4 "Following the report of a  
5 potential human rights violation,  
6 the General Counsel will promptly  
7 alert the President and other  
8 relevant personnel as the General  
9 Counsel deems appropriate under the  
10 circumstances."

11 Correct? I read that correctly?

12 A. Yes.

13 273 Q. And here the reference to "the  
14 president" is to the president of Barrick Gold  
15 Corporation, Mr. Bristow, correct?

16 A. Yes.

17 274 Q. Let's carry on, sir. Next I want  
18 to turn to the topic of Memorandums of  
19 Understanding at the North Mara Mine. And for  
20 that, we're going to refer to your affidavit no. 1,  
21 and let's start with Exhibit 2, please, to your  
22 affidavit.

23 MR. FRANKEL: He's got it.

24 BY MR. FIORANTE:

25 275 Q. If we could just look at the first

1 page of Exhibit 2, it's entitled "Memorandum of  
2 Understanding between Tanzania Police Force and  
3 North Mara Gold Mine Limited."

4 A. Yes.

5 -- OFF THE RECORD DISCUSSION RE AUDIO  
6 TECHNICAL ISSUES --

7 BY MR. FIORANTE:

8 276 Q. Mr. Lyambiko, we are looking at  
9 Exhibit 2 to your first affidavit in this matter.

10 A. Yes.

11 277 Q. This is the "Memorandum of  
12 Understanding between Tanzania Police Force and  
13 North Mara Gold Mine Limited" dated April 30th,  
14 2019; is that correct?

15 A. Yes.

16 278 Q. And you, as we discussed earlier,  
17 were promoted to the position of mine manager at  
18 North Mara Gold Mine Limited in July 2021, correct?

19 A. I was promoted as the general  
20 manager, not the mine manager.

21 279 Q. My apologies. General manager.

22 A. July 2021.

23 280 Q. Thank you. And so this Memorandum  
24 of Understanding was still in effect at the time  
25 that you were appointed general manager in July

1 2021, correct?

2 A. Correct.

3 281 Q. Okay.

4 MR. FRANKEL: Counsel, we're not  
5 getting the realtime transcript.

6 -- OFF THE RECORD DISCUSSION --

7 BY MR. FIORANTE:

8 282 Q. And if I could just take you to  
9 page 3 of what the lawyers call recitals, the last  
10 one reads:

11 "Whereas the signatories to  
12 this agreement recognize the  
13 importance of actions consistent  
14 with the terms of the Voluntary  
15 Principles which are attached as  
16 Annex D..."

17 Do you see that?

18 A. Yes.

19 283 Q. And those are the Voluntary  
20 Principles we looked at a moment ago, right?

21 A. Yes.

22 284 Q. And at paragraph 3.2, item (e),  
23 there is a reference to the Nyamongo FFU House.  
24 Can you tell me what FFU stands for?

25 A. Is referencing to which article,

1 is it 3?

2 285 Q. Article 3.2, item 3(e), and it  
3 appears on page 6.

4 A. Yes.

5 286 Q. Can you tell me what FFU stands  
6 for?

7 A. FFU, for this purpose here, it  
8 stands for the house where the FFU was living, so  
9 in police terms, FFU means field force unit.

10 287 Q. And that is the unit of the  
11 Tanzanian Police Force?

12 A. Yes.

13 288 Q. I want to take you to paragraph  
14 4.3 of the MoU. I just want to ask you about the  
15 reporting procedures, okay? So, at paragraph 4.3,  
16 it states:

17 "Police officers shall advise  
18 their superior officers immediately  
19 and the police shall advise the  
20 company in writing as soon as  
21 practicable of any..., and you'll  
22 see item (a), "criminal incident, or  
23 any impending criminal incident,  
24 including to but not limited to any  
25 violence, in the area..."

1 See that?

2 A. Yes.

3 289 Q. Just stop. And 4.3(b):

4 "...the police shall advise the  
5 company in writing as soon as  
6 practical of any...incident in which  
7 any police personnel uses force,  
8 including but not limited to the  
9 discharge of any weapon, in the  
10 area..." (As read).

11 A. What section are you referring?

12 290 Q. 4.3, item (b) as in bravo.

13 A. (B)? Oh, okay.

14 291 Q. I'm trying to make sure I  
15 understand the reporting requirements. So:

16 "Police officers shall advise  
17 their superior officers immediately  
18 and the police shall advise the  
19 company in writing as soon as  
20 practicable of any:

21 ... (b) incident in which any  
22 police personnel uses force,  
23 including but not limited to any  
24 accident involving the discharge of  
25 any weapon in the area..."

1 Correct?

2 A. Yes.

3 292 Q. Okay. And then to the extent that  
4 the report from the police may indicate the  
5 possible violation of human rights --

6 A. Where are you referring to?

7 293 Q. I'm not referring to anything, I'm  
8 trying to pose a question to you.

9 A. Okay.

10 294 Q. To the extent that the company  
11 receives a report under paragraph 4.3 of the  
12 discharge of a weapon that may involve a violation  
13 of human rights, the company is then required to  
14 report it to the general counsel for the Africa and  
15 Middle East region in accordance with the reporting  
16 procedure we looked at a moment ago in the  
17 Voluntary Principles, right?

18 A. Can you please repeat that again?

19 295 Q. So, a few minutes ago we looked at  
20 the reporting procedure that's described as part of  
21 Barrick's human rights procedures in the 2021  
22 Report of the Voluntary Principles. Do you recall  
23 that?

24 A. Yes.

25 296 Q. And so, what I'm asking you is,

1 and what we're now looking at is a Memorandum of  
2 Understanding with the Tanzanian Police Force  
3 related to the North Mara Mine, correct?

4 A. Yes.

5 297 Q. And paragraph 4.3 of that MoU  
6 requires the police to report to the company any  
7 incident in which police personnel uses force,  
8 including but not limited to the discharge of any  
9 weapon, correct?

10 A. So, just to clear that, if I  
11 recollect it, and the police shall advise the  
12 company by reporting.

13 298 Q. Provide the company in writing --

14 A. Yes.

15 299 Q. -- as soon as practicable of any  
16 incident where any police personnel uses force,  
17 including but not limited to discharging a weapon,  
18 right?

19 A. Yes.

20 300 Q. My question is once the company  
21 has received such a report, if the incident  
22 described indicates a possible violation of human  
23 rights, the company then reports that in accordance  
24 with the procedures in the Voluntary Principles  
25 Report?

1 A. Yes, yes.

2 301 Q. And then if we go to paragraph  
3 4.4, the police are required to keep a log of such  
4 incidents, correct?

5 A. Correct.

6 302 Q. And the log is to be made  
7 available to the company promptly upon request,  
8 correct?

9 A. Correct.

10 303 Q. And the company may also request  
11 any such additional information it may require and  
12 the police shall provide such information as  
13 requested, correct?

14 A. Correct.

15 304 Q. And if we go to paragraph 5.3,  
16 under this agreement:

17 "The police shall investigate  
18 any incident or claim that suggests  
19 a breach of the Principles and  
20 Obligations..."

21 Do you see that?

22 A. Yes.

23 305 Q. And principles and obligations, if  
24 we go back up, just to be clear, 4.1 of the report  
25 -- sorry, 4.1 of the MoU is where we find the

1 definition of principles and obligations?

2 A. Yes.

3 306 Q. And so the principles and  
4 obligations included in the MOU at paragraph 4.1  
5 include, at item (c), the United Nations Basic  
6 Principles on the Use of Force and Firearms by law  
7 enforcement officials, correct?

8 A. Correct.

9 307 Q. And also the United Nations Code  
10 of Conduct for Law Enforcement Officials, correct?

11 A. Correct.

12 308 Q. And both of those are attached as  
13 annexes, correct?

14 A. Correct.

15 309 Q. So back to paragraph 5.3, under  
16 this MoU, the police were required to investigate  
17 any incident that suggests a breach of the  
18 principles and obligations, correct?

19 A. Yes.

20 310 Q. And they should investigate it on  
21 the police's own initiative, or in response to a  
22 request by the company, correct?

23 A. Correct.

24 311 Q. Or in response to a complaint by  
25 the community, correct?

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A. Correct.

Q. At then at 5.4:

"Any police officer credibly  
accused of having breached the  
principles and obligations shall be  
identified to the mine."

Do you see that?

A. Yes.

313

Q. Paragraph 5.5:

"The police shall investigate  
and act expeditiously and  
effectively and inform the company  
once a month or more often upon  
request regarding the progress of  
any investigation, disciplinary  
action or prosecution of a Police  
Officer who is receiving or is  
accused in relation to a time when  
he or she received support." (As  
read).

Correct?

A. Correct.

314

Q. And at 5.6:

"The police shall respond to  
requests by the company for

1 information regarding investigations  
2 and efforts to hold police officers  
3 accountable for breaches of the  
4 Principles and Obligations within  
5 two weeks of any such request."

6 Right?

7 A. Yes.

8 315 Q. Now, if we could just go to  
9 Article 8 briefly on Implementation and  
10 Confrontation, it states at 8.2:

11 "The Company's Asset Protection  
12 Manager shall be responsible for  
13 communicating and liaising with  
14 Liaison Officers and the Community  
15 in accordance with this MoU on  
16 behalf of the Company."

17 See that?

18 A. Yes.

19 316 Q. Does the asset protection manager  
20 report to you as general manager of the mine?

21 A. Yes.

22 317 Q. Now, just turn briefly to Exhibit  
23 3 of your affidavit.

24 MR. FRANKEL: Where it says tab 3 at  
25 the top, turn to that.

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BY MR. FIORANTE:

318 Q. And you'll see it's a letter on  
Twiga Minerals Corporation Limited letterhead dated  
July 29, 2021. Do you see that?

A. Yes.

319 Q. And can we agree that this is the  
letter that extends the operation of the 2019 MoU  
that we were just looking at?

A. Yes.

320 Q. Sir, at the bottom of the page it  
also states, there is also a heading "Barrick North  
Mara"; do you see that?

A. Yes.

321 Q. Is there a company called Barrick  
North Mara?

A. This is a footnote, not a company.

322 Q. It's not a company.

A. Yes, sir.

323 Q. And then if we could turn next to  
Exhibit 4 in your affidavit, you should have it, a  
Memorandum of Understanding between the Tanzanian  
Police Force and North Mara Gold Mine Limited?

A. Sorry, tab 4?

324 Q. Tab 4. Dated 2022 on the title  
page. Okay?

1 A. Yes.

2 325 Q. You're looking at that?

3 A. Yes.

4 326 Q. Sir, am I correct that this is the  
5 Memorandum of Understanding between the Tanzanian  
6 Police Force and North Mara Gold Mine Limited that  
7 came into effect in May 2022?

8 A. Correct.

9 327 Q. And you are one of the signatories  
10 to this MoU, correct?

11 A. Correct.

12 328 Q. Were you personally involved in  
13 the negotiations for this MoU?

14 A. Yes.

15 329 Q. Who else was involved on the side  
16 of the company?

17 A. The legal counsel of the company.

18 330 Q. And what about general counsel for  
19 the region?

20 A. They were also involved.

21 331 Q. What about general counsel for  
22 Barrick Gold Corporation?

23 A. No, not that I'm aware of. And  
24 just to add others that were involved, the regional  
25 sustainability team.

1 -- Reporter intervenes for  
2 clarification --

3 -- RECESS AT 5:21 A.M. --

4 -- UPON RESUMING AT 5:30 A.M. --

5 BY MR. FIORANTE:

6 332 Q. Sir, you mentioned that the  
7 regional sustainability team was also involved in  
8 the negotiation of the 2022 MoU; is that correct?

9 A. Correct.

10 333 Q. And was that team led by  
11 Mr. Beringer?

12 A. It was led by Hilaire Diarra.

13 334 Q. Spell that name, please?

14 A. H-I-L-A-I-R-E D-I-A-R-R-A.

15 MR. FRANKEL: If you go to  
16 Mr. Beringer's affidavit, I believe you will find a  
17 reference to that person and that should help you  
18 spell it.

19 MR. FIORANTE: Got it. Got it.

20 MR. FRANKEL: Do you have it? It's at  
21 paragraph 26.

22 MR. FIORANTE: Thank you.

23 BY MR. FIORANTE:

24 335 Q. Sir, who else was involved under  
25 the regional sustainability team?

1 A. So Hilaire Diarra, who I  
2 mentioned.

3 336 Q. One person; is that correct?

4 A. Yes.

5 337 Q. Thank you. And if we could just  
6 look at section 11 of the MoU on the reporting  
7 page, section 11, page 14.

8 A. Yes.

9 338 Q. Okay. So if we could look at  
10 section 11, "Security Incidents."

11 "The TPF agree," and item (a),  
12 "to promptly advise the Company's  
13 Asset Protection Manager of any  
14 security incident involving use of  
15 weapons or use of force, and of any  
16 alleged human rights violation or  
17 abuse in which the TPF officer or  
18 other TPF personnel are involved  
19 while performing their duties in the  
20 area, or at any other operation  
21 which may have consequences to the  
22 company or to Barrick."

23 Correct?

24 A. Correct.

25 339 Q. And here, TPF is an abbreviation

1 for Tanzanian Police Force, correct?

2 A. Correct.

3 340 Q. And the reference to Barrick is to  
4 Barrick Gold Corporation, correct?

5 A. No.

6 341 Q. If we could look at item (b) under  
7 11:

8 "The TPF agree...to promptly  
9 investigate, report, and resolve all  
10 such incidents, potential violations  
11 or abuses in accordance with  
12 applicable national or international  
13 law and to keep the Company's Asset  
14 Protection Manager informed of all  
15 investigations."

16 Correct?

17 A. Correct.

18 342 Q. So, I just want to be clear, just  
19 as we looked at the 2022 MoU, if the company asset  
20 manager receives a report from TPF of alleged human  
21 rights violations or abuse in accordance with this  
22 section 11 of this MoU, the company would then  
23 report that information to general counsel for the  
24 Africa and Middle East region, correct?

25 A. Yes.

1 Responsible Gold Guide?

2 A. Yes.

3 352 Q. And does that standard address  
4 human rights, among other things?

5 A. Yes.

6 353 Q. And, sir, Synergy is not based in  
7 Tanzania, are they?

8 A. No.

9 354 Q. I believe they're based in the  
10 United Kingdom; is that correct?

11 A. Correct.

12 355 Q. And am I also correct that Synergy  
13 returned to North Mara in early 2022 to do a  
14 further review; is that correct?

15 A. Correct.

16 356 Q. And have they returned to North  
17 Mara since then?

18 A. No.

19 357 Q. At present, is there any schedule  
20 for Synergy to return to North Mara?

21 A. No.

22 358 Q. So at present, there's no plan to  
23 have Synergy return, that's all I'm asking.

24 A. That's not the case.

25 359 Q. Thank you. And sir, are you

1 familiar with the firm Avanzar, A-V-A-N-Z-A-R?

2 A. Yes.

3 360 Q. Am I correct that Avanzar in 2021  
4 carried out an assessment of North Mara against the  
5 Voluntary Principles?

6 A. Can you repeat that?

7 361 Q. Yes. Am I correct that in January  
8 2021, Avanzar carried out an assessment of North  
9 Mara against the Voluntary Principles?

10 A. Yes.

11 362 Q. And again, can we agree that  
12 Avanzar is not based in Tanzania?

13 A. Yes.

14 363 Q. Is it your understanding that  
15 they're based in North America?

16 A. Yes.

17 364 Q. And have Avanzar returned to North  
18 Mara since January 2021 to carry out any  
19 assessments?

20 A. I don't remember the dates  
21 clearly. I don't remember the dates clearly, but  
22 they came to the mine after I became the general  
23 manager.

24 365 Q. Sir, let's turn to Alphonse  
25 Affidavit No. 1, Exhibit K. You have on the screen

1 in front of you "Barrick Q1 2021 Report" as the  
2 title. Do you see that?

3 A. Yes.

4 366 Q. And then if you just read down a  
5 little bit:

6 "Toronto, May 5, 2021 - Barrick  
7 Gold Corporation today reported its  
8 results for the first quarter of  
9 2021..."

10 Do you see that?

11 A. Yes.

12 367 Q. Do we agree that this is a press  
13 release by, or, sorry, information released by  
14 Barrick Gold Corporation on May 5, 2021 by Barrick?

15 A. Yes.

16 368 Q. And if you turn to page 5 under  
17 "Steps in Tanzania," with a heading "ESG in Action:  
18 Tanzania Shows the Way." Do you see that?

19 A. Yes.

20 369 Q. And then in the second column the  
21 paragraph reads:

22 "Barrick has worked with  
23 independent specialists Avanzar to  
24 update its human rights policies,  
25 standards and procedures, and to

1 develop human rights workshops for  
2 managers and supervisors, the first  
3 of which was held in January 2021 of  
4 this year."

5 Do you see that?

6 A. Yes.

7 370 Q. And then it says:

8 "Avanzar has also conducted a  
9 human rights impact assessment."

10 Do you see that?

11 A. Yes.

12 371 Q. And that assessment was done at  
13 North Mara, correct?

14 A. Yes, correct.

15 372 Q. And do you recall who from Avanzar  
16 led that team?

17 A. I don't recall the name.

18 373 Q. Okay. And has Avanzar returned to  
19 North Mara for any assessments since 2021?

20 A. I think I have answered that  
21 question already. I said since I became general  
22 manager they have come once.

23 374 Q. When was that?

24 A. I don't remember the date  
25 currently.

1 375 Q. Would it be 2022 or '23?

2 A. I would have to cross-check.

3 376 Q. And sir, am I correct that it was  
4 Barrick Gold Corporation that selected Avanzar to  
5 perform those assessments?

6 A. Yes.

7 377 Q. Next, sir, are you familiar with a  
8 company called Apex Companies, LLC?

9 A. No.

10 378 Q. If we could look at Exhibit Z,  
11 Alphonse Affidavit No. 1. Okay. Sir, you should  
12 have on the screen in front of you on the  
13 letterhead of Barrick Gold Corporation, September  
14 2023, "Conflict-Free Gold Report for Barrick Gold  
15 Corporation." Do you have that?

16 A. Yes.

17 379 Q. Okay. Can we agree that this is a  
18 report that was issued by Barrick Gold Corporation,  
19 correct?

20 A. Yes.

21 380 Q. It was not issued by North Mara  
22 Mine Limited, correct?

23 A. Correct.

24 381 Q. And if you turn to Schedule A just  
25 to confirm this, you should see a Schedule A of --

1                   okay. You have on the screen in front of you,  
2                   "Schedule A - Mines Covered Under Barrick's  
3                   Management Statement of Conformance."

4                   A. Yes.

5       382           Q. And you'll see that it states:

6                               "Barrick Gold Corporation's  
7                   Conflict-Free Gold Report summarizes  
8                   the conformance of the following  
9                   mines to the World Gold Council's  
10                   Conflict-Free Gold Standard."

11                   And the list includes North Mara,  
12                   correct?

13                   A. Yes.

14       383           Q. And can we agree that the World  
15                   Gold Council Conflict-Free Gold Report includes  
16                   consideration of human rights matters?

17                   A. Yes.

18       384           Q. And then if I could take you back  
19                   up to the heading "Independent Assurance." Do you  
20                   have that page in front of you, sir?

21                   A. Yes.

22       385           Q. It states:

23                               "Barrick retained Apex  
24                   Companies LLC, an independent  
25                   assurance provider, to assess its

1 conformance with the standard."

2 Do you see that?

3 A. Yes.

4 386 Q. And then there is a reference in  
5 the next sentence to Duncan Pettit at Barrick. Do  
6 you know who that individual is?

7 A. Yes, I know him.

8 387 Q. What position does Mr. Pettit hold  
9 at Barrick?

10 A. I don't know (inaudible).

11 -- Reporter intervenes for  
12 clarification.

13 A. I'm saying, I don't know which  
14 position he is in.

15 388 Q. Thank you. And then if we could  
16 just scroll through the document to the independent  
17 assurance statement from Apex.

18 Okay. You now have on the screen in  
19 front of you a heading "Apex, Independent Assurance  
20 Statement, Barrick Gold, 2020 Conflict-Free Gold  
21 Report, September 2023"; do you have that?

22 A. Okay.

23 389 Q. Do you have that now? And the  
24 summary states:

25 "Apex Companies, LLC was

1 engaged by Barrick Gold Corporation  
2 to provide reasonable assurance over  
3 their Conflict-Free Gold Report for  
4 the period of January 1, 2022  
5 through December 31, 2022."

6 Correct?

7 A. Yes.

8 390 Q. So can we agree that Apex was  
9 engaged by Barrick Gold Corporation to perform that  
10 assurance review?

11 A. Yes.

12 391 Q. And can we agree that Apex is not  
13 based in Tanzania?

14 A. As I said before, I don't know  
15 Apex.

16 392 Q. Apart from the three third party  
17 companies we've discussed - Apex, Avanzar, Synergy  
18 - have there been any other third party assessments  
19 of matters pertaining to security or human rights  
20 at North Mara since you became general manager?

21 A. No.

22 393 Q. Sir, I just want to go back to  
23 your affidavit number 1 for a moment, and take a  
24 look at Exhibit 3. Do you have that in front of  
25 you?

1 region is, and you confirmed that it's Antoine  
2 Thibaud. Do you recall that?

3 A. Yes.

4 437 Q. Do you know what nationality  
5 Mr. Thibaud is?

6 A. He's from France.

7 438 Q. Do you know where he resides?

8 A. In UK currently.

9 439 Q. You were asked whether  
10 Mr. Thibaud's predecessor was Martin Welsh and you  
11 confirmed that that was correct. Do you recall  
12 that?

13 A. Yes.

14 440 Q. What nationality is Mr. Welsh to  
15 your knowledge?

16 A. No, I don't remember correctly.

17 441 Q. Do you know or do you recall where  
18 he resided?

19 A. Yes.

20 442 Q. Where?

21 A. He was from the Jersey Islands.

22 MR. FRANKEL: I've got no further  
23 questions in reexamination.

24 MR. FIORANTE: Thank you.

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Court File No. CV-22-00690649-0000  
ONTARIO  
SUPERIOR COURT OF JUSTICE

B E T W E E N:

SOPHIA MATIKO JOHN, IN HER PERSONAL CAPACITY AND AS  
LITIGATION GUARDIAN FOR HER MINOR CHILD, KELVIN;  
ANACRETUS MARINGO GIMANWA; ESTA GEORGE RANGE, IN  
HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN  
FOR HER MINOR CHILDREN JOSEPH, GODFREY, FILEMON AND  
REBEKA; ELIZABETH MATIKO IRONDO; NEEMA STEPHEN  
JOHN, IN HER PERSONAL CAPACITY AND AS LITIGATION  
GUARDIAN FOR HER MINOR CHILDREN JOHN, MIRIAM, ESTA,  
AND TIMOTHY; MASWI MARWA MOHABE; DOTTO WILLIAM  
ITAMA, IN HER PERSONAL CAPACITY AND AS LITIGATION  
GUARDIAN FOR HER MINOR CHILD CHRISTINA; LYIMO ITAMA  
MACHELA; ITAMA MACHELA MAX; CHARLES DANIEL NYAKINA;  
BHOKE HAGALE MARO; DANIEL NYAKINA GHATI; DICKSON  
JULIUS SISE; SIBORA MARWA MWITA; EMMANUEL  
NYAKORENGA MBURI; RYOBA ELIAS KEBWE; PASCO  
MAREMBELA MWITA; NYAHELI MARWA NYAKORENGA;  
CHRISTOPHER JHOMU MAKENDE; RANGE MWITA RANGE;  
AND FREDY CHACHA WAMBURA LEMA  
Plaintiffs

- and -

BARRICK GOLD CORPORATION  
Defendant

-----  
--- This is the Cross-Examination of SEBASTIAAN  
BOCK, on his affidavit sworn October 1, 2023, taken  
at the offices of the DaVinci Hotel and Suites,  
Corner 5th Street & Maude St, Sandton, 2031,  
Johannesburg, South Africa, with participants  
attending both in person and virtually, on the 28th  
day of May, 2024.  
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1           42                   Q.    All right.  And getting back to  
2           Barrick Gold Corporation, the company that is at  
3           the apex, is Dr. Bristow the CEO of that company?

4                           A.    Dr. Bristow, yes, he is the CEO of  
5           the Group of Companies.

6           43                   Q.    I am looking at the one entity  
7           that is at the very top, Barrick Gold Corporation.  
8           Is he the CEO of that company?

9                           A.    Yes, he is.

10          44                   Q.    Okay.

11                          All right, just some general questions  
12           about corporate filings.  We have an example of a  
13           corporate filing up on the screen, which is the  
14           Annual Information Form for 2023.  You would agree  
15           with me that Barrick is required to file a number  
16           of documents with Canadian securities regulators?

17                          A.    Yes.

18          45                   Q.    And those include, for example,  
19           Annual Information Forms; correct?

20                          A.    Yes, that's correct.

21          46                   Q.    Annual Reports?

22                          A.    Yes.

23          47                   Q.    Quarterly Reports?

24                          A.    Yes.

25          48                   Q.    Press releases?

1                   A.    Well, not necessarily all of the  
2                   press releases are required, but we do file press  
3                   releases, yes.

4           49           Q.    Ones that contain material  
5                   information; correct?

6                   A.    Pardon?

7           50           Q.    Ones that contain material  
8                   information; correct?

9                   A.    Yes, correct.

10          51           Q.    Notices of Annual Meetings of  
11                   Shareholders?

12                   A.    Correct.

13          52           Q.    And all of these are filed with  
14                   securities regulators and also available publicly;  
15                   correct?

16                   A.    Yes.

17          53           Q.    And you would agree with me that  
18                   it is important that all of these corporate  
19                   documents prepared by Barrick are accurate;  
20                   correct?

21                   A.    That's correct.

22          54           Q.    And in fact, Barrick takes great  
23                   effort to make sure that they are accurate?

24                   A.    That's correct.

25          55           Q.    And you would agree with me that

1 when they describe how things operate, they are  
2 fair representations of how things actually work?

3 A. Yes, correct.

4 56 Q. And Courts and others can rely on  
5 these documents and the statements contained within  
6 them; correct?

7 A. Yes, that's correct.

8 57 Q. Okay. Now, regarding this map, I  
9 want to focus in on I guess the chain of  
10 subsidiaries that leads to the North Mara Mine.

11 And actually, before I do that, I am  
12 going to go back to your affidavit, and you have  
13 included a corporate chart. There is a before and  
14 after. I am going to go to the one between  
15 paragraphs 17 and 18.

16 Can you confirm that this is the  
17 current corporate structure pertaining to the North  
18 Mara Mine?

19 A. Yes, that's correct.

20 58 Q. Okay. And in between Barrick Gold  
21 Corporation at the top and the North Mara Gold Mine  
22 at the bottom, there is a number of subsidiaries  
23 and holding companies; correct?

24 A. Yes, that's correct.

25 59 Q. And these are based in Jersey and

1 Barbados and the Cayman Islands; correct?

2 A. Yes, that's correct.

3 60 Q. And these are holding companies,  
4 not operating companies; correct?

5 A. Yes, that's correct.

6 61 Q. Okay. And one of these is Barrick  
7 TZ Limited; do you see that one?

8 A. Yes, I see that one.

9 62 Q. And that one is based in the UK?

10 A. Yes, that's correct.

11 63 Q. And this is the former Acacia;  
12 correct?

13 A. Yes, that's correct.

14 64 Q. And is this an operating company  
15 now or a holding company?

16 A. That is not an operating company,  
17 no.

18 65 Q. Okay, so it is a holding company?

19 A. Yes.

20 66 Q. And then we go to the North Mara  
21 Holdings Limited, and that one is also based in the  
22 UK and also a holding company; correct?

23 A. Correct.

24 67 Q. And then below that, there is  
25 North Mara Gold Mine Limited and that is a

1 Tanzanian company and it is an operating company?

2 A. Yes, that's correct.

3 68 Q. Okay. All of the companies that I  
4 have mentioned that are under Barrick Gold  
5 Corporation but before North Mara Gold Mine  
6 Limited, they don't have anything to do with the  
7 operation of the North Mara Mine; correct?

8 A. That is correct.

9 69 Q. And what is the purpose of these  
10 other companies?

11 A. These are quite normal in  
12 corporate structures. Quite often companies are  
13 held through various jurisdictions to ensure that  
14 you don't end up, for instance, paying double tax  
15 or if there aren't specific treaties, and so  
16 therefore it is, as per many other operating  
17 companies, it is quite a standard structure to have  
18 a holding company structured in this way.

19 I am no tax expert, so I can't  
20 specifically comment on why it is structured in  
21 this way. And as per your previous comment, this  
22 was a -- this is actually a simplified version of  
23 the original structure that Acacia had.

24 70 Q. Okay. I guess one way to describe  
25 that is tax efficiencies, that the structure is to

1 try and attain tax efficiency?

2 A. Yes, that would be one way to  
3 explain it.

4 71 Q. Okay. All of these holding  
5 companies, are you a director of any of them?

6 A. I would need to check on the  
7 holding companies specifically which ones I might  
8 be a director of.

9 72 Q. Okay, could you undertake to find  
10 out, please?

11 U/A MR. THOMSON: We'll take that question  
12 under advisement.

13 BY MR. WANLESS:

14 73 Q. Okay. Going back to North Mara  
15 Gold Mine Limited, that is owned 84 percent by  
16 Barrick and 16 percent by the Government of  
17 Tanzania; is that fair?

18 A. Yes, that is true.

19 74 Q. Okay. And then you will note that  
20 there are lines that connect Barrick Gold  
21 Corporation at the top all the way down to North  
22 Mara Gold Mine Limited; correct?

23 A. As the indirect holder, yes.

24 75 Q. Right. So there is a chain of  
25 subsidiaries, but there is a direct link between

1 Barrick Gold at the top and North Mara at the  
2 bottom through a chain of subsidiaries?

3 A. There is -- yes, there is indirect  
4 holding of Barrick Gold Corporation through various  
5 entities of ultimately of North Mara Gold Mine  
6 Limited.

7 76 Q. Okay. And I am going to go back  
8 to the Annual Information Form. The structure that  
9 is here is a little bit different. It might have  
10 just been an error.

11 But you will note that the North Mara  
12 Holdings (UK) Limited (United Kingdom) and North  
13 Mara Gold Mine Limited (Tanzania) and the North  
14 Mara Gold Mine (Tanzania) are sort of just an  
15 island there. They are not connected to the rest  
16 of the structure; do you see that?

17 A. I see that, yes.

18 77 Q. And do you know why that is? Is  
19 that an error, or what is going on here?

20 A. I didn't prepare this document, so  
21 I can't comment on that.

22 78 Q. Looking at it now, is it an  
23 accurate reflection of the structure, or is it  
24 missing a line?

25 A. As per what you are showing me on

1           89                   Q.    In order to be successful, Barrick  
2           has to be quite good at operating transnationally;  
3           correct?

4                           A.    Yes, that's correct.

5           90                   Q.    You are pretty good at operating  
6           across borders?

7                           A.    Yes, that's correct.

8           91                   Q.    And in different legal  
9           jurisdictions?

10                          A.    That is correct.

11           92                   Q.    And it is fair to say that  
12           communication is key in Barrick's ability to  
13           operate transnationally?

14                          A.    Well, specifically I can say that  
15           is very important for my Africa Middle East Region.  
16           Communication is really material in terms of the  
17           ability to manage your operations in these  
18           countries because there are various relationships  
19           you need to manage, such as your communities,  
20           governments who are -- some of them are  
21           shareholders. So yes, communication is important.

22           93                   Q.    Okay. And in terms of your  
23           region, are you confident in the communication  
24           structures that you have in place? Do you get the  
25           information that you need from your operations in

1 Africa?

2 A. Yes, I do. If I may elaborate, we  
3 manage the Africa Middle East Region, as per my  
4 affidavit, through a regional structure. We have a  
5 regional oversight team that provides the support  
6 to the local teams. These -- this specific team  
7 are from -- they reside in various different  
8 countries, most of them Africa, some of them reside  
9 in the UK or in Jersey in the Channel Islands.

10 We have a weekly what we call our "ExCo  
11 call" where everyone dials in, and that is really  
12 the main forum which we use to communicate.

13 And if we are now talking  
14 communication, I take it that we are talking  
15 internal communication, not external.

16 But that is our -- one of our key ways  
17 to effectively communicate and understand the  
18 current state of affairs.

19 94 Q. And so about North Mara in  
20 particular, if you need to get information  
21 regarding things that are happening on the ground  
22 in North Mara, you are confident you can get that  
23 information?

24 A. I would -- yes, I would say I  
25 would be able to get that information if it is

1 material to my -- to the business unit that I  
2 operate, yes.

3 95 Q. Okay. And if you ask employees of  
4 North Mara for information, they'll give it to you?

5 A. Yes.

6 96 Q. And if there is problems at the  
7 North Mara Mine, they are going to be reported to  
8 you?

9 A. Yes, if the problem is material,  
10 it would be reported to my level.

11 97 Q. And if you need documents or  
12 records from North Mara, you can get them?

13 A. Yes, if I requested those  
14 documents, I would get them.

15 98 Q. Have you ever had any issues  
16 getting information from North Mara?

17 A. No, I haven't. I have not had any  
18 issues getting information from North Mara.

19 99 Q. And have you had any issues  
20 getting documents from North Mara?

21 A. No, I have not.

22 100 Q. Do you communicate directly with  
23 Mr. Lyambiko?

24 A. Yes, if you are referring to the  
25 General Manager, Apolo, yes.

1 101 Q. How often are you in communication  
2 with him?

3 A. It depends. If there is anything  
4 material to deal with, it would be more often. I  
5 would say on average a few times in a month. It is  
6 not on a daily basis.

7 102 Q. Who at Barrick was involved in the  
8 decision to hire Mr. Lyambiko?

9 A. So Apolo is employed by North Mara  
10 Gold Mines Limited, and ultimately that is the  
11 entity that hired him, through that human resources  
12 department.

13 Of course, as part of the Africa Middle  
14 East Group, he is an important person in the group,  
15 so we would give our guidance and our input. But  
16 ultimately, it is the mine that hires him directly.

17 103 Q. And who conducts performance  
18 reviews of Mr. Lyambiko?

19 A. Apolo's performance review would  
20 be done by the General Manager for East and Central  
21 Africa, Tahirou Ballo. He is the next senior  
22 person or person up above Apolo.

23 104 Q. And would you participate in those  
24 performance reviews?

25 A. I do not do Apolo's performance

1 review directly, but I would review it after  
2 Tahirou has done it, and I would give some input in  
3 that, yes.

4 105 Q. And Tahirou Ballo is the General  
5 Manager of Operations for Tanzania; is that  
6 correct?

7 A. He is the General Manager  
8 Operations for the Central and East Africa.

9 106 Q. Okay. And he works directly for  
10 Barrick; is that correct? Barrick Gold, I should  
11 say.

12 A. Tahirou's contract, as far as I  
13 recall, is the same as mine. He is with Barrick  
14 Gold Holdings, which is in Jersey.

15 107 Q. But definitely not employed by  
16 North Mara Gold Mine Limited?

17 A. No, he is not.

18 108 Q. Does Barrick have any offices in  
19 Tanzania?

20 A. We have one of our subsidiaries,  
21 Barrick Tanzania, has an office.

22 109 Q. I am going back to the Annual  
23 Information Form and the chart of subsidiaries. Is  
24 that Barrick TZ Limited, or is it a different  
25 company?

1 are in London, and the third, which is in Paris, is  
2 intending to move to London.

3 137 Q. Understood. And Barrick has  
4 lawyers in Canada; correct?

5 MR. THOMSON: Again, we are now talking  
6 about employees of Barrick as opposed to external  
7 counsel?

8 BY MR. WANLESS:

9 138 Q. Well, first I'll start with  
10 internal counsel. Barrick has internal counsel  
11 based in Canada; correct?

12 A. If I can provide a bit of clarity,  
13 our General Counsel for the group, which is Poupak  
14 Bahamin, is based in Washington, DC.

15 139 Q. Does Barrick have any internal  
16 counsel in Canada?

17 A. As far as I am aware, and I don't  
18 deal with them directly on a daily basis, as far as  
19 I am aware there would be some legal counsel in  
20 Toronto, yes.

21 140 Q. And how many law firms, external  
22 law firms does Barrick regularly deal with in  
23 Canada?

24 U/A MR. THOMSON: I'll take that question  
25 under advisement.

1 BY MR. WANLESS:

2 141 Q. Barrick has a very long-standing  
3 relationship with the law firm Davies; is that  
4 correct?

5 U/A MR. THOMSON: I'll take that question  
6 under advisement.

7 MR. WANLESS: Okay, Mr. Thomson, I am  
8 going to ask just a couple of questions about this.  
9 I am not trying to be controversial. My only point  
10 is going to be that you folks have been working  
11 with Barrick for awhile, and that's about it.

12 But I'll ask my questions, if that is  
13 okay.

14 MR. THOMSON: Yeah, why don't you read  
15 them into the record, and I will take them all  
16 under advisement.

17 BY MR. WANLESS:

18 142 Q. Okay. Davies has been Barrick's  
19 go-to lawyers in Canada for a long time; correct?

20 U/A MR. THOMSON: I'll take that question  
21 under advisement.

22 BY MR. WANLESS:

23 143 Q. And Davies has acted for Barrick  
24 dozens of times over the past few decades?

25 U/A MR. THOMSON: I'll also take that

1 question under advisement.

2 BY MR. WANLESS:

3 144 Q. And in particular, Mr. Thomson has  
4 been Barrick's go-to lawyer for a number of matters  
5 for a number of years; correct?

6 U/A MR. THOMSON: And I will take that  
7 question under advisement.

8 BY MR. WANLESS:

9 145 Q. And you would agree with me that  
10 from a legal perspective, Barrick is  
11 well-represented in Canada?

12 U/A MR. THOMSON: Well, we take the  
13 compliment, but I will take that question under  
14 advisement.

15 BY MR. WANLESS:

16 146 Q. All right, I'll move on to a  
17 different topic.

18 This is about Barrick's policies. As I  
19 understand it, Barrick issues a number of  
20 company-wide policies; correct?

21 A. That is correct.

22 147 Q. And an example of one of those is  
23 the Human Rights Policy?

24 A. Yes, that is correct.

25 148 Q. Okay, and these company-wide

1 policies apply to all of Barrick's operations?

2 A. Yes, that is correct.

3 149 Q. And that includes the mines on the  
4 ground; correct?

5 A. Yes, that is correct.

6 150 Q. And these policies apply to all of  
7 the mines in your portfolio; correct?

8 A. Yes, that is correct.

9 151 Q. Okay. And who has the authority  
10 to set group-wide or region-wide policies?

11 A. The group-wide policies is usually  
12 set by a group of people, but it is managed by our  
13 Sustainability Executive who is Grant Beringer, and  
14 also it is overseen by the Board of Directors who  
15 ultimately oversees the company's environmental  
16 health, safety, corporate and social  
17 responsibility, including human rights policies,  
18 and the Board has an ESG Nominating Committee to  
19 that end.

20 152 Q. What is your role for making sure  
21 that these policies are followed?

22 A. Our role is to ensure that these  
23 policies are rolled out across the region. We play  
24 an oversight role in that respect. And the role of  
25 the operational management itself at the

1 operational level is to implement them.

2 153 Q. And what do you do if you find out  
3 that the policies are not being followed at a mine  
4 in Africa or the Middle East?

5 A. Most of those policies have  
6 specific mechanisms that would point the  
7 individuals to what needs to be done if a policy is  
8 not followed. So it would be escalated effectively  
9 higher up into the organization. Most of the time,  
10 if it is a material issue, it would be escalated to  
11 Grant Beringer, who is our sustainability  
12 executive, and to myself.

13 154 Q. Mr. Bock, where are you currently  
14 based?

15 A. I live in Stellenbosch in South  
16 Africa.

17 155 Q. And do you travel a lot for your  
18 job?

19 A. I would say I travel -- yes, I do  
20 have to travel quite a bit.

21 156 Q. And how often are you at the  
22 actual operating mines in your region?

23 A. There is a scheduled program where  
24 I would travel once a quarter I would try and get  
25 to all of the operations, and then I would

1           intermittently in between those -- and at those  
2           quarterly trips, on those trips we would do  
3           management reviews and hold Board meetings for the  
4           entities that I am a director of.

5                       And then intermittently I would travel  
6           to some of the sites, dependent on the needs.  
7           Quite often if we are busy with an expansion at an  
8           operation, I would then have to spend some time  
9           there, or if there are any other material issues  
10          which the teams would need assistance with.

11       157                       Q.    How often are you at the North  
12       Mara Mine?

13                       A.    I would say last year I visited  
14       North Mara probably six or seven times.

15       158                       Q.    As I understand it, Dr. Bristow is  
16       fairly hands-on; is that fair?

17                       A.    Yes, he travels quite often with  
18       me on these quarterly trips, so he would be at  
19       these operations at least four times a year.

20       159                       Q.    Okay, I am going to direct you to  
21       an exhibit attached to the Affidavit of Jeanine  
22       Alphonse number 1, which I will share on my screen.

23                       MR. THOMSON:  What exhibit is it, Cory?

24                       BY MR. WANLESS:

25       160                       Q.    It is Exhibit J, which is the

1 Notice of Annual Meeting of Shareholders dated May  
2 3rd, 2022. And I am going to go to page 120, which  
3 is PDF page 2037.

4 MR. FRANKEL: I have it on my iPad for  
5 the witness.

6 MR. WANLESS: Okay, and I have also  
7 shared my screen.

8 MR. FRANKEL: Okay, we see that now.  
9 Thank you.

10 BY MR. WANLESS:

11 161 Q. Okay. I want to draw your  
12 attention to the third paragraph under "Our  
13 Governance and Leadership Structure" where it  
14 describes how things operate, and I will start on  
15 the third sentence:

16 "The corporate office sets  
17 strategy and allocates people and  
18 capital according to the Company's  
19 strategic priorities. Regional  
20 Chief Operating Officers determine  
21 how to best maximize the long-term  
22 value of their business, with advice  
23 and assistance from corporate office  
24 experts. Those regional leaders  
25 work side-by-side with our regional

1 teams to maintain and enhance our  
2 license to operate, building  
3 partnerships of depth with host  
4 governments and communities. This  
5 lean, decentralized model allows  
6 information to flow freely and  
7 swiftly throughout the organization,  
8 and ensures that problems are solved  
9 quickly by the people closest to  
10 them."

11 Is that a fair reading of the portion  
12 of that paragraph?

13 A. Yes.

14 162 Q. And does this fairly describe  
15 Barrick's operating model?

16 A. Yes. If I may, it would be  
17 helpful to give a bit more context to our operating  
18 model and operations.

19 You know, most of our entities, and I  
20 include North Mara in this, are owned in  
21 stand-alone entities, and that goes for all of our  
22 operations. These entities have their own  
23 management teams. They are -- as per our operating  
24 model, most of those people that operate in those  
25 entities and that manage those entities would be

1 nationals of those countries, with the exceptions  
2 of some ex-pats. They have their own financial  
3 systems. They pay their own taxes. They have a  
4 Board of Directors of which we are often part of  
5 that, some of my team would be part of those  
6 directors. And you would also have, if we are in  
7 partnerships with the governments, in these  
8 entities you would also have the government as part  
9 of those directors.

10 And so when we talk about our operating  
11 model, as I have said earlier and referenced in my  
12 affidavit, we then have our regional management  
13 teams which effectively support that model.

14 163 Q. I am going to direct you back to  
15 paragraph 1 of your affidavit where you state:

16 "[...] I have overall  
17 responsibility for overseeing  
18 operations at Barrick's mines and  
19 mining projects in Africa and the  
20 Middle East."

21 That is true; correct?

22 A. Yes, that is true. I think it is  
23 important to read that with -- in conjunction with  
24 clause 11, the second sentence which says:

25 "Each region has a regional

1 operations team that provides  
2 support and oversight to local teams  
3 that manage the mines and projects  
4 within the region. As adverted to  
5 above, I lead the regional operating  
6 team for Africa and Middle East."

7 164 Q. Okay, I am not trying to say that  
8 there is necessarily a contradiction. I mean, you  
9 have just provided some context about how things  
10 actually operate, which I presume is true, and it  
11 is also true that you have overall responsibility  
12 for overseeing operations at Barrick's mines in  
13 Africa and Middle East; correct?

14 A. That is correct, yes.

15 165 Q. It is fair to say that North Mara,  
16 the North Mara Mine is important to the Government  
17 of Tanzania?

18 A. Yes, the Government of Tanzania  
19 owns 16 percent of the North Mara Gold Mine, and  
20 they share in 50 percent of the benefits. And so  
21 yes, it is an important operation for them.

22 166 Q. When you say "50 percent of the  
23 benefits", you mean 50 percent of the profits?

24 A. Yes, effectively 50 percent of the  
25 economic benefits.

1           167                   Q.    And North Mara Gold Mine Limited  
2                               was the largest taxpayer in Tanzania in 2022;  
3                               correct?

4                               A.    Yes, that is correct.

5           168                   Q.    And what about today?  Is it still  
6                               the largest taxpayer in Tanzania?

7                               A.    Yes, as far as I am aware, it is  
8                               still the largest taxpayer in Tanzania.

9           169                   Q.    What were the economic benefits  
10                              that went to the Tanzanian government in 2023?

11                              A.    It was around about \$120 million.

12           170                   Q.    And would you call that an average  
13                              year, a high year or a low year?

14                              A.    I would call that is probably safe  
15                              to say an average year.  It -- just to give  
16                              context, it depends on these economic benefits are  
17                              after we have made capital investment, so in some  
18                              years you would invest -- have to invest more and  
19                              so that number would then be lower.

20                              But I think in terms of an average,  
21                              that is probably a fair number.

22           171                   Q.    And prior to Barrick's takeover of  
23                              North Mara from Acacia, there was a tax dispute  
24                              between North Mara -- or sorry, between the  
25                              Government of Tanzania and Acacia; correct?

1 Environmental & Social Oversight Committee; is that  
2 correct?

3 A. Yes, that's correct.

4 232 Q. Okay. And if I can direct you to  
5 the Affidavit of Jeanine Alphonse number 1,  
6 Exhibit X, and I will put this up on the screen,  
7 and page 18 of that document.

8 MR. THOMSON: Sorry, could we start by  
9 identifying the document.

10 MR. WANLESS: Of course. It is  
11 Barrick's 2021 Sustainability Report.

12 MR. THOMSON: Thank you.

13 BY MR. WANLESS:

14 233 Q. Okay, and I am going to direct you  
15 to page 18 of that report, and it describes the  
16 Environmental & Social Oversight Committee in the  
17 following terms:

18 "Our most senior  
19 management-level body dedicated to  
20 sustainability is the Environmental  
21 & Social Oversight Committee (E&S  
22 Committee) which meets on a  
23 quarterly basis. The E&S Committee  
24 connects site-level ownership of  
25 sustainability to our Executive

1                   Officers and our Board of Directors  
2                   who have ultimate responsibility for  
3                   our sustainability performance."

4                   Do you see that?

5                   A.    Yes, I do.

6    234            Q.    And is that a fair description of  
7                   what the E&S Committee does?

8                   A.    Yes, that is a fair description.

9    235            Q.    All right.  And this committee is  
10                  Chaired by the President and CEO; correct?

11                  A.    Yes, that's correct.

12   236            Q.    And that is Dr. Bristow; correct?

13                  A.    Yes, that's correct.

14   237            Q.    And this committee also includes  
15                  the Chief Operating Officers for each region, which  
16                  would include you; correct?

17                  A.    Yes.

18   238            Q.    The Group Sustainability  
19                  Executive, which is Grant Beringer; correct?

20                  A.    Yes, that's correct.

21   239            Q.    The General Managers for each  
22                  mine, which in the case of North Mara would include  
23                  Apolo?

24                  A.    Yes.

25   240            Q.    Regional and site health, safety

1           it on my iPad for Mr. Bock because you have not put  
2           it on the screen.

3                           BY MR. WANLESS:

4   253                   Q.    I have not -- I have not shared  
5           it.  Fair enough.  Let me do that.

6                           All right, Mr. Bock, do you see that  
7           now?

8                           A.    Yes, I can see it.

9   254                   Q.    Okay.  And you can confirm that  
10          the annual meeting of shareholders for Barrick was  
11          held in Toronto on May 2nd, 2023?

12                          A.    Yes.

13   255                   Q.    Okay.  And this year's annual  
14          meeting of shareholders was conducted virtually;  
15          correct?

16                          A.    Yes.

17   256                   Q.    And during the pandemic, a number  
18          of the meetings were held, a number of the annual  
19          meeting of shareholders were held virtually;  
20          correct?

21                          A.    Yes, that's correct.

22   257                   Q.    But over, say, the last ten years  
23          or so, is it fair to say that the annual meeting of  
24          shareholders were either conducted virtually or in  
25          person in Toronto?

1 MR. THOMSON: You mean of Barrick.

2 BY MR. WANLESS:

3 258 Q. Of Barrick.

4 A. Yes.

5 259 Q. All right. I am going to go to  
6 page 117 of this document. If you are using the  
7 PDF, it is PDF page 1885. And it has a chart  
8 which, according to the document, and I quote:

9 "The diagram below summarizes  
10 our enterprise-wide approach to risk  
11 oversight and the allocation of risk  
12 oversight responsibilities."

13 Do you see that?

14 A. Yes, I can see that.

15 260 Q. All right. And do you agree that  
16 that diagram does summarize Barrick's  
17 enterprise-wide approach to risk oversight and  
18 allocation of risk oversight responsibilities?

19 A. Yes, that would be a fair  
20 representation.

21 261 Q. And those risks include  
22 environmental and social risks?

23 A. Yes.

24 262 Q. Human rights risks?

25 A. Yes.

1 263 Q. Security risks?

2 A. Yes.

3 264 Q. And just corporate social  
4 responsibility generally?

5 A. Yes.

6 265 Q. Okay. And in terms of the various  
7 steps of oversight, I guess, at the top there is  
8 the "Board Oversight"; correct?

9 A. Yes.

10 266 Q. And then there is the "ESG &  
11 Nominating Committee"; do you see that?

12 A. Yes.

13 267 Q. And who is on that committee? Or  
14 can you just describe that committee generally for  
15 me?

16 A. It is a -- that is a subcommittee  
17 of the Barrick Board, and it is made up of specific  
18 members of the Board who was Gustavo Cisneros, who  
19 has now passed, Christopher Coleman, Brian  
20 Greenspun, Anne Kabagambe and Loreto Silva. This  
21 was at the time of the affidavits.

22 268 Q. All right. And none of those  
23 individuals are based in Tanzania?

24 A. None of those are. They are based  
25 in the Dominican Republic, the United Kingdom,

1 United States and Chile.

2 269 Q. All right. And below the "ESG &  
3 Nominating Committee", there is the "Weekly  
4 Executive Review Meetings". Who participates in  
5 those?

6 A. That would be the executive of the  
7 Barrick Group, the management team.

8 270 Q. Are you on that team?

9 A. I represent the Africa Middle East  
10 Region in that meeting, yes.

11 271 Q. Okay. So it is top executives at  
12 Barrick, including the CEOs of all the regions?

13 A. Yes, including the COOs, yes.

14 272 Q. And the CEO is also part of those  
15 meetings?

16 A. Yes.

17 273 Q. And what about Mr. Beringer, would  
18 he be a part of those meetings?

19 A. Yes, Grant would -- he takes part  
20 in that meeting.

21 274 Q. Okay, and that is a standing  
22 weekly meeting?

23 A. Yes, on every Wednesday afternoon,  
24 morning for --

25 MR. FRANKEL: Sorry, I am just going to

1 interject here because the transcript has just been  
2 corrected inaccurately. He did not say "including  
3 the CEOs". He said "including the COOs" at 79:19.

4 BY MR. WANLESS:

5 275 Q. Thank you for that.

6 And under that there is the  
7 "Sustainability Executive"; do you see that?

8 A. Yes.

9 276 Q. And who is on the Sustainability  
10 Executive?

11 A. The Sustainability Executive, as I  
12 have it, refers to Grant Beringer.

13 277 Q. Ah, so it is one person rather  
14 than a committee?

15 A. Yeah.

16 278 Q. Okay. And then below that is the  
17 "Chief Operating Officers", of which you are one;  
18 correct?

19 A. Yes.

20 279 Q. And then there is the "Regional  
21 Leads". What does "Regional Lead" refer to?

22 A. "Regional Lead" in this context  
23 would refer to the Sustainability Leads in the  
24 region, and as previously stated, that would be  
25 Thomas Wilson in the Africa Middle East team.

1           280                   Q.    All right.  And then below that,  
2                               at the bottom there is the "Site Level Ownership of  
3                               Sustainability Risks and Opportunities", and I am  
4                               assuming that refers to the operating mines; is  
5                               that fair?

6                               A.    Yes.

7           281                   Q.    Okay, and am I --

8                               A.    That would refer --

9           282                   Q.    Go ahead.

10                              A.    Sorry, to be clear, that would  
11                              refer to the Sustainability Manager at those  
12                              sites --

13           283                   Q.    All right.

14                              A.    -- specifically, but I think when  
15                              you read that, that should be the context.

16           284                   Q.    And the arrows in these documents  
17                              represent information flow; is that fair?

18                              A.    Yes, I think that is a fair  
19                              representation.  The only point I would make for  
20                              context is that the Regional Leads, as you can see,  
21                              would flow information into either myself and to  
22                              Grant Beringer.  I don't necessarily flow  
23                              information in to Grant because he would already  
24                              have the same information that I would have.

25           285                   Q.    Okay.  All right, and I am going

1 to jump topics a little bit to the topic of  
2 compensation. As I understand it, part of the  
3 compensation metrics for senior leaders of Barrick  
4 includes compensation that is tied to the  
5 compliance record with human rights; is that fair?

6 A. I would appreciate if you could  
7 show me a document --

8 286 Q. Yes.

9 A. -- if you are referring to a  
10 specific document.

11 287 Q. Yes, I can do that.

12 A. Thank you.

13 288 Q. This document is in Jeanine  
14 Alphonse's Affidavit No. 1, the Sustainability  
15 Report 2021, which is Exhibit X, and it is on the  
16 13th page of this document or PDF page 2319.

17 MR. FRANKEL: Again, I am going to show  
18 it to Mr. Bock on my iPad.

19 MR. WANLESS: And I will share it as  
20 well.

21 MR. FRANKEL: Okay, it is on the  
22 screen.

23 BY MR. WANLESS:

24 289 Q. All right. There is a section  
25 that says "Integrating ESG Into Our Incentive

1 Compensation", and it reads:

2 "Sustainability is a  
3 foundational value for our business.  
4 Our employees, including our  
5 President and CEO, as well as  
6 members of the Executive Committee,  
7 are held to account for achieving  
8 our company-wide sustainability  
9 target through their incentive  
10 compensation scorecards. Long-term  
11 incentives for the President and  
12 CEO, members of the Executive  
13 Committee, and other senior managers  
14 as part of the Barrick Partnership  
15 Plan, are tied to key measures that  
16 reflect our licence to operate  
17 across the world. These measures  
18 include our safety performance,  
19 compliance record with respect to  
20 the environment, human rights and  
21 anti-corruption, as well as our  
22 stakeholder and community  
23 relations."

24 Do you see that?

25 A. Yes, I see that.

1           290                   Q.    Okay.  Would you agree that your  
2                                    compensation is linked in part to human rights  
3                                    performance?

4                                    A.    Yes, that is correct.

5           291                   Q.    And why does Barrick do that?

6                                    A.    I think as an executive team, we  
7                                    have overall responsibility for the performance of  
8                                    the group and to hold the operations to account to  
9                                    the policies that we have implemented, and of  
10                                   course, the human rights policies are one of those  
11                                   policies, if we refer to that one specifically.

12                                   Again, we as a management team,  
13                                   we -- the direct executive team manages all of  
14                                   them, quite large teams, and so ultimately the  
15                                   implementation happens at the level of the  
16                                   subsidiaries and the affiliates, but we as a  
17                                   management team need to make sure that we have  
18                                   oversight that that happens.

19           292                   Q.    All right.  Now I am going to  
20                                   change topics a little bit and go to North Mara  
21                                   Gold Mine Limited.  We have discussed before that  
22                                   this is a company that is incorporated under the  
23                                   laws of Tanzania; is that correct?

24                                   A.    Yes, that is correct.

25           293                   Q.    And in your affidavit, at

1 paragraph 26 you speak about the Board of Directors  
2 of North Mara Gold Mine Limited?

3 A. Yes.

4 294 Q. And you say that there are five  
5 directors; correct?

6 A. Yes.

7 295 Q. And then you state that two of the  
8 directors are Tanzanian government officials;  
9 correct?

10 A. Yes, that is true.

11 296 Q. Who are they currently?

12 A. It is Andrew and Kasmir.

13 297 Q. Do you know their last names?

14 A. It is quite difficult to  
15 pronounce, so if someone can maybe just provide  
16 that.

17 298 Q. If I could get an undertaking to  
18 provide the last names of Andrew and Kasmir?

19 U/T MR. THOMSON: We will undertake to  
20 provide you with their last names.

21 BY MR. WANLESS:

22 299 Q. Okay, thank you.

23 And do you know what role these  
24 individuals have with the Government of Tanzania?

25 A. I know that Andrew has some role

1 in the -- he is a financial person, so somewhere in  
2 the Ministry of Budget and Finance.

3 Kasmir I am not currently sure of, what  
4 his role is in government. As far as I understood,  
5 he is close to retirement or potentially already in  
6 retirement.

7 300 Q. All right. Could you undertake to  
8 advise the roles that Andrew and Kasmir have with  
9 the Government of Tanzania?

10 U/T MR. THOMSON: We will make inquiries  
11 and see what we can find out.

12 BY MR. WANLESS:

13 301 Q. Okay. And regarding the other  
14 three directors, they are appointees of Barrick;  
15 correct?

16 A. Yes, they are appointees from  
17 Barrick as an indirect shareholder.

18 302 Q. Okay. And the three directors are  
19 you, and you are the COO of Barrick for Africa and  
20 the Middle East; correct?

21 A. Yes, that is correct.

22 303 Q. And Mark Bristow, who is the CEO  
23 and President of Barrick?

24 A. Yes, that's correct.

25 304 Q. And Simon Bottoms, who is the

1 Executive Vice President of Barrick; correct?

2 A. Yes, that's correct.

3 305 Q. And just to be accurate and full,  
4 his title is Executive Vice President, Mineral  
5 Resource Management and Evaluations at Barrick;  
6 correct?

7 A. Yes, correct.

8 306 Q. Okay. And none of the Barrick  
9 appointees reside in Tanzania; correct?

10 A. Correct.

11 307 Q. In recent memory, is the COO  
12 Africa and Middle East for Barrick always a  
13 director of North Mara Gold Mine Limited?

14 A. Since we took over operatorship  
15 and oversight of those operations in Tanzania, in  
16 the Africa Middle East team the COO was a director,  
17 yes. So my predecessor, Willem Jacobs, was a  
18 director.

19 308 Q. Okay. And at the time, he was  
20 also Barrick's COO Africa and Middle East?

21 A. He was the COO for the Africa  
22 Middle East Region, yes.

23 309 Q. Okay. Since Barrick took over  
24 North Mara from Acacia in 2019, has anyone else  
25 been a Barrick-appointed Board member of North Mara

1 Gold Mine Limited other than you, Mr. Bristow,  
2 Mr. Bottoms and Mr. Jacobs?

3 A. As I recall, no. Mr. Bottoms, as  
4 I recall, replaced Willem Jacobs when he stepped  
5 down as a director.

6 310 Q. And how does Barrick choose who is  
7 going to occupy these Board seats?

8 A. It would usually be someone that  
9 would have some knowledge and can add value to the  
10 Board of these entities, and so therefore, as the  
11 Chief Operating Officer of the Africa and Middle  
12 East Region, I am very familiar with the operation.

13 Mark Bristow, as pointed out  
14 previously, he is very hands-on, so he is quite  
15 familiar with the operation and ensures that, you  
16 know, we apply our policies and our strategy.

17 And then Mr. Bottoms, really because of  
18 the legacy issues Acacia had with these mines in  
19 terms of extending their lives - and if I say  
20 "extending their lives", I am talking about the  
21 Life of Mine Plans and adding additional resources  
22 into those businesses to add more value to them -  
23 he is -- you know, he has a very good understanding  
24 of that, and therefore he can add quite a bit of  
25 strategic value to that Board.

1           311                   Q.    As part of your answer regarding  
2           Dr. Bristow, you referred to "our policies" and  
3           "our strategy". I assume that you mean Barrick's  
4           policies and Barrick's strategy?

5                           A.    Yes.

6           312                   Q.    And it is fair to say that to  
7           date, Barrick has received the assistance of North  
8           Mara Gold Mine regarding this litigation; correct?

9                           A.    It would be fair to say that team  
10           members of the Barrick executive has been involved  
11           and also within the Africa Middle East Region, yes.

12          313                   Q.    And that includes employees of  
13           North Mara Gold Mine?

14                          A.    Apologies, just to be clear, are  
15           you referring to who has been providing assistance  
16           or who the assistance is being provided to?

17          314                   Q.    Who is providing the assistance.

18                          A.    It would be external legal  
19           counsel. And maybe just for clarity, again, are we  
20           referring to the legal case itself or are we  
21           referring to the operating model?

22          315                   Q.    Well, I guess what I am trying to  
23           get at is, you know, there is a lawsuit against  
24           Barrick in Canada. Barrick has to respond to that  
25           in some way. Probably, and sort of without getting

1 into details, but I suspect that there was some  
2 form of investigation or inquiries or whatever, and  
3 I don't want to get into that.

4 But my question for you is has Barrick  
5 received the assistance of North Mara Gold Mine  
6 when doing that, when responding generally to this  
7 lawsuit?

8 A. Some of the employees of North  
9 Mara Gold Mine have been called as witnesses, and  
10 in that context, they were supported by the Barrick  
11 legal team and legal counsel and -- but more  
12 specifically, the external legal counsel.

13 316 Q. And going forward, your  
14 expectation would be that the North Mara Gold Mine  
15 employees will provide assistance requested by  
16 Barrick and legal counsel regarding documents or  
17 access to witnesses or information; correct?

18 A. Yes.

19 317 Q. Okay. I want to talk now about  
20 the Memorandum of Understanding with the Tanzanian  
21 police, and I will refer you to that exact document  
22 in a second, but I am just going to ask some  
23 preliminary questions if that is okay.

24 The original 2019 MOU was signed before  
25 you were COO Africa and Middle East for Barrick;

1 MR. FRANKEL: In his capacity as a  
2 director of North Mara Gold Mine Limited, yes.

3 MR. THOMSON: Okay, thank you.

4 BY MR. WANLESS:

5 323 Q. All right. I think that actually  
6 does it. That was my only point. So thank you for  
7 that assistance. I appreciate it.

8 All right, in 2022 a new Memorandum of  
9 Understanding with the Tanzanian Police Force was  
10 entered into; correct?

11 A. Yes, that is correct.

12 324 Q. All right. And I am showing you a  
13 copy of that agreement, which is attached as  
14 Exhibit B to the Affidavit of Jeanine Alphonse  
15 number 2, on the screen; is that correct?

16 A. Yes, that is correct.

17 325 Q. Okay. Why was a new Memorandum of  
18 Understanding necessary at this time?

19 A. If I recall it at this point, that  
20 the previous agreement had to be extended and we  
21 updated and signed a new agreement in 2022.

22 326 Q. Were there any issues with the old  
23 one that needed to be corrected?

24 A. I think there were some updates  
25 made. I don't recall anything specifically that

1 had to be corrected, as from time to time, as you  
2 review agreements, you update them.

3 Also, the current North Mara team that  
4 were in place at that time and also the Africa  
5 Middle East team was a different team who signed  
6 the original agreement.

7 But as I recall, the substance of the  
8 agreement remained very much the same.  
9 Effectively, the mine would provide the police with  
10 some payments in kind and support them to be able  
11 to do their job.

12 327 Q. Okay, thank you. And just to help  
13 me understand what this document is, it is a  
14 Memorandum of Understanding between the Tanzania  
15 Police Force and North Mara Gold Mine Limited;  
16 correct?

17 A. Yes, that's correct.

18 328 Q. And it is regarding the "Provision  
19 of Security Services and Maintaining Law and Order  
20 in the Area of North Mara Gold Mining Sites";  
21 correct?

22 A. Yes, that's correct.

23 329 Q. And you signed this Memorandum of  
24 Understanding on behalf of North Mara Gold Mine  
25 Limited; correct?

1           A.    Yes, that's correct.  I signed in  
2           my capacity as a director, and the General Manager,  
3           Apolo, signed as his capacity of General Manager  
4           who directly manages the relationship with the  
5           police on a day-to-day basis.

6    330           Q.    And it was --

7           MR. THOMSON:  And so we have it for our  
8           record, those signatures appear at page 18 of the  
9           MOU.

10           BY MR. WANLESS:

11    331           Q.    Thank you.

12                   And it was also signed by Dr. Jacobs  
13           who at the time was a director of North Mara Gold  
14           Mine Limited?

15           A.    Yes.

16    332           Q.    And at the time, what was your  
17           role with Barrick?

18           A.    I was the Chief Financial Officer  
19           for the Africa Middle East Region.

20    333           Q.    And Dr. Jacobs was the COO for the  
21           Africa and Middle East Region?

22           A.    Yes.

23    334           Q.    In your capacity as a director for  
24           North Mara Gold Mine Limited, would you ever do  
25           anything that is against the interests of Barrick?

1           A.    Barrick is -- I think the best way  
2           to answer the question and in terms of context is  
3           Barrick has very specific policies and procedures  
4           that we have implemented across the  
5           organization -- not implemented, but we have rolled  
6           out across the organization that needs to be  
7           adhered to. We need to ensure that, of course, the  
8           local operating entities act within the local  
9           regulations that are applicable.

10           And so therefore, within that framework  
11           and my capacity as a director of North Mara, which  
12           is an independent company, I would sign this  
13           agreement and ensure that the independent company  
14           acts within those policies. I would make sure  
15           that, you know, the various human rights policies  
16           are adhered to and that a contract like this, for  
17           instance, wouldn't contradict that.

18           And then, of course, as my capacity as  
19           a director, I need to ensure that it is appropriate  
20           for the entity itself to sign it.

21    335           Q.    All right, thank you. And I  
22           assume that you reviewed the MOU before you signed  
23           it?

24           A.    Yes.

25    336           Q.    Who else at Barrick would have

1 reviewed it and approved it?

2 A. Simon Bottoms as -- at that point,  
3 apologies, Simon Bottoms wasn't a director. So the  
4 other director, which would have been Mark Bristow,  
5 in his capacity of a director of this company,  
6 would have sight of this.

7 Grant Beringer, who needs to ensure,  
8 again, as I pointed out earlier, that as the person  
9 who ensures there is oversight and policies in  
10 place across our organization, he would look at  
11 this to make sure that, you know, those various  
12 human rights portions of that policy forms part of  
13 this contract and it is appropriate.

14 And then, of course, Apolo, which is  
15 the General Manager on-site.

16 And the commercial executive for the  
17 Africa Middle East Region would also work through  
18 this to ensure that, of course, contractually it is  
19 appropriate.

20 And then the legal counsel for the  
21 Africa Middle East Region, which is Antoine  
22 Thibaud, he would also look at this document.

23 So I would say those would really be  
24 the key people that would look at this.

25 337 Q. All right. This MOU refers to a

1 Company Asset Protection Manager. Do you know who  
2 that is?

3 MR. THOMSON: Can you show us where,  
4 Cory?

5 BY MR. WANLESS:

6 338 Q. Certainly. So it is in the  
7 "Defined terms":

8 "'Company's Asset Protection  
9 Manager' means the manager  
10 designated to that role by the  
11 Company from time to time who shall  
12 be located at the Mine Site."

13 Do you know who that is?

14 A. That would refer to the Security  
15 Manager on-site at North Mara.

16 339 Q. Okay, and who was that?

17 A. We would need to check who was at  
18 that point the specific person who was the Security  
19 Manager.

20 340 Q. Okay. If I can direct you to  
21 paragraph (P) of the acknowledgments, you would  
22 agree with me that this MOU requires both the  
23 Tanzanian Police Force and North Mara Gold Mine  
24 Limited to abide by, amongst others, the UN Code of  
25 Conduct for Law Enforcement Officials?

1 MR. FRANKEL: Sorry, Cory, can you  
2 magnify it a little bit on the screen?

3 Thank you.

4 THE WITNESS: Cory, do you mind  
5 repeating the question? I couldn't read it.

6 BY MR. WANLESS:

7 341 Q. Not at all. This agreement  
8 requires the parties, which are the Tanzanian  
9 Police Force and North Mara Gold Mine Limited, to  
10 abide by the United Nations Code of Conduct for Law  
11 Enforcement Officials?

12 A. Yes, if I read -- when I read that  
13 specific paragraph, they would be committed to  
14 exercising their specific rights in whatever their  
15 capacity to ensure these different protocols are  
16 adhered to, which is listed here.

17 342 Q. Okay. And the protocols that are  
18 listed include the United Nations Basic Principles  
19 on the Use of Force and Firearms By Law Enforcement  
20 Officials?

21 A. Yes, that is true.

22 343 Q. The Voluntary Principles?

23 A. Yes.

24 344 Q. And others?

25 A. Yes.

1 345 Q. Okay. And if we go to section 5.1  
2 of this document, it details the expectations on  
3 the Tanzanian Police Force regarding deployment; is  
4 that fair?

5 A. Yes.

6 346 Q. Okay, and that will include an  
7 "Officer Commanding Operations, who shall be  
8 located at the Barracks"?

9 A. Yes, that is what it refers to at  
10 point (a), as per point (a), yes.

11 347 Q. Okay, thanks.

12 And this is a note for the court  
13 reporter. For this next bit, I am going to be  
14 referring to both "Barrick" the company and  
15 "barracks" where police or other law enforcement  
16 reside. So just as a note there, when I say  
17 "barracks", I am referring in this instance to a  
18 police barracks.

19 It also provides for 142 Tanzanian  
20 Police Force officers to be deployed in relation to  
21 the mine site?

22 A. Yes.

23 348 Q. And then going down to (e), there  
24 is three Tanzanian Police Force Liaison Officers,  
25 which I understand are located at the mine site

1           itself; correct?

2                   A.    Yes, which refers to they are in  
3           that specific area, yes.

4    349            Q.    Okay.  Where at the mine site are  
5           they -- do they operate from, these Liaison  
6           Officers?

7                   A.    I speak under correction because I  
8           have never been to that office, but as I recall,  
9           there is an office, as per this clause, which they  
10          are located at the mine site.

11   350            Q.    Is that office located within the  
12          security offices for the mine site?

13                   A.    I can't comment on that.

14   351            Q.    Can you undertake to find out --

15                   A.    I am not sure.

16                   MR. THOMSON:  Sorry, you were speaking  
17          at the same time.

18                   BY MR. WANLESS:

19   352            Q.    I believe Mr. Bock said that he  
20          can't comment, and I asked him to undertake to find  
21          out, please.

22   U/T            MR. THOMSON:  Yeah, we'll make an  
23          inquiry.

24                   MR. FRANKEL:  And for the record, what  
25          he said was "I can't comment on that" and "I am not

1           sure", so it was transcribed correctly.

2                           MR. THOMSON:   Okay, thank you.

3                           BY MR. WANLESS:

4       353                   Q.    And your understanding of the role  
5           of these Liaison Officers is to provide a conduit  
6           for information between the Tanzanian Police Force  
7           and the North Mara Gold Mine; is that fair?

8                           A.    Yes, I think it would be helpful  
9           just to provide a little bit more context.

10                           We have a private security force which  
11           are unarmed, and they effectively manage the  
12           on-site security within the fences.

13                           The police themselves are, in terms of  
14           the force that are managing the security on a  
15           day-to-day basis, are outside of the fence.

16                           When the security -- the private, our  
17           private security, who are unarmed, when they  
18           believe that they are threatened and their lives  
19           are at risk, they would then call the police to  
20           effectively enter the mine premises and to assist  
21           us in dealing with the threat.

22       354                   Q.    All right.  I want to go down to  
23           section 6, which is "Allowances and in kind  
24           support", and this section governs the payments  
25           that are going to go from North Mara Gold Mine to

1 the Tanzanian Police Force; correct?

2 A. Yes.

3 355 Q. All right. And there is an  
4 operational daily fee of 100,000 Tanzanian  
5 shillings per officer listed on the duty roster;  
6 correct?

7 A. Yes.

8 356 Q. And just so I understand, for the  
9 duty roster, is that any police officer who happens  
10 to be working on any given day, or is it all of  
11 them that are deployed there regardless of whether  
12 or not they are working that day?

13 A. This is the -- this payment goes  
14 to anyone who is deployed on the day.

15 357 Q. So this amount is not calculated  
16 on the basis of officers who happen to not be  
17 working on a particular day?

18 A. This is for officers who are  
19 listed on the roster for the day, yes.

20 358 Q. All right. And again, my purpose  
21 here is not -- I am not trying to trip you up or  
22 anything like that, and so I just want to  
23 understand.

24 And I'll ask your counsel if that  
25 information happens to need some correction, if you

1 could make that correction?

2 U/T MR. THOMSON: We will.

3 BY MR. WANLESS:

4 359 Q. All right. And my understanding  
5 is of that amount, of the 100,000 Tanzanian  
6 shillings, half of it, 50,000 shillings, goes as a  
7 per diem payment to the officer directly; correct?

8 A. Yes.

9 360 Q. And is that payment that is made  
10 by North Mara Gold Mine to the officers directly,  
11 is that in addition to their wages that they  
12 receive as a result of being employed by the  
13 Tanzanian Police Force?

14 A. I can't specifically comment on  
15 that, but what I would say -- and my understanding  
16 is yes. What I would say is that we operate in a  
17 very remote area, and therefore, the police are  
18 really underresourced.

19 And so therefore, through the  
20 structure, what we have tried to achieve, just if  
21 you look at the overall context, is that we provide  
22 some additional resources to the police in that  
23 area, which if we did not do that, you wouldn't  
24 have necessarily the resources from the state  
25 needed to be able to, you know, manage the

1 specific -- or to pay the police in that area and  
2 the size of the force you would need.

3 361 Q. Thank you for that. Now, my  
4 specific question was about whether this per diem  
5 amount received by officers directly is in addition  
6 to the wages that they receive from the Tanzanian  
7 Police Force. I think your answer was yes, but it  
8 was that you were not sure.

9 So I would ask that you undertake to  
10 find out, please?

11 U/A MR. THOMSON: I'll take that question  
12 under advisement.

13 BY MR. WANLESS:

14 362 Q. Okay. And the remaining 50,000  
15 Tanzanian shillings per officer is paid to the  
16 Tanzanian Police Force; correct?

17 A. If we could go -- yes, thank you,  
18 if we can just maybe go to that specific clause  
19 stating that?

20 363 Q. Yes. So I think there are two  
21 that deal with the balance of the funds, as far as  
22 I understand from my reading of it. One is (c)  
23 which sets an operational administrative fee of 10  
24 million Tanzanian shillings, which is deducted from  
25 the remaining amount. Am I understanding that

1 correctly?

2 A. That is -- yes, that is deducted  
3 from, as it states, from the amounts we discussed  
4 from clause 6.1(a) which is the original amount  
5 before it gets split.

6 364 Q. Okay. So, so far we have 100,000  
7 Tanzanian shillings per officer, half of which goes  
8 directly to the officers themselves. The remaining  
9 half, 10 million Tanzanian shillings, is for an  
10 operational administration fee; correct?

11 A. This administration fee is  
12 deducted from the amounts payable we have just  
13 discussed.

14 365 Q. Okay. And then the remaining  
15 amount is considered an administrative fee under  
16 (e); correct?

17 A. If you could just scroll up again  
18 to the...

19 [Witness reviews document.]

20 So as it states in 6.1(a), you have the  
21 100,000 shillings per officer, which then the daily  
22 per diem, half of that goes to the specific officer  
23 deployed on the roster.

24 And then from that, you deduct the,  
25 which we were discussing, the operational

1 administration fee.

2 366 Q. And then the remainder is paid as  
3 an administrative fee --

4 A. Yes.

5 367 Q. Correct?

6 A. Could you -- do you mind scrolling  
7 down a little bit?

8 [Witness reviews document.]

9 Yes, as per this paragraph, the  
10 administration fees would be paid on a monthly  
11 basis, and it is to support the running of the  
12 force.

13 368 Q. Okay. And the administrative fee,  
14 it says that it will be used:

15 "[...] to support the smooth  
16 running of the Force and discharge  
17 of duties under this MoU, to be paid  
18 to the Office of the Chief of Police  
19 (Inspector General) vide official  
20 government account set out below  
21 [...]"

22 Do you see that?

23 A. Yes.

24 369 Q. Okay. And is this going to the  
25 Chief of the Police Force directly or to his

1 Office?

2 A. This, as per the agreement, goes  
3 to the officers -- the Office, sorry, of the Chief  
4 of Police.

5 370 Q. Okay. On a monthly basis, how  
6 much is North Mara Gold Mine paying pursuant to  
7 this Memorandum of Understanding to the Tanzanian  
8 police?

9 A. We would need to -- I would need  
10 to calculate that.

11 371 Q. Okay.

12 A. It is \$38 per person, so it  
13 depends on the roster and amount of people  
14 deployed.

15 372 Q. Do you know what the daily salary  
16 is of an average Tanzanian police officer?

17 A. No, I don't.

18 373 Q. Could you undertake to provide the  
19 monthly amount that is paid to the Tanzanian Police  
20 Force pursuant to this agreement, or the average, I  
21 guess?

22 MR. THOMSON: I'll take that question  
23 under advisement.

24 But just so I have it, Cory, average  
25 over what period?

1 BY MR. WANLESS:

2 374 Q. Yeah, fair enough, not my best  
3 question.

4 Well, let's make it easier. Total  
5 payments in 2023.

6 U/A MR. THOMSON: All right, I'll take that  
7 question under advisement.

8 BY MR. WANLESS:

9 375 Q. And going down to section  
10 7(a)(ii), this agreement requires the Tanzanian  
11 Police Force to warrant that:

12 "any TPF officers or other TPF  
13 personnel deployed to the Area have  
14 been provided with training on the  
15 Applicable Human Rights Principles  
16 and international humanitarian law  
17 and International Security and Human  
18 Rights Standards related to the use  
19 of force (e.g. UN Basic Principles  
20 on the Use of Force and Firearms by  
21 Law Enforcement Officials) in  
22 accordance with the guidance set out  
23 in the attached Schedule C  
24 (Voluntary Principles Training)."

25 Do you see that?

1 A. Yes, I do.

2 376 Q. And that is in fact occurring?

3 A. Yes.

4 377 Q. And in fact, it is Barrick that  
5 has provided that training through a company called  
6 Avanzar; is that fair?

7 A. Yes, to the best of my knowledge,  
8 that is true.

9 378 Q. And now I want to go to a section  
10 entitled "Security Incidents", section 11. This  
11 section requires the Tanzanian Police Force:

12 "(a) to promptly advise the  
13 Company's Asset Protection Manager  
14 of any security incident involving  
15 use of weapons or use of force, and  
16 of any alleged human rights  
17 violation or abuse in which TPF  
18 officers or other TPF personnel are  
19 involved while performing their  
20 duties in the Area, or at any other  
21 operation which may have  
22 consequences to the Company or to  
23 BARRICK."

24 Do you see that?

25 A. Yes.

1 379 Q. Now, in that section the agreement  
2 differentiates between "the Company", which is  
3 North Mara Gold Mine Limited, and "Barrick";  
4 correct?

5 A. Yes.

6 380 Q. And this section requires the  
7 Tanzanian Police Force to turn their attention to  
8 incidents that might have consequences to Barrick;  
9 correct?

10 A. I think it would be helpful and to  
11 the context, the consequences is first and foremost  
12 to North Mara Gold Mine who has the contract  
13 with -- who signed the MOU with the Police Force,  
14 and of course, it has got implications for Barrick  
15 as well as a result of our human rights policies  
16 and if it is not being appropriately implemented or  
17 adhered to.

18 381 Q. All right. And then 11(b)  
19 requires the Tanzanian Police Force:

20 "to promptly investigate,  
21 report, and resolve all such  
22 incidents, potential violations or  
23 abuses in accordance with applicable  
24 national and international law and  
25 to keep the Company's Asset

1 Protection Manager informed of all  
2 such investigations."

3 Correct?

4 A. Yes, that's correct.

5 382 Q. All right. So these two sections  
6 together require the Toronto police -- or sorry,  
7 the Tanzanian Police Force to report security  
8 incidents, including use of force and use of  
9 weapons, to North Mara Gold Mine Limited; correct?

10 A. Yes, that is correct.

11 383 Q. And also to keep them updated  
12 about any investigations; correct?

13 A. Yes, that is correct.

14 384 Q. And if an incident involving use  
15 of weapons or use of force was reported to the  
16 North Mara Gold Mine company, you would expect that  
17 it would be reported up the chain to you; correct?

18 A. Yes, in my capacity as one of the  
19 executives who are responsible to ensure that these  
20 policies are adhered to, I would be one of the  
21 people that would be informed, yes.

22 385 Q. I want to direct you to section  
23 5.6 which reads:

24 "The Company Asset Protection  
25 Manager and the Regional Police

1 Commander (or such other Senior  
2 Police Officer) shall meet regularly  
3 to discuss the security situation in  
4 the Area, any complaints levied by  
5 third parties in connection with the  
6 deployment, whether the complaints  
7 are received by the Company or any  
8 governmental entity, and the  
9 implementation of this MoU. At the  
10 meeting, the Regional Police  
11 Commander (or such other Senior  
12 Police Officer) shall also provide  
13 updates on the investigation of  
14 complaints previously raised (if  
15 any) and provide such other  
16 information as may reasonably be  
17 required by the Company Asset  
18 Project Manager to ascertain  
19 compliance with the terms of this  
20 MoU."

21 Do you see that?

22 A. Yes, I do.

23 386 Q. Are these regular meetings and  
24 discussions happening?

25 A. Yes, as per the communication from

1 the mine team to myself, these are happening, yes.

2 387 Q. Do you have any concerns that the  
3 Tanzanian Police Force will not abide by the terms  
4 of this agreement?

5 A. My answer is no. The reason for  
6 that is myself and the Sustainability Executive,  
7 Grant, met with the Regional Police Commander when  
8 we were on-site. It was towards the end of  
9 next -- sorry, towards the end of last year. I  
10 don't recall if it was in October or July,  
11 but -- and the reason for that is that we  
12 effectively joined the meeting between the Company  
13 Asset Protection Manager and the General Manager  
14 and the Regional Police Commander and, you know,  
15 had a discussion with regards to, you know, as the  
16 executive team, which was Grant and myself, what,  
17 you know -- that we were comfortable that the  
18 Police Commander and his Police Force understands  
19 these human rights policies and that they adhere to  
20 them.

21 You know, they of course raised all the  
22 challenges that they are dealing with, which were  
23 quite significant.

24 And so, in that specific meeting, the  
25 Regional Police Commander and his team that was

1           there didn't give us any reason to believe that  
2           they are not committed, you know, to these human  
3           rights policies and to this agreement that the mine  
4           has signed with them.

5       388                   Q.    All right.  So in your view, the  
6           Tanzanian Police Force is abiding by the terms of  
7           this Memorandum of Understanding?

8                           A.    What I would say is with any  
9           incident, we abide by this agreement where there is  
10          a proper investigation, and as per the agreement,  
11          if there was anything untoward on the side of the  
12          police, it would be raised and it would be dealt  
13          with and any individuals involved would be dealt  
14          with.

15       389                   Q.    I guess I'll phrase my question in  
16          a bit of a different way.  This Memorandum of  
17          Understanding sets out various responsibilities and  
18          obligations and rights of both sides, and I guess  
19          from the perspective of North Mara Gold Mine  
20          Corporation, to the extent that this agreement  
21          gives you certain rights, is there any reason to  
22          think that the Tanzanian Police Force would not  
23          cooperate?

24                           A.    No, the Tanzanian Police Force  
25          is -- you know, they are part of a sovereign

1 security -- or their job is to implement and manage  
2 security for Tanzania, which is an independent  
3 sovereign country. We don't -- we as North Mara  
4 don't direct the police.

5 The reasons for this memorandum of  
6 agreement is as per the OECD -- or sorry, the UN  
7 Voluntary Principles. It's best practice to have a  
8 Memorandum of Understanding in place because it  
9 does give you some recourse as per this agreement.

10 But ultimately, you know, we  
11 don't -- North Mara does not manage the Police  
12 Force, and therefore, if there is anything, any  
13 incident that has come to light, we act as per this  
14 Memorandum of Understanding because that is the  
15 only recourse that North Mara really has, and that  
16 includes a proper investigation.

17 390 Q. So in one of my earlier questions  
18 I referred to various sections of this agreement  
19 which govern information that needs to be provided  
20 by the Tanzanian Police Force to North Mara Gold  
21 Mine. Your expectation going forward is that the  
22 Tanzanian Police Force will abide by those  
23 commitments; correct?

24 MR. THOMSON: Sorry, Cory, which  
25 provision are you talking about?

1 BY MR. WANLESS:

2 391 Q. Well, the one that is up on the  
3 screen, for instance, so 5.6:

4 "At the meeting, the Regional  
5 Police Commander (or such other  
6 Senior Police Officer) shall also  
7 provide updates on the investigation  
8 of complaints previously raised (if  
9 any) and provide such other  
10 information as may reasonably be  
11 required by the Company Asset  
12 Project Manager to ascertain  
13 compliance with the terms of this  
14 MoU."

15 And so my question is, do you have any  
16 reason to think that the Tanzanian Police Force are  
17 not going to abide by that?

18 A. No. In my experience, if there  
19 has been an incident we have asked them to  
20 investigate, the police would follow their normal  
21 investigation route and they would release a  
22 report.

23 392 Q. And if you require more  
24 information from the police, you can get it;  
25 correct?

1 A. We would act as per the MOU, yes.

2 393 Q. All right. In addition to the per  
3 diems that we mentioned earlier, North Mara Gold  
4 Mine also provides in-kind support; correct?

5 A. If we could maybe go to that  
6 clause, it would be helpful.

7 394 Q. Sure.

8 A. Yes.

9 395 Q. So this is 6.3, and (a) refers to  
10 fuel for Tanzanian Police Force vehicles; correct?

11 A. Yes.

12 396 Q. And that is provided by North Mara  
13 Gold Mine?

14 A. Yes.

15 397 Q. The vehicles themselves are also  
16 provided by North Mara Gold Mine; correct?

17 A. Which clause are you referring to?

18 398 Q. If it helps, the vehicles  
19 themselves are referred to in the "Definitions"  
20 section, and they are listed by vehicle (a) through  
21 (t); do you see that?

22 MR. THOMSON: Under the heading "TPF  
23 Vehicles", so look at page 6 of the agreement.

24 THE WITNESS: Yes, I see that.

25 BY MR. WANLESS:

1           399                   Q.    All right.  And back at 6.3, North  
2           Mara Gold Mine is also providing repair and  
3           maintenance and engine servicing for those  
4           vehicles?

5                           A.    Yes, we -- North Mara takes the  
6           responsibility of the cost for that repair and  
7           maintenance, yes.

8           400                   Q.    And North Mara also provides food  
9           to the Tanzanian Police Force officers?  That is  
10          under 6.3 --

11                          A.    Yes, that is true.

12          401                   Q.    -- (c); correct?

13                          A.    That is true.

14                          MR. THOMSON:  Sorry, Cory, you cut out  
15          there.  I think you were speaking at the same time.  
16          You said that that is found under 6.3 and did you  
17          say (c)?

18                          MR. WANLESS:  Yes, 6.3(c).

19                          MR. THOMSON:  Thank you.

20                          BY MR. WANLESS:

21          402                   Q.    And if you could go to section 17,  
22          I'll start with 17(b), North Mara Gold Mine Limited  
23          also agreed to pay for the construction of canteen  
24          facilities at the barracks; correct?

25                          A.    Yes.

1           403                   Q.    And the barracks are referred to  
2                                above as the Toronto -- or sorry, the Tanzanian  
3                                Police Force barracks located at Nyamongo Police  
4                                Station, and that is defined as "Barracks"; did you  
5                                see that?

6                                A.    Yes.

7           404                   Q.    Okay.  And then regarding 17(a),  
8                                it says:

9                                        "Subject to contract, execute  
10                                      all appropriate documents necessary  
11                                      to effect the transfer [of] the  
12                                      legal title of the TPF barracks  
13                                      located at Nyamongo Police station  
14                                      ('Barracks'), to the TPF or to such  
15                                      other party as the TPF may  
16                                      nominate".

17                                      Do you see that?

18                                      A.    Yes, I do.

19           405                   Q.    Is it fair to say then that before  
20                                this agreement was signed, that North Mara Gold  
21                                Mine owned the barracks located at the Nyamongo  
22                                Police Station?

23                                      A.    As per that clause, that seems to  
24                                      be the case, yes.

25           406                   Q.    And how long did North Mara Gold

1 Frankel gives you the name, because I know that he  
2 knows it.

3 MR. FRANKEL: Yeah, I was going to pipe  
4 in.

5 If you look at the affidavit of  
6 Mr. Lyambiko, he discusses this matter and  
7 identifies that company as SGA, and it is at  
8 paragraph 35 of his first affidavit from October of  
9 last year.

10 And just for completeness, it is SGA  
11 Tanzania Limited.

12 BY MR. WANLESS:

13 427 Q. Mr. Bock, were you involved in the  
14 process to replace Nguvu Moja with SGA Tanzania  
15 Limited?

16 A. Yes, I was part of that process.

17 428 Q. Who else was involved from  
18 Barrick?

19 A. It would have been the mine  
20 management, so in other words, Apolo as the General  
21 Manager and his team who are the custodians of  
22 those contracts. It would have been Grant  
23 Beringer, the AME legal counsel Antoine and, again,  
24 the Commercial Lead for AME who would be Nic  
25 Marques. Those would be the key people involved in

1 that.

2 429 Q. Sorry, what was the last name that  
3 you mentioned?

4 A. Nic Marques. He is the Commercial  
5 Executive for AME.

6 430 Q. And where is Nic Marques based?

7 A. He is based in South Africa.

8 431 Q. And I take it you have an  
9 agreement with SGA Tanzania Limited?

10 A. North Mara has an agreement with  
11 them, yes.

12 432 Q. Can you undertake to produce that  
13 agreement?

14 U/A MR. THOMSON: I'll take that question  
15 under advisement.

16 BY MR. WANLESS:

17 433 Q. Okay. I am going to direct you  
18 back to the Annual Information Form for 2023 and  
19 the chart that we looked at earlier today, and I  
20 will share the screen again.

21 Okay, I want to ask you a few questions  
22 about Twiga Minerals Corporation Limited. Can you  
23 identify that on the chart? Do you see it there?  
24 Oh, sorry.

25 MR. FRANKEL: We don't have it on the

1 following on with the evidence of the witness.

2 MR. THOMSON: What he said is if  
3 someone had invaded your house, you would call the  
4 police, and that is what is happening at North  
5 Mara. When armed people invade the mine site,  
6 people at the mine call the police. That is what  
7 he said.

8 BY MR. WANLESS:

9 457 Q. All right.

10 Mr. Bock, do you acknowledge that there  
11 have been a number of deaths related to the North  
12 Mara Mine over the last several years?

13 A. There has been several incidents  
14 between the police and intruders of the North Mara  
15 Mine, and some of them has resulted in conflict and  
16 some of them has resulted in death --

17 458 Q. And how many --

18 A. -- on both sides.

19 459 Q. On both sides? How many police  
20 officers have died?

21 A. I can't -- I don't know that  
22 answer.

23 460 Q. Can you please provide that  
24 information?

25 U/A MR. THOMSON: I'll take that question

1 under advisement.

2 BY MR. WANLESS:

3 461 Q. Okay. And from your  
4 understanding, how many community members have died  
5 in confrontations with the police since Barrick  
6 took over from Acacia?

7 A. I don't have the number.

8 462 Q. Can you undertake to provide an  
9 answer?

10 U/A MR. THOMSON: I will also take that  
11 question under advisement.

12 BY MR. WANLESS:

13 463 Q. In your understanding, have there  
14 been any lawsuits that have been brought in  
15 Tanzania regarding anyone that alleges that they  
16 were hurt or killed by police near the North Mara  
17 Mine?

18 A. I don't have the answer.

19 464 Q. Can you undertake to find out?

20 U/A MR. THOMSON: We'll take that question  
21 under advisement.

22 BY MR. WANLESS:

23 465 Q. My understanding is there have not  
24 been any lawsuits brought in Tanzania. There was a  
25 lawsuit that was brought in the United Kingdom;

1 correct?

2 MR. THOMSON: Well, we can't answer  
3 about your understanding. If you are asking us to  
4 confirm that that is your understanding, we can't  
5 do that.

6 If the question is, was there a lawsuit  
7 brought in the United Kingdom, the answer to that  
8 question is there was.

9 BY MR. WANLESS:

10 466 Q. Okay. Thank you. You are right.  
11 It was a bad question.

12 Mr. Bock, you understand that a lawsuit  
13 was brought in the United Kingdom regarding deaths  
14 and other injuries caused by police related to the  
15 North Mara Mine; correct?

16 A. Yes, that's correct.

17 467 Q. Okay. I am directing you again to  
18 the same document that we looked at earlier, which  
19 is Exhibit X of the Alphonse Affidavit No. 1. This  
20 is the Sustainability Report for 2021.

21 And under the heading "Resolving  
22 allegations", it states:

23 "In early 2020, a group of 10  
24 claimants launched legal proceedings  
25 against North Mara Gold Mine Limited

1 citing use of excessive force by  
2 Tanzanian police during the time the  
3 mine was operated by the former  
4 Acacia Mining plc (Acacia). Whilst  
5 following legal advice we believe  
6 that a private company, such as  
7 North Mara Gold Mine Limited, cannot  
8 be held accountable for the actions  
9 of a national police force, we take  
10 these legacy claims seriously and  
11 are committed to resolving them in  
12 an open and transparent manner. As  
13 part of our commitment to resolving  
14 these claims and rebuilding  
15 community trust, we have chosen not  
16 to challenge the jurisdiction of the  
17 English courts to hear these claims.  
18 This means they will be heard in the  
19 English court system rather than in  
20 the Tanzanian courts."

21 Do you see that?

22 A. Yes, I see that.

23 468 Q. Okay, and does that accord with  
24 your understanding of Barrick's approach to this  
25 litigation in the United Kingdom?

1                   A.    Yes, with this specific  
2                   litigation, yes.

3                   469            Q.    Was Barrick successful in  
4                   resolving these claims in the UK in an open and  
5                   transparent manner?

6                   A.    I cannot comment on that because I  
7                   am not sure if it is privileged information or not.

8                   470            Q.    Certainly I understand how  
9                   settlement agreements work, and I am not trying to  
10                  get you to answer with information that you  
11                  shouldn't be disclosing.  So I'll ask just a  
12                  general question.

13                  Was Barrick Gold successful in  
14                  resolving those claims through a settlement?

15                  A.    Again, I am not sure if it is  
16                  privileged information or not, and I would rather  
17                  have us get back to you on that.

18                  MR. FRANKEL:  And just for the record,  
19                  to make sure that everybody is crystal clear about  
20                  this, Barrick Gold Corporation is not a party, was  
21                  not a party to that litigation.  It was not.

22                  MR. WANLESS:  All right.  If I may  
23                  suggest maybe a ten-minute break, I won't be very  
24                  long afterwards, but a break would be useful at  
25                  this time.

1 MR. THOMSON: Yes, that is fine.

2 MR. WANLESS: Okay. We'll go off the  
3 record.

4 -- RECESSED AT 5:45 P.M.

5 -- RESUMED AT 5:57 P.M.

6 BY MR. WANLESS:

7 471 Q. I am going to share my screen and  
8 show you I guess an update that was posted on  
9 Barrick Gold Corporation's website on March 27th,  
10 2024, and it reads:

11 "Legal Proceeding.

12 Barrick TZ Limited and North  
13 Mara Gold Mine Limited have reached  
14 a settlement of the claims by  
15 Tanzanian residents against them, in  
16 their English court proceedings with  
17 no admission of liability on their  
18 part."

19 Do you see that?

20 A. Just for context, what document is  
21 this that I am looking at?

22 472 Q. It is a PDF of Barrick's website.

23 A. And which section of the website?

24 473 Q. Well, let's do this. So now I am  
25 showing the actual web page, and you can see -- I

1 think I got it by searching. So I don't know where  
2 it has been posted.

3 But it is on Barrick's website,  
4 "Barrick.com/English/operations/north-  
5 mara/legal-proceeding-2024".

6 MR. FRANKEL: I am terribly sorry, Mr.  
7 Wanless, it is not actually appearing on the screen  
8 on our end.

9 MR. THOMSON: There we are.

10 MR. FRANKEL: And this is back to the  
11 PDF document.

12 MR. THOMSON: So your question was did  
13 he see that. Can you put the document back up on  
14 the screen?

15 There we are.

16 BY MR. WANLESS:

17 474 Q. So this -- now I am looking at the  
18 web page itself. Do you see that?

19 A. Yes, I can see that.

20 475 Q. And do you acknowledge that this  
21 is Barrick's statement regarding the conclusion of  
22 the lawsuit that was filed in the English courts  
23 regarding North Mara Gold Mine?

24 A. Yes, what appears to be shown on  
25 the screen is the Barrick website with that

1 specific sentence, yes.

2 476 Q. Okay. And do you agree that this  
3 is in fact Barrick's update regarding the  
4 conclusion of those legal proceedings?

5 A. Yes, that would be the update.

6 477 Q. All right. Now, we had spoken  
7 about Barrick TZ Limited earlier, and we agreed  
8 that it was a holding company; correct?

9 A. It is a company, a holding company  
10 which is in the UK, yes.

11 478 Q. Okay. And in terms of who was  
12 directing the litigation, it was Barrick Gold  
13 Corporation; correct?

14 A. It was legal counsel, our General  
15 Counsel Executive, Poupak, and our external  
16 counsel.

17 479 Q. And from Barrick's perspective, it  
18 is fair to say that Barrick was successful in  
19 resolving these claims in the United Kingdom?

20 A. To be precise, North Mara Gold  
21 Mine Limited, the company which it was brought  
22 against, was successful, yes.

23 480 Q. Okay. Does Barrick have any  
24 concerns about the ability of North Mara Gold Mine  
25 Limited or Barrick TZ Limited to defend those

1 lawsuits in the United Kingdom?

2 U/A MR. THOMSON: I'll take that question  
3 under advisement.

4 BY MR. WANLESS:

5 481 Q. You spoke earlier about an NGO,  
6 and the NGO you were referring to is RAID; correct?

7 A. Yes, that's correct.

8 482 Q. I have some names to go through  
9 with you.

10 Martin Welsh was a former Regional  
11 Counsel; correct?

12 A. Yes, he was the Regional Counsel  
13 for the Africa Middle East Region.

14 483 Q. Okay, and where was he based?

15 A. He was based in Jersey in the  
16 Channel Islands.

17 484 Q. And the General Manager of North  
18 Mara before Apolo was Luiz Correia; is that  
19 correct?

20 A. Yes, that's correct.

21 485 Q. And where did Mr. Correia live?

22 A. He was an ex-pat. I am not sure  
23 of his residency, but he has now moved back to  
24 South Africa. He is a South African citizen.

25 486 Q. Okay. I am going to play an audio

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Court File No. CV-22-00690649-0000  
ONTARIO  
SUPERIOR COURT OF JUSTICE  
B E T W E E N:  
OPHIA MATIKO JOHN, IN HER PERSONAL CAPACITY AND AS  
LITIGATION GUARDIAN FOR HER MINOR CHILD, KELVIN;  
ANACRETUS MARINGO GIMANWA; ESTA GEORGE RANGE, IN  
HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN  
FOR HER MINOR CHILDREN JOSEPH, GODFREY, FILEMON AND  
REBEKA; ELIZABETH MATIKO IRONDO; NEEMA STEPHEN  
JOHN, IN HER PERSONAL CAPACITY AND AS LITIGATION  
GUARDIAN FOR HER MINOR CHILDREN JOHN, MIRIAM, ESTA  
AND TIMOTHY; MASWI MARWA MOHABE; DOTTO WILLIAM  
ITAMA, IN HER PERSONAL CAPACITY AND AS LITIGATION  
GUARDIAN FOR HER MINOR CHILD CHRISTINA; LYIMO ITAMA  
MACHELA; ITAMA MACHELA MAX; CHARLES DANIEL NYAKINA;  
BHOKE HAGALE MARO; DANIEL NYAKINA GHATI; DICKSON  
JULIUS SISE; SIBORA MARWA MWITA; EMMANUEL  
NYAKORENGA MBURI; RYOBA ELIAS KEBWE; PASCOMAREMBELA  
MWITA; NYAHELI MARWA NYAKORENGA; CHRISTOPHER  
JHOMUMAKENDE; RANGE MWITA RANGE; AND  
FREDY CHACHA WAMBURA LEMA

Plaintiffs,

- and -

BARRICK GOLD CORPORATION

Defendant.

-----  
--- This is the Cross-Examination of GRANT  
BERINGER, upon his Affidavit sworn October 1st,  
2023, taken via Veritext Legal Solution Canada's  
Zoom virtual platform, with all participants  
attending remotely, on the 29th day of May, 2024.  
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1 -- Upon commencing at 8:00 a.m.

2 GRANT BERINGER: AFFIRMED.

3 CROSS-EXAMINATION BY MR. WANLESS:

4 1 Q. Mr. Beringer, can you please state  
5 your full name for the record?

6 A. It's Grant Bell Beringer.

7 2 Q. And I'd like to direct you to the  
8 affidavit that you swore on October 1st, 2023 and  
9 the first paragraph. I'm sharing it on the screen  
10 there.

11 A. Thanks.

12 3 Q. All right. You state that you are  
13 the group sustainability executive of Barrick Gold  
14 Corporation; is that correct?

15 A. That's correct.

16 4 Q. And you go on to state that you  
17 have overall oversight and accountability for  
18 sustainability-related matters associated with the  
19 mines and mining projects in Barrick's portfolio;  
20 that's correct?

21 A. That's correct.

22 5 Q. And that includes matters  
23 pertaining to human rights and community relations?

24 A. That's correct.

25 6 Q. And that includes the North Mara

1 Mine?

2 A. Yes, as part of the companies  
3 within the group of companies within Barrick Gold.

4 7 Q. All right. So it's fair to say  
5 that you have oversight and accountability for  
6 sustainability-related matters at the North Mara  
7 Mine?

8 A. I have oversight of  
9 sustainability-related matters of all of the  
10 companies within the Barrick Group, one of them  
11 being the North Mara Gold Mine.

12 8 Q. Okay. Who are you employed by?

13 A. I am employed by Barrick Gold  
14 Holdings Limited in Jersey.

15 9 Q. Okay. But there's no doubt that  
16 you're the group sustainability executive for  
17 Barrick Gold Corporation?

18 A. There's no doubt.

19 10 Q. All right. Ultimately you were in  
20 charge of human rights at all of Barrick's mines,  
21 including North Mara?

22 A. I oversee the human rights aspects  
23 associated with the group of companies, and one of  
24 those companies within that group is North Mara  
25 Gold Mine. I mean, I can elaborate on how it is

1 implemented at a site level if you wish.

2 11 Q. Well, I guess in terms of ultimate  
3 responsibility, would you agree that you are  
4 ultimately responsible for ensuring that human  
5 rights abuses do not happen at Barrick's mines?

6 A. Ultimately at all of Barrick's  
7 mines and operations, yes.

8 12 Q. Okay. I'm going to direct you to  
9 the affidavit of Jeanine Alphonse No. 1, which is  
10 Exhibit E, and it's an Annual Information Form  
11 dated as of March 17th, 2023, and I want to direct  
12 you specifically to page 52 of that document, the  
13 second paragraph. It says:

14 "The responsibility for the  
15 oversight and implementation of the  
16 Company's Human Rights Compliance  
17 Program sits with Barrick's Group  
18 Sustainability Executive, with  
19 support from the Senior  
20 Vice-President Business Assurance  
21 Risk and Business Integrity, and  
22 Barrick's Human Resources  
23 Executive." (As read).

24 Do you see that?

25 A. I do.

1 MR. THOMSON: I have a note, to answer  
2 the witness' question, I have a note that that is  
3 dated December of 2021, if that helps.

4 THE WITNESS: Yes, thank you.

5 BY MR. WANLESS:

6 27 Q. And the second paragraph is:

7 "Day-to-day responsibility for  
8 management of our human rights  
9 performance sits with our Group  
10 Sustainability Executive who is a  
11 member of the Company's Executive  
12 Committee and supports the sites by  
13 providing training as needed and  
14 addressing issues escalated by the  
15 sites. The Group Sustainability  
16 Executive is supported by regional  
17 sustainability needs." (As read).

18 That's correct, is it?

19 MR. FRANKEL: He just read to you this  
20 second paragraph.

21 THE WITNESS: It is. That's correct.

22 BY MR. WANLESS:

23 28 Q. In order for you to do your job  
24 properly, you depend on access to information  
25 regarding human rights issues at all of Barrick's

1 mines, correct?

2 A. That's correct.

3 29 Q. And that includes North Mara?

4 A. That's correct.

5 30 Q. And are you confident that the  
6 reporting mechanisms that you have in place ensure  
7 that you and your team get the information that you  
8 need?

9 A. Yes, absolutely.

10 31 Q. All right. And that would include  
11 access to documents and access to personnel as  
12 required?

13 A. Yes, that's right.

14 32 Q. And your compensation is based, in  
15 part, on the human rights performance of Barrick;  
16 is that correct?

17 A. It is, yes. It is a component of  
18 it.

19 33 Q. And why does Barrick do that?

20 A. Well, so maybe if I can explain in  
21 terms of how the compensation works related to what  
22 we call the sustainability metrics. You would have  
23 seen in our Sustainability Report that we've  
24 published a sustainability scorecard. Within that  
25 scorecard, we have five main themes in that, of

1           which human rights is one of those; we also have  
2           environment, social, health and safety, and then  
3           governance, and each of those metrics are rated on  
4           an annual basis.

5                       They also change every year based on  
6           either accomplishment of them or materiality that  
7           we assess on an annual basis, too.

8                       For a large part those metrics are  
9           comparable with our goals and they're quantitative,  
10          so it's public information that individuals can  
11          check, should they wish to.

12                      But there are some components that are  
13          unique to Barrick, and -- like our Community  
14          Development Committees, for instance, that's a  
15          project that Barrick has developed and we rate  
16          ourselves against those, and that's part of our  
17          scorecard. And part of that is a human rights  
18          component of it.

19                      As I say, it does change every year,  
20          but it makes up a portion of those metrics.  
21          Previously it accounted for 30 percent of our  
22          compensation; more recently we've changed that to  
23          20 percent. But it is a component of a much larger  
24          scorecard that is presented to the remuneration  
25          committee, and then they use their discretion based

1 on that.

2 34 Q. Thank you. You lead Barrick's  
3 sustainability team; is that fair?

4 A. I have members of my team, in fact  
5 I have two members of the team, but Barrick  
6 operates very differently to many of our peers in  
7 the industry at large, where we have a bottom-up  
8 approach in terms of sustainability.

9 So sustainability is driven from the  
10 operations up, and the responsibility of  
11 sustainability on a day-to-day basis is given to  
12 the site leads, and what I mean by a site lead is  
13 on many of our operations, if not all of them, we  
14 have environmental HODs - heads of department - and  
15 in most instances we have a community head of  
16 department that reports into a general manager of  
17 that mine or operation.

18 The general manager has a direct line  
19 to our regional COOs - chief operating officers -  
20 of which we have three, Africa/Middle East is one  
21 region, we have North America and then we have  
22 LATAM and Asia Pacific.

23 Part of the COOs team is also regional  
24 sustainability lead. They report directly to the  
25 COO.

1 I have a dotted line to those  
2 sustainability leads because those are not my  
3 direct reports, they report directly to the COOs,  
4 and as such I have a dotted line to the COOs. I  
5 report directly to the CEO of Barrick. I have two  
6 -- sorry, three direct reports in my structure. I  
7 have two sort of generalists, if you will, and one  
8 specialist closure person that reports to me.

9 So it is -- it is quite different in  
10 terms of those direct reports in that the regional  
11 sustainability leads report to the COOs.

12 35 Q. All right. And in terms of your  
13 direct reports, can you tell me who they are and  
14 what they do?

15 A. Sure. So, one of them is Duncan  
16 Pettit who is based in London, England. His title  
17 I believe is sustainability manager, and he assists  
18 me with the oversight and the implementation of our  
19 strategy over the group of companies which sits  
20 under Barrick Gold.

21 I also have Marcel Radyn who is based  
22 in British Columbia, Canada. He oversees -- he  
23 assists Duncan in some of that work, particularly  
24 around investor relations, also things like GHG  
25 emissions, data management, and then we've also got

1 a small sort of research and development within  
2 sustainability that Marcel really leads.

3 I then have Alison Brown who is also  
4 based in BC. She oversees our closure portfolio  
5 for both our legacy sites, there is a number of  
6 legacy sites that sit within various companies  
7 underneath Barrick Gold, as well as the operating  
8 sites in terms of developing closure plans for the  
9 day they do close, to ensure that they are  
10 sustainable and that we are prepared for closure.  
11 That's her job.

12 36 Q. And those three individuals, who  
13 do they work for?

14 MR. THOMSON: Sorry, meaning who are  
15 they actually employed by?

16 MR. WANLESS: Well, I guess I'll ask a  
17 couple of different questions.

18 BY MR. WANLESS:

19 37 Q. In their role they act for  
20 Barrick, correct?

21 A. They do, yes.

22 38 Q. Okay. And then who are they  
23 employed by?

24 A. I don't actually know the entities  
25 that have employed those individuals.

1 39 Q. Can you undertake to find out,  
2 please?

3 U/A MR. THOMSON: We'll take your question  
4 under advisement.

5 BY MR. WANLESS:

6 40 Q. All right. And at paragraph 25 of  
7 your affidavit, sorry, 26, you refer to the  
8 regional sustainability lead for Africa and the  
9 Middle East being Thomas Wilson. Is that  
10 information correct?

11 A. Sorry, Cory, would you mind  
12 bringing that up on the screen for me, please?

13 41 Q. Just confirming that there hasn't  
14 been a change.

15 A. You're referring to 26?

16 42 Q. 26, my question is regarding  
17 Thomas Wilson, the regional sustainability lead for  
18 Africa and the Middle East. Is he still in that  
19 position?

20 A. Yes, he is.

21 43 Q. All right. And he's still based  
22 in South Africa?

23 A. Yes, he is.

24 44 Q. It also refers to the previous  
25 regional sustainability lead for Africa and the

1 Middle East, Hilaire Diarra. Where does Hilaire  
2 Diarra reside currently?

3 A. Hilaire is now our general manager  
4 of our Tongon Mine which is in Côte d'Ivoire, so he  
5 does spend most of his time there, although I  
6 believe his domicile is Mali. He is Malian and  
7 that's where his family resides.

8 MR. FRANKEL: And just for the purposes  
9 of the transcript, Mr. Beringer said Côte d'Ivoire.

10 THE WITNESS: Sorry, the Ivory Coast.

11 BY MR. WANLESS:

12 45 Q. And what corporate entity is  
13 Thomas Wilson employed by?

14 MR. THOMSON: One correction for the  
15 court reporter, I believe the witness said sorry, I  
16 meant the Ivory Coast, not "I will repost."

17 THE WITNESS: Correct.

18 -- Reporter's Note: Transcript reflects  
19 correction.

20 BY MR. WANLESS:

21 46 Q. Mr. Beringer, which corporate  
22 entity employs Thomas Wilson?

23 A. I'm not certain of which entity it  
24 is.

25 47 Q. Can you undertake to find out,

1 please?

2 U/A MR. THOMSON: I'll take that question  
3 under advisement.

4 BY MR. WANLESS:

5 48 Q. And Mr. Beringer, where do you  
6 reside?

7 A. I live here in Johannesburg, South  
8 Africa.

9 49 Q. And I take it for your job you  
10 travel quite a bit?

11 A. Yes, I do.

12 50 Q. How often are you on various mine  
13 sites?

14 A. Well, certainly at least quarterly  
15 I travel to the majority of our -- the operations.  
16 At least quarterly, but there are some instances  
17 where I'll travel in between the quarters to those  
18 operations, depending on the need.

19 51 Q. How many operations are in your  
20 portfolio?

21 A. So, we have 17 operations in 12  
22 countries, those are the operating entities that  
23 produce gold, but we also have a few projects that  
24 I'm involved in, as well as I mentioned we have  
25 some legacy sites that are closed, which also fall

1 into my portfolio.

2 52 Q. So when you say that you travel to  
3 sites on a quarterly basis, you're talking about 17  
4 sites and about 12 countries?

5 A. Yes, that's more or less correct.

6 53 Q. The human resources executive for  
7 Barrick is Darian Rich, correct?

8 A. That's correct.

9 54 Q. And Mr. Rich is based in Toronto;  
10 is that correct?

11 A. No, I believe he is based in  
12 Henderson, Nevada.

13 55 Q. All right. And if that  
14 information is not correct, you'll let me know?

15 U/T MR. THOMSON: We will.

16 BY MR. WANLESS:

17 56 Q. Barrick issues a number of reports  
18 that relate to human rights, correct?

19 A. We've issued one, the one that you  
20 highlighted earlier, in December of 2021.

21 57 Q. Sorry, maybe I'll ask a slightly  
22 different question. Barrick issues a number of  
23 reports that touch on human rights?

24 A. If you're referring to our  
25 Sustainability Report which we report on annually,

1 we include a section on human rights in those  
2 annual reports.

3 58 Q. Okay. So I will direct you to an  
4 example of that, which is Exhibit 4 to your  
5 affidavit, and I'll share on the screen. This is  
6 an example of a Barrick Sustainability Report that  
7 you just spoke of?

8 A. Yes.

9 59 Q. And you say that this is published  
10 by Barrick annually?

11 A. That is correct.

12 60 Q. And it addresses a number of  
13 issues, one of which is human rights, correct?

14 A. Yes, that's correct.

15 61 Q. And then you mentioned another  
16 report, which is the Human Rights Report, which you  
17 attach at Exhibit 8 of your affidavit, and this is  
18 a stand-alone Human Rights Report, correct?

19 A. That is correct.

20 62 Q. Now, I believe this one was  
21 published in 2021; is that correct?

22 A. Yes.

23 MR. THOMSON: December 2021 I believe.

24 BY MR. WANLESS:

25 63 Q. All right. So how often does

1                   Barrick publish stand-alone human rights reports?

2                   A.     This is the only stand-alone  
3                   report that we've published.

4         64                   Q.     Do you plan to publish any more  
5                   stand-alone human rights reports?

6                   A.     We've -- we don't have a cadence  
7                   in terms of publishing these stand-alone reports.  
8                   It's certainly not required of us. We will -- we  
9                   will report on them as and when we believe we need  
10                  to.

11                  We feel that our Sustainability Report  
12                  is sufficient in that regard, it is fairly  
13                  thorough, it has all of the content that we believe  
14                  needs to be covered for our shareholders/investors,  
15                  so at this point in time, we have no plans in  
16                  submitting a stand-alone report but may in the  
17                  future.

18         65                   Q.     All right. Next is Exhibit 11 to  
19                   your affidavit, which is a Conflict-Free Gold  
20                   Report for Barrick Gold Corporation. This one is  
21                   dated September 2022. Do you see that?

22                  A.     Yes.

23         66                   Q.     And this is an example of reports  
24                   that Barrick produces that are required as part of  
25                   Barrick's membership in the World Gold Council's

1 Conflict-Free Gold Standard; is that correct?

2 A. That is correct.

3 67 Q. And how often are they produced by  
4 Barrick?

5 A. We produce this annually.

6 68 Q. And then similarly, Barrick  
7 produces reports to the Voluntary Principles on  
8 Security and Human Rights; is that correct?

9 A. That is correct.

10 69 Q. And just so you have an example,  
11 I'm directing you to the affidavit of Jeanine  
12 Alphonse No. 1, Exhibit AA, and on the screen is an  
13 example of one of these reports that Barrick  
14 produces for the Voluntary Principles on Security  
15 and Human Rights, this one from 2022; correct?

16 A. Yes, that's correct.

17 70 Q. Okay. And these reports are  
18 required as part of formally having joined the  
19 Voluntary Principles on Security and Human Rights?

20 A. Yes, as part of the Corporate  
21 Pillar.

22 71 Q. Sorry, can you explain more of  
23 what you mean by the Corporate Pillar?

24 A. So, the Voluntary Principles are  
25 composed of three pillars: the Corporate Pillar,

1 Government Pillar and then NGO Pillar. Part of the  
2 Corporate Pillar's reporting and membership is to  
3 report annually on the Voluntary Principles on  
4 Security and Human Rights. And I don't believe  
5 that the other pillars are required to do so.

6 72 Q. Right. So corporations have to  
7 formally join the Voluntary Principles on Security  
8 and Human Rights, correct?

9 A. Yes, that's correct. There is a  
10 process that goes through those two pillars that I  
11 mentioned, and then there is a review of the  
12 company, should they want to join, by  
13 representatives of each of those pillars.

14 MR. FRANKEL: Just for the purposes of  
15 the transcript, a minute ago the witness said "and  
16 I don't believe the other pillars are required to  
17 do so."

18 -- Reporter's Note: Transcript reflects  
19 correction.

20 MR. WANLESS: Could we go off the  
21 record for just a second?

22 MR. THOMSON: Sure.

23 -- OFF THE RECORD DISCUSSION --

24 BY MR. WANLESS:

25 73 Q. As part of formal membership in

1 the Voluntary Principles on Security and Human  
2 Rights, Barrick is required to submit annual  
3 reports on the Voluntary Principles on Security and  
4 Human Rights, correct?

5 A. That is correct.

6 74 Q. Okay. So, I mentioned four  
7 different kinds of reports. There's the  
8 sustainability reports that Barrick produces,  
9 there's Barrick's Human Rights Report, the  
10 stand-alone one that you referred to, there's  
11 Barrick's reports regarding the conflict-free gold  
12 requirements, and there's Barrick's report to the  
13 Voluntary Principles on Security and Human Rights.

14 And my question is, from Barrick's  
15 perspective, is the content of these reports  
16 accurate?

17 A. Yes, the content is. All of the  
18 information that is put in those reports is vetted  
19 by a third party independent assurer. Apex is our  
20 assurer.

21 75 Q. Apex reviews the information in  
22 these reports before it goes out?

23 A. Yes.

24 76 Q. And I presume that employees of  
25 Barrick also review the reports before they go out?

1 A. That is correct.

2 77 Q. Including yourself?

3 A. Yes.

4 78 Q. So it's fair to say that these  
5 reports paint an accurate picture of Barrick's  
6 approach to human rights?

7 A. Yes.

8 79 Q. And it's fair to say that these  
9 reports paint an accurate picture of what Barrick  
10 is actually doing and taking responsibility for?

11 A. Yes, as well as the group of  
12 companies that sit within Barrick, we give details  
13 of how each of those companies is implementing the  
14 various policies and principles.

15 80 Q. And it's also fair to say that  
16 these reports paint an accurate picture of how  
17 information is reported within Barrick, information  
18 related to human rights?

19 A. Sorry, I don't fully understand  
20 what the question is asking.

21 81 Q. Well, some of these reports refer  
22 to reporting structures, about how human rights  
23 issues and concerns are reported up the chain, and  
24 I'm just confirming that if it's in these reports,  
25 it's accurate.

1                   A.    On how human rights aspects are  
2                   communicated within the various groups of  
3                   companies?

4           82                   Q.    Yes.

5                   A.    Yeah, I would obviously, you know,  
6                   like to see which sections you're referring to in  
7                   terms of that reporting structure.  Sorry, I'm not  
8                   entirely clear what the question is.

9           83                   Q.    Well, maybe it will help if I  
10                  direct you to a document.  I'm directing you to  
11                  Exhibit BB of Jeanine Alphonse's Exhibit No. 1.  
12                  This is the Barrick's 2021 Annual Report to the  
13                  Voluntary Principles on Security and Human Rights.

14                  A.    Um-hmm.

15           84                   Q.    And at page 6 of that document,  
16                  there is:

17                                "Barrick is required to report  
18                                on Company procedure or mechanism to  
19                                report security-related incidents  
20                                with human rights implications by  
21                                public/private security forces  
22                                relating to the Company's  
23                                activities."    (As read).

24                                And then it goes on to describe what's  
25                                called Barrick's Human Rights Reporting Procedure,

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which I'll read:

"Barrick's Human Rights

Reporting Procedure provides sites with detailed guidance on how to effectively report human rights impacts or allegations (including when, how and to whom). Once a potential human rights violation is reported to designated local management, the reporting contact must, within 24 hours of becoming aware of the report, notify the Head Country In-House Legal Counsel or the General Counsel. Following the report of the potential human rights violation, the General Counsel will promptly alert the President and other relevant personnel as the General Counsel deems appropriate under the circumstances." (As read).

Do you see that?

A. I do, yes.

85

Q. Is that an accurate reflection of Barrick's reporting structure regarding human rights issues?

1                   A.    Yes, it is.  And to be clear, the  
2                   reporting structure is such that at that operating  
3                   site it would be reported to the head country  
4                   in-house legal representative first, and then make  
5                   its way up to our general counsel, and then  
6                   ultimately to the president and CEO.

7           86                   Q.    Okay.  And when you refer to the  
8                   general counsel, you're talking about Barrick's  
9                   general counsel?

10                   A.    We have -- it's the in-house legal  
11                   counsel or the general counsel for that region, and  
12                   then I believe it would be taken up to our general  
13                   counsel for Barrick which oversees the group of  
14                   companies, and then to the president and CEO, yes.

15           87                   Q.    Okay.  And the president and CEO  
16                   you're talking about is Dr. Bristow?

17                   A.    That is correct.

18           88                   Q.    And I assume as part of this  
19                   reporting procedure, you would also expect to be  
20                   notified about any human rights issues?

21                   A.    That is right, yes.

22           89                   Q.    And similarly, it would be  
23                   reported to the COO of Africa and Middle East?

24                   A.    Yes, that's correct.

25           90                   Q.    I'm now going to direct you to

1 Exhibit V from the affidavit of Jeanine Alphonse  
2 No. 1. This is a press release with the title  
3 "Barrick Publishes Human Rights Report," and it is  
4 dated December 10th, 2021. And the third paragraph  
5 reads:

6 "During 2020, Barrick updated  
7 several standards, including the Use  
8 of Force Standard, and developed a  
9 new Voluntary Principles on Security  
10 and Human Rights Standard." (As  
11 read).

12 That second standard, the Voluntary  
13 Principles on Security and Human Rights Standard,  
14 that's the one we talked about earlier, correct?

15 A. Yes, that is correct.

16 91 Q. And that's an internal document to  
17 Barrick?

18 A. That is right.

19 92 Q. And the Use of Force Standard,  
20 that again is a Barrick standard, correct?

21 A. It is, but we obviously use  
22 guidelines like the Voluntary Principles, hence the  
23 name to guide, you know, the content of that. That  
24 is an internal standard or part of that standard,  
25 yes.

1           93                           Q.    Okay.  Yes.  Just so there's no  
2                                    confusion, my reading of this paragraph is there  
3                                    are two separate standards.  There's the Use of  
4                                    Force Standard and then a separate Voluntary  
5                                    Principles on Security and Human Rights Standard;  
6                                    is that correct?

7                                    A.    You're correct in saying that, the  
8                                    Use of Force Standard is an annexure to the  
9                                    Voluntary Principles on Security and Human Rights  
10                                   Standard.  They are both standards, that's right.

11          94                           Q.    Can you please produce a copy of  
12                                    the use of force standards?

13                                   U/A           MR. THOMSON:  Take your question under  
14                                    advisement.

15                                   BY MR. WANLESS:

16          95                           Q.    All right.  At paragraph 20, you  
17                                    --

18                                    A.    Sorry, Cory, what document is  
19                                    that?

20          96                           Q.    Sorry, of your affidavit.  
21                                    Paragraph 20 of your affidavit, you state that the  
22                                    company had 12 directors and 17 executive officers  
23                                    as of March 13, 2023.  Do any of these directors or  
24                                    executive officers live in Tanzania?

25                                    A.    No, I don't believe so.

106

1 Q. All right. And just very quickly  
2 starting on the left if you could just name them  
3 and give the title, if you could?

4 A. So first we have Seb Bock, who is  
5 the COO of Africa/Middle East Region; we then have  
6 Peter Richardson who is the, I think is part of the  
7 executive director of Nevada Gold Mines within the  
8 North American region; we then have myself, group  
9 sustainability executive; next to me is John  
10 Gemmell, he's part of our communications team not  
11 on the executive; we then have Lois Wark who is our  
12 executive for comms and investor relations; behind  
13 her is Dorian Rich, our head of human resources;  
14 next to him is David Lee, who subsequently left the  
15 company, he was part of the communications team,  
16 investor relations; then we have Mark Bristow, our  
17 CEO; next to him, behind him is Mark Hill our COO  
18 of LATAM and Asia Pacific; then is Graham  
19 Shuttleworth, chief financial officer; behind  
20 Graham to the right is Joel Holliday, who heads up  
21 the exploration executive team; the person there I  
22 don't know, I think he's part of the New York Stock  
23 Exchange; and then we have Simon Bottoms, who is --  
24 heads up our mineral resources management; we then  
25 have Christine Keener who heads up the North

1           America, COO of North America; and then lastly we  
2           have Chris Coleman, who is a director on the board.

3           107                   Q.    Thank you for that.  And you can  
4           confirm none of these individuals live in Tanzania?

5                           A.    That is correct.

6           108                   Q.    All right.  At paragraph 19 of  
7           your affidavit, you refer to a department and  
8           business function of Barrick called Strategic  
9           Matters.  Do you see that?

10                          A.    Yes.

11           109                   Q.    Can you tell me what Strategic  
12           Matters is?

13                          A.    Really, you know, there's a number  
14           of functions that they play, but really it's  
15           looking at growth opportunities within our -- that  
16           we may want to acquire, so, you know, mergers and  
17           acquisitions would fall under that department, as  
18           well as divestitures of certain operations, too, so  
19           it works both ways, and they would look at that.

20                          But there are other aspects as the name  
21           suggests, you know, that really drive the strategy  
22           around growth of the company.  They would also be  
23           very involved in new projects we get involved in,  
24           there's some aspect in terms of setting up those  
25           agreements with countries that we operate in,

1 framework agreements and others that that team  
2 would lead, and obviously in any negotiations that  
3 take place between us and governments.

4 And that's generally what the  
5 department does.

6 110 Q. So that department would have been  
7 involved, for example, in the negotiations with the  
8 Tanzanian Government that happened and resulted in  
9 the takeover from Acacia?

10 A. They certainly were part of it.  
11 We also had the Africa/Middle East Region heavily  
12 involved in those discussions, then our COO, Willem  
13 Jacobs, was intimately involved in those  
14 discussions.

15 111 Q. And would they be involved in sort  
16 of conflict resolution when there's issues that pop  
17 up, for example, that might result in litigation?

18 A. To some extent, depending on, you  
19 know, the context and the issue. Generally any  
20 legal matters are dealt with by our legal team and  
21 general counsel.

22 112 Q. All right. And where is the legal  
23 team for Barrick based?

24 A. Well, again, much like my team,  
25 you know, it is a very leading team, if you will,

1 on the corporate side of things. It really is  
2 driven at a regional level and so, again, we have  
3 that sort of bottom-up approach that I referred to  
4 earlier, where you have a regional head of legal  
5 for each of those three regions that I mentioned.

6 So we have our head of legal for  
7 Africa/Middle East who is based in London, England;  
8 our legal for LATAM -- in fact, I stand to be  
9 corrected where he is based, so I'm not going to  
10 hazard a guess, but he's the regional lead for  
11 LATAM; and then we have the legal head for North  
12 America who is based in Salt Lake City, Utah.

13 113 Q. You referenced earlier Barrick's  
14 Human Rights Policy, and I'm going to direct you to  
15 paragraph 29 of your affidavit where you stated  
16 that:

17 "Barrick has prepared and  
18 approved a Human Rights Policy, and  
19 adheres faithfully to it."

20 Do you agree with that statement?

21 A. I do.

22 114 Q. And you are ultimately responsible  
23 for ensuring that Barrick adheres faithfully to its  
24 Human Rights Policy?

25 A. Ultimately, yes, I provide

1 oversight, but as mentioned earlier, there is a  
2 responsibility for each of our sites within the  
3 companies underneath Barrick that assists with  
4 implementation of that Human Rights Policy on a  
5 day-to-day basis.

6 115 Q. Right. But you would not disagree  
7 with me that you're ultimately responsible for  
8 ensuring that Barrick adheres faithfully to its  
9 Human Rights Policy, even though others are  
10 involved in implementing it?

11 A. Yes, I believe that is correct. I  
12 think you cited it in one of the paragraphs that we  
13 also have our head of compliance and risk that also  
14 oversees part of that implementation of the Human  
15 Rights Policy.

16 116 Q. And who is that person?

17 A. Ashleigh Lawson.

18 117 Q. And where is Ms. Lawson based?

19 A. She's based in London, England.

20 118 Q. I've now put on the screen Exhibit  
21 7 of your affidavit, which is Barrick Gold  
22 Corporation's Human Rights Policy. And you would  
23 agree that this policy applies to all of Barrick's  
24 operations?

25 A. It does. I think we do make a

1                   distinction where certain of our joint ventures,  
2                   you know, have their own human rights policies or  
3                   approaches. We will endeavour to, you know, put  
4                   this policy in front of them and align those two  
5                   generally, yes.

6       119                   Q.     But this does apply, for example,  
7                   to North Mara?

8                   A.     It does, yes.

9       120                   Q.     And these policies, from Barrick's  
10                   perspective, are mandatory?

11                   A.     Yes, they are.

12       121                   Q.     And what do you do if you find out  
13                   that policies are not being followed at a  
14                   particular mine?

15                   A.     We would have generally those --  
16                   the review that would make that finding is based on  
17                   those independent reviews that I referred to  
18                   earlier that goes through those aspects. Obviously  
19                   the human rights policy is an overarching document;  
20                   I think we've talked about the Voluntary Principles  
21                   Standard on Human Rights which would form part of  
22                   that, and obviously is how we implement the policy  
23                   that you have up there.

24                                 So generally, it would come through  
25                   those reviews that take place, and in each of

1           those, there are recommendations that are made  
2           should the policy not be followed, or ways to  
3           improve it.

4                           I would just add that certainly from my  
5           recollection on those reviews, I never made a  
6           finding that the policy hasn't been implemented,  
7           but rather some sections of perhaps the standard or  
8           aspects of the standards that could be improved on,  
9           but I don't think they've ever highlighted that the  
10          policy has not been implemented.

11       122                   Q.    All right.  I'm going to go next  
12          to the Conflict-Free Gold Policy, this is Exhibit  
13          9.  And Barrick is a member of the World Gold  
14          Council, correct?

15                           A.    That's correct.

16       123                   Q.    And North Mara Gold Mine Limited  
17          is not a member of the World Gold Council, correct?

18                           A.    Well, by nature of the fact that  
19          Barrick Gold is a member, North Mara Gold Mine  
20          Limited needs to adhere to those principles  
21          associated with that membership, so like the  
22          Responsible Gold Mining Principles and the  
23          Conflict-Free Gold Policy, so on that basis they  
24          need to align to those principles as one of the  
25          many companies underneath Barrick Gold.

1 124 Q. Right. So all of Barrick's  
2 companies need to abide by the Conflict-Free Gold  
3 Standard, correct?

4 A. That is correct.

5 125 Q. And the only entity that is  
6 formally a member of the World Gold Council is  
7 Barrick Gold Corporation, correct?

8 A. Yes, that is correct.

9 126 Q. And Barrick was involved in the  
10 formulation or, sorry, the formation of the  
11 Conflict-Free Gold Policy?

12 A. The Barrick Conflict-Free Gold  
13 Policy?

14 127 Q. Sorry, that was a poor question.  
15 The standard itself.

16 MR. THOMSON: Meaning the standard of  
17 the World Gold Council?

18 BY MR. WANLESS:

19 128 Q. Yes.

20 A. I can't answer that question. It  
21 predates my involvement.

22 129 Q. Okay. And I believe you mentioned  
23 a company that assists you with assurance and  
24 compliance, a company called Apex Companies; is  
25 that correct?

1 A. Yes, that is correct.

2 130 Q. Okay. And is it Barrick that has  
3 retained Apex?

4 A. I would need to -- I would need to  
5 check what entity has the contract.

6 131 Q. And Apex is based in the United  
7 States?

8 A. I believe so, yes.

9 132 Q. I'm going to go next to the  
10 Voluntary Principles on Human Rights which you  
11 discuss in your affidavit at paragraph 28, where  
12 you state:

13 "The Company has been a member  
14 of the Voluntary Principles  
15 Initiative since 2010. Indeed,  
16 Barrick was the first Canadian  
17 mining company to join."

18 Again, North Mara Gold Mine Limited is  
19 not itself a member of the Voluntary Principles  
20 Initiative?

21 A. No, as I said earlier, you know,  
22 as a part of the group of companies underneath  
23 Barrick Gold, they certainly subscribe to those  
24 Voluntary Principles.

25 133 Q. Right. But they're not a member.

1           You spoke earlier of a process you have to go  
2           through in order to obtain membership, and North  
3           Mara Gold Mine has not done that, correct?

4                           A.    No.

5    134                   Q.    But Barrick has?

6                           A.    Yes.  And maybe just for context,  
7           you know, when I refer to Barrick and many of the  
8           publications, we do so and we talk about, you know,  
9           all of the companies that exist underneath, the  
10          group of companies that exist under Barrick, so  
11          when we refer to Barrick Gold, I think it's done  
12          for simplicity and to be brief, you know, rather  
13          than listing all of the groups of companies that  
14          fall within Barrick Gold.

15   135                   Q.    All right.  And I'm directing you  
16          now to Exhibit 6 to your affidavit which is  
17          Voluntary Principles on Security and Human Rights  
18          Members.

19                           A.    Yes.

20   136                   Q.    And it lists a number of  
21          governments that are members, including Canada,  
22          correct?

23                           A.    That is correct.

24   137                   Q.    Tanzania is not a member; is that  
25          correct?

1 A. Not currently, no.

2 138 Q. And in terms of companies, Barrick  
3 Gold Corporation is listed, correct?

4 A. That is correct.

5 139 Q. And North Mara Gold Mine Limited  
6 is not, correct?

7 A. The company itself is not listed  
8 there, but Barrick Gold Corporation reports on  
9 behalf of North Mara Gold Mine Limited as one of  
10 the groups of companies under Barrick, as you would  
11 have seen in the annual report.

12 140 Q. I understand that you participated  
13 on behalf of Barrick in the VPI Plenary and  
14 Corporate Pillar meetings?

15 A. I have not in the last two plenary  
16 meetings. Duncan Pettit, who I mentioned earlier,  
17 has. Most recently there was one last week or two  
18 weeks ago in Washington, D.C., which he attended.

19 141 Q. So somebody from Barrick attends  
20 these annual plenary and corporate pillar meetings?

21 A. That's right.

22 142 Q. And Barrick Gold is a signatory to  
23 the UN Compact, correct?

24 A. The UN Global Compact?

25 143 Q. Yes.

1 A. That's correct.

2 144 Q. And again, North Mara Gold Mine  
3 Limited is not a signatory, correct?

4 A. Yes, as I explained before, you  
5 know, the reporting that Barrick Gold would do  
6 would be for the group of companies that fall  
7 within them, and North Mara Gold Mine Limited would  
8 be part of those.

9 145 Q. Fair enough. North Mara Gold Mine  
10 Limited has not independently signed the Global  
11 Compact?

12 A. No.

13 146 Q. You spoke earlier about third  
14 party human rights assessors. We have spoken about  
15 Apex so far and a company called Avanzar has come  
16 up. How long has Barrick worked with Avanzar?

17 A. Certainly for the last five years.  
18 I know that Avanzar provided services to various  
19 companies within Barrick Gold prior to the merger  
20 with Randgold. As you would have read in my  
21 affidavit, I was with Randgold Resources for a very  
22 short time before the merger, so I don't have the  
23 details, you know. It's January of 2019 in terms  
24 of how far Avanzar, you know, worked with Barrick  
25 before that time.

1 147 Q. Fair enough. But certainly  
2 Barrick has been working with Avanzar since 2019?

3 A. That's right.

4 148 Q. And as I understand it, Avanzar  
5 does a few things for you folks. They conduct  
6 independent human rights assessments, correct?

7 A. That's right.

8 149 Q. They help consult on your human  
9 rights standards; is that correct?

10 A. Yes, we ask them to review those  
11 in line with, you know, the Voluntary Principles on  
12 Security and Human Rights as well as the UN Guiding  
13 Principles.

14 150 Q. And they also provide human rights  
15 training?

16 A. That's correct. Not exclusively  
17 but they have, that's correct.

18 151 Q. All right. And that training is  
19 training to the employees of Barrick and Barrick  
20 subsidiaries, correct?

21 A. It actually is related just to the  
22 subsidiaries of Barrick. Really those sites which  
23 fall under the various group of companies, so for  
24 instance, they would have conducted human rights  
25 training at North Mara Gold Mine who is -- and the

1 entities owned by North Mara Gold Mine Limited. So  
2 they are focused on those group of companies and  
3 the sites that fall underneath those.

4 In terms of the corporate side of  
5 things, which as you may know is a very small team,  
6 I think we have 55 members in the Toronto office,  
7 and they would receive training through our  
8 internal training processes through Ashleigh Lawson  
9 who runs, as I mentioned earlier, the head of  
10 compliance and risk.

11 152 Q. All right. Regarding North Mara,  
12 just so I am clear on this, training is provided on  
13 security and human rights both to the private  
14 security contractor, correct?

15 A. Both?

16 153 Q. Sorry, to the private security  
17 contractor, correct?

18 A. That is correct.

19 154 Q. And also to the Tanzanian Police  
20 Force?

21 A. That is correct.

22 155 Q. And Avanzar is based in North  
23 America, correct?

24 A. I believe so, yes.

25 156 Q. And it has offices in Calgary,

1 Alberta and in California, correct?

2 A. Yes.

3 157 Q. Regarding the independent human  
4 rights assessments that Avanzar has done, they've  
5 done assessments for North Mara specifically,  
6 correct?

7 A. That is correct, yes.

8 158 Q. And in order to do that, they need  
9 access to documents, information and employees to  
10 speak with, correct?

11 A. That's correct.

12 159 Q. In your view, did they have the  
13 access that they needed to do their job?

14 A. I believe they did. It was --  
15 generally it's a week-long visit and they have just  
16 done that review, and the general manager at North  
17 Mara would facilitate that visit. He's responsible  
18 for setting up the agenda as well as making sure  
19 that all the heads of department are available for  
20 Avanzar, usually two individuals that come from  
21 Avanzar, to talk with them and obviously some of  
22 our contractors, too. It's not just the employees.

23 160 Q. How many independent human rights  
24 assessments have been conducted by Avanzar related  
25 to North Mara since 2019?

1                   A.    We certainly conducted one in 2021  
2                   and there was one in 2023.  I stand to be corrected  
3                   whether we conducted one in 2019; I don't believe  
4                   so.

5    161                Q.    All right.  Can you please produce  
6                   a copy of those reports from 2021 and 2023?

7    U/A               MR. THOMSON:  We'll take your question  
8                   under advisement.

9                   BY MR. WANLESS:

10   162               Q.   And I also understand assessments  
11                   were conducted by Synergy; is that correct?

12                   A.    Yes, I think there's probably some  
13                   useful context to provide there.  Those assessments  
14                   were not requested by North Mara Gold Mine Limited,  
15                   rather by North Mara Gold Mine Limited's refinery,  
16                   MMTC-PAMP, who were requested by the LBMA, the  
17                   London Bullion Market Association, who regulates  
18                   refineries, had requested that MMTC-PAMP contract a  
19                   third party independent expert to review North Mara  
20                   Gold Mine based on the OECD guidelines, due  
21                   diligence guidance.

22   163                Q.    All right.  And as I understand it  
23                   there were independent assessments in 2019, 2020  
24                   and 2022; is that correct?

25                   A.    No, I believe it was in 2019,

1 November of 2019, and in 2021, with a report issued  
2 in 2022.

3 164 Q. Got it. Other than the ones we  
4 have discussed so far, has Barrick had any other  
5 third party human rights assessments conducted  
6 related to North Mara?

7 A. I wouldn't -- those are certainly  
8 the two human rights impact assessments that have  
9 been reviewed. If I may just provide a little bit  
10 of clarity around the Synergy scope of work. You  
11 know, as I mentioned, it was based on the OECD Due  
12 Diligence Guidance and really that was in terms of  
13 the supply chain, so both upstream and downstream  
14 of the operation, and hence the reason the  
15 refineries were asked in the downstream of North  
16 Mara Gold Mine.

17 So it wasn't just looking at human  
18 rights aspects, the OECD guidance covers a number  
19 of the due diligence guidance on supply chain, it  
20 covers a number of aspects, but a component of it  
21 certainly was around various risks, perceived risks  
22 at North Mara Gold Mine, one of them being security  
23 and human rights, there were others in terms of  
24 environmental, too, that they looked at.

25 So it wasn't exclusively a human rights

1 impact assessment and nor do I think they would  
2 classify it as that.

3 And just to be clear, we've also had  
4 engagements with -- North Mara Gold Mine have had  
5 engagements with a number of local NGOs that come  
6 through to the mine on a quarterly basis. The mine  
7 invites them on a two-day visit to come and assess  
8 the mine. There's no formal report, but it is part  
9 of North Mara Gold Mine's engagement. As we do  
10 with the communities, we also engage with the NGOs.

11 165 Q. All right, thank you. I'm going  
12 to suggest a morning break or after an afternoon  
13 break, I guess.

14 MR. THOMSON: Sure.

15 MR. WANLESS: Maybe we could come back  
16 at let's make it 9:45. I don't think I'm going to  
17 be that much longer.

18 MR. THOMSON: Okay. Thanks very much.

19 MR. FRANKEL: So, Mr. Beringer, as we  
20 discussed, you remain under cross-examination. So  
21 you're not to speak with us or anybody else about  
22 the case or your evidence. We'll leave you alone  
23 in the boardroom.

24 THE WITNESS: I understand.

25 -- RECESS AT 9:19 --

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-- UPON RESUMING AT 9:45 --

BY MR. WANLESS:

166 Q. I'm told that I neglected to mark  
the Barrick Sustainability Report for 2023 as an  
exhibit, so I would like to do that now. I believe  
it's Exhibit 17.

MR. FRANKEL: Yes.

MR. WANLESS: Which is Barrick's  
Sustainability Report for 2023.

EXHIBIT NO. 17: Barrick's  
Sustainability Report 2023.

MR. THOMSON: That's fine.

BY MR. WANLESS:

167 Q. Mr. Beringer, in your affidavit  
you refer to and attach a number of Barrick  
policies. One of them is the Human Rights Policy  
that we've already discussed; another is attached  
as Exhibit 3, which is Barrick's Sustainable  
Development Policy; another that's attached is  
Exhibit 9, which is Barrick's Conflict-Free Gold  
Policy; attached as Exhibit 12 is Barrick's Code of  
Business Conduct and Ethics; attached as Exhibit 13  
is Barrick's Anti-Bribery and Anti-Corruption  
Policy; and attached as Exhibit 14 is Barrick's  
Social Performance Policy. And you would agree

1 with me that all of these policies are issued by  
2 Barrick?

3 A. Yes, that's correct.

4 168 Q. And they apply to all of Barrick's  
5 operations, including North Mara?

6 A. They do, with obviously the  
7 exception I mentioned earlier around --

8 [Reporter intervenes].

9 MR. THOMSON: You're breaking in and  
10 out.

11 THE WITNESS: I'll try and speak up.  
12 I'm not sure if anything's changed here.

13 MR. THOMSON: Sorry, Grant, please  
14 speak a little more slowly.

15 THE WITNESS: Okay. Sure. I was  
16 saying that with the exception of the JVs where  
17 they may have their own policies in place, we  
18 certainly engage with them on our policies, but  
19 they may have their own.

20 BY MR. WANLESS:

21 169 Q. When you speak of JVs, you're  
22 talking about joint ventures, correct?

23 A. That's correct.

24 170 Q. And the North Mara Mine does not  
25 fall under that joint venture exception, correct?

1                   A.    No, in that it is a partnership,  
2                   though, with the government.

3       171            Q.    No, I understand that.  I guess my  
4                   question is all the policies that I referred to,  
5                   all of them apply directly to North Mara, correct?

6                   A.    That is correct.

7       172            Q.    And all of these policies are  
8                   mandatory, correct?

9                   A.    Yes.

10      173            Q.    Are you aware of any lawsuit filed  
11                   in Tanzania against North Mara Gold Mine Limited or  
12                   Barrick Gold Corporation regarding any alleged  
13                   abuses or killing by Tanzanian Police at the North  
14                   Mara mine?

15                   A.    No, I'm not aware.

16      174            Q.    Are you aware of any lawsuits  
17                   filed in Tanzania against North Mara Gold Mine  
18                   Limited or Barrick Gold Corporation regarding any  
19                   alleged human rights abuse at the North Mara Mine?

20                   A.    Sorry, Cory, can you just explain  
21                   what the difference is between those two questions  
22                   you asked?

23      175            Q.    The second is a little broader.  
24                   The first related to alleged abuses or killing by  
25                   the Tanzanian Police, and the second question is

1                   regarding any alleged human rights abuse at the  
2                   North Mara Mine generally.

3                   A.     No, not that I know of.

4     176            Q.     All right.  And in your role as  
5                   sustainability executive, you would know if a  
6                   lawsuit was filed at North Mara alleging a human  
7                   rights abuse at that mine?

8                   A.     Yes, I would.

9                   MR. WANLESS:  All right.  Thank you.  
10                  Those are my questions.

11                  MR. THOMSON:  So I only have one  
12                  question in re-examination.

13                  RE-EXAMINATION BY MR. THOMSON:

14     177            Q.     Mr. Beringer, at the outset of  
15                   your examination you were asked about Barrick's  
16                   Human Rights Policy in particular, and you offered  
17                   to elaborate on how that policy was actually  
18                   implemented at the North Mara Mine.  Do you recall  
19                   that?

20                  A.     I do, yes.

21     178            Q.     And Mr. Wanless did not take you  
22                   up on your invitation but I will.  What is the  
23                   elaboration you are offering to provide?

24                  A.     I think what I was going to  
25                   explain, and I alluded to it a little bit later, is

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Court File No. CV-22-00690649-0000  
ONTARIO  
SUPERIOR COURT OF JUSTICE

B E T W E E N:

SOPHIA MATIKO JOHN, IN HER PERSONAL CAPACITY AND AS  
LITIGATION GUARDIAN FOR HER MINOR CHILD, KELVIN;  
ANACRETUS MARINGO GIMANWA; ESTA GEORGE RANGE, IN  
HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN  
FOR HER MINOR CHILDREN JOSEPH, GODFREY, FILEMON AND  
REBEKA; ELIZABETH MATIKO IRONDO; NEEMA STEPHEN  
JOHN, IN HER PERSONAL CAPACITY AND AS LITIGATION  
GUARDIAN FOR HER MINOR CHILDREN JOHN, MIRIAM, ESTA,  
AND TIMOTHY; MASWI MARWA MOHABE; DOTTO WILLIAM  
ITAMA, IN HER PERSONAL CAPACITY AND AS LITIGATION  
GUARDIAN FOR HER MINOR CHILD CHRISTINA; LYIMO ITAMA  
MACHELA; ITAMA MACHELA MAX; CHARLES DANIEL NYAKINA;  
BHOKE HAGALE MARO; DANIEL NYAKINA GHATI; DICKSON  
JULIUS SISE; SIBORA MARWA MWITA; EMMANUEL  
NYAKORENGA MBURI; RYOBA ELIAS KEBWE; PASCO  
MAREMBELA MWITA; NYAHELI MARWA NYAKORENGA;  
CHRISTOPHER JHOMU MAKENDE; RANGE MWITA RANGE;  
AND FREDY CHACHA WAMBURA LEMA  
Plaintiffs

- and -

BARRICK GOLD CORPORATION  
Defendant

-----  
--- This is the Cross-Examination of JEBRA KAMBOLE,  
on his affidavit sworn February 1, 2024, taken at  
the offices of the Hyatt Regency, 24 Kivukoni Road,  
Dar es Salaam, Tanzania, with participants  
attending both in person and virtually, on the 8th  
day of May, 2024.  
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1                   inappropriate and excessive fees for  
2                   unnecessary work contrary to law;"  
3                   Right?

4                   A.     Yes.

5           814           Q.     You will agree, I am sure,  
6           Mr. Kambole, that that rule does not forbid lawyers  
7           from charging fees that are below minimum amounts,  
8           does it?

9                   A.     That is prohibited.

10          815           Q.     Where in the rule that prohibits  
11          charging or receiving inappropriate and excessive  
12          fees for unnecessary work contrary to law is there  
13          a prohibition against charging fees that are too  
14          low? Please explain that to me.

15                   A.     Thank you. What I -- my opinion  
16          in this is that in Tanzania this is what you call  
17          undercutting, which is unethical for lawyers in  
18          Tanzania. And if you refer a proper interpretation  
19          of 6.1(1) for "charging and or receiving  
20          inappropriate and excessive", so it is depending on  
21          your interpretation of "inappropriate".

22                   And we look at the regulation as a  
23          whole, not in pieces. So you read together this  
24          regulation together with the other part of the  
25          regulation, so that you get the concept of what is

1           meant by undercutting.

2           816           Q.    You have not referred to a  
3           different provision other than the one that we are  
4           about to come to.  This is the provision you have  
5           referred to, right?

6           A.    Yes.

7           817           Q.    And your evidence, so that I  
8           understand it, is that when -- and just so we are  
9           clear, it says "inappropriate and excessive".  It  
10          does not say "inappropriate [or] excessive";  
11          correct?

12          A.    Yes, it is correct.

13          818           Q.    And just so I understand it,  
14          because I want to be fair to you --

15          A.    Yes.

16          819           Q.    -- because the Court is going to  
17          be asked to form a different view, your evidence is  
18          that when this regulation contains a prohibition on  
19          "charging and or receiving inappropriate and  
20          excessive fees for unnecessary work contrary to  
21          law", what that is actually prohibiting is  
22          undercutting other lawyers by charging fees that  
23          are too low?  That is your evidence?

24          A.    To my interpretation and in my  
25          opinion, charging or receiving inappropriate and

1 A. Yes, because it also concerned  
2 myself.

3 1042 Q. Because?

4 A. Because it also attaching myself.  
5 We are charged together.

6 1043 Q. The charge was made, this is what  
7 you are saying to me, that the charge was made and  
8 it was withdrawn?

9 A. Yes.

10 1044 Q. You have attached no document in  
11 describing the matter of Mr. Kilatu that reflects  
12 that the charge against him was motivated by his  
13 involvement in public interest cases; correct?

14 A. I do not attach any documents.

15 1045 Q. Now, the next person that you  
16 refer to is Tito Elia Magoti?

17 A. Yes.

18 1046 Q. Were you present when he was  
19 apparently abducted by four unidentified people?  
20 Were you there?

21 A. I was his counsel.

22 1047 Q. Were you there when he was  
23 apparently abducted?

24 A. No, no.

25 1048 Q. What you are saying in this

1           subparagraph (c) is information that Mr. Magoti  
2           provided to you?

3                   A.    Yes, because I was the counsel  
4           representing him in court.

5    1049           Q.    I understand that.

6                   A.    Yes.

7    1050           Q.    But my question is simply whether  
8           this is based on information he provided to you?

9                   A.    This is from the information, the  
10          access of the documents which you have, the access  
11          of being the counsel of himself, I have the charge  
12          sheet and I know it. I was represent him in the  
13          Eastern Court of Justice, though I did not mention  
14          it.

15   1051           Q.    You represented him in the Eastern  
16          Court of Justice; is that what you just said?

17                   A.    Yes.

18   1052           Q.    None of the documents you just  
19          referred to is attached to this affidavit or your  
20          report?

21                   A.    Yes.

22   1053           Q.    And you are aware, are you, that  
23          Tito Elia Magoti is not a witness in this  
24          proceeding?

25                   A.    I don't know what --

1 1054 Q. All right, well, you can take it  
2 from me I have no way to cross-examine him, so all  
3 I have is you, Mr. Kambole --

4 MR. FIORANTE: Well, that is not --

5 MR. FRANKEL: -- in front of me right  
6 now --

7 MR. FIORANTE: Sorry, Counsel, that is  
8 not an appropriate statement.

9 MR. FRANKEL: Okay.

10 MR. FIORANTE: It is of no concern to  
11 this witness who you get to cross-examine.

12 So you can ask your question based on  
13 his report, but you need to refrain from  
14 editorializing.

15 BY MR. FRANKEL:

16 1055 Q. Well, all right, Mr. Fiorante,  
17 we'll have to agree to disagree. I think I have  
18 made a statement of fact, but that is fine.

19 Let's look at subparagraph (d), and you  
20 deal there with Boniface Mwabukusi?

21 A. Yes.

22 1056 Q. Now, are you aware that he had in  
23 fact provided an affidavit in this case?

24 A. I don't know.

25 1057 Q. You didn't know that?

1 A. That he provide the affidavit in  
2 this case?

3 1058 Q. Yes. Did you know that?

4 A. No.

5 1059 Q. You again have provided no  
6 documents pertaining to the statements that you  
7 make about Mr. Mwabukusi?

8 A. Yes.

9 1060 Q. And of course, in that  
10 subparagraph (d) of paragraph 51, you don't  
11 describe the nature of the alleged misconduct that  
12 he was charged with; correct?

13 A. I did not mention it exactly on  
14 the cases of misconduct, but I just mentioned later  
15 the intention of charging him for treason offences.

16 1061 Q. The next subparagraph is about  
17 Dr. Rugemeleza Nshala?

18 A. Yes.

19 1062 Q. And again, you have attached no  
20 documents to your report concerning Dr. Nshala?

21 A. Yes.

22 1063 Q. You say he reported the matter of  
23 death threats to the police?

24 A. Yes.

25 1064 Q. Were you there when he did that?

1 A. Yes.

2 1065 Q. You were?

3 A. Yes.

4 1066 Q. All right. The next subparagraph  
5 is about Mr. Mpoki?

6 A. Yes.

7 1067 Q. Were you present during the  
8 hearing of the Advocates Committee that you  
9 describe in the first sentence?

10 A. Yes.

11 1068 Q. You were not an advocate for  
12 Mr. Mwabukusi in that Committee Hearing; correct?

13 A. In that proceedings?

14 1069 Q. Yes, I'm asking about the first  
15 sentence.

16 A. I was there.

17 1070 Q. You were there?

18 A. Yes, and there were a number of  
19 lawyers included, but the leading counsel was  
20 Dr. Nshala and Mr. Mpale Mpoki.

21 1071 Q. And nowhere here did you say that  
22 you were one of the lawyers for Mr. Mwabukusi;  
23 correct?

24 A. Yes, I do not mention it.

25 1072 Q. You did not attach any documents

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Court File No. CV-22-00690649-0000  
ONTARIO  
SUPERIOR COURT OF JUSTICE  
B E T W E E N:  
OPHIA MATIKO JOHN, IN HER PERSONAL CAPACITY AND AS  
LITIGATION GUARDIAN FOR HER MINOR CHILD, KELVIN;  
ANACRETUS MARINGO GIMANWA; ESTA GEORGE RANGE, IN  
HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN  
FOR HER MINOR CHILDREN JOSEPH, GODFREY, FILEMON AND  
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MWITA; NYAHELI MARWA NYAKORENGA; CHRISTOPHER  
JHOMUMAKENDE; RANGE MWITA RANGE; AND  
FREDY CHACHA WAMBURA LEMA

Plaintiffs,

- and -

BARRICK GOLD CORPORATION

Defendant.

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--- This is the Cross-Examination of DR. WILBERT  
KAPINGA, upon his Affidavit sworn April 4th, 2023,  
taken via Veritext Legal Solution Canada's Zoom  
virtual platform, with all participants attending  
remotely, on the 22nd day of May, 2024.

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1 claim by Modesta and several other individuals, and  
2 then there are matters in the Land and Housing  
3 Tribunal in a District in Musoma for claims for  
4 compensation of land taken over by -- by North Mara  
5 Gold Mine, there are a couple of cases there, one  
6 by Augustino Sasi, another one by a certain Daniel  
7 Marwa; there is a third one which I can't remember  
8 off the top of my head.

9 But the three matters in the Land  
10 Tribunal and two matters in the High Court in  
11 Mwanza, sorry, in Musoma, and in Dar es Salaam,  
12 there is a contractual dispute in the commercial  
13 division of the High Court of Tanzania, and there  
14 is also an arbitration on a production -- on a  
15 production agreement by some supplier, okay.

16 10 Q. Okay, thank you for that. Are you  
17 aware of any lawsuits brought in Tanzania against  
18 North Mara Gold regarding deaths at the North Mara  
19 Mine allegedly caused by police?

20 A. No, not in Tanzania, no.

21 11 Q. Okay. And have you ever handled  
22 the defense of such a matter for North Mara Gold?

23 A. I have not.

24 12 Q. And similarly, are you aware of  
25 any lawsuits brought in Tanzania against Barrick

1 Gold regarding deaths at the North Mara Gold Mine  
2 allegedly caused by police?

3 A. I am not aware of any such claims.

4 13 Q. Okay. And do you have any role  
5 for Barrick or North Mara Gold in the defense of  
6 this lawsuit?

7 A. No, I have no role.

8 14 Q. And do you ever act as legal  
9 counsel for Barrick Gold directly?

10 A. Not directly. There are a couple  
11 of matters in which Barrick Gold has been -- has  
12 been joined in the contract dispute which is filed  
13 in the commercial court, it's named there, so yes,  
14 in that sense, I do act.

15 15 Q. Okay. So if they're named in a  
16 lawsuit in Tanzania, you might act as their legal  
17 counsel?

18 A. Yes.

19 16 Q. Okay. Your affidavit deals with a  
20 letter that you sent to a Dr. Chacha Murungu and  
21 Mr. Daud Mahemba on January 30th, 2023; is that  
22 correct?

23 A. That's correct, sir.

24 17 Q. And this letter is attached as  
25 Exhibit 9 to your affidavit, correct?

1 raise concerns as to whether Mr. Murungu and Mr.  
2 Mahemba entered into contingent fee or success fee  
3 with the plaintiff, correct?

4 A. That's correct.

5 24 Q. And you raise similar concerns  
6 about whether they had entered into litigation  
7 funding arrangements with third-party funders,  
8 correct?

9 A. That is correct.

10 25 Q. And you raise those concerns  
11 because contingency fee arrangements are not  
12 permitted in Tanzania, correct?

13 A. That's -- that's the reason for  
14 raising that.

15 26 Q. And the same thing with success  
16 fee, they're not permitted in Tanzania?

17 A. Unless they're combined with a fee  
18 arrangement or a fee has been paid in advance, or a  
19 fee agreement, yes. Success fee will be permitted.

20 27 Q. But what is not permitted is the  
21 lawyers offer their services without payment up  
22 front but are paid if they win at the end. That's  
23 not allowed?

24 A. That's not allowed, yes.

25 28 Q. And then similarly, litigation

1 funding by third parties is not allowed?

2 A. Litigation by third parties is not  
3 something which has been contemplated in our  
4 practice, it's very recent, but it does -- it might  
5 fall within the general -- the general concept of  
6 funding by the lawyer who is running the case,  
7 maintaining the case.

8 29 Q. And the idea being that if any --  
9 if anyone is funding the case, and they're going to  
10 receive a benefit at the end, that's not permitted?

11 A. That's not permitted, yes.

12 30 Q. Okay. What are the consequences  
13 to a lawyer for entering into a contingent fee  
14 arrangement in Tanzania?

15 A. Well, the main consequence is they  
16 would have violated the law, and penal proceedings  
17 may be taken against them.

18 31 Q. Okay. Disciplinary proceedings,  
19 you mean the Advocates Committee?

20 A. Yes, if complaint is placed before  
21 the Advocates Committee, it may look into that.

22 32 Q. And do you know what the  
23 consequences of that might mean, would disbarment  
24 be a possibility?

25 A. Well, depending on the severity,

1 A. I do. Yes, I do.

2 60 Q. In your article, you draw specific  
3 attention to the case of tee Tom TUM May goatee.  
4 Do you consider his case to be a miscarriage of  
5 justice?

6 A. Well, can you display the chapter  
7 somewhere so that I'm certain of what I said about  
8 him?

9 61 Q. Sure, I can do that. Before I do,  
10 actually, I just want your opinion on that. Do you  
11 consider his case to be a miscarriage of justice?

12 A. Not necessarily. I haven't used  
13 that terminology in that.

14 62 Q. No, I know. I'm asking you a  
15 question. I'm not saying that I'm quoting you, I'm  
16 asking you a question.

17 A. I don't think I should respond to  
18 that because I didn't express that opinion. All  
19 that article is doing is to show how the plea  
20 bargaining practice was used for certain political  
21 ends in some cases.

22 63 Q. Right.

23 A. As reported.

24 64 Q. Right. And it's fair to say that  
25 essentially it's being abused by the government to

1 extort people?

2 A. At the time, yes.

3 65 Q. I'm going to put on the screen the  
4 article. Now, just making sure that the screen  
5 share works, do you folks see a document that reads  
6 "Tanzania Yearbook of Public Law 2022"?

7 MR. FRANKEL: Yes.

8 THE WITNESS: Yes, I can see the part  
9 of the cover page.

10 BY MR. WANLESS:

11 66 Q. All right. And counsel, I shared  
12 this document with you last night with the  
13 condition that it wouldn't be opened until this  
14 examination. Do you happen to have it in front of  
15 you, Mr. Frankel?

16 MR. FRANKEL: I have it on my iPad and  
17 I only opened it after the witness was under  
18 affirmation and you started the cross-examination.

19 MR. WANLESS: Okay, thank you.

20 BY MR. WANLESS:

21 67 Q. All right. So just to confirm,  
22 this is the -- this is a copy of the "Tanzania  
23 Yearbook of Public Law" that you just discussed,  
24 correct?

25 A. That is correct. That is correct.

1 I see the first page, yes.

2 68 Q. Okay. And then I'm going to flip  
3 to the table of contents and in the table of  
4 contents, it refers to "Plea Bargaining" by Wilbert  
5 B. Kapinga; that's you, correct?

6 A. That's correct.

7 69 Q. And then the next page which  
8 starts on page 41 of the yearbook is your article,  
9 and can you confirm that this is the article that  
10 we've been discussing?

11 A. This is the article, yes.

12 70 Q. All right. Could we mark this  
13 document as Exhibit number 1, please.

14 MR. FRANKEL: Sorry, counsel, I think a  
15 better way to do this, if I might, would be to mark  
16 it sequentially the next number. We've been  
17 continuing from one examination to the other in a  
18 sequence, so I believe the next number would be 13  
19 if that's all right.

20 MR. WANLESS: I know that makes a lot  
21 of sense to me, yes, so if we can mark it as  
22 Exhibit 13, please.

23 MR. FRANKEL: Yes.

24 EXHIBIT NO. 13: Publication entitled  
25 "Tanzania Yearbook of Public Law 2022."

Court File No. CV-22-00690649-0000

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

SOPHIA MATIKO JOHN, IN HER PERSONAL CAPACITY AND AS LITIGATION  
GUARDIAN FOR HER MINOR CHILD, KELVIN; ANACRETUS MARINGO GIMANWA;  
ESTA GEORGE RANGE, IN HER PERSONAL CAPACITY AND AS LITIGATION  
GUARDIAN FOR HER MINOR CHILDREN JOSEPH, GODFREY, FILEMON AND  
REBEKA; ELIZABETH MATIKO IRONDO; NEEMA STEPHEN JOHN, IN HER  
PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR  
CHILDREN JOHN, MIRIAM, ESTA AND TIMOTHY; MASWI MARWA MOHABE;  
DOTTO WILLIAM ITAMA, IN HER PERSONAL CAPACITY AND AS LITIGATION  
GUARDIAN FOR HER MINOR CHILD CHRISTINA; LYIMO ITAMA MACHELA; ITAMA  
MACHELA MAX; CHARLES DANIEL NYAKINA; BHOKE HAGALE MARO; DANIEL  
NYAKINA GHATI; DICKSON JULIUS SISE; SIBORA MARWA MWITA; EMMANUEL  
NYAKORENGA MBURI; RYOBA ELIAS KEBWE; PASCO MAREMBELA MWITA;  
NYAHELI MARWA NYAKORENGA; CHRISTOPHER JHOMU MAKENDE; RANGE  
MWITA RANGE; AND FREDY CHACHA WAMBURA LEMA

Plaintiffs

- and -

BARRICK GOLD CORPORATION

Defendant

**DOCUMENTS FOR USE IN EXAMINATION OF WILBERT KAPINGA**

EXHIBIT

13

# TANZANIA YEARBOOK OF PUBLIC LAW 2022



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## PLEA BARGAINING

Wilbert B. Kapinga

Bowmans Tanzania, Dar es Salaam

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### Introduction

Plea bargaining was introduced to Tanzania's criminal justice system in September 2019 by Part IV of The Written Laws (Miscellaneous Amendments) (No. 4) Act, 2019 (the Amendment Act) which amended s 194 of the Criminal Procedure Act (the CPA).<sup>1</sup> The Amendment Act introduced a pre-trial procedure which allowed for negotiation prior to a plea to criminal charges.<sup>2</sup> The negotiation between the accused and the prosecution results in a plea-bargaining agreement (PBA) under which the accused agrees to plead guilty to a particular offence or a lesser offence in exchange for certain concessions from the prosecutor which may not be limited to merely a more lenient potential sentence or the withdrawal of other criminal charges.<sup>3</sup> In other words, plea bargaining covers all circumstances in which incarcerated criminal suspects are induced to plead guilty in anticipation that they will receive a more lenient sentence by doing so.

The policy reasons for introducing plea bargaining to Tanzania are said to be: (1) a reduction of case backlogs; (2) the timely delivery of justice; and (3) a reduction in inmate congestion in remand prisons. Prior to its implementation, the PBA between the prosecution and the defence must be registered in court. Apparently, to achieve the above policy objectives without delay and despite the lack of implementing regulations, numerous PBAs were made and

- 
- 1 Cap. 20 R.E. 2019. In this article, unless the context otherwise appears, references to section(s) or their abbreviated form 's' or 'ss' are references to the CPA.
  - 2 President John Pombe Magufuli assented to the Amendment Act on 19 September 2019.
  - 3 Objects contained in the Special Bill Supplement published on 30 May 2019 with respect to Part IV of The Written Laws (Miscellaneous Amendments) (No. 4) Act, 2019.

The plea agreement form is provided in the First Schedule to the Rules.<sup>37</sup> Where the agreement provides for compensation to be paid to the victim by an accused person, the value or form of compensation must be negotiated between the victim and the accused person and endorsed by the prosecutor if, in his opinion, the compensation serves the ends of justice.<sup>38</sup> Where negotiations for compensation payable to the victim break down or the prosecutor determines that the proposed compensation defeats the ends of justice, the prosecutor is not to include a compensation proposal in the final draft of the agreement.<sup>39</sup>

### The Practice of Plea Bargains in Tanzania

The tale about the practice of plea bargaining does not begin with the passing of the Amendment Act in September 2019 or indeed the promulgation of the PBA Rules in February 2021. There are reported accounts of apparently arbitrary arrests and incarcerations of certain persons, many of them were wealthy or were senior executives of mega corporations in Tanzania who were subjected to threats and coercion into paying huge sums of money to 'purchase' their liberty through plea bargaining. The tale is not about reduction of case backlogs or alleviation of inmate congestion of petty criminals languishing in remand prisons.<sup>40</sup> It is the tale of apparent state extortion of large sums of money from wealthy individuals and entities to fund mega infrastructure projects and the health sector in Tanzania. In the account I offer below, it has now come to light that there was a vast fraud perpetuated upon the money collected via plea agreements.<sup>41</sup>

Now I turn to some of the reported accounts and *dramatis personae* of the plea-bargaining practice. The earliest reported accounts of plea-bargaining

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37 r 9.

38 r 10(2).

39 r 10(4).

40 Nyagawa, Kelvin, Exzaudi. 'Research Report on the Efficacy of Laws and Institutions Governing Plea Bargaining in Tanzania' Research Paper for the Partial Fulfilment of the Requirements of the Degree of Bachelor of Laws (LLB), Mzumbe University, Tanzania, 2022, at p.67.

41 'Massive Fraud at the DPP's office as plea bargain money stashed away in China' *The Citizen*, Tanzania, 01 February 2023 – reported by Owere, Paul, Web Editor, Mwananchi Communications Limited.

involved a businessman, Akram Azizi, who was charged with economic sabotage and held in remand prison in 2018. He was released from remand custody after a plea agreement and payment of TShs. 259 million to the government. The prosecution withdrew the money laundering charges against him, and a plea was entered into for a lenient sentence.<sup>42</sup>

On 30 September 2019, President John Magufuli received a report by the DPP showing that some 467 people facing economic crime charges were ready to negotiate their freedom. Speaking at State House, Dar es Salaam, the DPP, Biswalo Mganga, reported to the President that the accused had agreed to pay a total of TShs. 107.8 billion, the sum they allegedly acquired illegally.<sup>43</sup> This development was apparently triggered by President John Magufuli, who on or about 22 September 2019, had directed the DPP to immediately allow those arrested and remanded on economic crimes to plea bargain by the end of mid-October 2019.<sup>44</sup> President Magufuli said the money would be directed to development projects for infrastructure and health sectors.<sup>45</sup> It is notable that the President's directive of 22 September 2019 was given barely three days after he had assented to the Amendment Act. By the end of that month the DPP had a report at hand for the President indicating that over 460 inmates facing economic crime charges were ready to plea bargain for their liberty. The haste with which plea bargain process was undertaken raises concerns whether the criminal suspects had waived their constitutional rights under Article 13 of the Constitution of Tanzania for a fair hearing and not to be treated as guilty of the offence until proved guilty.

In April 2019, the leading mobile phone service provider Vodacom Tanzania Plc, agreed to plead guilty to economic crime charges and to pay TShs. 5.28 billion to the government after Vodacom's managing director, Hisham Hendi, and four other executives of the company were charged with economic crimes.<sup>46</sup> Other accounts of wealthy individuals who plea bargained for their liberty during 2019 and 2020 (when the implementing regulations for plea bargaining were not yet in place) include: Sanjeev Kumar, the former chief executive of Bank-M, who agreed with the DPP to pay TShs. 8 billion after he

42 *The Citizen Newspaper*, Tanzania, 18 December 2018.

43 *The Citizen Newspaper*, Tanzania, 30 September 2019.

44 *Id.*

45 *Id.*

46 *The Citizen Newspaper*, Tanzania, 11 April 2019.

admitted the charges with Prevention and the DPP to pay the accused's household wello and Hal thereafter agreed US\$388,000 in us Mwanyika, two other served prison before that resulted in their liberty.

Some of the PBA Rules include of embezzled TShs. 309,461 dropped and later paying only Mustapha Yusuf manipulating allegedly occasionally entering into allowing the g

There are also for exercising incarceration bargaining schemes whose money remand prison failure to do so him.<sup>49</sup> Tito Ma

47 *Supra*, fn. 2.

48 *Supra*, fn. 2.

49 *Supra*, fn. 2.

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admitted the money laundry charges against him; Yasin Katera, who was charged with money laundering together with the former director of the Prevention and Combating of Corruption Bureau, Godfrey Gugai, agreed with the DPP to pay TShs. 100 million and for the government to confiscate the accused's house at Nyegezi, Mwanza; two businesswomen, Magdalena Uh-wello and Halima Nsubuga, who admitted to money laundering charges and thereafter agreed with the DPP to pay TShs. 101 million and to their US\$388,000 in the bank being confiscated by the government; and Deograti-us Mwanyika, a former senior executive of Bulyanhulu Gold Mine Limited and two other senior executives of the company who spent 526 days in remand prison before concluding an agreement with the DPP to pay TShs. 1.5 billion that resulted in 38 money laundering charges being dropped and them gain- ing their liberty.<sup>47</sup>

Some of the plea bargain cases which were concluded in 2021 under the PBA Rules include those of Harbinder Seth Singh, who faced 12 charges of embezzlement and money laundering allegedly causing loss of TShs. 309,461,300,158.27. But after accepting a plea the charges were dropped and he agreed to pay TShs. 26 billion to secure his freedom, howev- er paying only TShs. 200 million at the time of his release; and Mohamed Mustapha Yusufuali, who allegedly generated TShs. 7 million per minute by manipulating Tanzania Revenue Authority Electronic Fiscal Devices and alleg- edly occasioning loss of TShs. 27 billion to the government, was set free after entering into a plea agreement with the DPP to pay TShs. 1,201,000,000 and allowing the government to confiscate his four houses.<sup>48</sup>

There are also the not-too-wealthy but who had offended the powers that be for exercising their constitutional right of free speech and who did not escape incarceration in remand prisons and were subjected to the seedy plea- bargain scheme. A case in point is that of the *Republic v. Erick Kabendera* whose money laundering charges were dropped, and he was released from remand prison after agreeing to pay TShs. 100 million in instalments and after failure to do so left the DPP with the option to reframe the charges against him.<sup>49</sup> Tito Magoti, a lawyer and outspoken critic of government who was

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47 *Supra*, fn. 22 at p.69.

48 *Supra*, fn. 22 at p.70.

49 *Supra*, fn. 22 at p.68.



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others who had 15 counts of occasioning loss, during the implementation of the Dar es Salaam Rapid Bus System project, levelled against them.<sup>56</sup>

Regarding the money collected from plea bargaining agreements, the President of Tanzania, Samia Suluhu Hassan, recently said that the government is investigating a bank account in China where money collected from plea bargains in the DPP's office was reportedly stashed away.<sup>57</sup> There are indeed conflicting reports within government between the Ministry of Justice and the Controller and Auditor General (CAG) as to the amount that was collected between July 2020 and April 2021. The Ministry report gave an account of TShs. 35.07 billion while the CAG reported a collection of TShs. 51 billion.<sup>58</sup>

### Concluding Remarks

In the USA, South Africa and the United Kingdom, plea bargains have been lauded for increasing the efficiency of the courts and for the reduction of expense and time for the accused. Critics of plea bargaining complain that this efficiency comes at the expense of transparency and justice.<sup>59</sup> The concept carries with it an inherent risk that the accused are not equally treated and hence that there is no equal protection before the law.<sup>60</sup> While it is too early to assess the impact of plea bargaining on the Tanzanian criminal justice system, the use of plea bargaining is likely to inspire controversy over issues such as its potentially coercive effect on incarcerated persons who might feel pressured to enter into a plea bargain to avoid the more serious consequences that would result from conviction.

Plea bargaining will be open to criticism on grounds that its close relationship with rewards, threats and coercion potentially endangers the correct legal outcome.<sup>61</sup> In circumstances where the so-called information gathering value of plea bargaining pressures an accused to cooperate with the prosecution,

56 *Daily News*, Tanzania, 3 June 2022.

57 <https://www.thecitizen.co.tz/tanzania/news/national/massive-fraud-at-the-dpps-office-as-plea-bargain-money-stashed-away-in-china-4106530>.

58 *Id.*

59 See: Thomas, *supra*, pp.177 to 178; and Steyn, *supra*, p. 218.

60 Steyn, *supra*, p.217.

61 Bawden, Tom (28 November 2007), 'Analysis: The Natwest Three Plea Bargain', *The Times*, London.

the coercive effect of plea bargaining begets the incarcerated person's dilemma: it is in the interest of one accused to confess and testify against another, irrespective of the innocence of either. Arguably, the worst case is when only one party is guilty. Here, the innocent one is unlikely to confess, while the guilty is likely to confess and testify against the innocent. Other potential criticisms are that plea bargaining allows offenders to escape appropriate punishment for their crimes. Also, arguably, the existence of plea bargains penalizes those who exercise their constitutional right to trial. Other arguments include that of innocent suspects sometimes agreeing to plea bargains because they are bewildered by justice system and do not know else what to do.

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**Introduction**

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Court File No. CV-22-00690649-0000  
ONTARIO  
SUPERIOR COURT OF JUSTICE  
B E T W E E N:  
SOPHIA MATIKO JOHN, IN HER PERSONAL CAPACITY AND AS  
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ANACRETUS MARINGO GIMANWA; ESTA GEORGE RANGE, IN  
HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN  
FOR HER MINOR CHILDREN JOSEPH, GODFREY, FILEMON AND  
REBEKA; ELIZABETH MATIKO IRONDO; NEEMA STEPHEN  
JOHN, IN HER PERSONAL CAPACITY AND AS LITIGATION  
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AND TIMOTHY; MASWI MARWA MOHABE; DOTTO WILLIAM  
ITAMA, IN HER PERSONAL CAPACITY AND AS LITIGATION  
GUARDIAN FOR HER MINOR CHILD CHRISTINA; LYIMO ITAMA  
MACHELA; ITAMA MACHELA MAX; CHARLES DANIEL NYAKINA;  
BHOKE HAGALE MARO; DANIEL NYAKINA GHATI; DICKSON  
JULIUS SISE; SIBORA MARWA MWITA; EMMANUEL  
NYAKORENGA MBURI; RYOBA ELIAS KEBWE; PASCOMAREMBELA  
MWITA; NYAHELI MARWA NYAKORENGA; CHRISTOPHER  
JHOMUMAKENDE; RANGE MWITA RANGE; AND  
FREDY CHACHA WAMBURA LEMA

Plaintiffs,

- and -

BARRICK GOLD CORPORATION

Defendant.

-----

--- This is the Cross-Examination of FATMA AMANI  
KARUME, upon his Affidavit sworn January 27th,  
2024, taken via Veritext Legal Solution Canada's  
Zoom virtual platform, with all participants  
attending remotely, on the 25th day of June, 2024.

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1 files.

2 177 Q. And am I correct that to your  
3 knowledge, the investigation of the bombing of your  
4 office and Mr. Lissu's attempted assassination  
5 remain open today?

6 A. To date, yes.

7 178 Q. There have been no arrests to  
8 date, correct?

9 A. No arrests to date.

10 179 Q. Okay. Now, paragraph 17 of your  
11 affidavit, you refer to a 2018 report by the  
12 American Bar Association, correct?

13 A. Yes.

14 180 Q. The title of that report was  
15 "Warning Shots: Threats to the Independence of the  
16 Legal Profession in Tanzania."

17 A. Yes.

18 181 Q. And you have attached extracts  
19 from that report to your affidavit as Exhibit B,  
20 correct?

21 A. Yes.

22 182 Q. The report was published in April  
23 of 2018?

24 A. Yes.

25 183 Q. And we can agree that this was a

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Court File No. CV-22-00690649-0000  
ONTARIO  
SUPERIOR COURT OF JUSTICE  
B E T W E E N:  
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MWITA; NYAHELI MARWA NYAKORENGA; CHRISTOPHER  
JHOMUMAKENDE; RANGE MWITA RANGE; AND  
FREDY CHACHA WAMBURA LEMA

Plaintiffs,

- and -

BARRICK GOLD CORPORATION

Defendant.

-----

--- This is the Cross-Examination of BONIFACE A.K.  
MWABUKUSI, upon his Affidavit sworn January 30th,  
2024, taken via Veritext Legal Solution Canada's  
Zoom virtual platform, with all participants  
attending remotely, on the 20th day of June, 2024.

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1           139                           Q.    And if we look at the reasons, now  
2    turn to page 3 of the reasons of Justice Ismail,  
3    you see the second paragraph on the page, it starts  
4    with the words, "Subsequent to execution of the  
5    IGA," do you see that?

6    A.    Yes.

7           140                           Q.    If we look at the last part of  
8    that paragraph, just the last sentence, the court  
9    says this:

10    "In the end, the IGA was given  
11    a resounding nod by a majority of  
12    Members of Parliament in attendance  
13    on the day." (As read)

14    A.    Correct.

15           141                           Q.    Now, am I right that shortly after  
16    the IGA was approved by the Tanzanian Parliament,  
17    four citizens of Tanzania commenced these  
18    proceedings in the High Court of Tanzania in Mbeya?

19    A.    Correct.

20           142                           Q.    This was really a challenge to the  
21    legality of the ports deal, correct?

22    A.    Correct.

23           143                           Q.    Am I also correct that you were  
24    one of four lawyers for the applicants in this case  
25    when it was argued before this panel of three

1 judges of the High Court in Mbeya in July of 2023?

2 A. I was a leading lawyer, correct.

3 144 Q. Okay. And if we look at page 9 of  
4 the decision, the first sentence of that first full  
5 paragraph, it says:

6 "Hearing of the matter was  
7 through oral submissions that pitted  
8 Messrs. Mpale Mpoki, [you], Phillip  
9 Mwakilima...and Levino  
10 Ngalimitumba..., " against a number  
11 of lawyers for the Government of Tanzania.

12 Correct?

13 A. Correct.

14 145 Q. So there were -- as I understand  
15 it, there were four lawyers then acting for the  
16 petitioners when this matter was argued in July of  
17 2023 and they included you, Mr. Mpoki, and two  
18 other lawyers?

19 A. Correct.

20 146 Q. Now, am I correct that on July 3  
21 of 2023, while this petition was pending before  
22 these three justices of the High Court, you held a  
23 media briefing on the steps of the High Court in  
24 Mbeya?

25 A. It was not a media briefing, it

1 rallyes'."

2 I take it that's an accurate quote of  
3 what you said in this media briefing on August 10,  
4 correct?

5 A. I remember saying that, but not in  
6 this way, but I said something of that nature.

7 500 Q. And then reading down to the  
8 next paragraph:

9 "'To want to protect the  
10 resources of this country is not  
11 treasonous. We will inform the  
12 respective authority just as the law  
13 has prescribed. And we will also  
14 inform Tanganyikans that it is time  
15 to protect our resources'."

16 Again, that's an accurate quote of what  
17 you said during the media briefing on August 10?

18 A. Yeah, because I was being accused  
19 of treason even before that date. That's the  
20 meaning of that quotation. Even before that, I was  
21 arrested. Maybe three or four times, they are  
22 accusing that I'm being backed (inaudible), they  
23 are finding the case. So, I was saying that I was  
24 not doing anything treasonable, to stand for what I  
25 think is right. And so I was reiterating. So I

1 can recall speaking some of it but not everything  
2 the way they put it.

3 501 Q. Skip down a paragraph, the last  
4 paragraph on the page:

5 "However, Mwabukusi said the  
6 people would give the government a  
7 fourteen-day ultimatum to change the  
8 agreement's terms. If it didn't,  
9 the people would use their  
10 constitutional rights to refuse to  
11 obey the current government,  
12 including refusing to pay taxes  
13 until authorities came to honour  
14 their demands."

15 Again, you made that statement during  
16 the media briefing of August 10?

17 A. I cannot recall that. I cannot  
18 recall that, no.

19 502 Q. You don't deny having made the  
20 statement though, do you?

21 A. I said I'm not recalling on that,  
22 so I cannot confirm something which I don't know.

23 503 Q. Now, did you read this article in  
24 The Chanzo around the time it was published on  
25 August 11?

1 statement on the second page, which is August 16,  
2 2023; do you have that?

3 A. Yeah, I see it.

4 518 Q. Okay. And you're aware that the  
5 Honourable Nape Moses Nnauye was, at least in  
6 August of 2023, Tanzania's Minister responsible for  
7 Information, Communication and Information  
8 Technology?

9 A. Correct.

10 519 Q. And you're no doubt aware that in  
11 his statement, the minister specifically denied  
12 that you and others had been arrested for simply  
13 protesting the ports deal, the government --

14 A. He is a -- it's not once. I said  
15 I was arrested in June with the security officers,  
16 and the people from intelligence and the police, I  
17 was interrogated on IGA. They said because of IGA,  
18 they wanted to know which foreign country was  
19 backing what I was doing.

20 520 Q. Right.

21 A. So -- so, it is about IGA. They  
22 were arresting me for treason just because of IGA,  
23 nothing else.

24 521 Q. When you swore your affidavit in  
25 this matter in January of this year, you forgot to

1 mention that you'd been arrested in June, right?

2 A. Yeah, I say that also in June I  
3 was arrested and there was a number of arrests, not  
4 one.

5 522 Q. And you've already agreed with me  
6 that there is no reference whatsoever in your  
7 affidavit to you being arrested in June?

8 A. I couldn't put everything because  
9 the arrest continue even after file -- my arrest  
10 continue. I'm still suffering the same consequence  
11 to date.

12 523 Q. Sorry, when you say you couldn't  
13 put everything in, are you saying there was what,  
14 some page limit on how many pages you could swear  
15 to in an affidavit?

16 A. I'm saying to date, I am being  
17 arrested, I am being followed, I am being harassed  
18 to date. Still I am not a free person just because  
19 of this happened.

20 524 Q. Sorry.

21 A. What I'm doing, it's not ended.  
22 It's still a continued process. I'm getting  
23 harassment. I'm getting attacked. My freedom of  
24 movement has been limited.

25 525 Q. You were attempting to create or

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Court File No. CV-22-00690649-0000  
ONTARIO  
SUPERIOR COURT OF JUSTICE

B E T W E E N:

SOPHIA MATIKO JOHN, IN HER PERSONAL CAPACITY AND AS  
LITIGATION GUARDIAN FOR HER MINOR CHILD, KELVIN;  
ANACRETUS MARINGO GIMANWA; ESTA GEORGE RANGE, IN  
HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN  
FOR HER MINOR CHILDREN JOSEPH, GODFREY, FILEMON AND  
REBEKA; ELIZABETH MATIKO IRONDO; NEEMA STEPHEN  
JOHN, IN HER PERSONAL CAPACITY AND AS LITIGATION  
GUARDIAN FOR HER MINOR CHILDREN JOHN, MIRIAM, ESTA,  
AND TIMOTHY; MASWI MARWA MOHABE; DOTTO WILLIAM  
ITAMA, IN HER PERSONAL CAPACITY AND AS LITIGATION  
GUARDIAN FOR HER MINOR CHILD CHRISTINA; LYIMO ITAMA  
MACHELA; ITAMA MACHELA MAX; CHARLES DANIEL NYAKINA;  
BHOKE HAGALE MARO; DANIEL NYAKINA GHATI; DICKSON  
JULIUS SISE; SIBORA MARWA MWITA; EMMANUEL  
NYAKORENGA MBURI; RYOBA ELIAS KEBWE; PASCO  
MAREMBELA MWITA; NYAHELI MARWA NYAKORENGA;  
CHRISTOPHER JHOMU MAKENDE; RANGE MWITA RANGE;  
AND FREDY CHACHA WAMBURA LEMA  
Plaintiffs

- and -

BARRICK GOLD CORPORATION  
Defendant

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--- This is the Cross-Examination of ULIMBOKA  
MWASOMOLA, on his affidavit sworn April 12, 2024,  
taken at the offices of the Hyatt Regency, 24  
Kivukoni Road, Dar es Salaam, Tanzania, with  
participants attending both in person and  
virtually, on the 13th day of May, 2024.  
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1 A. For sure.

2 58 Q. But these are the ones that you  
3 chose to highlight in your report for the Canadian  
4 Court; correct?

5 A. For the same reason as I stated  
6 earlier, for issues of having variety of cases on  
7 issues that we handle and also the availability of  
8 these decisions.

9 59 Q. So if we could start, let's look  
10 at the case of Shaban Kisawile. I have it at B-21  
11 of your report.

12 This is a decision of the High Court of  
13 Tanzania Labour Division at Dar es Salaam, and the  
14 date of the ruling is October 25th, 2022; is that  
15 correct?

16 A. Correct.

17 60 Q. Did you assist in this case at  
18 LAC?

19 A. Yes, I did.

20 61 Q. Okay. So you can confirm that the  
21 underlying claim was in relation to an allegation  
22 of unfair termination of employment?

23 A. Yes, correct.

24 62 Q. That matter was the subject of an  
25 arbitration where the arbitrator ruled the

1 termination was both substantively and procedurally  
2 fair; correct?

3 A. Correct.

4 63 Q. The applicant then sought to  
5 appeal the ruling of the arbitrator; correct?

6 A. "Challenge" would be the better  
7 term --

8 64 Q. Fair.

9 A. -- because you cannot appeal.

10 65 Q. Thank you. So the applicant was  
11 seeking to challenge the ruling of the arbitrator?

12 A. Correct.

13 66 Q. Okay. And on June 13th, 2022, the  
14 applicant was granted an extension of time to  
15 challenge the arbitration award, right?

16 A. Correct.

17 67 Q. But when the matter came on for a  
18 hearing before Justice Mganga, the Court raised an  
19 issue of jurisdiction, and that was whether the  
20 extension order had been complied with; is that  
21 fair?

22 A. Correct.

23 68 Q. And the Court on its own motion  
24 asked for submissions on that issue; is that right?

25 A. Correct.

1           69                   Q.    And the matter was disposed of on  
2           the basis of written submissions?

3                           A.    Correct.

4           70                   Q.    And in this case, the written  
5           submissions for the applicant were prepared by LAC;  
6           is that right?

7                           A.    Correct.

8           71                   Q.    So there was no oral hearing; is  
9           that fair?

10                          A.    Yes.

11          72                   Q.    And this case did not in any way  
12          involve a trial on the merits of a contested issue;  
13          is that fair?

14                          A.    Correct.

15          73                   Q.    The representation provided by LAC  
16          was limited to the preparation and filing of  
17          written submissions; is that fair?

18                          A.    Correct.

19          74                   Q.    And did you prepare those written  
20          submissions?

21                          A.    Yeah, my role here, because I  
22          found the case on track, it was handled by someone  
23          else before I took it over, and I participated in  
24          the case, especially during the preparation of the  
25          written submissions.

1           75                   Q.    But ultimately, the Court ruled  
2                                   that the applicant had failed to comply with the  
3                                   order extending the time to challenge the  
4                                   arbitration award and ruled that the matter was now  
5                                   time-barred; is that fair?

6                                   A.    Correct.

7           76                   Q.    Do you have a recollection of how  
8                                   much time you spent preparing the written  
9                                   submissions?

10                                  A.    Not very easy for me to remember  
11                                  that.

12           77                   Q.    Okay. Was it a matter of, like,  
13                                  10 hours? 20 hours?

14                                  A.    I cannot recall very directly the  
15                                  time spent on this specific case.

16           78                   Q.    And if I could ask you to turn  
17                                  next to B-8.

18                                  A.    B-8?

19           79                   Q.    Yes, the case of Joseph Mwita v.  
20                                  Kariakoo Bazaar Ltd. You have that in front of  
21                                  you? This is a decision of the High Court of  
22                                  Tanzania Labour Division at Dar es Salaam, and the  
23                                  date of the ruling is May 22nd, 2023?

24                                  A.    Correct.

25           80                   Q.    And this was an application for

1 the extension of time within which to challenge a  
2 labour arbitrator's award; is that fair?

3 A. Yes, correct.

4 81 Q. And again the application was  
5 decided on the basis of written submissions; is  
6 that right?

7 A. Correct.

8 82 Q. And the applicant's submissions  
9 were prepared by the Legal Aid Committee; is that  
10 right?

11 A. Correct.

12 83 Q. And that was the extent of the  
13 representation provided by LAC on this matter; is  
14 that right?

15 A. Correct.

16 84 Q. And at page 6 of the case, the  
17 Court determined that the matter was time-barred  
18 and the Court was functus officio; is that correct?

19 A. Correct.

20 85 Q. Were you personally involved in  
21 preparing the submissions for the applicant?

22 A. Correct.

23 86 Q. And do you recall how much time  
24 you spent preparing those submissions?

25 A. It is unlikely for me to remember

1 exactly the time I used in preparing the written  
2 submissions, especially on a very specific case.

3 87 Q. Let's take a look next at the case  
4 of Paulo Moshi Sologo. I have it at B-16 of your  
5 report. You should have there a decision of the  
6 High Court Land Division at Dar es Salaam in the  
7 matter of Miscellaneous Land Application No. 345 of  
8 2023; do you have that?

9 A. Yes.

10 88 Q. And the dates given here for the  
11 ruling are the 22nd and 30th of June, 2023?

12 A. Yes.

13 89 Q. And again, this was an application  
14 for an extension of time to file an appeal against  
15 the judgment and orders of the District Land and  
16 Housing Tribunal; is that right?

17 A. Correct.

18 90 Q. And now, in this case, it appears  
19 that the parties appeared in person. So if you  
20 could look at the top of page 2:

21 "The application was heard on  
22 22nd June 2020 viva voce."

23 Do you see that?

24 A. Yes.

25 91 Q. And then:

1 "Both parties appeared in  
2 person."

3 Correct?

4 A. Correct.

5 92 Q. So what was the nature of the  
6 involvement of LAC in this case?

7 A. Well, this is one of the case that  
8 the LAC provided legal aid to the applicant, but  
9 unfortunately, this was not conducted under my  
10 auspicial or under my mandate, so it was conducted  
11 by another advocate within the house.

12 93 Q. Okay. And that advocate did not  
13 appear at the hearing of this matter that is the  
14 subject of this decision; is that correct?

15 A. It would appear.

16 94 Q. He would have appeared?

17 A. It would appear, from the reading  
18 of the first line under page 2 of the judgment.

19 95 Q. Right. It would appear that no  
20 advocate appeared for the applicant in this matter;  
21 correct?

22 A. Correct.

23 96 Q. So we are unable, based on a  
24 reading of just this ruling, to determine the  
25 extent of LAC's involvement in this matter; is that

1 fair?

2 A. That would be a fair comment to  
3 make by reading the judgment.

4 97 Q. If we could next turn to B-6, the  
5 case in the matter of application for adoption  
6 order. B-6.

7 You have there in the High Court of the  
8 United Republic of Tanzania Dar es Salaam District  
9 Registry in the matter of an application for an  
10 adoption order by Engerasia Thomas Mtui of Dar es  
11 Salaam, and the date of the ruling is shown as  
12 March 4th, 2024?

13 A. Yes.

14 98 Q. So this was a ruling on an  
15 uncontentious matter; correct?

16 A. Correct.

17 99 Q. And in this matter you appeared at  
18 least at some point in time for the petitioner?

19 A. Correct.

20 100 Q. And again, do you have any  
21 recollection as to how much time you expended on  
22 this matter?

23 A. The time spent in preparing the  
24 documents or you mean the time spent during the  
25 hearing?

1           101                   Q.    Well, let's start with the  
2                               documents. Do you have any recollection of how  
3                               much time you spent preparing the Court documents?

4                               A.    The Court documents for these  
5                               kinds of cases would be prepared in a matter of not  
6                               more than two weeks, so to say one week would be  
7                               enough if you have all the facts and all the  
8                               documents needed, yes.

9           102                   Q.    And what about for the oral  
10                              hearing?

11                             A.    For the oral hearing, the time  
12                             would be much implicated, depending on the report  
13                             that has to be submitted by the social welfare.

14                             But two days of hearing, if the matter  
15                             is non-contentious, will be enough.

16           103                   Q.    And next can we look at the case  
17                              at B-1 of your report.

18                             A.    B-1.

19           104                   Q.    You should have there the decision  
20                              of the High Court at Dar es Salaam, Civil Appeal  
21                              No. 143 of 2023 in the matter of Mugala v. Mohamed;  
22                              do you have that?

23                             A.    Yes, correct.

24           105                   Q.    And this was an appeal of a  
25                              decision denying an applicant an extension of time

1 to appeal a decision from the Primary Court at  
2 Kinondoni; is that right?

3 A. Correct.

4 106 Q. And this application was disposed  
5 of on the basis of written submissions?

6 A. Correct.

7 107 Q. And in this case, the applicant  
8 obtained assistance from LAC?

9 A. Correct.

10 108 Q. And LAC's representation --  
11 [Court Reporter intervenes for  
12 clarification.]

13 BY MR. FIORANTE:

14 109 Q. My question was, LAC's  
15 representation of the applicant was limited to the  
16 preparation of written submissions; is that  
17 correct?

18 A. Let me put it this way for the  
19 understanding. The way these appeals are  
20 conducted, you normally would prepare the documents  
21 as you suggested and file them in the Court. Then  
22 the Court will arrange a date for where the  
23 advocates will appear.

24 And then after that, the Court will  
25 decide -- not the Court. By the way, it is the

1 parties who will propose a way to dispose the  
2 appeal.

3 So the method of disposing the appeal  
4 that was chosen was written submissions.

5 110 Q. Thank you. And in this case, the  
6 application was dismissed; is that correct?

7 A. Correct.

8 111 Q. And so have we covered now the  
9 list of cases that you referenced in paragraph 50  
10 that have taken place within the last ten years?  
11 Is that all of them?

12 A. Yes.

13 112 Q. Now, at paragraph 54 of your  
14 report, you mention that:

15 "The Legal Aid Committee is  
16 currently involved in numerous  
17 public interest litigation matters."

18 Is that correct?

19 A. Correct.

20 113 Q. At item (a), you're referring to  
21 the case of Jackson Rwehumbiza & Others v. The  
22 Permanent Secretary Ministry of Natural Resources;  
23 is that right?

24 A. Correct.

25 114 Q. And that case can be found at B-7

1 of your report; is that correct?

2 A. B-7? What is found at B-7 is the  
3 decision of the High Court, and what is reported at  
4 paragraph 54 is the appeal of this decision.

5 115 Q. Okay. So that was my question.  
6 So was LAC involved in the decision that appears at  
7 B-7 of your report?

8 A. No.

9 116 Q. So it became involved after that  
10 decision for the purposes of bringing an appeal; is  
11 that correct?

12 A. Yes. And that is what is  
13 contained under paragraph (a) of paragraph 54.

14 117 Q. Thank you. But that is an example  
15 of a case that you cite as the LAC being involved  
16 in public interest litigation; correct?

17 A. Yes, at the moment we have --

18 118 Q. And the involvement was in  
19 relation to an appeal that a matter had been -- of  
20 a matter which was determined to be time-barred in  
21 the judgment that appears at B-7, right?

22 A. Correct.

23 119 Q. If we could just go back to  
24 paragraph 15 of your report for a moment. This is  
25 with respect to the Legal Aid Clinics organized and

1 run by NMG Attorneys. Am I correct that those  
2 Legal Aid Clinics take place only in the Ubungo  
3 District of Dar es Salaam; is that right?

4 A. Correct.

5 120 Q. Okay. So NMG Attorneys does not  
6 run Legal Aid Clinics outside of Dar es Salaam; is  
7 that fair?

8 A. Basing on the agreement, we have  
9 not, no.

10 121 Q. So just to be very clear, NMG does  
11 not operate Legal Aid Clinics in the Mara Region,  
12 for instance?

13 A. Correct.

14 122 Q. Now, at paragraph 32, you state  
15 that:

16 "As of 2023, there were  
17 approximately 435 legal aid  
18 providers registered in Mainland  
19 Tanzania alone."

20 Correct?

21 A. Correct.

22 123 Q. But, sir, would it be fair to say  
23 that not all of those legal aid providers would be  
24 in a position to provide advocates to represent  
25 legal aid recipients through to a trial; is that

1 fair?

2 A. Very fair.

3 124 Q. Many of the legal aid  
4 organizations focus on providing legal education to  
5 indigent persons; correct?

6 A. Correct.

7 125 Q. And many of them are also involved  
8 in assisting indigent persons with filing documents  
9 in Court; is that correct?

10 A. Correct.

11 126 Q. And many of them are staffed by  
12 paralegals who are not permitted to represent  
13 individuals in the High Court; is that fair?

14 A. Correct.

15 127 Q. Would you agree with me that in  
16 complex cases, an indigent person may require the  
17 services of an advocate in order to have a fair  
18 chance at achieving justice?

19 A. Correct.

20 128 Q. Now, at paragraph 58, you discuss  
21 the funding of the Legal Aid Committee; correct?

22 A. Correct.

23 129 Q. Okay. But you did not provide for  
24 the Court in Canada any information about the  
25 litigation budget of the Legal Aid Committee, for

1 instance; correct?

2 A. Correct.

3 130 Q. And am I correct that LAC's only  
4 office is in Dar es Salaam?

5 A. Can you repeat the question?

6 131 Q. Sorry, am I correct that LAC's  
7 only office is in Dar es Salaam?

8 A. Correct.

9 132 Q. It does not have an office in  
10 Musoma?

11 A. Correct.

12 133 Q. Or Mwanza?

13 A. Correct.

14 134 Q. Or anywhere in the Mara Region?

15 A. Correct.

16 135 Q. And nowhere in your report do you  
17 identify the budget that LAC has to travel to other  
18 regions of Tanzania to meet with clients; correct?

19 A. Correct, and that never came to my  
20 mind.

21 136 Q. That's fine. And would it be fair  
22 to say that the majority of cases which LAC  
23 presently handles involves probate and  
24 administration of estates, marriage and divorce  
25 matters, land conflicts, labour and employment

1 rights and child support and maintenance?

2 A. You are correct, that is some of  
3 the nature of the cases that LAC handles, but it is  
4 not an exhaustive list of the cases.

5 137 Q. No, but it's the majority of the  
6 cases which LAC handles at present; correct?

7 A. Correct.

8 138 Q. Why don't we just take a short  
9 break. I'm going to confer with my colleague, but  
10 we're almost done.

11 -- RECESSED AT 12:40 P.M.

12 -- RESUMED AT 12:45 P.M.

13 MR. FIORANTE: Okay. We're back on the  
14 record.

15 Thank you, Mr. Mwasomola. I have no  
16 further questions for you.

17 MS. O'SULLIVAN: And we have no  
18 questions for re-examination.

19  
20 -- Adjourned at 12:46 p.m.

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Court File No. CV-22-00690649-0000  
ONTARIO  
SUPERIOR COURT OF JUSTICE

B E T W E E N:

SOPHIA MATIKO JOHN, IN HER PERSONAL CAPACITY AND AS  
LITIGATION GUARDIAN FOR HER MINOR CHILD, KELVIN;  
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CHRISTOPHER JHOMU MAKENDE; RANGE MWITA RANGE  
FREDY CHACHA WAMBURA LEMA

Plaintiffs

- and -

BARRICK GOLD CORPORATION

Defendant

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-- This is the transcript of the Cross-Examination  
of JOSEPH OLESHANGAY, on his Affidavits sworn  
February 1 and May 6, 2024, taken at the offices  
of the Hyatt Regency, 24 Kivukoni Road, Dares  
Salaam, Tanzania, with participants attending both  
in person and virtually, on the 12th day of May,  
2024.

1                   offered to pay only Tshs. 60 million,  
2                   which the victim declined. Formal  
3                   engagements and letters were sent to  
4                   North Mara (Acacia) to follow up on  
5                   the case. Following several meetings  
6                   however, Barrick agreed to compensate  
7                   the victim and paid an amount of \$82  
8                   million, on the 30th December 2021."

9                   Sir, when it says 82 million, I assume  
10                  that means Tanzanian shillings and not  
11                  \$82 million?

12                  A.    It is written in dollars but I  
13                  hope it is not.

14    225            Q.    It would make no sense in the  
15                  context for it to be \$82 million, it must be  
16                  shillings, correct?

17                  A.    Yes.

18    226            Q.    And is it also correct that LHRC  
19                  provided assistance to the resident in question  
20                  in connection with his successful effort to  
21                  obtain compensation from the North Mara mine?

22                  A.    It is written -- of course the  
23                  way it is written is not sort of litigated, like  
24                  sort of correspondence, which they agreed to  
25                  settle.

1 227 Q. I didn't ask about litigation.

2 A. Yes, I'm just saying, the way I  
3 see it, it is just they assisted. The LHRC  
4 seems to have assisted.

5 228 Q. LHRC assisted this person in  
6 connection with a land matter concerning the  
7 North Mara mine, correct?

8 A. It is written actually -- yes,  
9 North Mara.

10 229 Q. And nowhere in your first  
11 affidavit, or in your expert report, or in your  
12 supplementary affidavit do you disclose the fact  
13 that LHRC provided assistance in connection with  
14 that matter, correct?

15 A. I was not aware of any help for  
16 this.

17 230 Q. Even though at the time you were  
18 in the -- or maybe you weren't, I don't know,  
19 maybe you'll tell me, in the Arusha office of  
20 LHRC?

21 A. I'm in Arusha office. It seems  
22 to be the settlement was on 30 December 2021.

23 231 Q. Yes.

24 A. We do not know when it was  
25 initiated, it is not disclosed at least.

1 232 Q. Where were you on December 30th,  
2 2021? Which office were you based in at the  
3 time?

4 A. I was in Dar es Salaam, at least  
5 by December. But the way it seems it was not  
6 handled under the legal aid, the way it is  
7 written. So it was sort of advocacy, that's why  
8 it's correspondence that ended in proposition.

9 233 Q. I think we missed each other.

10 A. Okay.

11 234 Q. At that time you were based out  
12 of the Arusha office of LHRC?

13 A. 2021? It must be Dar es Salaam,  
14 you can see in my CV.

15 235 Q. When did you go back to Arusha?

16 A. 2022.

17 236 Q. Thank you.

18 A. And maybe for clarity, when I say  
19 it, Arusha office is responsible for different  
20 places, including Mara, is for legal aid, for  
21 legal aid only. Because I say it, Arusha office  
22 is the legal aid office. But for advocacy we  
23 have one office in Dar es Salaam, assisted a bit  
24 by the Dodoma office, who are doing advocacy  
25 throughout the country.

1       237           Q.     And am I not correct that the Dar  
2       es Salaam office and the Dodoma office of the  
3       Legal and Human Right's Centre are farther away  
4       from Tarime than Arusha?

5                   A.     Yes.   We co-operate but the  
6       initiation -- if it is advocacy -- I described  
7       we have advocacy, we have legal aid and several  
8       other sub-departments.  But for proper execution  
9       of responsibilities, if it is legal aid we  
10      assign a legal aid office; if it is advocacy,  
11      for example, you engage Barrick or Acacia to  
12      compensate and settle; if that matter is to go  
13      to court then the legal aid will be as taking  
14      that road.  But if it is engagement, any officer  
15      can be assigned but their responsibility is from  
16      advocacy unit.

17      238           Q.     My question was, am I not correct  
18      that the Dar es Salaam office and the Dodoma  
19      office are farther away from Tarime than Arusha?

20                   A.     Yes.

21      239           Q.     Thank you.

22                   --    OFF-THE-RECORD DISCUSSION   --

23                   BY MR. FRANKEL:

24      240           Q.     Pull up again tab 9,  
25      Mr. Oleshangay, if you would.  Once again this

1 is the annual report of 2022 for the LHRC, or an  
2 excerpt of it rather?

3 A. Yes.

4 241 Q. The annual report for 2022, of  
5 course, it is reporting on matters that occurred  
6 in 2022?

7 A. Right.

8 242 Q. By that time you were back in the  
9 Arusha office, correct?

10 A. Right.

11 243 Q. Let's look at page 63, using the  
12 numbers in the bottom right, page 34 at the top.  
13 This page is part of the section that describes  
14 the key achievements of the Legal and Human  
15 Rights Centre in 2022?

16 A. Yes.

17 244 Q. If you look at item 9, using the  
18 Roman numerals, it's on the right-hand side of  
19 the page.

20 A. I see, yes.

21 245 Q. It says:  
22 "LHRC supported 98 local  
23 communities on access to remedy case  
24 through judicial mechanisms on behalf  
25 of residents of Nyakunguru village,

1 Tarime district for land compensation  
2 and it was successful in 2022 as ruled  
3 by High Court Musoma registry. The  
4 residents have been compensated by  
5 North Mara Gold Mine."

6 That's an accurate statement in the  
7 annual report?

8 A. Yes, that's what it is in the  
9 report.

10 246 Q. And that's what happened?

11 A. When you ask me the contents of  
12 that report, I'm not the author of that report.  
13 But I believe what is contained in the report is  
14 accurate. So far as the report is accurate then  
15 I believe it is accurate information.

16 247 Q. Okay. Did you disclose anywhere  
17 in your expert report, or in your supplementary  
18 affidavit, the LHRC's involvement in the matter  
19 that I just described to you concerning the  
20 North Mara mine in 2022?

21 A. I didn't describe and I was not  
22 aware.

23 248 Q. Even though by that time you were  
24 back in the Arusha office?

25 A. Yes.

1 249 Q. Even though this is a land  
2 compensation matter?

3 A. Yes.

4 250 Q. And even though the description  
5 says that it was a land compensation matter that  
6 involved an access to remedy case through  
7 judicial mechanisms?

8 A. For purpose of this, I say it was  
9 not handled under Arusha legal aid office in  
10 2022, to not by me or any subordinate in my  
11 department, land.

12 251 Q. Can you turn to page 39 of the  
13 annual report, which is, given the numbers at  
14 the top --

15 -- OFF-THE-RECORD DISCUSSION --

16 BY MR. FRANKEL:

17 252 Q. So, Mr. Oleshangay, I apologize  
18 that before us there are a couple of pages  
19 missing in the brief, so we will --

20 A. Okay.

21 253 Q. On the screen you should see a  
22 cover page for the annual report 2022?

23 A. Yes.

24 254 Q. I'm going to ask that we go to  
25 page 39 of the annual report -- if you look at

1 the top?

2 A. Yes.

3 255 Q. There is a heading that reads:

4 "3.3 enhanced access to  
5 appropriate and effective remedies,  
6 both judicial and nonjudicial."?

7 A. Yes.

8 256 Q. Underneath that heading there is  
9 a sub-heading that reads:

10 "3.3.1 Provision of legal support  
11 to communities/victims of violation of  
12 socioeconomic and environmental  
13 rights".

14 A. Yes.

15 257 Q. And underneath that there is some  
16 text and then a table. Do you see that?

17 A. I see the table and -- yes.

18 258 Q. I'm interested in the third item  
19 in the table, which is a land case on behalf of  
20 a male client of the LHRC where the authority  
21 listed is "Nonjudicial Grievance Mechanisms  
22 (African Barrick, North Mara Community Affairs  
23 Department)." Do you see that?

24 A. I see.

25 259 Q. If we move forward to page 41 of

1 the annual report you will see there that there  
2 is a two-page description that continues on to  
3 the next page, two-page description of a land  
4 compensation matter involving the North Mara  
5 mine. And if you want to take a bit of time to  
6 look at it you can.

7 A. Page?

8 260 Q. This is page 41.

9 A. "The Lands of My Child" (sic) is  
10 the title?

11 261 Q. Correct. Yes. It is a  
12 description of a land compensation case of the  
13 North Mara mine?

14 A. Yes, the North Mara mine.

15 262 Q. Is it fair to say that this  
16 description concerns the same matter as the one  
17 that we just saw listed in the table on the  
18 prior page?

19 A. Yes.

20 263 Q. As I understand it LHRC assisted  
21 an individual named Sadock Maningo Malime (ph)

22 A. Yes.

23 264 Q. And it did so in resolving a  
24 grievance he had lodged with North Mara mine  
25 concerning compensation for his land?

1 A. Yes.

2 265 Q. Nowhere in your evidence in this  
3 proceeding did you disclose the LHRC's  
4 involvement in that matter, correct?

5 A. Let me describe it this way, the  
6 case you are mentioning just here, not the legal  
7 aid cases, it is on access to remedy, which I  
8 say in my report, we have a department for  
9 corporate social responsibilities which can also  
10 do access to remedy in a few cases, that's why  
11 they mention a few, like one labour case, one  
12 land case, it's not the legal aid issue.

13 I did not include it in my report  
14 because I was not aware of the existence of this  
15 case by the time.

16 266 Q. When you say "by the time", did  
17 you become aware of it in the period after but  
18 before today?

19 A. Now.

20 267 Q. Just now when I took you to the  
21 document?

22 A. Yes.

23 268 Q. If we turn to page 42 of the  
24 Annual Report, Mr. Oleshangay, on the right-hand  
25 side of the page, there is a paragraph that

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Court File No. CV-22-00690649-0000

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

OPHIA MATIKO JOHN, IN HER PERSONAL CAPACITY AND AS  
LITIGATION GUARDIAN FOR HER MINOR CHILD, KELVIN;  
ANACRETUS MARINGO GIMANWA; ESTA GEORGE RANGE, IN  
HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN  
FOR HER MINOR CHILDREN JOSEPH, GODFREY, FILEMON AND  
REBEKA; ELIZABETH MATIKO IRONDO; NEEMA STEPHEN  
JOHN, IN HER PERSONAL CAPACITY AND AS LITIGATION  
GUARDIAN FOR HER MINOR CHILDREN JOHN, MIRIAM, ESTA  
AND TIMOTHY; MASWI MARWA MOHABE; DOTTO WILLIAM  
ITAMA, IN HER PERSONAL CAPACITY AND AS LITIGATION  
GUARDIAN FOR HER MINOR CHILD CHRISTINA; LYIMO ITAMA  
MACHELA; ITAMA MACHELA MAX; CHARLES DANIEL NYAKINA;  
BHOKE HAGALE MARO; DANIEL NYAKINA GHATI; DICKSON  
JULIUS SISE; SIBORA MARWA MWITA; EMMANUEL  
NYAKORENGA MBURI; RYOBA ELIAS KEBWE; PASCOMAREMBELA  
MWITA; NYAHELI MARWA NYAKORENGA; CHRISTOPHER  
JHOMUMAKENDE; RANGE MWITA RANGE; AND  
FREDY CHACHA WAMBURA LEMA

Plaintiffs,

- and -

BARRICK GOLD CORPORATION

Defendant.

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--- This is the Cross-Examination of MOHAMED  
CHANDE OTHMAN, upon his Affidavit sworn October 2,  
2023, taken via Veritext Legal Solution Canada's  
Zoom virtual platform, with all participants  
attending remotely, on the 14th day of May, 2024.

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1 cities."

2 Is that an accurate transcription of  
3 your comments?

4 A. Yes, (inaudible).

5 COURT REPORTER: Sorry, could I have  
6 that repeated, please.

7 THE WITNESS: Yes, that was the  
8 situation then pertaining.

9 BY MR. FIORANTE:

10 41 Q. Carrying on at 8:01 of the  
11 transcript:

12 "So, in terms of what we call  
13 ratio, advocate population ration in  
14 Tanzania, we have one advocate for  
15 every 82,000 people. South Africa  
16 which has almost the same population  
17 as us has one advocate for 2,500.  
18 The South African population is  
19 about almost the same as us."

20 Is that an accurate transcription of  
21 your comment?

22 A. Yes, it is. It is also pertaining  
23 at that time.

24 42 Q. And then at page 8 of the  
25 transcript, starting at the time stamp 8:30:

1 "So my point is, your future  
2 admission and enrolment as  
3 advocates, Tanzania would still be  
4 probably suffering from  
5 under-lawyering, not over-lawyering  
6 but maybe also misplaced lawyering,  
7 because we will be most of the time  
8 in major cities, but not in rural  
9 areas."

10 I'll stop there. Is that an accurate  
11 transcription of your remarks?

12 A. Yes, it is. It says what it says.

13 43 Q. But I believe the last sentence,  
14 which in the transcript reads:

15 "Again as I said, we have a  
16 lawyer gap."

17 I believe in the video you said "we  
18 have justice gap." Do you recall that?

19 A. Yeah, probably yes.

20 44 Q. Thank you. Now, sir, do you  
21 recall giving a talk on April 16th, 2024 for the  
22 strategic -- sorry, The Centre for Strategic  
23 Litigation's launch of the 2022 Public Law  
24 Yearbook?

25 A. Yes, I recall that.

1 the court, but they are also -- for example, those  
2 accused who are charged with rape, they don't get  
3 legal representation from the court.

4 So, you have to look at a case-by-case  
5 basis to say whether, you know, one has legal  
6 representation. It's not like everybody doesn't  
7 have legal representation. So there are those who  
8 have legal representation, there are those that  
9 don't have legal representation depending upon the  
10 circumstances, whether it's criminal, whether it's  
11 civil, and so on.

12 80 Q. In your experience, are the issues  
13 that you just described unique to Tanzania or  
14 within Africa?

15 MR. FIORANTE: That's a leading  
16 question.

17 BY MR. FRANKEL:

18 81 Q. It's not. You need to answer the  
19 question.

20 A. No, it is not. I think the  
21 problem of access to justice, the problem of legal  
22 representation is across Africa because first, in  
23 terms of numbers, we have less number of lawyers  
24 given the population. The ratio of the population  
25 to lawyers is -- is not very high, so that is one

1 aspect that, you know.

2 The other aspect which is mentioned  
3 here in terms of legal representation which is  
4 also, of course, Africa. Many lawyers are in urban  
5 areas than there are in rural areas, so this is  
6 another issue for legal representation.

7 You have, for example, also that  
8 Tanzania has developed over a number of years now,  
9 we have, like, over 15 universities in which  
10 students receive law degrees. Years back, we  
11 didn't have that.

12 So, not all African countries, for  
13 example, where you have -- you have sufficient law  
14 schools, where you have graduates, that is why, for  
15 example, in Tanzania we have a strong or developing  
16 paralegal profession, paralegal to cover the gap  
17 between the qualified lawyer and somebody who can  
18 give Legal Aid advice, so that's why we have here  
19 legislated in our Legal Aid Act paralegals who  
20 assist indigent persons in terms of advising them  
21 about marriage issues, on inheritance issues, and  
22 so on.

23 82 Q. Do you recall that, again, early  
24 in the cross-examination, Mr. Fiorante asked you  
25 whether you agree that there is a deficit of timely

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Court File No. CV-22-00690649-0000  
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SUPERIOR COURT OF JUSTICE

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AND FREDY CHACHA WAMBURA LEMA  
Plaintiffs

- and -

BARRICK GOLD CORPORATION  
Defendant

-----  
--- This is the Cross-Examination of LEONARD PAULO  
SHAIDI, on his affidavits sworn October 2, 2023,  
January 4, 2024 and April 5, 2024 respectively,  
taken at the offices of the Hyatt Regency, 24  
Kivukoni Road, Dar es Salaam, Tanzania, with  
participants attending both in person and  
virtually, on the 16th day of May, 2024.  
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1 Statement of Claim, please. Do you recognize this  
2 to be the Statement of Claim issued by Sophia  
3 Matiko John and others in the Superior Court of  
4 Justice of Ontario as against Barrick Gold  
5 Corporation?

6 A. Yes.

7 23 Q. If I could direct you to  
8 paragraph 154 of the Statement of Claim, please.  
9 You understood from your review of the Statement of  
10 Claim that the Plaintiffs in Canada are advancing  
11 claims against Barrick Gold Corporation for aiding  
12 and abetting breaches of customary international  
13 law?

14 A. Yes.

15 24 Q. And did you understand that that  
16 claim was based on a 2020 decision of the Supreme  
17 Court of Canada in the case of Araya v. Nevsun?

18 A. I've not looked into that case.

19 25 Q. Okay. So that's not a case that  
20 you reviewed in this matter?

21 A. No, I didn't.

22 26 Q. Okay. And, sir, is it your -- in  
23 your report, would you agree with me that you do  
24 not provide any analysis of the jurisprudence in  
25 Tanzania as to whether a claim for damages can be

1 based on customary international law?

2 A. No, I did not do that, but I know  
3 that you -- without saying customary international  
4 law, there are other laws under which those claims  
5 can be pursued within the legal system of Tanzania.

6 27 Q. Yes, sir, but I want to be very  
7 specific. The claims in Canada are advanced both  
8 under tort law; correct?

9 A. Yes.

10 28 Q. And for breach of customary  
11 international law; correct?

12 A. Yes.

13 29 Q. And my questions are focussed on  
14 the issue of customary international law. Would  
15 you agree with me that you present no analysis in  
16 your expert report with respect to whether claims  
17 in Tanzania can be based directly on customary  
18 international law?

19 A. I did not do that because my  
20 concentration was on cause of action, cause of  
21 action for what happened, and the cause of action  
22 is justiciable under the Tanzanian legal system.

23 30 Q. Yeah, I think you mean -- I'll  
24 clarify on the transcript. You mean justiciable?

25 A. Yes.

1 investigated, they never investigated, at what  
2 stage of investigations have they reached. This is  
3 information known to the police.

4 74 Q. But in your report, you stated  
5 that you had difficulty understanding the basis for  
6 her belief that no investigation had been done,  
7 right? That's what you said?

8 A. I think I said that I don't  
9 necessarily accept what they stated because I -- I  
10 used the word "allegation", it's what she alleges.  
11 But I can't say that I believe what she said  
12 because she believes that what she said.

13 75 Q. And let's just look at  
14 paragraph 36 of your reply report, please. And  
15 it's the second part of the report, and I think you  
16 have stressed this in your evidence already today.  
17 And this says:

18 "As a general matter, there is  
19 no way for members of the public to  
20 know what matters the Tanzania  
21 Police Force have investigated or  
22 are now investigating."

23 That's your point; correct?

24 A. That's correct.

25 76 Q. And that:

1 "The Police are under no legal  
2 obligation to disclose publicly the  
3 existence or details of specific  
4 investigations, and generally do not  
5 do so."

6 Correct?

7 A. Correct.

8 77 Q. And you're not:

9 "[...] aware of any law or  
10 guideline in Tanzania that would  
11 require the Police, as a standard  
12 practice, to apprise alleged victims  
13 of crimes, their relatives or  
14 witnesses to an incident of  
15 investigative steps the Police have  
16 taken, might take or intend to  
17 take."

18 Correct?

19 A. Correct.

20 78 Q. So the Tanzanian law is very clear  
21 on that point; correct?

22 A. Yes.

23 79 Q. The police are under no obligation  
24 to inform the family of anything relating to a  
25 possible investigation into the shooting of a

1 family member?

2 A. It's not the same as saying that  
3 they have no -- they cannot have access to this  
4 information. There is ways of accessing this type  
5 of information.

6 80 Q. That was not my question, sir.

7 A. Okay.

8 81 Q. My question was, the opinion  
9 you've presented in paragraph 36 was that Tanzanian  
10 law is clear that the police are under no  
11 obligation to disclose that information to the  
12 family?

13 A. Yes.

14 82 Q. Okay. Are you familiar with the  
15 United Nations principles for the investigation of  
16 extrajudicial executions?

17 A. I've read these principles before,  
18 but I cannot remember everything.

19 83 Q. Well, we'll pull them up on the  
20 screen so we can take a look at them together.

21 MS. O'SULLIVAN: Sorry, just for the  
22 transcript, I think at 26:09 it says "I have read  
23 these principles before, but I cannot", and then he  
24 said "remember everything".

25 MR. FIORANTE: Okay.

1           that case.

2           110                   Q.    How about the incidents involving  
3           Dr. Nshala Rugemeleza?  You are familiar with  
4           Dr. Nshala?

5                           A.    Yes, I know him.

6           111                   Q.    He is a highly respected senior  
7           advocate at the bar?

8                           A.    Well, I have no opinion of that.

9           112                   Q.    Okay.  He's a former President of  
10          the Tanganyika Law Society?

11                          A.    Yes.

12          113                   Q.    And he publicly reported receiving  
13          death threats in July 2023 relating to his public  
14          statements regarding the proposed agreement between  
15          the Government of Tanzania and the Emirate of Dubai  
16          and Dubai Ports World?

17                          A.    I don't know the details of this  
18          matter.

19          114                   Q.    You're aware that he reported  
20          receiving death threats?

21                          A.    Yes.

22          115                   Q.    That's a matter of --

23                          A.    He made allegations.  He alleged,  
24          he alleged to have received death threats.  These  
25          are allegations.

1 116 Q. These are allegations, sir?

2 A. Yes.

3 117 Q. A senior member of the bar states  
4 publicly he received death threats, and you're  
5 saying those are allegations?

6 A. That he alleged that he received  
7 death threats.

8 118 Q. Sir, he said he received them.

9 A. Yeah, but these are -- he alleged  
10 that he received death threats. That's what I'm  
11 saying.

12 119 Q. If you can't agree with me that  
13 Dr. Nshala publicly stated that he received --

14 A. No, I cannot accept it is a fact  
15 that he received death threats.

16 120 Q. Is it your understanding that in  
17 these proceedings it is your role as an expert to  
18 find facts?

19 A. Yes.

20 121 Q. Let's turn to Mr. Boniface  
21 Mwabukusi. Can we agree that in August 2023 he  
22 received a summons to appear before the Advocates  
23 Committee to face disciplinary charges?

24 A. I don't know the details of this  
25 matter.

1           263                   Q.    And can we fairly assume that you  
2                                    have not taken on any of those cases; otherwise,  
3                                    you would have listed them as relevant experience?

4                                    A.    Yeah, but I've taken cases against  
5                                    state interests, not necessarily human rights, and  
6                                    I don't know cases -- any case where an advocate  
7                                    has failed to take up a case against the state  
8                                    related to human rights.  There are several cases  
9                                    on human rights which are even now pending in  
10                                   Court.

11           264                   Q.    And just to be clear, nowhere in  
12                                   your report do you identify any cases that have  
13                                   been filed in Tanzania against state actors in  
14                                   relation to fatal shootings in the North Mara Mine  
15                                   region; correct?

16                                   A.    Correct.

17           265                   Q.    Sir, when I first raised the  
18                                   question regarding the advocates, you indicated  
19                                   that it was your understanding that Mr. Tairo was  
20                                   going to address the matter of the disciplinary  
21                                   proceedings against those lawyers?

22                                   A.    I said I have read Mr. Tairo's  
23                                   statement, and I was not even sure.  But you know,  
24                                   I've read these statements.

25           266                   Q.    Did you read it prior to preparing

1 395 Q. And it reads -- the heading is  
2 "Important Information on Professional Ethics and  
3 Conduct"; correct?

4 A. Yes.

5 396 Q. And it states:

6 "Dear Esteemed Member,  
7 Hope this email finds you in a  
8 good health."

9 Do you see that?

10 A. Yes.

11 397 Q. Do you recall receiving this email  
12 as a member of the TLS?

13 A. No, I cannot remember. I mean, it  
14 is a long time ago. I cannot recall.

15 398 Q. So if we look at the second page,  
16 you'll see the paragraph that reads:

17 "The TLS Ethics Committee has  
18 observed with concerns that of late  
19 there has been an increase on the  
20 complaints by clients against  
21 advocates for misconduct. Some of  
22 these misconducts include but are  
23 not limited to fraud,  
24 misappropriation or dealing  
25 dishonestly with client's monies,

1 Champerty, arrogance, poor service  
2 delivery, undercutting, etc."

3 Do you see that?

4 A. Yes.

5 399 Q. So you do not know what the term  
6 "undercutting" means in the context of this notice  
7 from the Tanganyika Law Society?

8 A. Now I can understand that. I  
9 know.

10 400 Q. Okay. So can you agree with me  
11 then that the practice of undercutting by an  
12 advocate in Tanzania may constitute professional  
13 misconduct?

14 A. Yes.

15 401 Q. And are you familiar with Advocate  
16 Barnabas Pascal Nyalusi?

17 A. No.

18 402 Q. He is a Ph.D. candidate at the  
19 University of Dar es Salaam?

20 A. I cannot recall him.

21 403 Q. Okay. Let me just see if we can  
22 do it this way. I'm going to turn up an article he  
23 published in August of 2022.

24 Okay. And you have on the screen an  
25 article entitled "The Ethical Dimension For Legal

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Court File No. CV-22-00690649-0000  
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Plaintiffs

- and -

BARRICK GOLD CORPORATION  
Defendant

-----  
--- This is the Cross-Examination of AUDAX VEDASTO,  
on his affidavit sworn April 5, 2024, taken at the  
offices of the Hyatt Regency, 24 Kivukoni Road, Dar  
es Salaam, Tanzania, with participants attending  
both in person and virtually, on the 13th day of  
May, 2024.  
-----

1 subject to the compliance with the rule which  
2 requires either an application and, within that  
3 application, show that they are relevant and  
4 necessary for purposes of the case, to avoid the  
5 abuse of this process.

6 52 Q. Okay. I think we're saying the  
7 same thing. Unless the other party applies for an  
8 order for production of documents from the other  
9 side, there is no requirement to turn over harmful  
10 documents; is that fair?

11 A. Yes, unless there is an  
12 application, there is no such requirement.

13 53 Q. And there is also no right to  
14 examine a party prior to trial for the purposes of  
15 discovery; is that correct?

16 A. Prior to trial?

17 54 Q. Yes.

18 A. Prior to trial for purposes of  
19 discovery, you apply to examine.

20 55 Q. You apply to deliver  
21 interrogatories; is that right?

22 A. Yes, you apply to deliver  
23 interrogatories. That is also allowed.

24 56 Q. But there is no general right to  
25 question a party prior to trial for the purposes of

**UNDERTAKINGS AND ADVISEMENTS ARISING FROM THE CROSS-EXAMINATION OF GRANT BERINGER**

(Examination held on May 29, 2024)

UNDERTAKINGS AND ADVISEMENTS				
	Question No.	Page	Undertaking / Advisement	Barrick's Response
1	19	10:11-15	<b>Advisement:</b> To produce any contracts that Barrick has with Avanzar regarding training at North Mara.	Any contracts that may exist with Avanzar regarding training at North Mara are not relevant to the determination of any of the issues before the Court on this motion. That said, Avanzar is not based in Ontario. It maintains offices in California and Calgary.
2	23	11:22-25	<b>Advisement:</b> To produce a copy of Barrick's internal standards based on the Voluntary Principles that it uses in ensuring that its Human Rights Policy is implemented at all of its operating sites.	The contents of any internal standards concerning the Voluntary Principles are not relevant to the determination of any of the issues that are before the Court on this motion.
3	38-39	18:22-19:4	<b>Advisement:</b> To provide the name of the entity that employs the following individuals that report directly to Mr. Beringer: Duncan Pettit, Marcel Radyn, and Allison Brown.	<p>Duncan Pettit is employed by Barrick Gold (London) Limited, which is a United Kingdom corporation. Marcel Radyn is employed by Barrick Gold Corporation. Allison Brown is employed by Barrick Gold Inc_Nickel Plate.</p> <p>Duncan Pettit is the Group Sustainability Manager of the Barrick group of companies. He resides in England. He is involved in matters pertaining to health and safety, the environment, community engagement and social responsibility in respect of operations and projects owned and operated by affiliates of Barrick.</p> <p>Marcel Radyn is the Sustainability Resource Lead of Barrick. He resides in Alberta. He has no involvement in matters pertaining to security, human rights or community relations at the North Mara Gold Mine.</p> <p>Allison Brown is the Director, Reclamation and Closure. She resides in British Columbia. Her responsibilities pertain to issues associated with reclamation and mine closure. She has no</p>

Court File Nos. CV-22-00-690649-0000 / CV-24-00-714148-0000

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

SOPHIA MATIKO JOHN, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD, KELVIN; ANACRETUS MARINGO GIMANWA; ESTA GEORGE RANGE, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILDREN JOSEPH, GODFREY, FILEMON AND REBEKA; ELIZABETH MATIKO IRONDO; NEEMA STEPHEN JOHN, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILDREN JOHN, MIRIAM, ESTA, AND TIMOTHY; MASWI MARWA MOHABE; DOTTO WILLIAM ITAMA, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD CHRISTINA; LYIMO ITAMA MACHELA; ITAMA MACHELA MAX; CHARLES DANIEL NYAKINA; BHOKE HAGALE MARO; DANIEL NYAKINA GHATI; DICKSON JULIUS SISE; SIBORA MARWA MWITA; EMMANUEL NYAKORENGA MBURI; RYOBA ELIAS KEBWE; PASCO MAREMBELA MWITA; NYAHELI MARWA NYAKORENGA; CHRISTOPHER JHOMU MAKENDE; RANGE MWITA RANGE; AND FREDY CHACHA WAMBURA LEMA

Plaintiffs

and

**BARRICK GOLD CORPORATION**

Defendant

**A N D B E T W E E N:**

ESTER NYANGI PETRO, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD LUCIA; LEONIDA RUBEN JOSHUA, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILDREN, MACHUGU, NEEMA AND DANIEL; ABEL SAIMA MACHUGU NYAMARUNGU; CLEMENSIA PROTAS MARWA; MACHERA KIMIRA WANKA; CHARLES IKAYA MGAYA; MAHERI MWITA NTORA; AND CHARLES MWITA MSETI

Plaintiffs

and

**BARRICK GOLD CORPORATION**

Defendant

**FACTUM OF BARRICK GOLD CORPORATION**  
**(MOTION TO DISMISS OR STAY ACTIONS)**

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## PART I - OVERVIEW

1. The two actions that have given rise to this motion are quintessential examples of impermissible forum-shopping. They have no business being litigated and adjudicated in Ontario. Instead, they should be dismissed or permanently stayed on the basis that this Court lacks jurisdiction or, alternatively, on the basis of the doctrine of *forum non conveniens*.

2. The Plaintiffs in both actions are residents of Tanzania. They claim that they were injured, or that they are the relatives of individuals who were killed, by members of the Tanzania Police Force (the “**TPF**”) at or near the North Mara Gold Mine (the “**Mine**”) in Tanzania. All of the witnesses to the alleged incidents in question reside in Tanzania. The Mine is owned and operated by North Mara Gold Mine Limited (“**NMGML**”), a Tanzanian company whose workforce consists almost entirely of Tanzanian nationals. NMGML has contractual arrangements with the TPF pertaining to the TPF’s responsibility to provide public security in the area of the Mine. Those arrangements are governed by Tanzanian law, as are any civil claims the Plaintiffs could properly assert in respect of the alleged incidents.

3. The Plaintiffs have not, however, commenced proceedings against the TPF or NMGML, either in Tanzania or at all. Rather, they purport to assert contrived claims against Barrick Gold Corporation (“**Barrick**”)—the indirect parent company of NMGML—in Ontario. Put succinctly, the Plaintiffs have made the deliberate choice to sue the wrong party in the wrong jurisdiction.

4. There is no meaningful connection between Ontario and the subject matter of this litigation, let alone a real and substantial one. The Plaintiffs’ efforts to manufacture the requisite connection through artful pleading do not withstand scrutiny and are unsupported by properly admissible evidence. To the contrary, unchallenged evidence demonstrates that Barrick’s limited business dealings in Ontario have nothing whatsoever to do with the day-to-day operations of the Mine,

with the conduct of the TPF in Tanzania, or with the relationship between NMGML and the TPF. They are hardly sufficient to vest this Court with jurisdiction to adjudicate the Plaintiffs' claims.

5. Even if this Court had jurisdiction *simpliciter*, this is a textbook case in which the doctrine of *forum non conveniens* should be applied. The Courts of Tanzania are clearly a more appropriate forum for deciding the matters at issue. Indeed, for the reasons explained below, they are the only appropriate forum. Every relevant factor points toward Tanzania rather than toward Ontario, including: (i) the location of the parties, witnesses and documentary evidence; (ii) significant language barriers that will impede the discovery and trial processes if the actions proceed in Ontario; and (iii) the system of substantive law that governs the Plaintiffs' claims.

6. Perhaps most fundamentally, basic principles of fairness militate heavily in favour of requiring these cases to proceed in Tanzania rather than Ontario. That is so because there is no way to compel members of the TPF and other third-party witnesses who reside in Tanzania to testify in connection with a legal proceeding in Ontario, whether in-person or remotely. Letters of request and the taking of commission evidence are not viable solutions, given that they will not be enforced in Tanzania. If the actions proceed in Ontario, this Court will be deprived of evidence that is absolutely essential to the fair, proper and reliable adjudication of the claims at issue. Justice would be put to the hazard. And Barrick's substantive right to defend itself against the Plaintiffs' unfounded allegations would be severely compromised. By contrast, not one of these insurmountable problems will arise if the Plaintiffs are required to litigate their claims in Tanzania.

7. The Plaintiffs seek to justify their decision to sue Barrick in the wrong forum by turning this motion into a referendum on the Tanzanian legal system. They invite the Court to engage in a microscopic dissection of various features of Tanzanian law and the civil justice system—all in an effort to conjure up baseless concerns about their ability to obtain a fair trial and complaints about

the supposed loss of non-existent juridical advantages if they are required to litigate their claims in Tanzania. In effect, the Plaintiffs are asserting that the Canadian approach to the conduct of litigation is somehow inherently superior to the approach adopted by a sovereign African democracy with a well-developed and effective system of civil justice.

8. This Court should not entertain the Plaintiffs' attacks on the laws and judiciary of Tanzania. They fly in the face of international and interjudicial comity, disrespect policy choices that undergird a foreign legal system, and are based on unreliable evidence that was largely decimated in cross-examination and contradicted by the evidence of multiple lay and expert witnesses. The overwhelming weight of the evidence confirms that the judiciary of Tanzania is independent and capable, that its laws and civil procedure are fair, and that Tanzania is an entirely appropriate forum. The Plaintiffs' assertions to the contrary are devoid of merit and smack of paternalism.

## **PART II - SUMMARY OF THE FACTS**

### **A. THE PARTIES**

#### **(i) *The Plaintiffs***

9. As alluded to above, two substantially identical actions have been commenced against Barrick in Ontario in respect of the alleged conduct of the TPF at or in the vicinity of the Mine. The first was commenced in November 2022 on behalf of 21 Plaintiffs. The second was commenced in February 2024 on behalf of eight additional Plaintiffs. Of these 29 Plaintiffs, 16 say they are relatives of deceased persons who were allegedly killed by members of the TPF. The remaining 13 Plaintiffs claim that they were personally injured by members of the TPF. The Plaintiffs acknowledge that they are residents of local villages in the vicinity of the Mine, and that all of the incidents in question occurred in Tanzania.<sup>1</sup>

<sup>1</sup> Statement of Claim issued November 23, 2022 ("First SOC"), ¶16-30, 85-147, CC [A9189](#); Statement of Claim issued February 5, 2024 ("Second SOC"), ¶16-22, 75-110, CC [A9247](#).

10. Residents of those villages speak Swahili or Kurya almost exclusively. There is no indication that any of the 29 Plaintiffs has any facility in English. To the contrary, the Plaintiffs who have given evidence in this proceeding have done so through interpreters.<sup>2</sup>

**(ii) Barrick Gold Corporation**

11. Barrick is continued under the *Business Corporations Act* of British Columbia and has its registered office in Vancouver. It is an international gold mining company, with a portfolio of operating mines and mining projects around the world. Those mines and projects are owned, operated and managed not by Barrick but by local subsidiaries or affiliates domiciled in the countries in which they are located. The overwhelming majority of the 23,000 people employed by the Barrick group of companies work at the mine sites.<sup>3</sup>

12. Consistent with its commitment to sustainable mining, Barrick maintains policies aimed at protecting the human rights of members of local communities situated near the mines in its portfolio. Responsibility for implementing these policies rests with the operating subsidiaries or affiliates that own and operate the mines.<sup>4</sup>

13. Barrick has limited business activities in Ontario. Most notably, it maintains a small corporate office in Toronto that has a headcount of fewer than 55 people who are involved in Barrick's finance, corporate development, communications, investor relations, legal and human resources functions. None of those employees is responsible for the operations of the North Mara Gold Mine. No member of Barrick's sustainability team or its regional team for Africa and the

<sup>2</sup> Affidavit of Charles Daniel Nyakina sworn January 19, 2024 ("**Nyakina Affidavit**"), ¶3 and jurat, CC [A69](#); Affidavit of Elizabeth Matiko Irondo sworn January 19, 2024 ("**Irondo Affidavit**"), ¶2 and jurat, CC [A79](#); Transcript of the Cross-Examination of Charles Daniel Nyakina dated May 9, 2024 ("**Nyakina Transcript**"), p. 5, q. 1, [CC F5118](#); Transcript of the Cross-Examination of Elizabeth Matiko Irondo dated May 9, 2024 ("**Irondo Transcript**"), p. 5, q. 1, CC [F933](#); Affidavit of Grant Beringer sworn October 1, 2023 ("**Beringer Affidavit**"), Exhibits 16-19, CC [B-1-3076](#).

<sup>3</sup> Beringer Affidavit, ¶11-14, 19, CC [B-1-2796](#); Affidavit of Sebastiaan Bock sworn October 1, 2023 ("**Bock Affidavit**"), ¶9, CC [B-1-3101](#); Cross-Examination of Bock, Exhibit 14, p. 15 (Annual Information Form for 2023), [CC F363](#).

<sup>4</sup> Beringer Affidavit, ¶21-23, 28-33, 35-37, CC [B-1-2798](#); Transcript of the Cross-Examination of Apolinary Lyambiko dated May 18, 2024 ("**Lyambiko Transcript**"), p. 107 qq. 432-433, [CC F2679](#).

Middle East resides in Ontario. None of the personnel responsible for developing Barrick's policies concerning human rights resides in Ontario. Moreover, only one of Barrick's executive officers is based in Ontario, and not a single member of its Board of Directors resides here.<sup>5</sup>

**B. THE NORTH MARA GOLD MINE**

**(i) Ownership and Management**

14. The North Mara Gold Mine is located in a remote area of the Mara Region of Tanzania. As stated above, it is owned, operated and managed by NMGML. Barrick has an indirect 84% ownership interest in NMGML, with the Government of Tanzania owning the remaining 16%. Barrick also has an indirect 84% ownership interest in Twiga Minerals Corporation ("**Twiga**"), a Tanzanian company that provides certain management services to the Mine.<sup>6</sup>

15. The Mine is in every respect a local operation:

- (a) NMGML employs a workforce of more than 1,350 people, approximately 96% of whom are Tanzanian nationals and none of whom resides in Ontario. This workforce is responsible for the full range of mine-related functions. The General Manager of NMGML, Apolinary Lyambiko, has final say on all day-to-day operational matters. He is a Tanzanian national. Nine of his 13 Heads of Department are Tanzanian. The remaining four are nationals of other African countries. All of the employees of NMGML involved in security and community relations are Tanzanian nationals;
- (b) NMGML has its own business premises, bank accounts, finance team and payroll, and makes its own personnel decisions;
- (c) Sustainability and community engagement are delivered on the ground, rather than from any corporate office (whether in Ontario or elsewhere). NMGML devotes significant time and resources to engaging with members of local villages in the area of the Mine, procures goods and services locally, and funds a number of important initiatives to support local residents. To this end, NMGML has established a Community Development Committee chaired by Mr. Lyambiko to oversee investment in community projects identified by local stakeholders;
- (d) Local residents who have concerns about impacts associated with the Mine can participate in a grievance mechanism established and operated by NMGML, and in

<sup>5</sup> Beringer Affidavit, ¶19-20, 24-26, 34, CC [B-1-2798](#); Bock Affidavit, ¶10-12, [CC B-1-3102](#).

<sup>6</sup> Bock Affidavit, ¶13-21, [CC B-1-3103](#); Apolinary Lyambiko Affidavit sworn October 1, 2023 ("**Lyambiko Affidavit**"), ¶11-12, CC [B-1-3155](#).

doing so obtain timely and appropriate remedies;<sup>7</sup> and

- (e) The business and affairs of NMGML are overseen by a Board of Directors consisting of two appointees of the Government of Tanzania and three appointees of Barrick in its capacity as indirect majority shareholder. None of the members of the Board resides in Ontario. The Board meets in-person in Tanzania on a quarterly basis.<sup>8</sup>

**(ii) Security at the Mine**

16. Unfortunately, the Mine is invaded regularly by trespassers who attempt to steal gold-bearing rock and other property. Trespassers frequently storm the Mine in large groups and are routinely armed with machetes, spears and other dangerous weapons that they use to intimidate, injure or even kill employees of NMGML and of third party-contractors. Intruders also place themselves at serious risk of injury or death from exposure to dangers that any untrained person would face in entering an active, operating mine site.<sup>9</sup>

17. In the period from August 2020 to July 2023, NMGML and Twiga engaged a private Tanzanian contractor known as Nguvu Moja to provide unarmed security personnel at the Mine. The Plaintiffs rely on NMGML's contractual arrangements with Nguvu Moja in their Statements of Claim by asserting mistakenly that Barrick entered into and oversaw those arrangements. Uncontested evidence establishes, however, that that assertion is false. These arrangements were entered into in Tanzania by Tanzanian entities, involved the provision of security services in Tanzania by Tanzanians, were governed by Tanzanian law, and involved payments by and to Tanzanian companies that were deposited into a Tanzanian bank account.<sup>10</sup>

18. Consistent with internationally recognized best practices, NMGML has also entered into

<sup>7</sup> Lyambiko Affidavit, ¶13-23, 26, CC [B-1-3156](#); Lyambiko Transcript, pp. 5-8, 103-105, 107, qq. 1-9, 418-420, 423-424, 432-433, CC [F2577](#).

<sup>8</sup> Bock Affidavit, ¶26-27, CC [B-1-3109](#); Lyambiko Transcript, pp. 13-14, q. 36, CC [F2585](#).

<sup>9</sup> Lyambiko Affidavit, ¶28-31 CC [B-1-3162](#); Transcript of the Cross-Examination of Sebastiaan Bock dated May 28, 2024, (“**Bock Transcript**”), pp. 139-140, q. 455, CC [F323](#).

<sup>10</sup> Lyambiko Affidavit, ¶34-37, 40-41, CC [B-1-3165](#); Lyambiko Affidavit, Exhibit 1, pp. 1-3, 49 (Nguvu Moja Agreement), CC [B-1-3177](#); First SOC, ¶68-69, 102, 133-134, 141, CC [A9207](#); Second SOC, ¶60-61, CC [A9264](#).

arrangements with the TPF to ensure that the TPF has the means necessary to discharge its responsibility to provide security in the area of the Mine. Arrangements such as these are not unusual in connection with extractive operations located in remote areas. They are, in fact, specifically contemplated by the Voluntary Principles on Security and Human Rights—an important set of governing principles that NGOs, extractives companies (including Barrick) and nation-states (including Canada, the United States and the United Kingdom) have adopted. The Voluntary Principles acknowledge that security is “a fundamental need, shared by individuals, communities, businesses and governments alike”, and recognize that arrangements between private companies and public security forces are frequently necessary and entirely appropriate.<sup>11</sup>

19. Numerous mining companies, banks and civil society groups in Tanzania have entered into agreements with the TPF.<sup>12</sup> Such arrangements are particularly essential at North Mara because of the incessant unlawful conduct of armed trespassers and other intruders described above.

20. At the time of the incidents complained of in these proceedings, the terms of NMGML’s relationship with the TPF were prescribed by two Memoranda of Understanding (the “MOUs”): one entered into in April 2019 and a replacement agreement entered into in May 2022.<sup>13</sup>

21. The Plaintiffs rely extensively on the MOUs in their Statements of Claim in an effort to connect Barrick to the activities of the TPF. Here again the Plaintiffs’ claims are demonstrably false. Barrick is not a party to the MOUs. They are wholly Tanzanian agreements that were entered into between Tanzanian parties and pertain to the provision of security services in Tanzania by

<sup>11</sup> Beringer Affidavit, ¶45-48, [CC B-1-2806](#); Beringer Affidavit, Exhibit 5, pp. 1, 4-7, [CC B-1-2953](#); Beringer Affidavit, Exhibit 6, [CC B-1-2963](#); Bock Transcript, pp. 119-120, q. 389, [CC F303](#).

<sup>12</sup> Expert Report of Leonard Paulo Shaidi dated October 2, 2023 (“**Shaidi First Report**”) ¶55, [CC B-1-4210](#); Transcript of the Cross-Examination of Fatma Karume dated June 25, 2024 (“**Karume Transcript**”), pp. 67-72, qq. 231-255, [CC F1845](#); Exhibit 19 to the Cross-Examination of Fatma Karume, Tab 21, p. 9, [CC F2189](#); Transcript of the Cross-Examination of Joseph Oleshangay dated May 12, 2024 (“**Oleshangay Transcript**”), pp. 233-235, qq. 1051-1056, [CC F5389](#); Exhibit 5 to the Cross-Examination of Joseph Oleshangay, Tab 51, [CC F5821](#).

<sup>13</sup> Lyambiko Affidavit, ¶50-51, [CC B-1-3170](#).

Tanzanian police officers. Moreover:

- (a) The MOUs are governed by Tanzanian law and explicitly require members of the TPF to abide by national and international human rights and anti-corruption standards, as well as with regional and international policing standards;
- (b) The MOUs impose record-creation obligations on the TPF;
- (c) The MOUs contemplate the payment of allowances by NMGML to the TPF, which are remitted in Tanzanian shillings to a Tanzanian bank account; and
- (d) As a practical matter, communications between employees of NMGML and members of the TPF are frequently conducted in Swahili.<sup>14</sup>

22. Although NMGML provides financial assistance and other support to the TPF to enable it to discharge its responsibility to maintain public security in the remote area of the Mine, neither NMGML nor Barrick directs or controls the TPF. To the contrary, the TPF is a sovereign, independent police force that operates under its own chain of command throughout Tanzania, including in the Mara Region. This is recognized explicitly in the MOUs. Even in the absence of the MOUs, the TPF would still operate in the area of the Mine.<sup>15</sup>

### C. THE ALLEGED INCIDENTS

23. The Plaintiffs' claims pertain to alleged acts of violence supposedly perpetrated by members of the TPF at or near the Mine during the period from April 2021 to July 2023. There is no suggestion that any such acts were committed by employees of NMGML or Barrick.<sup>16</sup>

24. Every single witness with first-hand knowledge of the alleged incidents resides in Tanzania, as do virtually all other witnesses whose testimony will be necessary to adjudicate the

<sup>14</sup> First SOC, ¶52, 73-82, 148, 150, CC [A9195](#); Second SOC ¶44, 66-74, 111, 113, CC [A9267](#); Lyambiko Affidavit, ¶42-48, 52-57, 60-62, CC [B-1-3167](#); See, e.g., 2019 MOU, Preamble and ss. 3.1, 4.1, 4.2, 4.4, 5.1, Schedule C, Annexes A and B, CC [B-1-17909](#) and 2022 MOU, Preamble, (G), (M)-(P) and ss. 6.1, 13, 20, Schedule B, CC [B-1-18036](#); Beringer Affidavit, ¶42-44, CC [B-1-2806](#).

<sup>15</sup> Lyambiko Affidavit, ¶42, 45-46, CC [B-1-3167](#); 2019 MOU, ss. 10.1-10.3, CC [B-1-17916](#); 2022 MOU, Preamble (Q), CC [B-1-18038](#); Beringer Affidavit, ¶44, CC [B-1-2806](#); Bock Transcript, pp. 119-120, qq. 389, CC F303; Shaidi First Report, ¶51-55, CC [B-1-4209](#). Although the 2019 MOU does not contain an express "governing law" provision, there is no doubt that it is governed by Tanzanian law.

<sup>16</sup> First SOC, ¶16-30, 85-147, CC [A9189](#); Second SOC, ¶16-22, 77-110, CC [A9247](#).

Plaintiffs' claims fairly, properly and reliably. The vast majority of the witnesses are third-party witnesses such as members of the TPF, local residents (including family members of the Plaintiffs, community leaders, neighbours and other trespassers), medical personnel involved in providing treatment to trespassers, and employees of Nguvu Moja. Critical documents are likewise in the possession of third parties in Tanzania, including the TPF and local medical facilities. Many of these records are written in Swahili rather than in English.<sup>17</sup>

#### **D. THE LEGAL SYSTEM OF TANZANIA**

25. The Tanzanian legal system finds its origins in the legal system of England, and continues to be heavily influenced by English law. Tanzania shares a commitment to bedrock principles aimed at ensuring that justice is dispensed fairly. These principles include: (i) the primacy of the rule of law; (ii) the separation of powers; and (iii) the independence of the judiciary.<sup>18</sup> The laws, judiciary and administration of justice in Tanzania are all entitled to respect.

26. The principal approach of the Plaintiffs in opposing this motion, however, is to launch a panoply of attacks on the Tanzanian legal system. They criticize everything from the manner in which judges are appointed, to the regulation of legal professionals, to domestic civil discovery rules, to the availability of legal services and the independence of members of the bar.

27. None of those attacks has merit. They are based on the decidedly unreliable evidence of five seriously flawed witnesses: (i) three purported experts in Tanzanian law, one of whom is not even qualified to practise law in Tanzania and all of whom breached their duties to this Court; and (ii) two Tanzanian lawyers who claimed that they were subjected to disciplinary hearings in

<sup>17</sup> Beringer Affidavit, ¶49, 54, 57, 59, [CC B-1-2808](#); Lyambiko Affidavit, ¶62, 63-64, CC [B-1-3173](#); Irondo Transcript, qq. 122-123, 128, 149-164, pp. 30-31, 35-37, CC [F906](#); Nyakina Transcript, qq. 50-61, 110-111, 145-147, pp. 13-14, 23, 28, CC [F5126](#); Shaidi First Report, ¶57-71, CC [B-1-4211](#); Irondo Under Advisement Response No. 9, CC [F6690](#).

<sup>18</sup> Shaidi First Report, ¶20-27, CC [B-1-4199](#).

retaliation for taking cases against the Government, but provided manifestly misleading accounts of both their own conduct and the disciplinary proceedings in question. The evidence of all of these witnesses was riddled with misstatements and should be given little if any weight.

28. By contrast, Barrick has tendered cogent evidence from reputable experts in Tanzanian law, lawyers in Tanzania who have regularly acted against the Government without incident, and comparative legal scholars who explained that aspects of the Tanzanian legal system the Plaintiffs complain of are standard features of legal systems around the world. The evidence of Barrick's witnesses was largely untouched in cross-examination. Of particular note, the principal expert in Tanzanian law relied upon by Barrick is Mohamed Chande Othman, the former Chief Justice of Tanzania. Chief Justice Othman filed two detailed expert reports that rebutted directly the Plaintiffs' criticisms concerning the independence of the judiciary and the fairness of the administration of justice in Tanzania. The Plaintiffs made the tactical choice to cross-examine the Chief Justice only briefly, however, and elected not to challenge the substance of his evidence.<sup>19</sup>

29. A number of aspects of the Tanzanian legal system the Plaintiffs' witnesses have attempted to impugn are addressed immediately below.

*(i) Independence of the Tanzanian Judiciary*

30. As the expert evidence of Chief Justice Othman makes clear, the Courts of Tanzania are independent, impartial and fully capable of determining the Plaintiffs' claims fairly and properly.

This is so both as a matter of constitutional law and in practice. In particular:

- (a) The independence and impartiality of the Tanzanian judiciary is enshrined in the Constitution of Tanzania, which confirms that justice is to be administered without fear, favour or influence from other organs of the State;<sup>20</sup>

<sup>19</sup> Transcript of the Cross-Examination of Mohamed Chande Othman dated May 14, 2024 ("**Othman Transcript**"), pp. 1-30, qq. 1-76, CC [F5955](#).

<sup>20</sup> Shaidi First Report, Exhibit 10, *Constitution of the United Republic of Tanzania*, Article 107A [*Constitution*], CC [B-1-4468](#);

- (b) The President of Tanzania appoints Judges of the High Court after consulting with an independent Judicial Service Commission. This consultation is constitutionally mandated, and in practice no candidate has ever been selected from outside a shortlist provided by the Commission to the President.<sup>21</sup> The Tanzanian process is more robust than the procedure for appointments to the Supreme Court of Canada, whereby the Prime Minister may fill vacancies by selecting from a shortlist of candidates prepared by an advisory board but consultation with the board is not constitutionally required;<sup>22</sup>
- (c) The President appoints Justices of the Court of Appeal, the highest court in Tanzania, after consulting with the Chief Justice of Tanzania. In practice, the President makes selections from a shortlist prepared by the Chief Justice with input from all then-current Justices of the Court of Appeal. The Chief Justice, in turn, is appointed by the President from a shortlist of candidates prepared by the departing Chief Justice;<sup>23</sup> and
- (d) Once appointed, Judges of the High Court and Justices of the Court of Appeal have security of tenure and of remuneration. This ensures that members of the judiciary can carry out their functions fairly and properly, without risk of retaliation.<sup>24</sup> Unlike the Judges of many State Courts in the United States, they are appointed rather than elected. They cannot be removed from their positions capriciously. Similar to the Canadian system, removal requires the recommendation of a special tribunal that operates independently of the President and other branches of the Government.<sup>25</sup>

31. As noted above, the Plaintiffs did not challenge Chief Justice Othman’s evidence concerning these issues in cross-examination. Their attempt to attack the independence of the Tanzanian judiciary rests on an Expert Report of a **Kenyan** lawyer named Donald Deya. Mr. Deya’s assertion that the Tanzanian judiciary is not independent stems principally from his unfounded claim that the Constitution of Tanzania accords the President too much power in respect of the appointment and remuneration of judicial officers.<sup>26</sup>

32. Mr. Deya’s evidence with respect to the issue of judicial independence should be given no

Expert Report of Mohamed Chande Othman dated October 2, 2023 (“**Othman First Report**”), ¶38-42, CC [B-1-3240](#).

<sup>21</sup> Othman First Report, ¶47-48, CC [B-1-3242](#); Reply Expert Report of Mohamed Chande Othman dated April 5, 2024 (“**Othman Second Report**”), ¶9, 26-35, CC [B-1-12653](#).

<sup>22</sup> Appointments to the Supreme Court of Canada are a matter of Prime Ministerial prerogative: see, e.g. Hogg & Wright, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters, 2023), Vol. 1, §8.4, CC [B-1-76](#); Government of Canada, Office of the Commissioner for Federal Judicial Affairs, [Supreme Court of Canada Appointment Process – 2023: Frequently Asked Questions](#).

<sup>23</sup> Othman Second Report, ¶11-14, 17-23, CC [B-1-12655](#).

<sup>24</sup> Othman First Report, ¶46, 51-54, 61-71, CC [B-1-3241](#); Othman Second Report, ¶9, CC [B-1-12653](#).

<sup>25</sup> Othman First Report, ¶52-54, CC [B-1-3243](#); Othman Second Report, ¶9, CC [B-1-12653](#). Judges are also afforded immunity from prosecution: *Constitution*, Article 110A(3), CC [B-1-3893](#); Othman First Report, ¶70, CC [B-1-3246](#).

<sup>26</sup> Expert Report of Donald Omondi Deya dated February 1, 2024 (“**Deya Report**”), ¶101-134. CC [A117](#).

weight. He is not and has never been qualified to practise law in Tanzania, and has no relevant expertise. Indeed, he was forced to concede in cross-examination that Chief Justice Othman has more knowledge and experience than he does with respect to: (i) the operations and procedures of the Judicial Service Commission; (ii) the appointment processes for the Chief Justice of Tanzania, Justices of the Court of Appeal and Judges of the High Court; and (iii) the remuneration, discipline and retirement of members of the judiciary in Tanzania.<sup>27</sup>

**(ii) Regulation of the Legal Profession in Tanzania**

33. The Plaintiffs’ witnesses take issue with the fact that the model of governance of the legal profession in Tanzania is not one of untrammelled self-regulation. They suggest that there is an inherent problem with the Advocates Committee—the main body responsible for professional discipline of lawyers—because the Attorney General can bring complaints against lawyers before the Committee and also potentially serve as a member of it. According to the Plaintiffs’ witnesses, this permits the Committee to be weaponized against lawyers who act against the Government.<sup>28</sup>

34. Leaving aside for the moment that the Plaintiffs have made the tactical choice to assert claims against Barrick rather than against the Government of Tanzania, none of these complaints withstands scrutiny. This is so for a host of reasons, including:

- (a) A number of the Plaintiffs’ witnesses asserted that the Attorney General of Tanzania sits in judgment of his own cause in disciplinary proceedings before the Advocates Committee. This is simply false. Although those witnesses have identified several instances in which the Attorney General filed complaints against lawyers, in not one of those cases did the Attorney General sit on the Panel of the Advocates Committee that presided over the resulting disciplinary proceeding. Rather, in each case, the Panel consisted of a sitting Judge of the High Court, a senior member of the bar appointed by the Tanganyika Law Society and the Director of Public Prosecutions (a senior

<sup>27</sup> Transcript of the Cross-Examination of Donald Omondi Deya dated May 15, 2024 (“**Deya Transcript**”), pp. 11-15, 16-19 88-97, qq. 32-53, 61-74, 419-463, CC [F579](#).

<sup>28</sup> Affidavit of Boniface A.K. Mwabukusi sworn January 30, 2024 (“**Mwabukusi Affidavit**”), ¶17-18, CC [A9114](#); Expert Report of Jebra Kambole dated February 1, 2024 (“**Kambole Report**”), ¶53-54, CC [A5239](#); Expert Report of Joseph Oleshangay dated February 1 (“**Oleshangay Report**”), ¶80-82, CC [A2422](#); Deya Report, ¶16-24, CC [A99](#).

government official whose independence is enshrined in Tanzanian law);<sup>29</sup>

- (b) As noted above and discussed in greater detail below, evidence relied upon by the Plaintiffs concerning the alleged persecution of lawyers who have acted against the Government is entirely unreliable and should be disregarded; and
- (c) Self-regulation is not the only accepted model of governance of the legal profession. To the contrary, the unchallenged expert evidence of Professor Adam Dodek is that Canada is a global outlier and that the trend in common law jurisdictions is toward co-regulation, in which governments are involved in the governance and discipline of lawyers. Even in Canada, provincial Law Societies both prosecute and adjudicate complaints of lawyer misconduct, and Attorneys General can file complaints against specific lawyers. Professor Dodek concluded that based on his comparative analysis there is “nothing inherent in the structure of lawyer discipline [in Tanzania] that would undermine or compromise the independence of the bar in Tanzania”.<sup>30</sup>

*(iii) Access to Justice*

35. There is little doubt that the Plaintiffs can obtain timely and fair access to justice in Tanzania. The country has a well-established legal system and a sophisticated bar that consists of more than 10,000 lawyers. There is a courthouse in a town located less than a two-hour drive from the communities in which the Plaintiffs reside. The Plaintiffs would be permitted to testify in Swahili without the need for an interpreter. They would also be able to testify in Kurya with court-provided interpretation into English or Swahili. The Courts of Tanzania have the power to compel relevant witnesses to testify (including members of the TPF), and to order production of relevant documents both from parties and from non-parties. Moreover, the average time for a case to proceed from filing through to a determination on the merits in Tanzania is substantially faster than in the Superior Court of Ontario in the Toronto Region.<sup>31</sup>

<sup>29</sup> Deya Transcript, pp. 36-37, 73-80, qq. 167-168, 374-386, CC [F580](#); Expert Report of Makarios Tairo dated April 16, 2024 (“**Tairo Report**”), ¶108-117, CC [B-1-16197](#); Tairo Report, Appendix B, Tab 23, National Prosecutions Services (Establishment) Order, Government Notice No. 49, CC [B-1-16897](#).

<sup>30</sup> Expert Report of Adam Dodek dated April 5, 2024, ¶5, 115-122, CC [B-1-7965](#).

<sup>31</sup> Oleshangay Transcript, pp. 66-67, qq. 300-304, CC [F5222](#); Tab 69, Exhibit 5 to the Cross-Examination of Oleshangay, p. 62, CC [F5925](#); Othman Transcript, pp. 45-49, qq. 105-106, 108-112, CC [F5999](#); Nyakina Transcript, pp. 7-8, qq. 9-16, CC [F5120](#); Irondo Transcript, pp. 6-7, qq. 7-8, CC [F882](#); Othman First Report, ¶31-32, 88-89, 101-108, 139-140, CC [B-1-3239](#); Shaidi First Report, ¶34-35, 38-40, 67-70, 74, CC [B-1-4203](#); Expert Report of Leonard Paulo Shaidi dated April 5, 2024 (“**Shaidi Third Report**”), ¶50, CC [B-1-15688](#); Expert Report of Audax Vedasto dated April 5, 2024 (“**Vedasto Report**”), ¶40-47, 49-50, CC [B-1-17123](#).

36. Several of the Plaintiffs’ witnesses nevertheless argue that the Plaintiffs will be unable to access suitable legal services in Tanzania because: (i) there is an alleged “chill” that prevents lawyers from taking cases against the Government; and (ii) neither contingent fee arrangements nor sufficient legal aid is available, and the Plaintiffs cannot afford to engage counsel.<sup>32</sup>

37. As adverted to above, the alleged “chill” is a red herring. Barrick and NMGML are private corporations rather than instrumentalities of the Government of Tanzania. There is no evidence that lawyers in Tanzania are broadly reluctant to sue the Government, let alone sue private corporations—even ones in which the State has a minority ownership interest. To the contrary, NMGML is regularly sued in Tanzania by Tanzanian parties represented by Tanzanian counsel. NMGML wins some cases and loses others.<sup>33</sup>

38. In any event, the alleged “chill” does not exist. The uncontested evidence of numerous senior Tanzanian lawyers is that they have frequently represented clients in claims against the Government without fear of reprisal, and that they would not hesitate to act in a case against Barrick or NMGML in Tanzania.<sup>34</sup>

39. The suggestion that the Plaintiffs would be unable to engage counsel in Tanzania due to their indigence is equally meritless. Although Tanzania has made the policy choice not to permit contingent fee arrangements, this is hardly surprising or problematic. Restrictions on contingent fee arrangements exist in jurisdictions around the world. Indeed, contingent fee arrangements were

<sup>32</sup> Nyakina Affidavit, ¶15, CC [A71](#); Irondo Affidavit, ¶24, CC [A83](#); Affidavit of Fatma Karume sworn January 27, 2024 (“**Karume Affidavit**”), ¶42, CC [A9043](#); Kambole Report, ¶26, 29-31, 48-50, CC [A5231](#); Oleshangay Report, ¶66, 76, 84, 116, 136-137, CC [A2419](#); Deya Report, ¶97, 190, CC [A116](#).

<sup>33</sup> Affidavit of Dr. Wilbert Kapinga sworn April 4, 2024, ¶13-19, CC [B-1-10919](#); Affidavit of Apolinary Lyambiko sworn April 4, 2024 (“**Lyambiko Second Affidavit**”), ¶4-8, CC [B-1-11160](#); Vedasto Report, ¶14, CC [B-1-17119](#); Transcript of the Cross-Examination of Audax Vedasto dated May 13, 2024 (“**Vedasto Transcript**”), pp. 6-8, qq. 11-12, CC [F6600](#).

<sup>34</sup> Affidavit of Mpaya Kamara sworn April 5, 2024, ¶3-5, 13-28, 34-36, CC [B-1-10766](#); Affidavit of Richard Rweyongeza sworn April 5, 2024, ¶2-3, 8-37, CC [B-1-15359](#); Vedasto Transcript, pp. 72-73, qq. 269-271, CC [F6666](#); Expert Report of Ulimboka Mwasomola dated April 12, 2024 (“**Mwasomola Report**”), ¶4, 48-55, 72-75, CC [B-1-11656](#); Shaidi Third Report, ¶9-10, CC [B-1-15673](#).

barred in Ontario for approximately a century and only permitted relatively recently.<sup>35</sup>

40. Regardless, the argument that the Plaintiffs cannot find legal counsel in Tanzania is speculative at best and contradicted by the evidence. The *Legal Aid Act* of Tanzania provides for legal aid in civil cases and directs the judicial officers presiding over civil proceedings to cause a person to obtain such services where the Court determines that it is in the interest of justice to do so. As of 2023, there were approximately 435 legal aid providers registered in Mainland Tanzania alone. These legal aid providers are permitted to offer services across all of Mainland Tanzania, including the Mara Region. Moreover, any lawyer is permitted to accept *pro bono* mandates.<sup>36</sup> It is telling that the Plaintiffs have adduced no evidence that they even attempted to retain counsel or obtain legal aid services in Tanzania, much less that they were unsuccessful in doing so.

### PART III - ISSUES, LAW AND ARGUMENT

41. This motion raises two issues: (i) does this Court have jurisdiction *simpliciter* to preside over and adjudicate the two actions; and (ii) if so, should this Court nevertheless stay the actions in favour of the Courts of Tanzania on the basis of the doctrine of *forum non conveniens*?

#### A. JURISDICTION *SIMPLICITER*

42. The test for jurisdiction *simpliciter* is whether there is a “real and substantial connection” between Ontario and the subject matter of the litigation. In assessing this threshold issue, the Court must go beyond the artful pleadings of the Plaintiffs and carefully weigh the evidence tendered by both parties.<sup>37</sup> The governing test involves a two-step analysis:<sup>38</sup>

<sup>35</sup> Expert Report of Stefaan Voet dated April 5, 2024, ¶26-49, CC [B-1-17599](#); *McIntyre Estate v. Ontario (AG)*, 2002 CanLII 45046 (ON CA), ¶18, 35.

<sup>36</sup> Mwasomola Report, ¶19-29, 32, CC [B-1-11659](#); Mwasomola Report, Appendix B, Tab 27, *Legal Aid Act*, s 27, CC [B-1-12551](#); Tairo Report, Appendix B, Tab 19, *Advocates (Professional Conduct and Etiquette) Regulations (GN 118 published on 09/03/2018)*, Rule 74, CC [B-1-16709](#).

<sup>37</sup> *Yip v. HSBC Holdings*, 2017 ONSC 5332 ¶104-110 (“*Yip SC*”), *aff’d*, 2018 ONCA 626 (“*Yip CA*”), *leave ref’d*, 2019 CanLII 23866 (SCC); *Sikhs for Justice v. India*, 2020 ONSC 2628 ¶21 (“*Sikhs*”); *Gerbien v. Apotex Inc.*, 2023 ONSC 6792 ¶148.

<sup>38</sup> *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 (“*Van Breda*”) ¶66-69, 82, 85-88, 90, 95-98, 100-105, 108-112; *Haaretz.com v. Goldhar*, 2018 SCC 28 (“*Haaretz.com*”) ¶34-43.

- (a) *First*, the Plaintiffs must establish a “good arguable case” regarding the presence of one of four “presumptive connecting factors”—*i.e.*, that the defendant (i) is domiciled or resides in, (ii) carries on business in or (iii) engaged in tortious conduct in Ontario, or that (iv) a relevant contract was made in Ontario.
- (b) *Second*, if such a factor does exist, Barrick must demonstrate that the relative strength of the linkage with Ontario is so weak and indirect that the presumption of jurisdiction *simpliciter* is rebutted, in which case the actions must be dismissed.

43. Barrick concedes that two presumptive connecting factors are present in this case. Although it is domiciled in British Columbia and is therefore a foreign defendant,<sup>39</sup> Barrick is resident and carries on business in Ontario because it maintains a corporate office in Toronto.<sup>40</sup>

44. The inquiry therefore turns to whether these presumptive connecting factors have been rebutted.<sup>41</sup> The ease with which these factors can be established makes it that much more important for this Court to assess critically the actual strength of the relationship between Ontario and the Plaintiffs’ claims.<sup>42</sup>

45. The Supreme Court has made clear that “where the presumptive connecting factor is the fact that the defendant is carrying on business in the province, the presumption can be rebutted by showing that the subject matter of the litigation is unrelated to the defendant’s business activities in the province”.<sup>43</sup> This Court has confirmed that where there is only a tenuous connection between a defendant’s business operations or residence in Ontario and the asserted claims, these presumptive connecting factors are rebutted and jurisdiction *simpliciter* is displaced.<sup>44</sup>

46. The Court should make that very determination in the case at bar. The link between

<sup>39</sup> A corporation’s domicile is its jurisdiction of incorporation and the place of its registered office: [Zhang v. Hua Hai Li Steel Pipe Co.](#), 2019 ONSC 7465 ¶28; [JTI-Macdonald v. B.C.](#), 2000 BCSC 312 ¶174-179; [Brown, Gow, Wilson v. Beleggs-Societeit N.V.](#), 1961 CanLII 430 (ON SC) p. 690.

<sup>40</sup> [Yip SC](#), *supra*, ¶159; [Canada Life Assurance Co. v. C.I.B.C.](#), [1979] S.C.J. No. 63 ¶8-9, 13-14, 18-19, [CC B-1-264](#).

<sup>41</sup> [Van Breda](#), *supra*, ¶81, 94-96, 100.

<sup>42</sup> [Sikhs](#), *supra*, ¶49.

<sup>43</sup> [Van Breda](#), *supra*, ¶95-96.

<sup>44</sup> [Kornhaber v. Starwood Inc.](#), 2014 ONSC 6182 ¶1-12; [Jacobovich v. Israel](#), 2021 ONSC 3558 ¶1-10, 61-67, 93-98 (“[Jacobovich](#)”).

Barrick’s limited business activities in Ontario and the Plaintiffs’ claims is not only tenuous—it does not exist. There is no connection whatsoever between Barrick’s corporate office in Toronto and harm the Plaintiffs supposedly sustained in Tanzania. As stated above, no one who works in Barrick’s Toronto office is involved in the management of the North Mara Gold Mine. Nor does the relationship between NMGML and the TPF have any connection to Ontario. Put simply, the Mine is not operated or overseen from Ontario.<sup>45</sup>

47. Any finding that this Court has jurisdiction *simpliciter* to preside over the Plaintiffs’ claims would invite the same mischief the Court warned against in *Jacobovich v. Israel*:

If I were to find that this Court has jurisdiction *simpliciter* in this case, a curious result ensues. Plaintiffs who have no connection to Ontario would have recourse to this Court for a tort or contractual claim that originated entirely outside Ontario and with multi-jurisdictional parties who also have no connection to Ontario, against defendants, only one of whom is resident in Ontario, and who only exercised an administrative function that was minor in relation to the original alleged wrongdoing.

[T]his would result in Ontario becoming an international “hosting court” for any number of international disputes that have no real or substantial connection to Ontario. This would be inconsistent with the principles of fairness, predictability and comity set out in *Van Breda*....<sup>46</sup>

48. It is difficult to conceive of a clearer case in which the presumption of jurisdiction *simpliciter* has been rebutted. The Court should dismiss the actions on that basis alone.

## **B. FORUM NON CONVENIENS**

49. If this Court concludes that it has jurisdiction *simpliciter*, it must next determine whether it should exercise that jurisdiction pursuant to the doctrine of *forum non conveniens*.<sup>47</sup> The relevant question is whether Barrick has demonstrated that the Courts of Tanzania are a “clearly more

<sup>45</sup> To the extent that the Plaintiffs assert incorrectly that part of the alleged torts pleaded in their Statements of Claim occurred in Ontario, any such presumptive connecting factor is rebutted for the same reasons: see *Van Breda*, *supra*, ¶95-96; *Yip SC*, *supra*, ¶209-211, *aff’d Yip CA* ¶42-50; *Jacobovich*, *supra*, ¶1-10, 72, 93-98.

<sup>46</sup> *Jacobovich*, *supra*, ¶96-97.

<sup>47</sup> *Haaretz.com*, *supra*, ¶27, 31; *Van Breda*, *supra*, ¶101.

appropriate forum” for the fair and efficient resolution of the matters at issue. To meet this onus, Barrick must establish that the Courts of Tanzania: (i) possess jurisdiction *simpliciter* over the subject matter of the actions; and (ii) are clearly more appropriate having regard to a number of context-sensitive factors.<sup>48</sup> As explained below, both criteria are readily satisfied.

**(i) The Courts of Tanzania Possess Jurisdiction Simpliciter**

50. There is no need for this Court to assess whether there is a real and substantial connection between the Plaintiffs’ claims and Tanzania. That is so because Barrick has conceded that “[t]he Courts of Tanzania ... have jurisdiction to adjudicate claims asserted by the Plaintiffs against NMGML, the [TPF] and/or Barrick in respect of the alleged security incidents at issue”.<sup>49</sup>

51. In any event, there are multiple presumptive connecting factors between the subject matter of this litigation and Tanzania. The Plaintiffs have alleged that Barrick is resident and does business in Tanzania; some portion of the alleged torts clearly occurred in Tanzania;<sup>50</sup> and several relevant contracts (namely, NMGML’s arrangements with the TPF and Nguvu Moja) were “made” in Tanzania.<sup>51</sup> The Plaintiffs cannot rebut these presumptive connecting factors, as doing so would require them to contradict their own pleadings.

**(ii) The Courts of Tanzania Are a Clearly More Appropriate Forum**

<sup>48</sup> *Van Breda*, *supra*, ¶103, 108-109; *Breedon v. Black*, 2012 SCC 19 (“*Breedon*”) ¶22-23; *Lapointe Rosenstein Marchand Melancon LLP v. Cassels Brock & Blackwell LLP*, 2016 SCC 30 ¶52 (“*Lapointe*”); *Kyko Global Inc. v. M/S Crawford Bayley*, 2021 ONCA 736 ¶49 (“*Kyko*”); *Yip SC*, *supra*, ¶218, 222; *Jacobovich*, *supra*, ¶99.

<sup>49</sup> Notice of Motion dated May 17, 2023, ¶24, CC B-1-2781; Notice of Motion dated July 16, 2024, ¶24, CC B-1-2781. The uncontested expert evidence of Chief Justice Othman is that the Courts of Tanzania would have and take jurisdiction if the Plaintiffs commenced equivalent proceedings in Tanzania: Othman First Report, ¶109-115, CC B-1-3254.

<sup>50</sup> In applying Ontario’s conflict of laws principles, this Court must analyze “the place where a tort was committed” for two different purposes, namely: (i) to determine jurisdiction *simpliciter* and (ii) to identify the body of law that governs the cause of action (as part of the *forum non conveniens* analysis). The applicable tests are different and can yield different results. See, e.g.: *Das v. George Weston Ltd.*, 2017 ONSC 4129 ¶1-5, 199-207, 212, 217-265 (“*Das SC*”), *aff’d* 2018 ONCA 1053 ¶1-4, 32-38, 71-74, 76, 79-91, 99 (“*Das CA*”), *leave ref’d*, 2019 CanLII 73201 (SCC); *Leonard v. Houle*, [1997] O.J. No. 4563 (C.A.) ¶1-3, 17-21, 29-31 (“*Leonard*”) *leave ref’d*, [1998] S.C.C.A. No. 19 CC B-1-1421; *Paniccia v. MDC Partners Inc.*, 2017 ONSC 7298 ¶81-83; *Yip SC*, *supra*, ¶207, 239.

<sup>51</sup> A contract is “made” where the last essential element of contract formation occurs: see *Lapointe*, *supra*, ¶39-47.

52. The second branch of the *forum non conveniens* test requires Barrick to establish that—based on a holistic assessment of the factors listed below<sup>52</sup>—the Courts of Tanzania would be a clearly more appropriate forum for resolving the matters at issue. The Supreme Court of Canada has confirmed that: (i) not all of these factors will always be relevant; (ii) a particular factor may be more or less important in a given case; and (iii) this assessment is qualitative in nature, rather than a mathematical exercise of tallying up the number of factors that point to each jurisdiction.<sup>53</sup>

**(A) Fairness to Barrick If the Actions Proceed in Ontario**

53. As the Supreme Court has made clear, one of the fundamental goals of the *forum non conveniens* exercise is “to ensure that both parties are treated fairly.”<sup>54</sup> If the selection of one court as *forum conveniens* will seriously prejudice the ability of a party to defend claims asserted against it, the resulting unfairness must weigh heavily in favour of the other forum.

54. Importantly, that was the exact conclusion reached by the Supreme Court in *Haaretz.com v. Goldhar*.<sup>55</sup> That case arose from a defamation claim brought in Ontario by a plaintiff who resided both in Ontario and in Israel against a defendant based in Israel. The majority of the witnesses and evidence were located in Israel and the tort in question had been committed in multiple jurisdictions, including Ontario.

55. The Supreme Court concluded that the Ontario action should be stayed in favour of the Courts of Israel. In reaching that conclusion, the Supreme Court placed particular emphasis on the risk of trial unfairness that would result if the action were to be tried in Ontario. Justice Côté—whose reasons were endorsed by a plurality of the Court—ruled that if the action proceeded in

<sup>52</sup> The factors in question are adapted from the lists articulated by the Supreme Court in *Van Breda*, *supra*, ¶110-112; *Breedon*, *supra*, ¶30-37; *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18 (“*Banro*”) ¶49; and *Haaretz.com*, *supra*, ¶52-65, 67-84, 95-98.

<sup>53</sup> *Van Breda*, *supra*, ¶105, 110; *Breedon*, *supra*, ¶23, 28, 37; *Lapointe*, *supra*, ¶53.

<sup>54</sup> *Haaretz.com*, *supra*, ¶79 [emphasis original]; *Van Breda*, *supra*, ¶105; *Breedon*, *supra*, ¶36.

<sup>55</sup> *Haaretz.com*, *supra*.

Ontario there was an unacceptable risk that the defendant would be denied its basic right to defend itself fairly and fully because of the potential unwillingness of the Courts of Israel to enforce letters of request. Indeed, Justice Côté viewed this issue as so central that she returned to it at three junctures of her ruling.

56. *First*, at the outset of her *forum non conveniens* analysis, Justice Côté emphasized that the plaintiff's choice of forum must be displaced if the alternative inflicts unfairness on the defendant:

While the normal state of affairs favours exercising jurisdiction in the forum where it is properly assumed, **this should never come at the cost of one party facing unfair or clearly inefficient proceedings.** ...Where the evidence indicates that the alternative forum is in a better position to dispose fairly and efficiently of the litigation, the court should grant the stay... **especially ... in cases where the evidence raises doubt as to whether proceeding in the chosen forum will provide the defendant with a fair opportunity to present its case.**<sup>56</sup> [emphasis added]

57. *Second*, Justice Côté returned to this issue in her discussion of the comparative convenience and expense for witnesses of proceeding in Israel or Ontario. She specifically linked the issue of trial unfairness with the risk that the Israeli Courts might refuse to enforce letters of request:

**[D]etermining whether it is likely that Israel would actually enforce such a letter of request is crucial to ensuring the fairness of a potential trial in Ontario.** ...This fact must be proven by expert evidence led by the party seeking to establish it; in this case, [the plaintiff] Goldhar.

...[T]he evidence did not allow the courts below to ensure that [the defendant] Haaretz would be able to compel its witnesses to testify if the trial proceeded in Ontario. Being unable to do so would affect Haaretz's ability to defend itself in Ontario, which would be significantly unfair...

...I conclude that this factor weighs heavily in favour of a trial in Israel. ... [T]he courts below never satisfied themselves that [key] witnesses could be compelled to testify if the action proceeded in Ontario, despite the fact that it would be significantly unfair for Haaretz to be unable to compel them.<sup>57</sup> [emphasis added]

58. *Third*, Justice Côté stated as follows in addressing the issue of fairness:

<sup>56</sup> [Haaretz.com](#), *supra*, ¶47.

<sup>57</sup> [Haaretz.com](#), *supra*, ¶64-65, 70 (and see also ¶59, 61, 63).

[T]he evidence did not allow the courts below to ensure that Haaretz would be able to compel its witnesses to testify if the trial were to proceed in Ontario. This raises doubt as to whether Haaretz would have a fair opportunity to defend itself if a trial were held in Ontario. The prospect of such a circumstance...would be significantly unfair to Haaretz....By not considering this, the motion judge failed to carry out his duty “to ensure that both parties are treated fairly”.<sup>58</sup> [emphasis added, underlining in original]

59. Although *Haaretz.com* is the most authoritative ruling addressing this issue, Canadian courts have confirmed repeatedly that if there is a risk that a defendant will be unable to collect evidence from foreign witnesses for use at trial in a Canadian proceeding, the resulting unfairness may justify the Canadian court declining jurisdiction over the matter.<sup>59</sup>

60. Significantly, in *Haaretz.com* the Ontario action was stayed on the basis of an unproven concern that letters of request might not be enforced in Israel.<sup>60</sup> Here the uncontroverted expert evidence of Chief Justice Othman and Professor Leonard Shaidi, a senior legal scholar in Tanzania, establishes that the Courts of Tanzania will not enforce letters of request issued by this Court.<sup>61</sup>

61. By contrast—and similar to the approach taken by the Courts of Israel, as noted in *Haaretz.com*<sup>62</sup>—the Courts of Tanzania will compel evidence from residents of that country for use in a Tanzanian proceeding. As Professor Shaidi explained in his Expert Report, the Courts of Tanzania have the power to summons members of the TPF to testify and to compel them to produce documents.<sup>63</sup> Professor Shaidi’s evidence on this point was unchallenged in cross-examination.

62. This is a potentially dispositive issue that the Court should weigh heavily in its *forum non conveniens* analysis. If this Court assumes jurisdiction, Barrick will be left to defend the Plaintiffs’

<sup>58</sup> *Haaretz.com*, *supra*, ¶79.

<sup>59</sup> See, e.g.: *Jacobovich*, *supra*, ¶108-109, 111; *Shanghai Zhong Jia Hua Chuang Ye Investment LLP v. Bai*, 2022 BCSC 935 ¶29, 33-35 (“*Shanghai*”); *Bang v. Kim*, 2022 BCSC 1893 ¶148-149 (“*Bang*”), *var’d on other grounds*, 2024 BCCA 88. And see also *Kyko*, *supra*, ¶40 [in obiter].

<sup>60</sup> *Haaretz.com*, *supra*, ¶59, 61, 63, 64, 79.

<sup>61</sup> Othman First Report, ¶124-138, CC B-1-3258; Shaidi First Report, ¶71-73, CC B-1-4216.

<sup>62</sup> *Haaretz.com*, *supra*, ¶59.

<sup>63</sup> Shaidi First Report, ¶67-70, CC B-1-4215. See also Shaidi Third Report, ¶50, CC B-1-15688.

claims with both hands tied behind its proverbial back. As noted above, virtually all of the witnesses whose evidence will be required for the actions to be decided fairly and reliably reside in Tanzania. They are not employees of either Barrick or NMGML. Barrick cannot compel any of these third-party witnesses to testify or produce relevant documents, either live at trial in Ontario or via letters of request in Tanzania, in connection with litigation before this Court.<sup>64</sup>

63. By way of example only, this means that if the actions were to proceed to trial in Ontario, Barrick and the Court would be deprived of a full or sufficient evidentiary record concerning:

- (a) the manner in which the alleged incidents involving members of the TPF occurred, or whether they happened at all;
- (b) whether the alleged actions of members of the TPF were justified in the specific circumstances and context in which those actions were taken;
- (c) the manner in which the Plaintiffs or members of their families sustained the injuries complained of and whether they merely exacerbated previous physical problems; and
- (d) the seriousness of each alleged injury and whether it actually caused or contributed to any subsequent death.

64. It is frankly unimaginable that this Court would entertain multiple wrongful death claims in the absence of first-hand witnesses to each and every incident that is alleged to have caused the deaths at issue. Here, however, the Plaintiffs have failed to establish that even a single relevant witness to the incidents in question will be available to testify at trial. Instead, the only Plaintiffs who testified in connection with this motion confirmed that they have no such evidence.<sup>65</sup>

65. It is hardly fair to Barrick or to the Court in a case of this nature—which involves allegations of serious misconduct and human rights abuses, and therefore risks inflicting enormous reputational and other harm on Barrick—to adjudicate the Plaintiffs’ claims in the absence of

<sup>64</sup> Kambole Transcript, pp. 174-175, qq. 768-771, [CC F1102](#).

<sup>65</sup> Nyakina Transcript, pp. 23-26, qq. 108-110, 113-118, 128-136, CC [F5136](#); Irondo Transcript, pp. 32-33, qq. 132-138, CC [F908](#).

critical testimony and documentary evidence. This is particularly true when there is a viable and readily available alternative forum in which these problems do not arise. On this basis alone, this Court can and should stay the actions in favour of the Courts of Tanzania.

**(B) Fairness to the Plaintiffs If the Motion Is Granted**

66. The *forum non conveniens* assessment must also take into account any genuine unfairness the Plaintiffs would suffer if this Court were to decline jurisdiction in favour of the Courts of Tanzania. The Court should be reluctant, however, to find that the laws and judiciary of a foreign democratic country are so deficient that there is a real risk that the Plaintiffs will be unable to obtain a fair trial there. It would be inconsistent with international and interjudicial comity for such a damning conclusion to be drawn lightly in the absence of highly compelling evidence.

67. It is surely not good enough for the Plaintiffs to offer vague assertions of prejudice based on unproven criticisms regarding the independence of the Tanzanian judiciary and bar. Instead, specific and cogent evidence is required to establish that there is a real risk that the Courts of Tanzania would not adjudicate the Plaintiffs' claims against Barrick fairly or properly.<sup>66</sup>

68. There is no such evidence and no such risk. To the contrary, the evidence establishes that members of the Tanzanian judiciary and Tanzanian bar are both independent and capable.

69. As noted above, the central argument advanced by the Plaintiffs is incoherent. They allege that the Government of Tanzania supposedly retaliates against lawyers who take cases against it, and has therefore created a "chill" that would deprive the Plaintiffs of the ability to engage suitable Tanzanian counsel to litigate their claims against Barrick. This nonsensical argument is based principally on the evidence of Fatma Karume and Boniface Mwabukusi, two Tanzanian lawyers

<sup>66</sup> [Bang, supra](#), ¶169-171; [Garcia v. Tahoe Resources Inc.](#), 2017 BCCA 39 ¶125-126 ("[Garcia CA](#)"), *leave ref'd*, [2017 CanLII 35114](#) (SCC).

who claim in their affidavits that they have been subjected to disciplinary proceedings before the Advocates Committee solely as a result of having acted against the Government.

70. There are at least two insurmountable problems with that contention. *First*, and most obviously, the Plaintiffs have asserted claims against Barrick rather than against the Government, with the result that even if the “chill” complained of by the Plaintiffs exists (and it does not), it would be of no consequence. As explained above, there is no evidence that the “chill” would extend to cases against Barrick or even against NMGML. Indeed, the evidence is to the contrary.

71. In this regard, the situation before the Court is analogous to the case of *Oakwell v. Enernorth*. There, the question was whether a Singaporean judgment was unenforceable in Ontario because of alleged government interference and judicial bias in Singapore. This Court and the Court of Appeal for Ontario both found that such allegations were irrelevant because the defendant’s evidence of interference and bias pertained only to political cases rather than commercial ones.<sup>67</sup> Our Courts were not prepared to indict the entire judiciary of a sovereign nation in a sweeping manner. This Court should be similarly reluctant to endorse the Plaintiffs’ unfounded attacks on the Tanzanian judiciary and legal system.

72. *Second*, the narratives offered by Ms. Karume and Mr. Mwabukusi are entirely inaccurate. Neither of them is a martyr who has been targeted unfairly because they had the temerity to act against the Government.<sup>68</sup> Rather, they were disciplined by the Advocates Committee because they engaged in uncivil and improper behaviour that is contrary to well-established ethical rules

<sup>67</sup> *Oakwell Engineering Ltd. v. Enernorth Industries Inc.*, 2005 CanLII 27149 (ON SC) ¶56-61, *aff’d*, 2006 CanLII 19327 (ON CA) ¶3, 23-24, *leave ref’d*, 2007 CanLII 1145 (SCC).

<sup>68</sup> Both of them have acted against the Government repeatedly without being subjected to disciplinary proceedings. See Karume Transcript, pp. 13-15, 18-20, 24-25, 27, qq. 40-46, 55-57, 62-65, 82-83, 93, CC [F1791](#); Transcript of the Cross-Examination of Boniface Mwabukusi dated June 20, 2024 (“**Mwabukusi Transcript**”), pp. 10-12, 19-21, 23, qq. 26-35, 66-75, 88, CC [F4320](#).

governing the conduct of lawyers in Tanzania.<sup>69</sup>

73. There is no truth to Ms. Karume’s contention that she was suspended and ultimately disbarred simply for having challenged the constitutionality of the appointment of the Attorney General of Tanzania. She was disciplined because she made rude and intemperate remarks about the Attorney General, published a series of disparaging and irresponsible posts on Twitter before and during her hearing before the Advocates Committee, and behaved abysmally during the course of that hearing. Regrettably, Ms. Karume materially mischaracterized the actual facts in the affidavit she swore in connection with this motion and failed to attach to it a number of key documents pertaining to her disciplinary proceedings. She also failed to disclose that she made the tactical and informed choice to: (i) lead no evidence in her own defence during proceedings before the Advocates Committee; and (ii) take no steps to ask the High Court of Tanzania to set aside an Order made by the Principal Judge of that Court suspending her from practice.<sup>70</sup>

74. Mr. Mwabukusi’s assertion that he was subjected to disciplinary proceedings because he acted in a matter challenging the legality of commercial arrangements between the Governments of Tanzania and Dubai is likewise untethered to the truth. In reality, he was subjected to disciplinary proceedings before the Advocates Committee because he breached applicable ethical rules by: (i) making inflammatory and irresponsible statements during a media briefing he conducted on the steps of the courthouse concerning the matter while it remained pending before the Courts of Tanzania; and (ii) publishing equally inflammatory comments on Twitter that

<sup>69</sup> Transcript of the Cross-Examination of Makarios Tairo dated May 22, 2024 (“**Tairo Transcript**”), pp. 78-83, 88, 102-106, qq. 280-296, 317-318, 348-359, CC [F6554](#).

<sup>70</sup> Karume Affidavit, ¶29, CC [A9039](#); Tairo Report, ¶133-168, CC [B-1-16203](#); Tairo Report, Appendix B, Tab 3, pp. 35-37, CC [B-1-16292](#); Tairo Report, Appendix B, Tab 4, p. 2, CC [B-1-16318](#); Karume Transcript, pp. 198-201, 646-651, CC [F1976](#); Tairo Transcript, pp. 42-47, 61-64, qq. 145-168, 220-231, CC [F6518](#).

attacked the honesty, integrity and conduct of multiple public officials.<sup>71</sup>

75. Approximately three months after Mr. Mwabukusi swore his affidavit in connection with this motion, the Advocates Committee issued its decision in the disciplinary proceedings against him. The Committee concluded that Mr. Mwabukusi had misconducted himself but chose only to admonish him, rather than to suspend or disbar him.<sup>72</sup> The minimal sanction imposed on Mr. Mwabukusi contradicts any notion that outcomes in disciplinary proceedings against lawyers in Tanzania are preordained or that the Government can use such proceedings to procure the disbarment of lawyers who act against its interests.

76. Moreover, neither Ms. Karume nor Mr. Mwabukusi was a fair witness in cross-examination. They refused repeatedly to answer direct questions in a straightforward manner. Instead, they dissembled, prevaricated and were combative throughout. Mr. Mwabukusi also revealed himself to be a conspiracy-monger who ultimately claimed that every single Member of Parliament in Tanzania who approved the commercial arrangements with Dubai was corrupt. When Mr. Mwabukusi was asked to produce the evidence he had gathered in support of his extraordinary claim, Plaintiffs' counsel took the question under advisement and later refused it.<sup>73</sup>

**(C) Convenience to the Parties and their Connections to Each Forum**

77. An assessment of the relative convenience or inconvenience the parties would face in proceeding in the two potential forums clearly militates in favour of staying the actions.

78. Because Barrick's senior executives are resident around the world, including in Africa, it

<sup>71</sup> Mwabukusi Transcript, pp. 40-41, 175-177, qq. 153-155, 533-536, CC [F4324](#); Tairo Report, Appendix B, Tab 5, CC [B-1-16400](#); Tairo Report, ¶169-191, CC [B-1-16212](#); Tairo Report, Appendix B, Tab 1, Complaint, CC [B-1-16226](#); Mwabukusi Examination, Exhibit 18, Tab 17, CC [F4734](#); Mwabukusi Affidavit, ¶10, CC [A9114](#).

<sup>72</sup> Mwabukusi Transcript, pp. 121-124, qq. 392-393, CC [F4431](#); Mwabukusi Examination, Exhibit 18, Tab 17, CC [F4734](#).

<sup>73</sup> See, e.g., Mwabukusi Transcript, pp. 38-40, 52-55, 57-63, 71-80, 84-86, 104-114, 121-124, 130-134, 160, 168-169, qq. 146-152, 179-182, 187-203, 221-256, 279-289, 353-365, 393, 412-420, 492-494, 507-511, CC [F4323](#); Karume Transcript, pp. 111-114, 122-127, 139-146, 173-187, 193-198, qq. 399-405, 440-454, 488-504, 589-607, 636-645, CC [F1889](#); Mwabukusi Responses to Questions Taken Under Advisement no. 1, 5, CC [F6697](#).

would not be inconvenienced if this Court were to decline jurisdiction in favour of the Courts of Tanzania. The Plaintiffs would obviously face no inconvenience if the actions were tried in their home country, particularly when the likely venue for trial is a courthouse located in a town near to where they reside.<sup>74</sup>

79. The relevant links between the parties and Tanzania are clearly far stronger than their links to Ontario. Although Barrick is resident in Ontario, its indirect subsidiaries own and operate the North Mara Gold Mine and two other mines in Tanzania.<sup>75</sup> The Plaintiffs' only connection is to Tanzania. Not one of the Plaintiffs has any connection to Ontario.

**(D) Convenience to the Witnesses**

80. An assessment of the convenience and inconvenience to witnesses also favours the Courts of Tanzania as the *forum conveniens*.

81. It would be significantly more convenient to virtually every relevant witness if they can provide *viva voce* evidence in Tanzania rather than in Ontario. To the best of Barrick's knowledge, there is no witness likely to be called at trial who resides in Ontario. The vast majority of the potential witnesses reside in Tanzania. This includes current and former employees of NMGML, current and former members of the TPF, other witnesses to the events in question, local community leaders, and physicians and medical staff who treated the Plaintiffs and their deceased family members. Senior members of Barrick's regional team for Africa and the Middle East and its team involved in sustainability-related matters are based in Africa.<sup>76</sup>

<sup>74</sup> Beringer Affidavit, ¶20, CC [B-1-2798](#); Bock Affidavit, ¶8, 12, 24, 26, CC [B-1-3101](#); Shaidi First Report, ¶74, CC [B-1-4217](#); Nyakina Transcript, pp. 7-8, qq. 9-16, CC [F5120](#); Irondo Transcript, pp. 6-7, qq. 7-8, CC [F882](#).

<sup>75</sup> Bock Affidavit, ¶16-17, CC [B-1-3103](#).

<sup>76</sup> Beringer Affidavit, ¶35-37, CC [B-1-2803](#); Bock Affidavit, ¶8, 12, 24, 25, CC [B-1-3101](#); Lyambiko Affidavit, ¶13, 15-16, CC [B-1-3156](#); Irondo Transcript, pp. 30-31, 35-37, qq. 122-123, 128, 149-164, CC [F887](#); Nyakina Transcript, pp. 23, 28, qq. 110-111, 145-147, CC [F5136](#).

82. Crucial documentary evidence is also located in Tanzania. This includes police and medical records that are unlikely to be released absent an Order of the Courts of Tanzania. Although such Orders can be issued in conjunction with proceedings pending before the High Court of Tanzania, they will not be made in conjunction with litigation in Ontario.

83. Importantly, there are significant language barriers that would prevent the Plaintiffs' claims from being tried efficiently in Ontario and that are likely to impose an intolerable burden on this Court. These barriers are obvious from, among other things, transcripts of the cross-examinations of the two Plaintiffs who provided evidence in connection with this motion, as well as the Plaintiffs' responses to undertakings and advisements.<sup>77</sup> The reality is that the vast majority of the Tanzanian witnesses do not speak or understand English. If the actions proceed in Ontario, all of these witnesses will require Swahili interpreters. Indeed, to the extent that relevant witnesses speak and understand only Kurya rather than Swahili, it will be difficult to find qualified interpreters in Ontario at all.<sup>78</sup> Many of the key documents will also have to be translated from Swahili to English. Conversely, no Swahili translators or interpreters will be required if these claims are adjudicated in Tanzania given that the Tanzanian judiciary operates both in English and in Swahili.<sup>79</sup> The Supreme Court of Canada has noted that the need to retain interpreters in an Ontario proceeding—in circumstances where many witnesses do not speak English—is a factor that favours the selection of the foreign court as the *forum conveniens*.<sup>80</sup>

#### **(E) The System of Substantive Law that Governs the Plaintiffs' Claims**

84. The selection of the body of law that governs the Plaintiffs' claims is a significant factor

<sup>77</sup> See generally Irondo Transcript and Nyakina Transcript, CC [F877](#), CC [F5114](#); Irondo Responses to Questions Taken Under Advisement nos. 1, 4-5, CC [F6688](#); Nyakina Responses to Questions Taken Under Advisement no. 2, CC [F6691](#).

<sup>78</sup> Affidavit of Tracey O'Rahilly sworn April 4, 2024, ¶3-4, CC [B-1-12646](#).

<sup>79</sup> Shaidi First Report, ¶74(c), CC [B-1-4218](#); Othman First Report, ¶31, 89, CC [B-1-3239](#).

<sup>80</sup> [Haaretz.com](#), *supra*, ¶53; and see [Bang](#), *supra*, ¶146-147; [Shanghai](#), *supra*, ¶31-33.

in the *forum non conveniens* analysis. The Supreme Court has held definitively that “[o]ne factor that must be considered in the *forum non conveniens* analysis is the law applicable to the tort”,<sup>81</sup> and has found that the courts of a given jurisdiction are more likely to be the *forum conveniens* if the body of law governing the claim is the law of that jurisdiction.<sup>82</sup>

85. The Courts of this Province have likewise concluded that if a plaintiff’s claims are governed by the laws of a foreign country, this supports declining jurisdiction in favour of the courts of that country.<sup>83</sup> This is so because although foreign law can be proved in Ontario by adducing expert evidence,<sup>84</sup> doing so requires additional time, increases the cost to the parties, and renders the proceeding significantly more complicated.<sup>85</sup> Indeed, in connection with this motion alone, the parties have filed a total of 12 affidavits from eight witnesses opining on matters of Tanzanian law. It is clearly more efficient and substantially more reliable for members of the judiciary of Tanzania to construe and apply the laws of that country.

86. In selecting the body of law that governs claims in tort (the *lex loci delicti*), this Court must identify the single location (the *situs* of the tort) in which the tort was committed.<sup>86</sup> Here it is clear that the law of Tanzania governs the claims of alleged negligence, wrongful death and breach of customary international law pleaded by the Plaintiffs.

87. **Negligence.** In selecting the law governing an allegation of multijurisdictional negligence—*i.e.*, where a careless act allegedly occurs in one country but its consequences are felt in a second country—the *lex loci delicti* is the law of the place where the tort was “completed”

<sup>81</sup> [Banro](#), *supra*, ¶49.

<sup>82</sup> [Banro](#), *supra*, ¶62; [Breedon](#), *supra*, ¶33.

<sup>83</sup> [Currie v. Farr’s Coach Lines Ltd.](#), 2015 ONSC 2352 ¶3-4, 7, 37, 51, 53-56, 58 (“*Currie*”). The converse is also true: [Trident Consulting Internat. Inc. v. Logsdon](#), 2018 ONSC 1696 (Master) ¶22.

<sup>84</sup> [Dosen v. Meloche Monnex](#), 2021 ONCA 141, ¶54; [Das SC](#), *supra*, ¶200-206, *aff’d*, [Das CA](#), *supra*, ¶67.

<sup>85</sup> [Jacubovich](#), *supra*, ¶122; [Shanghai](#), *supra*, ¶35.

<sup>86</sup> This can be contrasted with the potential identification of multiple places where a tort occurred for purposes of confirming the existence of jurisdiction *simpliciter*: [Yip SC](#), *supra*, ¶239; [Das SC](#), *supra*, ¶217-22, 234-239, 254-257.

through the suffering of harm by the Plaintiffs.<sup>87</sup> Having regard to the nature of the Plaintiffs’ claims, that can only be the laws of Tanzania. Our Courts have held that even when foreign plaintiffs plead strategically that they suffered harm in their home jurisdiction as a consequence of negligence that allegedly originated in the head office of a Canadian corporation, the *lex loci delicti* remains the law of the plaintiffs’ home jurisdiction and is not the law of the Canadian province in which the head office is located.<sup>88</sup>

88. **Wrongful Death Claims.** Although the Plaintiffs purport to assert wrongful death claims under the Ontario *Family Law Act*, they have no right to do so. Because the Plaintiffs’ negligence claims are unquestionably governed by the laws of Tanzania, the laws of Tanzania also govern their wrongful death claims. As explained in the leading Canadian treatise (citing the Ontario *Family Law Act*): “[D]ependants claiming damages for a wrongful death must show that they are so entitled under the law of the place of the tort”.<sup>89</sup> In this case, that is Tanzania. Significantly, derivative claims under the *Family Law Act* have been dismissed repeatedly in circumstances where the underlying negligence action is itself governed by foreign law.<sup>90</sup>

89. Because a negligence claim governed by a body of foreign law cannot support a wrongful death claim under the *Family Law Act*, it is incumbent on the Plaintiffs to pursue their wrongful death claims under the *Law Reform (Fatal Accidents and Misc. Provisions) Act* of Tanzania.<sup>91</sup> In

<sup>87</sup> See, e.g., *Leonard*, *supra*, ¶1-3, 17-21, 29-31, CC [B-1-1422](#); *Lilydale Cooperative Ltd. v. Meyn Canada Inc.*, 2013 ONSC 5313 ¶3, [8\(a\)](#), [9-12](#), [23](#); *Long v. Dundee Resort Development LLC*, 2013 ONSC 4238 ¶1, [10](#), [23](#), [30-31](#).

<sup>88</sup> *Das SC*, *supra*, ¶223-265, *aff’d*, *Das CA* ¶32-38; *Yordanes v. BNS*, 2006 CanLII 1777 (ON SC) ¶2, [31](#), [97-99](#). See also *Garcia v. Tahoe Resources Inc.*, 2015 BCSC 2045 ¶74-80, *rev’d on other grounds*, *Garcia CA*, *supra*; and *Kalma v. African Minerals Ltd.*, [2018] EWHC 3506 (QB) ¶1-5, [9](#), *aff’d*, *Kalma CA*, [2020] EWCA Civ 144.

<sup>89</sup> Walker, *Canadian Conflict of Laws*, 7<sup>th</sup> ed. (Toronto: LexisNexis, 2023), Vol. 2, §19.02[2], CC [B-1-83](#).

<sup>90</sup> Significantly, this is true even if the laws of the “foreign” jurisdiction do not permit such wrongful death claims or award less generous compensation than would be available under the *Family Law Act*—see, e.g., *Prefontaine Estate v. Frizzle*, 1990 CarswellOnt 347 (C.A.) ¶19-23, 25, 31, 43-44, 50, 54, CC [B-1-1750](#); *Buchan v. Non-Marine Underwriters, Lloyds, London*, [1999] O.J. No. 1974 (S.C.J.) ¶3-6, 11, 17-19, 27-29, [CC B-1-245](#); *Somers v. Fournier*, [2001] O.J. No. 2683 (S.C.J.) ¶1, 4, 12, 73-74, 84, *aff’d but varied on issue of pre-judgment interest*, 2002 CanLII 45001 (ON CA), CC [B-1-2074](#); *Bowes v. Chalifour*, [1992] O.J. No. 2960 (Gen. Div.) ¶1-2, 4, 8, 11-13, 18-20, CC [B-1-168](#); *Buchar v. Weber*, 1990 CanLII 8060 (ON SC) ¶1, [2](#), [5](#), [7](#), [13-16](#), [19](#).

<sup>91</sup> Othman First Report, ¶116-121, CC [B-1-3256](#).

this regard, in *Das v. George Weston Ltd.*, this Court and the Court of Appeal for Ontario both held that negligence that allegedly occurred at an Ontario head office—but that caused injuries and deaths in Bangladesh—was governed by the laws of Bangladesh. The wrongful death claims at issue were therefore governed by the *Fatal Accidents Act* of Bangladesh.<sup>92</sup>

90. **Breaches of customary international law.** The allegation that Barrick breached norms of customary international law by somehow permitting or failing to prevent misconduct committed in Tanzania by Tanzanian authorities against Tanzanian citizens must necessarily be governed by the laws of Tanzania. Tanzania is where any alleged wrongdoing occurred and crystallized through the harm supposedly suffered by the Plaintiffs. In Canada, such claims have not been found definitively to be cognizable causes of action.<sup>93</sup> Importantly, like Canadian law, Tanzanian law accepts that the categories of tort claims are not closed and that novel torts can be established.<sup>94</sup>

**(F) The Loss of Juridical Advantages**

91. Based on their expert evidence, the Plaintiffs apparently intend to argue that Ontario offers juridical advantages that they will be deprived of if they are required to pursue their claims in Tanzania. In considering that argument, this Court must bear in mind that foregone juridical advantages are the “least weighty” of the traditional *forum non conveniens* factors, and have been characterized as a “very weak” and generally “problematic” factor in determining which of two courts is the clearly more appropriate forum.<sup>95</sup> This is so for a number of reasons.

92. *First*, as the Supreme Court has affirmed repeatedly, any assessment of juridical advantages is a “zero sum game”: while one party may lose a benefit if the proceeding is heard in

<sup>92</sup> *Das SC*, *supra*, ¶1-5, 223-265, 292, 317, 358, *aff’d*, *Das CA*, *supra*, ¶1-4, 32-38, 43, 63, 71-74, 76, 91, 99, 103.

<sup>93</sup> See *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 ¶68-69.

<sup>94</sup> *Othman First Report*, ¶122, CC B-1-3257. See, by analogy, *Das SC*, *supra*, ¶287.

<sup>95</sup> *Yip SC*, *supra*, ¶218, 222, 234-243, 257-258, 264, *aff’d*, *Yip CA*, *supra*, ¶66-72; *George Leon Family Trust v. Volkswagen*, 2018 ONSC 4265 ¶46-47 (“*Volkswagen*”).

a foreign country, the opposing party is equally likely to lose a comparable benefit if the proceeding is heard in Ontario. For this reason, the Supreme Court has explained that “Juridical advantage ... as a practical matter, may not add much to the jurisdictional analysis” and “should not weigh too heavily in the *forum non conveniens* analysis”.<sup>96</sup>

93. *Second*, the Supreme Court has emphasized the impropriety of placing undue weight on the loss of a juridical advantage that will occur simply as a result of a proceeding being heard in a different jurisdiction. Placing significant weight on the loss of such advantages is problematic because doing so is contrary to the principle of comity. It presumes implicitly that characteristics of the Ontario system are innately superior to different but no less valid attributes of the alternative jurisdiction:

...[A]n emphasis on juridical advantage may be inconsistent with the principles of comity. In particular, a focus on juridical advantage may put too strong an emphasis on issues that may reflect only differences in legal tradition which are deserving of respect, or courts may be drawn too instinctively to view disadvantage as a sign of inferiority and favour their home jurisdiction.<sup>97</sup>

94. *Third*, because of the central role that comity plays in private international law, Canadian courts must guard against any normative presumption that differences in foreign legal systems render those systems inferior simply because they diverge from Canadian traditions or expectations. The Supreme Court has noted that “[d]ifferences should not be viewed instinctively as signs of disadvantage or inferiority”, and that “[i]n the end, the court must engage in a contextual analysis, but refrain from leaning too instinctively in favour of its own jurisdiction”.<sup>98</sup>

95. This Court must therefore avoid engaging in a microscopic and inappropriately critical analysis of policy choices made by Tanzania in arranging its legal system. It would be entirely

<sup>96</sup> *Breedon*, *supra*, ¶27, 35; *Haaretz.com*, *supra*, ¶76, 96(3); *Yip SC*, *supra*, ¶237, *aff'd*, *Yip CA*, *supra*, ¶69.

<sup>97</sup> *Breedon*, *supra*, ¶26; and see *Bouzari v. Bahremani*, 2015 ONCA 275 ¶46.

<sup>98</sup> *Van Breda*, *supra*, ¶112; and also *Yip SC*, *supra*, ¶236; *Currie*, *supra*, ¶55-56; *Volkswagen*, *supra*, ¶46-47.

inconsistent with comity to presume that differences between the Tanzanian legal system and the legal system of Ontario somehow mean that Ontario is necessarily the *forum conveniens*:

**Parsing another country’s procedural law to assess comparative advantage or disadvantage eviscerates the “attitude of respect for and deference to the legitimate actions of other states and their courts” that lies at the core of international comity. ...[I]nternational comity means...that in cases where the other country’s legal system is otherwise legitimate...this court should respect and accept the other country’s legal system in its entirety, **including any differences in litigation procedure...**<sup>99</sup> [emphasis added]**

96. *Finally*, it is important to bear in mind the relatively minor role that loss of juridical advantage plays in the broader *forum non conveniens* analysis. The loss of a juridical advantage that would be available in Ontario—even one that is important to a party—does not preclude an action from being stayed on the basis of *forum non conveniens*. In *Haaretz.com*, for example, the Supreme Court determined that the right to a jury trial was “a substantive right of particular importance” in defamation cases. Even though this right was available in Ontario and not in Israel, the Court stayed the Ontario proceeding in favour of the Courts of Israel.<sup>100</sup>

97. In the case at bar, it appears that the Plaintiffs will seek to persuade this Court that they will lose two juridical advantages if the actions are stayed in favour of the Courts of Tanzania: (i) the ability to engage counsel on a contingent fee basis; and (ii) relatively broad discovery rights parties have in civil litigation in Ontario. In doing so, the Plaintiffs seek to draw this Court into precisely the sort of paternalistic dissection of the Tanzanian legal system that the Supreme Court has warned against. Neither of these putative losses of advantage should be accorded any weight.

98. **Contingency Fees.** Although contingent fee arrangements are prohibited in Tanzania, this is of no moment. It is a perfectly valid policy choice to prohibit or restrict the availability of such

<sup>99</sup> *Volkswagen*, *supra*, ¶49. By analogy, see also *Das SC*, *supra*, ¶275.

<sup>100</sup> *Haaretz.com*, *supra*, ¶71-76.

arrangements. As noted above, Tanzania is hardly unique in making that policy choice. Moreover, the Courts of Ontario have held repeatedly that the fact that a foreign jurisdiction does not permit class proceedings—or the contingent fee arrangements on which they are predicated—is not a significant juridical disadvantage.<sup>101</sup> Likewise, the fact that it may be less costly for a plaintiff to litigate in Ontario than in another jurisdiction is a relatively minor factor in the analysis. Our Courts have accepted that foreign jurisdictions are *forum conveniens* despite the costs of litigation being higher than in Ontario.<sup>102</sup>

99. In any event, the absence of contingent fee arrangements in Tanzania will not prevent the Plaintiffs from obtaining legal services there. As stated above, there is a robust legal aid framework in Tanzania and *pro bono* legal services are also available. In circumstances such as these where the Plaintiffs adduced no evidence that they have made any effort whatsoever to obtain legal aid or *pro bono* services in Tanzania, it does not lie in their mouths to complain that they will be unable to engage counsel if required to pursue their claims in their home country.

100. **Discovery Rights.** Although discovery rights in civil litigation in Tanzania are narrower than they are in Ontario, this does not constitute a significant juridical disadvantage associated with proceeding in Tanzania.<sup>103</sup> The discovery regime in Tanzania simply reflects policy choices that have been made in crafting that country's justice system in an effort to reduce the financial and other burdens associated with civil litigation. Tanzania is, once again, hardly unique in choosing to place restrictions on discovery. As Professor Scott Dodson, an expert in comparative

<sup>101</sup> [Volkswagen](#), *supra*, ¶39-47, 49; [Yip SC](#), *supra*, ¶257-258.

<sup>102</sup> See, e.g., [Currie](#), *supra*, ¶58.

<sup>103</sup> Barrick expects that the Plaintiffs may attempt to rely upon the decision of the British Columbia Court of Appeal in [Garcia v. Tahoe Resources](#) in arguing that alleged shortcomings of the Tanzanian discovery regime constitute a juridical disadvantage associated with pursuing their claims in Tanzania. Any such reliance would be misplaced. The ruling on this issue in *Garcia* must be treated with considerable care and skepticism. It is premised on the type of normative reasoning the Supreme Court has warned against repeatedly. *Garcia* is also readily distinguishable from the case at bar. See [Garcia CA](#), *supra*, ¶1-3, 73-80. To the extent necessary or appropriate, Barrick will address *Garcia* in its Reply Factum and in oral argument.

procedure, explains in his Expert Report, the expansive discovery regime in Ontario is the global outlier. The global norm is to impose limitations on discovery rights.<sup>104</sup>

101. In any event, the specific concerns identified by the Plaintiffs' experts with respect to discovery rights in Tanzania are misplaced and mischaracterize applicable Tanzanian law.

102. Although parties to civil proceedings in Tanzania do not have a freestanding obligation to produce every potentially relevant document in their possession, litigants can and routinely do bring successful applications for the discovery of documents under the Tanzanian *Civil Procedure Code*.<sup>105</sup> The Plaintiffs' experts have seriously mischaracterized the authorities they purport to rely upon in claiming that such applications cannot succeed unless the documents in question are described with a high degree of specificity, and that as a result a party can only obtain discovery of documents it already knows exists.<sup>106</sup> In reality, the party seeking discovery must simply frame its request for documents with sufficient particularity to permit the producing party to know what is being asked of it and cannot engage in fishing expeditions.<sup>107</sup> This is entirely consistent with principles governing discovery in Ontario.

103. Although there is no procedure for oral discovery in Tanzania, there is likewise no provision for oral discovery in civil litigation in many other jurisdictions (including, for instance, Germany, Belgium and Italy) or in many domestic and international arbitrations.<sup>108</sup> Moreover, in Tanzania pre-trial discovery can be conducted by way of written interrogatories with leave of the Court. The argument advanced by the Plaintiffs' experts that interrogatories cannot be used to undermine an opposing party's case is once again premised on a fundamental mischaracterization

<sup>104</sup> Dodson Report, ¶18, 34-37, CC [B-1-4794](#).

<sup>105</sup> Vedasto Report, ¶20-27, CC [B-1-17119](#).

<sup>106</sup> Oleshangay Report, ¶33-39, CC [A2411](#); Kambole Report, ¶16, CC [A5228](#).

<sup>107</sup> Vedasto Report, ¶30-39, CC [B-1-17121](#).

<sup>108</sup> Dodson Report, ¶27-33, CC [B-1-4797](#).

of the governing jurisprudence.<sup>109</sup> Their contention that Tanzanian law does not provide a mechanism for obtaining pre-trial production of documents from non-parties is also wrong.<sup>110</sup>

104. Ultimately, the Plaintiffs speculate that if their claims are heard in Tanzania, they may have difficulty obtaining production of relevant documents as a result of features of the Tanzanian approach to discovery. Those claims are unfounded, including because: (i) NMGML owns and operates the Mine, and the Plaintiffs have not identified any relevant documents Barrick might have; and (ii) in any event, the Plaintiffs could sue both NMGML and Barrick in Tanzania and obtain documentary discovery from each of them. By contrast, if these actions proceed in Ontario, Barrick will be legally prevented from obtaining vital testimony and documentary evidence from third-party witnesses located in Tanzania.

105. In assessing the Plaintiffs' assertions of foregone juridical advantage, this Court must therefore be mindful of Justice LeBel's warning in *Black v. Breedon*: "[A]ny loss of advantage to the foreign plaintiff must be weighed as against the loss of advantage, if any, to the defendant in the foreign jurisdiction if the action is tried there rather than in the domestic forum'... Juridical advantage therefore should not weigh too heavily in the *forum non conveniens* analysis."<sup>111</sup> If each party will face a countervailing evidence-gathering disadvantage regardless of where the action is heard, the issue of juridical advantage becomes academic.

106. The foregoing analysis leads inexorably to the conclusion that the Courts of Tanzania are a clearly more appropriate forum than Ontario for the adjudication of the Plaintiffs' claims. Barrick's motion must be granted and the actions should be dismissed or permanently stayed.

<sup>109</sup> Oleshangay Report, ¶45-47, CC [A2414](#); Kambole Report, ¶21, CC [A5229](#); Vedasto Report, ¶60-65, CC [B-1-17126](#).

<sup>110</sup> Vedasto Report, ¶40-50, CC [B-1-17123](#).

<sup>111</sup> *Breedon*, *supra*, ¶27.

*(iii) The Plaintiffs' Evidence Should Be Disregarded*

107. In considering this motion, the Court would be entirely justified in disregarding or according no weight to the lay and expert evidence adduced by the Plaintiffs.

108. Any material tendered through a witness that merely repeats or relays information emanating from third parties (who are not themselves called as witnesses) is inadmissible for the truth of its contents. In this regard, the affidavits relied upon by the Plaintiffs are rife with hearsay. Although Rule 39.01(4) of the *Rules of Civil Procedure* provides that affidavit evidence on a motion may contain statements based on the deponent's "information and belief," the precise source of the information and the fact of the belief must be specified.<sup>112</sup> This Rule is not an unfettered licence to rely upon hearsay.

109. The Plaintiffs have purported to tender dozens of documents consisting of thousands of pages through an affidavit sworn by a law clerk. The clerk in question apparently obtained these documents online. Her affidavit does not establish the authenticity of these documents and offers no explanation as to their relevance or the purpose for their inclusion in the record.<sup>113</sup>

110. Some of the documents attached to the clerk's affidavit, such as copies of Barrick's own securities filings, are unobjectionable. Others are objectionable on their face, including because the clerk cannot possibly possess a genuine belief in the accuracy or reliability of their contents. This Court has refused to admit documents for the truth of their contents in these circumstances, where a clerk simply collected materials from the internet and attached them to an affidavit.<sup>114</sup> Similarly, this Court and the Court of Appeal for Ontario have more generally rejected attempts to

<sup>112</sup> *Rules of Civil Procedure*, r. 39.01(4); *Williams v. Canon Canada Inc.*, 2011 ONSC 6571 ¶102, *aff'd*, 2012 ONSC 3692 (Div. Ct.).

<sup>113</sup> See generally Affidavit of Jeanine Alphonse #1 sworn February 1, 2024, CC [A5539](#).

<sup>114</sup> *Mobilix Hurontario Contractor v. Edgel Equipment Rentals*, 2023 ONSC 5885 (Assoc. J.) ¶4, [20-21](#).

insert third-party documents into the record via a law clerk’s affidavit in circumstances where: (i) the authors of the documents are not available for cross-examination; and (ii) the clerk has no basis for endorsing their accuracy or completeness.<sup>115</sup>

111. It is similarly unacceptable for the Plaintiffs’ fact witnesses, Ms. Karume and Mr. Mwabukusi, to attach to their affidavits third-party articles and offer them for the truth of their contents.<sup>116</sup> The authors of these articles have not been put forward as witnesses and there is no evidence that their contents are true. As the Court of Appeal has confirmed, appending articles to an affidavit affirmed by a witness who has no personal knowledge of the articles “[is] no different than tendering the articles themselves, which would constitute inadmissible hearsay”.<sup>117</sup>

112. The expert reports relied upon by the Plaintiffs are even more problematic. Canadian law imposes an important gatekeeper responsibility on judges to police the admission of expert evidence.<sup>118</sup> Very little, if any, of the expert evidence tendered by the Plaintiffs survives the application of the relevant standards. Our Courts have struck out, ruled inadmissible or given no weight to opinion evidence in circumstances directly analogous to those at issue before this Court:

- a) **A witness is not allowed to opine on foreign law if the witness lacks the necessary qualifications to provide such evidence.**<sup>119</sup> Mr. Deya’s evidence concerning the Tanzanian legal system is inadmissible or should be given no weight on this basis.<sup>120</sup>
- b) **An expert’s evidence will be excluded or accorded no weight if it misstates the content of, or draws conclusions that are inconsistent with, applicable law or governing rules.**<sup>121</sup> Regrettably, all three of the Plaintiffs’ experts did exactly that.

Mr. Kambole made demonstrably false statements regarding the Tanzanian legal

<sup>115</sup> *Dia v. Calypso Theme Waterpark*, 2021 ONCA 273 ¶¶13, 18-19; *Oxley v. Oxley*, 2010 ONSC 1609 ¶¶7-12; *Enterprise Rent-A-Car Co. v. Richards*, 2019 ONSC 5201 ¶¶29-31.

<sup>116</sup> Mwabukusi Affidavit, Exhibit C, CC [A9148](#), and Karume Affidavit Exhibits A, B, C, F-H, CC [A9046](#), [A9049](#), [A9057](#), [A9088](#), [A9098](#).

<sup>117</sup> *R. v. Hanse*, 2022 ONCA 843 ¶¶18-20, 33-41; and see *R. v. Shilling*, 2021 ONCA 916 ¶¶20-21.

<sup>118</sup> *R. v. Abbey*, 2017 ONCA 640 ¶¶47-49; *White Burgess v. Abbott and Haliburton Co.*, 2015 SCC 23 ¶¶22-24 (“*White Burgess*”).

<sup>119</sup> *RBC v. Societe Generale (Canada)*, 2005 CanLII 18860 (ON SC) ¶¶2, 5; *Andrash v. Andrash*, 1967 CanLII 560 (BC SC) p. 443; *Winbigler v. Winbigler*, 1953 CanLII 579 (BCSC) pp. 136-137.

<sup>120</sup> Deya Transcript, pp. 11-20, qq. 32-83, CC [F579](#).

<sup>121</sup> *Gould, supra*, ¶¶67, 181, 217, 242-244, 249, 258, 261.

system, mischaracterized numerous Tanzanian legal authorities and asserted opinions for which no legal authority exists.<sup>122</sup> Mr. Oleshangay expressed opinions that have been consistently rejected by the Court of Appeal of Tanzania and mischaracterized numerous legal authorities.<sup>123</sup> Mr. Deya likewise mischaracterized Tanzanian law and drew conclusions that were unsupported by any authority.<sup>124</sup>

- c) **An expert's evidence will be accorded little if any weight if it was predicated on a false or unproven factual foundation. Parties must prove through separate, properly admissible evidence that foundational facts relied on by an expert are true, accurate and complete.**<sup>125</sup> All of the Plaintiffs' experts ventured opinions and assertions that were unsupported by properly admissible evidence.

Mr. Kambole purported to opine on claims and proceedings brought against members of the Tanzanian bar in circumstances where he lacked direct knowledge and the Plaintiffs provided no supporting evidence or corroborating documents.<sup>126</sup>

Mr. Oleshangay: (i) made bald assertions regarding the number of lawyers in Tanzania who litigate human rights and public interest matters; and (ii) made salacious claims and allegations about matters in Tanzania, including proceedings brought against members of the Tanzanian bar, in the absence of supporting evidence.<sup>127</sup>

Mr. Deya purported to attach to this Expert Report for the truth of their contents 32 third-party reports despite making no effort to verify the accuracy or reliability of information they contained. Although he claimed to have been a co-author of another third-party report, his claim in that regard was exposed to be exaggerated at best.<sup>128</sup> He also purported to opine on claims and proceedings brought against members of the Tanzanian bar despite having no personal knowledge of those matters and in the absence of supporting documents. Indeed, he was forced to concede in cross-examination that in opining on those claims and proceedings he had simply

<sup>122</sup> See, for example, Kambole Report, ¶53, CC [A5239](#); Kambole Transcript, pp. 213-223, qq. 953-996, CC [F1141](#) (describing inaccurately the role of the Director of Public Prosecutions and the Attorney General); Kambole Report, p. 16, FN 10, CC [A5239](#), and Kambole Transcript, pp. 238-249, qq. 1083-1127, CC [F1166](#) (stating incorrectly that the Tanzanian Law Society is not involved in the discipline of advocates); Kambole Report, ¶25, 29, CC [A5230](#), and Kambole Transcript, pp. 177-194, qq. 781-845, CC [F1105](#), (asserting incorrectly that it is illegal for lawyers to charge fees below minimum amounts and that acting *pro bono* is impermissible); Kambole Report, ¶15-21, CC [A5227](#), and Kambole Transcript, pp. 76-86, 88-92, 103-112, 117-126, 133-138, 141-155 qq. 402-433, 442-456, 493-523, 547-587, 625-644, 663-710; CC [F1104](#), (mischaracterizing Tanzanian law concerning discovery).

<sup>123</sup> Oleshangay Report, ¶120-124, 133-135, CC [A2429](#), and Oleshangay Transcript, pp. 95-142, qq. 414-611, CC [F5251](#) (regarding the availability of legal aid and costs orders against legal aid recipients); Oleshangay Report, ¶33-39, 45-47, 185-192, CC [A2411](#), and Oleshangay Transcript, pp. 184-195, 236-249, qq. 802-855, 1061-1087, 1094-1112, CC [F5340](#) (mischaracterizing and misquoting several Tanzanian authorities)

<sup>124</sup> Deya Report, ¶87, CC [A114](#); Deya Transcript, pp. 71-75, qq. 342-355, CC [F639](#) (mischaracterizing law pertaining to appeal rights); Deya Report, ¶22-24, CC [A100](#), and Deya Transcript, pp. 78-81, qq. 374-386, CC [F646](#) (asserting falsely that the Attorney General sits in judgment of his own cause in proceedings before the Advocates Committee).

<sup>125</sup> *R. v. Abbey*, 1982 CarswellBC 230 (S.C.C.) ¶4, 50-52 CC [B-1-1798](#); *R. v. Lavallee*, [1990] S.C.J. No. 36 ¶65-66, 72, 74 CC [B-1-1882](#); *M.C.*, *supra*, ¶69-70, 80, 98, 101.

<sup>126</sup> See, e.g., Kambole Report, ¶51, CC [A5237](#); Kambole Transcript, pp. 224-230, qq. 997-1027, CC [F1152](#).

<sup>127</sup> See, e.g., Oleshangay Report, ¶78, 80, 160-162 and Oleshangay Transcript, pp. 65-66, 148-153, 157-159 and 202-208, CC [F5221](#).

<sup>128</sup> Deya Report, Appendix A (Index Tabs 26-58), CC [A142](#); Deya Transcript, pp. 104-111, qq. 499-527. Deya conceded that the single report which he claimed to have prepared does not list him as a representative who participated in its preparation: Deya Transcript, pp. 116-120, qq. 546-560; CC [F684](#).

“regurgitated” what other lawyers had told him.<sup>129</sup>

- d) **The evidence of an expert witness will not be admitted if the witness lacks the requisite independence and impartiality.**<sup>130</sup> Key *indicia* of an expert’s lack of impartiality include an unwillingness to make appropriate concessions in the face of contrary evidence<sup>131</sup> or otherwise acting in an evasive manner.<sup>132</sup> Regrettably, each of Mr. Kambole, Mr. Oleshangay and Mr. Deya engaged in this exact conduct.<sup>133</sup>

113. As a result, all that remains is Barrick’s highly credible and largely unchallenged evidence. That evidence establishes overwhelmingly that Tanzania is clearly the more appropriate forum for the adjudication of the matters at issue.

#### PART IV - ORDER REQUESTED

114. For all of these reasons, Barrick respectfully requests that an Order be issued granting its motion with costs.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 16<sup>th</sup> day of August, 2024.



per

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**DAVIES WARD PHILLIPS & VINEBERG LLP**  
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<sup>129</sup> See, e.g., Deya Report, ¶52-92, CC [A108](#); Deya Transcript, pp. 39-76, qq. 176-359 in particular p. 76, q. 359, CC [F607](#).

<sup>130</sup> *White Burgess, supra*, ¶32, 35-40, 45, 52-54.

<sup>131</sup> *Khelifa v. Sunrise*, 2015 ONSC 740 ¶123-124, 126, 128-129, 209, *aff’d*, 2016 ONCA 698.

<sup>132</sup> *White v. St. Joseph’s Hospital*, 2019 ONCA 312 ¶29, 30, 41; *R. v. McCaw*, 2019 ONSC 53 ¶220, 235, 239.

<sup>133</sup> See, e.g., Kambole Transcript, pp. 103-112, 174-177, 241-250, qq. 493-522, 768-780, 1099-1128, [CC F1031](#); Oleshangay Transcript, pp. 119-124, 175-179, 183-195, 243-248, qq. 512-527, 778-787, 812-855, 1094-1110; Deya Transcript, pp. 61-75, qq. 302-356, CC [F5275](#).

**SCHEDULE “A”**  
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**SCHEDULE “B”**

**TEXT OF STATUTES, REGULATIONS AND BY-LAWS**

**1. *Courts of Justice Act, R.S.O. 1990, c. C.43, s. 106***

*Stay of proceedings*

**106** A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

\*\*\*

**2. *Rules of Civil Procedure, R.R.O. 1990, Reg. 1994***

*General Principle*

**1.04 (1)** These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

...

*To Defendant*

**[21.01](3)** A defendant may move before a judge to have an action stayed or dismissed on the ground that,

*Jurisdiction*

(a) the court has no jurisdiction over the subject matter of the action;

...

*Action Frivolous, Vexatious or Abuse of Process*

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly.

...

*Generally*

**39.01 (1)** Evidence on a motion or application may be given by affidavit unless a statute or these rules provide otherwise.

...

*Contents — Motions*

**[39.01](4)** An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are

specified in the affidavit.

\*\*\*

### 3. *Family Law Act, R.S.O. 1990, c. F.3, s. 61*

#### *Right of dependants to sue in tort*

**61 (1)** If a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse, as defined in Part III (Support Obligations), children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction.

#### *Damages in case of injury*

- (2)** The damages recoverable in a claim under subsection (1) may include,
- (a) actual expenses reasonably incurred for the benefit of the person injured or killed;
  - (b) actual funeral expenses reasonably incurred;
  - (c) a reasonable allowance for travel expenses actually incurred in visiting the person during his or her treatment or recovery;
  - (d) where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the person, a reasonable allowance for loss of income or the value of the services; and
  - (e) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred.

#### *Contributory negligence*

**(3)** In an action under subsection (1), the right to damages is subject to any apportionment of damages due to contributory fault or neglect of the person who was injured or killed.

SOPHIA MATIKO, IN HER PERSONAL CAPACITY AND AS  
LITIGATION GUARDIAN FOR HER MINOR CHILD KELVIN et al.  
Plaintiffs

-and- BARRICK GOLD CORPORATION  
Defendant

Court File Nos. CV-22-00-690649-0000  
CV-24-00-714148-0000

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT TORONTO

**FACTUM OF BARRICK GOLD CORPORATION  
(MOTION TO DISMISS OR STAY ACTIONS)**

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**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**SOPHIA MATIKO JOHN, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD, KELVIN; ANACRETUS MARINGO GIMANWA; ESTA GEORGE RANGE, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILDREN JOSEPH, GODFREY, FILEMON AND REBEKA; ELIZABETH MATIKO IRONDO; NEEMA STEPHEN JOHN, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILDREN JOHN, MIRIAM, ESTA AND TIMOTHY; MASWI MARWA MOHABE; DOTTO WILLIAM ITAMA, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD CHRISTINA; LYIMO ITAMA MACHELA; ITAMA MACHELA MAX; CHARLES DANIEL NYAKINA; BHOKE HAGALE MARO; DANIEL NYAKINA GHATI; DICKSON JULIUS SISE; SIBORA MARWA MWITA; EMMANUEL NYAKORENGA MBURI; RYOBA ELIAS KEBWE; PASCO MAREMBELA MWITA; NYAHELI MARWA NYAKORENGA; CHRISTOPHER JHOMU MAKENDE; RANGE MWITA RANGE; AND FREDY CHACHA WAMBURA LEMA**

Plaintiffs

- and -

**BARRICK GOLD CORPORATION**

Defendant

**FACTUM OF THE PLAINTIFFS  
(Jurisdiction *Simpliciter* and *Forum Non Conveniens*)**

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## PART I- OVERVIEW

1. This case arises from a decades-old, ongoing dispute between members of the local community and Barrick Gold Corporation's mine in North Mara, Tanzania, regarding access to waste rock. Artisanal miners seek to earn a subsistence living by entering waste rock dumps in an effort to secure trace amounts of gold. Barrick has dealt with this situation through a security strategy that centres on contracting with the Tanzanian police, who are armed with live ammunition and have repeatedly responded to intrusions onto waste rock with lethal force.

2. There is no exact count of community members who have been shot and killed by security forces at the mine but a Tanzanian parliamentary inquiry, human rights groups, and local residents put the number somewhere between 77 and 100 deaths over more than a decade.<sup>1</sup>

3. To date, despite this high level of extreme violence, the Tanzanian legal system has proved incapable of providing any meaningful access to justice for the victims. Crucially, despite so many deaths, not one civil claim has been brought in the courts of Tanzania in relation to any of the police shootings at North Mara.<sup>2</sup> Similarly, no police officers have been charged. In fact, the only lawsuit of any kind that has been brought regarding any of the police shootings is a civil action prosecuted in the courts of England.

4. The plaintiffs are artisanal miners or the surviving family members of artisanal miners who were injured or killed as a result of Barrick's corporate strategy for dealing with people who attempt to secure subsistence livelihood from the mine's waste rock.

<sup>1</sup> Elizabeth Matiko Irondo Affidavit sworn January 19, 2024 ("**Irondo Affidavit**") para 10, Case Centre ("[CC – A80](#)Jeanine Alphonse Affidavit #1 sworn February 1, 2024 ("**Alphonse Affidavit #1**") Exhibit XX, p 46 [CC – A8550](#)

<sup>2</sup> Barrick is unaware of any lawsuits brought against NMGML in Tanzania related to police violence at North Mara. Transcript of Cross-examination of Sebastiaan Bock dated May 28, 2024 ("**Bock Transcript**") q. 463, p. 142 [CC – F326](#); Barrick Under Advisement Response (Bock) No. 26, p. 9 [CC - F6682](#).

5. The defendant, Barrick Gold Corporation, is a Canadian mining company with its head office in Toronto. Barrick controls its global operations, including its North Mara mine, through, amongst other methods, corporate policies and directives issued by head office.

6. The plaintiffs seek to hold Barrick accountable for these human rights violations on the basis that it is Barrick, not its local subsidiary, that has ultimate responsibility for compliance with international human rights and security standards. It is Barrick, not its local subsidiary, which claims to have “zero tolerance for human rights abuses wherever it operates”.<sup>3</sup> Similarly, it is Barrick, not its local subsidiary, that has declared in filings with Canadian securities regulators that respect for human rights is a pillar of the company’s global sustainability policy.

7. These policies place the responsibility for compliance with human rights and security standards at the highest levels of the corporate structure – senior management and the Board of Directors of Barrick. As stated in Barrick’s Human Rights Report:

We maintain strong risk oversight practices, with responsibilities outlined in the mandates of the Board and related Board Committees. The Board’s mandate makes clear its responsibility for reviewing and discussing with management the processes used to assess and manage risk ... and the implementation of appropriate systems to deal with such risks.<sup>4</sup>

8. Senior management receive reports “in real time” about human rights and sustainability incidents, and the performance bonuses of Barrick’s senior executives are tied directly to attainment of the company’s global environmental and human rights targets.<sup>5</sup>

9. This case, as framed, focuses on the failure of Barrick’s senior management to exercise proper oversight over its subsidiaries to ensure compliance with the human rights and security standards which Barrick itself applies and considers mandatory at the North Mara mine. The

<sup>3</sup> Transcript of Cross-examination of Apolinary Lyambiko dated May 18, 2024 (“**Lyambiko Transcript**”) q. 129-133 pp. 37-38 [CC – F2609](#); Alphonse Affidavit #1, Exhibit C, p. 31 CC – A6039

<sup>4</sup> Grant Beringer Affidavit sworn October 1, 2023 (“**Beringer Affidavit**”) Exhibit. 8, p. 17 [CC – B-1-2987](#)

<sup>5</sup> Alphonse Affidavit #1 Exhibit E, pp. 49-50 [CC – A6522](#)

plaintiffs advance claims based on both negligence and on the violation of customary international law as recognized by the Supreme Court of Canada in *Nevsun v. Araya*.

10. The courts of Tanzania do not provide an adequate alternative forum for the litigation of these complex claims, let alone a forum which is clearly fairer and more efficient than Ontario. The reality is, if this lawsuit is not heard in Ontario, it will not be heard at all. As noted by Barrick's legal expert, former Chief Justice Othman, the Tanzanian legal system faces a deficit of public interest litigation due to profound barriers to access. Contingency fees are prohibited. The clustering of lawyers in major urban centers, combined with high costs, places legal representation beyond the financial means of a large portion of the population including these plaintiffs. This "justice gap"<sup>6</sup> is not overcome by the existence of legal aid providers since the vast majority of legal aid resources are not devoted to representation by counsel but rather to educating and empowering litigants to represent themselves.

11. Further, the limited scope of discovery available in Tanzania would severely restrict, not enhance, the search for the truth in the matters at issue in this case. It is common ground that in Tanzania there is no requirement for a party to produce all relevant documents in its possession and that oral discovery is not available. The restricted nature of discovery may, in other cases, be unlikely to result in unfairness where parties have similar financial resources and knowledge of the underlying events, but it will have a profound impact on this case where there is a massive information and resource asymmetry between the parties.

<sup>6</sup> Transcript of the Cross-Examination of Mohamed Chande Othman dated May 14, 2024 ("**Othman Transcript**") q. 42-43, pp. 20-21 [CC – F5974](#).

## PART II - FACTS

### A. The Parties

#### (i) Defendant Barrick Gold Corporation

12. Barrick Gold Corporation (“Barrick”) is a global mining company headquartered in Toronto, Ontario.<sup>7</sup> As Barrick repeatedly states in its corporate filings, “Barrick’s head office is located at Brookfield Place, TD Canada Trust Tower, 161 Bay Street, Suite 3700, Toronto, Ontario M5J 2S1”.<sup>8</sup> At least 50 employees are based in Barrick’s Toronto head office.<sup>9</sup> Barrick’s common shares are listed and traded over the Toronto Stock Exchange.<sup>10</sup> Barrick’s 2023 annual meeting of shareholders was held in Toronto, and over the last ten years, all of the annual meetings were either conducted in Toronto or remotely.<sup>11</sup>

13. Barrick habitually presents itself to the world and to securities regulators as a Canadian company, for example by highlighting that “Barrick was the first Canadian mining company” to sign on to certain international transparency or sustainability initiatives.<sup>12</sup> Barrick is required to regularly file records with Canadian securities regulators.<sup>13</sup>

14. Barrick has a “strong and long-standing relationship with the Canadian government”<sup>14</sup> and regularly lobbies the Canadian government in Ottawa.<sup>15</sup>

<sup>7</sup> Alphonse Affidavit #1 Exhibit DD, p. 9 [CC – A8219](#), Exhibit EE [CC – A8238](#); Beringer Affidavit, para. 11 [CC – B-1-2796](#)

<sup>8</sup> Alphonse Affidavit #1 Exhibit E, p. 15 [CC – A6477](#), Exhibit F, p. 15 [CC – A6713](#), Exhibit G, p. 15 [CC – A6936](#), Exhibit H, p. 15 [CC – A7159](#)

<sup>9</sup> Beringer Affidavit, para. 19 [CC – B-1-2797](#)

<sup>10</sup> Beringer Affidavit, para. 11 [CC – B-1-2796](#)

<sup>11</sup> Alphonse Affidavit #1, Exhibit I [CC – A7333](#); Bock Transcript, q. 254-258, pp. 79-80 [CC – F263](#)

<sup>12</sup> Alphonse Affidavit #1 Exhibit L [CC – A7757](#); Exhibit WW [CC – A8499](#); Exhibit. F, p. 178 [CC – A6876](#); Beringer Affidavit para. 28 [CC – B-1-2800](#)

<sup>13</sup> Bock Transcript q. 44-47, p. 19 [CC – F203](#)

<sup>14</sup> Alphonse Affidavit #1 Exhibit L [CC - A7757](#)

<sup>15</sup> Alphonse Affidavit #1 Exhibit HHH [CC – A8758](#)

15. Though Barrick’s head office is in Toronto, it operates internationally. Barrick has 17 operations in 12 countries on 4 continents.<sup>16</sup> Barrick has operating mines in 5 different African countries, including Tanzania, and exploration in two others.<sup>17</sup> According to Barrick’s CEO, “[A]s a Canadian company, we are extremely competitive around the globe.”<sup>18</sup>

16. Barrick’s global operations require a high level of competence at making decisions across borders and operating in different legal systems.<sup>19</sup> Barrick is expert at directing its worldwide operations through a coordinated communication system that permits directives to be issued by senior management and implemented at the local level.<sup>20</sup> There is no question that Barrick is a sophisticated and well-resourced litigant that is well-versed in operating internationally.

## (ii) The Plaintiffs

17. The plaintiffs are artisanal miners who were injured or the surviving family members of artisanal miners who were killed by Tanzanian police as a result of Barrick’s strategy for dealing with people who attempt to secure subsistence livelihood from the mine’s waste rock.

18. The plaintiffs survive on subsistence incomes and cannot afford lawyers in Tanzania.<sup>21</sup>

19. Elizabeth Matiko Irondo sells vegetables at market. She lives close to the mine with family in a simple house with a dirt floor, mud walls, and a corrugated metal roof. She does not have electricity or indoor plumbing. She has to support her children and her slain son’s family.<sup>22</sup>

<sup>16</sup> Transcript of the Cross-Examination of Grant Beringer dated May 29, 2024 (“**Beringer Transcript**”) q. 51-52, pp. 21-22 [CC – F29](#); Bock Transcript q. 87, p. 29 [CC – F213](#)

<sup>17</sup> Bock Transcript q. 88, p. 29 [CC – F213](#)

<sup>18</sup> Alphonse Affidavit #1 Exhibit WW [CC – A8499](#)

<sup>19</sup> Bock Transcript q. 89-91, p. 30 [CC – F214](#)

<sup>20</sup> Bock Transcript q. 92-99, pp. 30-32 [CC – F214](#)

<sup>21</sup> Irondo Affidavit paras. 24-26 [CC – A83](#); Charles Daniel Nyakina Affidavit affirmed January 19, 2024 (“**Nyakina Affidavit**”) paras. 15-16 [CC – A71](#)

<sup>22</sup> Irondo Affidavit paras. 11-12, 24-26 [CC – A81](#); [CC – A83](#)

20. Charles Nyakina supports his family by selling shoes in the street, where he makes approximately \$5 on a “really good day”. Four months out of the year, he farms a small area at his home for his family’s consumption and has no income during those months.<sup>23</sup>

## **B. The Claim**

21. The plaintiffs bring claims against Barrick in direct negligence as the parent company with ultimate authority over human rights and security matters at the North Mara mine and for aiding and abetting violations of customary international law.

22. The claim of direct negligence is informed by the UK Supreme Court ruling in *Vedanta Resources PLC v Lungowe and others*, 2019 UKSC 20 (“*Vedanta*”). In that case, the court examined whether the role of the parent company in the management of its mine in Zambia was sufficient to give rise to a duty of care in tort to local residents. The court rejected the argument that the claim of direct parent company liability raised novel issues of law:

But the liability of parent companies in relation to the activities of their subsidiaries is not, of itself, a distinct category of liability in common law negligence. Direct or indirect ownership by one company of all or a majority of the shares of another company (which is the irreducible essence of a parent/subsidiary relationship) may enable the parent to take control of the management of the operations of the business or of land owned by the subsidiary, but it does not impose any duty upon the parent to do so, whether owed to the subsidiary or, a fortiori, to anyone else. Everything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary.<sup>24</sup> (emphasis added)

23. In this case, the plaintiffs plead that Barrick created, directs, implements, and supervises the security strategy and human rights policy at the North Mara mine, and Barrick’s negligence led to the deaths and injuries to community members.<sup>25</sup> Further, it is alleged that Barrick has

<sup>23</sup> Nyakina Affidavit para. 15 [CC – A71](#)

<sup>24</sup> *Vedanta Resources PLC v Lungowe and others*, 2019 UKSC 20 (“*Vedanta*”), para. 49

<sup>25</sup> Statement of Claim issued November 23, 2022 (“**First SOC**”) para. 15, [CC A9188](#); Statement of Claim issued February 5, 2024 (“**Second SOC**”) para. 15, [CC A9246](#)

retained control over human rights and security policies applicable to North Mara at all material times.<sup>26</sup> There is ample evidence to establish a strong factual basis for these allegations.

24. As recognized by the Supreme Court of Canada in *Nevsun*, claims against corporations for aiding and abetting violations of customary international law may be actionable under Canadian law. In reaching this conclusion, Justice Abella, writing for the majority, noted:

This appeal involves the application of modern international human rights law, the phoenix that rose from the ashes of World War II and declared global war on human rights abuses. Its mandate was to prevent breaches of internationally accepted norms. Those norms were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities. Conduct that undermined the norms was to be identified and addressed.<sup>27</sup>

25. In contrast, there are no reported cases in Tanzania that have considered the application of customary international law in a tort case.<sup>28</sup>

26. The plaintiffs are represented in Ontario by experienced counsel who have litigated tort claims related to direct parent company liability and customary international law.

**C. Barrick exercises ultimate control and top-down authority over issues of human rights and security at all its mines, including North Mara**

27. Barrick’s global mining operations, including North Mara, are subject to policies which are developed, reviewed, implemented, and monitored by senior management of the parent company including multiple committees of the Board of Directors. This includes human rights and security policies that form a pillar of Barrick’s “sustainability” program.<sup>29</sup> Compliance with these policies is mandatory for all Barrick mines, including North Mara.<sup>30</sup>

<sup>26</sup> First SOC para. 54, [CC A9196](#); Second SOC para. 46 [CC A9253](#)

<sup>27</sup> *Nevsun Resources Ltd. v. Araya*, [2020 SCC 5](#) (“*Nevsun SCC*”), para. 1

<sup>28</sup> Expert Report of Joseph Oleshangay dated February 1, 2024 (“*Oleshangay Report*”), paras 25, 201 [CC – A2409](#), [CC – A2446](#); Transcript of the Cross-Examination of Leonard Paulo Shaidi dated May 16, 2024 (“*Shaidi Transcript*”) q. 26, pp. 10- 11 [CC – F6100](#)

<sup>29</sup> Lyambiko Transcript q. 124, p. 36 [CC – F2608](#)

<sup>30</sup> Beringer Transcript q. 118-120, pp. 41- 42 [CC – F49](#)

28. Sustainability is not incidental or tangential to Barrick’s business operations. According to public statements and securities filings by Barrick:

- “[S]ustainability has long been an integral part of the way we do business. In fact, its principles are deeply embedded in our organizational DNA.”<sup>31</sup>
- “Deeply embedded in [long-term business plans] is our long-standing commitment to the principles of [environmental, social, and governance (“ESG”)], which informs all our business decisions.”<sup>32</sup>

29. In its 2023 Notice of Annual Meeting – held in the Tim Horton’s Theatre at the Hockey Hall of Fame in Toronto – Barrick repeated, “Our sustainability strategy is our business plan. Sustainability is the foundation for how we conduct our business.”<sup>33</sup> Barrick’s approach to sustainability is “integrated and holistic.”<sup>34</sup>

30. Barrick embeds its sustainability philosophy, including its commitment to respect human rights, throughout its entire organization using a “top down leadership” system of oversight combined with bottom-up reporting.<sup>35</sup> As this diagram depicts, multiple groups at the senior management and Board levels of Barrick are engaged in sustainability efforts:<sup>36</sup>

<sup>31</sup> Alphonse Affidavit # 1, Exhibit C, p. 14 [CC – A6020](#); Lyambiko Transcript q. 142-144, pp. 39-40 [CC – F2611](#)

<sup>32</sup> Alphonse Affidavit #1 Exhibit B, p. 12 [CC – A5794](#); Lyambiko Transcript q. 153, p. 43 [CC - F2615](#)

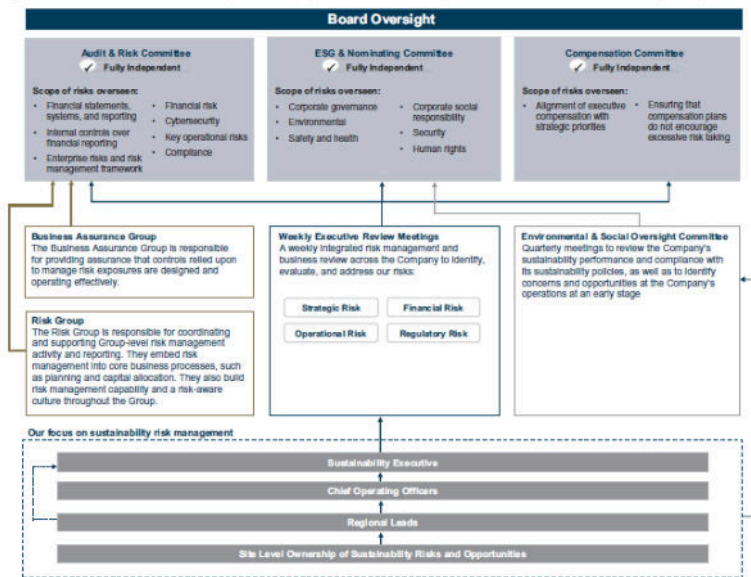
<sup>33</sup> Alphonse Affidavit #1 Exhibit I, pp. 1, 15 [CC – A7340](#), [CC – A7354](#)

<sup>34</sup> Alphonse Affidavit #1 Exhibit E, p. 48 [CC – A6521](#)

<sup>35</sup> Beringer Affidavit Exhibit 8, p. 17 [CC – B-1-2987](#)

<sup>36</sup> Alphonse Affidavit #1 Exhibit I, p. 117 [CC – A7456](#); Bock Transcript q. 259-266, pp. 80-81 [CC – F264](#)

The diagram below summarizes our enterprise-wide approach to risk oversight and the allocation of risk oversight responsibilities.



31. As confirmed by the General Manager of the North Mara mine Apolinary Lyambiko on cross-examination, Barrick's sustainability philosophy comes from the highest levels of Barrick, from the Chair of the Board and the CEO, and flows down to the mine level to local subsidiary North Mara Gold Mine Limited ("NMGML").<sup>37</sup> Barrick's sustainability vision includes "zero tolerance for human rights violations wherever we operate"<sup>38</sup> and applies to North Mara.<sup>39</sup>

32. Key responsibility for sustainability resides with the Sustainability Executive, a position held by Barrick affiant Grant Beringer.<sup>40</sup> According to Mr. Beringer, this includes responsibility for ensuring that human rights abuses do not happen at any of Barrick's mines and operations.<sup>41</sup>

33. Mr. Beringer holds executive office with Barrick, not the local subsidiaries that he oversees.<sup>42</sup> He, like all of Barrick's executives, is not a resident of Tanzania. He reports to CEO Mark Bristow. Also like all senior Barrick executives, his compensation is tied in part to attainment

<sup>37</sup> Lyambiko Transcript q. 153-160, pp. 43-44 [CC – F2615](#)

<sup>38</sup> Lyambiko Transcript q. 129-133 pp. 37-38 [CC – F2609](#); Alphonse Affidavit #1, Exhibit C, p. 31 [CC – A6037](#)

<sup>39</sup> Lyambiko Transcript q. 133, p. 38 [CC – F2610](#)

<sup>40</sup> Bock Transcript q. 151, p. 44 [CC – F228](#)

<sup>41</sup> Beringer Transcript q. 11, p. 7 [CC – F15](#)

<sup>42</sup> Beringer Transcript q. 9, p. 6 [CC – F14](#)

of the company's sustainability targets, including on human rights.<sup>43</sup> This executive compensation is approved at annual meetings held in Toronto.<sup>44</sup>

34. While Mr. Beringer has day to day responsibility for human rights performance,<sup>45</sup> he confirmed that Barrick's Board of Directors has ultimate oversight responsibility.<sup>46</sup>

35. Mr. Beringer is supported by regional sustainability leads<sup>47</sup> who report directly to a regional Barrick COO.<sup>48</sup> In the case of North Mara, that is Sebastiaan Bock, the COO of the Africa-Middle East region ("AME"). Mr. Beringer is also supported by Barrick's Senior Vice-President Business Assurance, Risk and Business Integrity (currently Ashleigh Lawson), and Barrick's Human Resources Executive (currently Darian Rich).<sup>49</sup>

36. Barrick's global sustainability activities are coordinated by the Environmental & Social Oversight Committee ("E&S Committee"). As described by Barrick, the E&S Committee is the most senior management-level body dedicated to sustainability; it "connects site-level ownership of sustainability to Barrick's Executive Officers and Board of Directors" who have ultimate responsibility for sustainability performance.<sup>50</sup>

<sup>43</sup> Beringer Transcript q. 32-33, pp. 14-15 [CC – F22](#); Alphonse Affidavit #1 Exhibit I, p. 20 [CC – A7359](#); Exhibit X, p. 13 [CC – A7900](#). In explaining why executive compensation is linked to human rights performance, Barrick regional COO and affiant Sebastiaan Bock, testified, "I think as an executive team, we have overall responsibility for the performance of the group and to hold the operations to account to the policies that we have implemented..." Bock Transcript q. 290-291, pp. 87 [CC – F271](#)

<sup>44</sup> Alphonse Affidavit #1 Exhibit I, pp. 1, 20 [CC – A7340](#), [CC – A7359](#)

<sup>45</sup> Beringer Transcript q. 27, p. 13 [CC – F21](#); Beringer Affidavit Exhibit 8, p. 18 [CC – B-1-2988](#);

<sup>46</sup> Beringer Affidavit para. 39. See also Lyambiko Transcript q. 169, p. 46 [CC – F2618](#)

<sup>47</sup> Beringer Affidavit Exhibit 8, p. 18 [CC – B-1-2988](#); Beringer Transcript q. 27, 34, pp. 13, 16-17 [CC – F21](#), [CC – F24](#); Bock Affidavit paras. 25 [CC – B-1-3109](#)

<sup>48</sup> Beringer Transcript q. 34, pp. 16-17 [CC – F24](#)

<sup>49</sup> Alphonse Affidavit #1 Exhibit E, p. 52 [CC – A6525](#); Beringer Affidavit para. 34 [CC – B-1-2803](#); Beringer Transcript q. 12-13, 53, 115-117 pp. 7-8, 22, 41 [CC – F15](#), [CC – F30](#), [CC – F49](#)

<sup>50</sup> Alphonse Affidavit #1 Exhibit X, p. 18 [CC – A7905](#); Bock Transcript q. 233-234, pp. 74-75 [CC – F258](#); Lyambiko Transcript q. 165-169, pp. 45-46 [CC – F2617](#)

37. The E&S Committee is chaired by Barrick’s CEO, and its members include the COOs for each of Barrick’s 3 regions, Barrick’s Sustainability Executive, the General Managers for each mine, Barrick’s in-house legal counsel, and a third-party sustainability expert.<sup>51</sup>

38. The E&S Committee creates a “regular upward cascade of data [that] ensures that everyone from site to the region and group, understands our relative performance and progress” on sustainability issues. On cross-examination, Mr. Lyambiko confirmed that this “cascade” includes data relating to human rights and security matters.<sup>52</sup>

39. As confirmed by Mr. Lyambiko, Barrick has developed and implemented a Human Rights Reporting Procedure that applies at all of its mine sites and provides detailed guidance on how to quickly and effectively report human rights incidents.<sup>53</sup> The procedure requires that once a potential human rights violation is reported to local management, within 24 hours they must notify the Head Country In-House Legal Counsel or the General Counsel.<sup>54</sup>

40. The General Counsel promptly alerts Barrick’s CEO and other personnel.<sup>55</sup> This includes Mr. Beringer as Barrick’s Sustainability Executive, and the regional COO, Mr. Bock.<sup>56</sup>

41. The information available to Barrick executives includes extensive CCTV footage. As described by Mr. Lyambiko, the North Mara mine has “an extensive network of closed-circuit television, thermal and infrared cameras around the Mine site, and the employment of specially trained personnel to monitor these video feeds.”<sup>57</sup>

<sup>51</sup> Alphonse Affidavit #1 Exhibit X, p. 18 [CC – A7905](#); Bock Transcript q. 233-251, pp. 74-78 [CC – F258](#)

<sup>52</sup> Lyambiko Transcript q. 199-201 pp. 51-52 [CC – F2623](#); Alphonse Affidavit #1 Exhibit Y, p. 12 [CC – A8068](#)

<sup>53</sup> Lyambiko Transcript q. 259-262, pp. 67-68 [CC – F2639](#); Alphonse Affidavit #1 Exhibit BB, p. 6 [CC – A8188](#)

<sup>54</sup> Beringer Transcript q. 84-85, pp. 29-31 [CC – F37](#); Alphonse Affidavit #1 Exhibit BB, p. 6 [CC – A8188](#)

<sup>55</sup> Beringer Transcript q. 84-85, pp. 29-31 [CC – F37](#); Alphonse Affidavit #1 Exhibit BB, p. 6 [CC – A8188](#)

<sup>56</sup> Beringer Transcript q. 88-89, p. 31 [CC – F39](#)

<sup>57</sup> Apolinary Lyambiko Affidavit sworn October 1, 2023 (“**Lymabiko Affidavit**”) para. 32(e) [CC – B-1-3164](#)

42. According to Barrick, the CCTV network monitors the conduct of Tanzanian police at North Mara whenever police come on site to respond to an emergency.<sup>58</sup>

43. The flow of information up to senior leadership is essential to Barrick's approach to sustainability. As explained by Mr. Bock, the E&S Committee "ensures that the operating sites adheres to our policies, that they implement them properly, and that this is effectively a communication channel between the executive management in the Barrick Group of Companies and the AME Region and who effectively gives the oversight and the operational sites who implement those policies and, of course, the day-to-day sustainability initiative."<sup>59</sup>

44. In addition to quarterly meetings of the E&S Committee, Barrick monitors "sustainability-related risks and opportunities facing the Company in real time" in weekly meetings between the Regional Sustainability Leads and the Group Sustainability Executive.<sup>60</sup>

45. Barrick's CEO reviews the reports of the E&S Committee with the Board's Environmental, Social, Governance & Nominating Committee ("ESG & Nominating Committee").<sup>61</sup> The reason for this, as identified by Barrick, is that "[b]y bringing Executive and Board level attention to key sustainability issues, we can identify concerns and opportunities at an early stage, remedy them and drive continual improvements."<sup>62</sup>

46. Mr. Bock testified that if Barrick's policies are not being followed at a mine in his region, the matter is escalated higher up into the organization. Most of the time, if it is a material issue, it is escalated to him and to Mr. Beringer as Barrick's Sustainability Executive.<sup>63</sup>

<sup>58</sup> Alphonse Affidavit #1 Exhibit CC, p. 5 [CC – A8206](#)

<sup>59</sup> Bock Transcript q. 251, pp. 77 [CC – F261](#); Lyambiko Transcript q. 165-169, p. 45 [CC – F2617](#)

<sup>60</sup> Alphonse Affidavit #1 Exhibit E, p. 49 [CC – A6522](#). Barrick also has a standing weekly Executive Review meeting that includes Barrick's CEO, all regional COOs, and the Sustainability Executive, Mr. Beringer. Bock Transcript q. 269-274, pp. 82-83 [CC – F266](#); Alphonse Affidavit #1 Exhibit I, p. 117 [CC – A7456](#).

<sup>61</sup> Alphonse Affidavit #1 Exhibit X, p 18 [CC – A7905](#)

<sup>62</sup> Alphonse Affidavit #1 Exhibit X, p 18 [CC – A7905](#)

<sup>63</sup> Bock Transcript q. 153, p. 45 [CC – F229](#)

47. According to Mr. Bock, Barrick’s CEO, Dr. Bristow, is very hands-on and quite familiar with the North Mara operation. Dr. Bristow ensures that the mine applies Barrick’s policies and strategy.<sup>64</sup> Dr. Bristow visits North Mara at least 4 times per year, and Mr. Bock visited North Mara 6 or 7 times last year.<sup>65</sup>

48. Barrick’s human rights and security policies are informed by international standards and guidelines as well as Barrick’s involvement in a number of international initiatives. It is Barrick, not its subsidiaries, that participates in these initiatives.

49. Barrick was the first Canadian mining company to join The Voluntary Principles Initiative (“VPI”), which promotes the Voluntary Principles on Security and Human Rights (“VPSHR”).<sup>66</sup> Barrick, not NMGML, files annual VPSHR reports and attends plenary meetings.<sup>67</sup>

50. Barrick’s annual report to the VPSHR reflects the company’s top-down approach to the development and implementation of human rights and security policies:

Overarching responsibility for VPSHR implementation falls under the Group Sustainability Executive and the Senior Vice President of Business Assurance, Risk and Business Integrity, the latter being accountable to the Board through the Board’s Audit & Risk Committee. Additional reporting and accountability to the Board is carried out through the Environmental, Social, Governance and Nominating Committee by the Group Sustainability Executive and the CEO. Implementation responsibility at corporate level is managed by Sustainability and Business Integrity personnel. Day-to-day implementation is led by the Security department at a site level.<sup>68</sup>

51. Barrick has developed its own internal standard and procedures to ensure alignment with the VPSHR.<sup>69</sup> Consistent with the diagram in paragraph 30, Barrick reports, “The updated VPSHR Standard and related procedures were reviewed and approved by the Group Sustainability

<sup>64</sup> Bock Transcript q. 310, p. 91 [CC – F275](#)

<sup>65</sup> Bock Transcript q. 157-158, p. 46 [CC – F230](#)

<sup>66</sup> Beringer Affidavit para. 28 [CC – B-1-2800](#)

<sup>67</sup> Alphonse Affidavit #1, Exhibit E, p. 52 [CC – A6525](#); Exhibit AA [CC – A8166](#); Exhibit BB [CC – A8183](#), Exhibit CC [CC – A8202](#); Beringer Affidavit Exhibit 8, p. 6 [CC – B-1-2982](#); Beringer Transcript q. 140-141, p. 47 [CC – F55](#); Lyambiko Transcript q. 237, 242 pp. 61, 62 [CC – F2633](#), [CC – F2634](#);

<sup>68</sup> Alphonse Affidavit #1 Exhibit BB, p. 3 [CC – A8185](#)

<sup>69</sup> Beringer Transcript q. 21-22, p. 10 [CC – F18](#); Alphonse Affidavit #1 Exhibit CC, p. 3 [CC – A8204](#)

Executive, the Senior Vice President, Business Assurance, Risk and Business Integrity and Legal Groups in 2020. The updated Standard and related procedures were discussed with the Barrick Executive Committee, including the Regional Chief Operating Officers, and how the Standard and procedures would be implemented across the group and at the operations. They were rolled out in 2021 at North Mara, Bulyanhulu, [and other Barrick operations].”<sup>70</sup>

52. Barrick’s internal VPSHR standard includes a Use of Force Standard that establishes the way force can be used by security personnel to comply with international principles and law. It was developed by Barrick and is annexed to Barrick’s internal VPSHR standard.<sup>71</sup>

### **Barrick’s Involvement in Security Issues at North Mara**

53. The involvement of Barrick’s senior management in security issues at North Mara extends beyond its policies. Barrick’s executives have been directly involved in arrangements with the Tanzania Police Force (“TPF”) and in selecting private security contractors. While Barrick is not a formal party to agreements with the TPF, it is intimately involved.

54. Barrick’s General Counsel for the AME region and Barrick’s regional Sustainability Team were involved in negotiating the current Memorandum of Understanding (“2022 MOU”) with the TPF.<sup>72</sup> The MOU was also reviewed by senior Barrick personnel prior to signing including Barrick’s CEO, Dr. Bristow; Mr. Beringer; Mr. Bock; and Barrick’s commercial executive for the AME region.<sup>73</sup>

<sup>70</sup> Alphonse Affidavit #1 Exhibit BB, p. 5 [CC – A8187](#).

<sup>71</sup> Beringer Transcript q. 90-93, pp. 31-33 [CC – F39](#); Alphonse Affidavit #1 Exhibit V [CC – A7844](#); Beringer Affidavit Exhibit 8, p. 49 [CC – B-1-2886](#)

<sup>72</sup> Lyambiko Transcript q. 330-333, pp. 82-83 [CC – F2654](#)

<sup>73</sup> Bock Transcript q. 335-336, pp. 100-101 [CC – F284](#)

55. Mr. Bock and Willem Jacobs, both senior Barrick executives, personally signed the 2022 MOU as well as a letter extending the previous MOU (“2019 MOU”) in their capacity as Barrick’s appointees to the NMGML Board.<sup>74</sup>

56. Mr. Bock testified that Barrick, through the North American-based Avanzar, provided human rights and use of force training to the TPF under the 2022 MOU.<sup>75</sup>

57. Barrick has rights under the MOU.<sup>76</sup> Further, the MOU requires the TPF to turn their attention to incidents involving use of force with consequences to Barrick, not just NMGML.<sup>77</sup>

58. Through Barrick’s Human Rights Reporting Procedure and the MOU, Barrick executives have access to significant information from the TPF on any use of force, use of weapons or human rights violations at the North Mara mine.

59. Under the 2022 MOU, the TPF promptly advises North Mara’s Asset Protection Manager of any security incident involving use of weapons or use of force, and of any alleged human rights violation in which a TPF officer is involved.<sup>78</sup> This is reported up the corporate chain to Barrick’s general counsel for the AME region, the regional COO, Barrick’s Sustainability Executive, and the CEO.<sup>79</sup> Mr. Bock stated on cross-examination that he has no reason to think the TPF would not abide by the MOU provisions on information sharing.<sup>80</sup> He confirmed that if more information is

<sup>74</sup> 2022 MOU, p. 18 [CC-B-1-18052](#); Lyambiko Affidavit Exhibit 3 [CC-B-1-3208](#) Sebastiaan Bock Affidavit sworn October 1, 2023 (“**Bock Affidavit**”) para. 26 [CC-B-1-3109](#); Bock Transcript q. 294, p. 88 [CC-F272](#); Lyambiko Transcript q. 407 p. 100 [CC-F2672](#)  
Bock Transcript q. 301-305, pp. 89-90 [CC-F273](#); Alphonse Affidavit #1 Exhibit A, p. 17 [CC-A5575](#); Exhibit C, p. 171 [CC-A6177](#)

<sup>75</sup> Bock Transcript q. 375-377, pp. 113-114 [CC-F297](#)

<sup>76</sup> 2022 MOU p. 13, s. 7(b) [CC-B-1-18047](#)

<sup>77</sup> 2022 MOU p. 14, s. 11 [CC-B-1-18048](#); Bock Transcript q. 378-380, pp. 114-115 [CC-F298](#)

<sup>78</sup> 2022 MOU p. 14, s. 11 [CC-B-1-18048](#)

<sup>79</sup> Lyambiko Transcript q. 342 p. 85 [CC-F2657](#); Bock Transcript q. 384, p. 116 [CC-F300](#); Beringer Transcript q. 84-85, 88-89, pp. 29-31 [CC-F37](#), [CC-F39](#)

<sup>80</sup> Bock Transcript q. 390-391, pp. 121-122 [CC-F304](#)

required from the police, it will be obtained through the MOU.<sup>81</sup> This information sharing is not only contractually required but in fact occurs.<sup>82</sup>

60. Mr. Bock testified that last year he and Mr. Beringer visited the police commander responsible for North Mara, giving Mr. Bock confidence that the TPS would abide by the MOU:

[W]e effectively joined the meeting between the Company Asset Protection Manager and the General Manager and the Regional Police Commander and, you know, had a discussion with regards to, you know, as the executive team, which was Grant and myself, what, you know -- that we were comfortable that the Police Commander and his Police Force understands these human rights policies and that they adhere to them. ... And so, in that specific meeting, the Regional Police Commander and his team that was there didn't give us any reason to believe that they are not committed, you know, to these human rights policies and to this agreement that the mine has signed with them.<sup>83</sup>

61. Senior executives of Barrick are also directly involved in arrangements with local private security providers at North Mara. In 2023, a new contractor, SGA Tanzania Limited (“SGA”), took over private security operations at the mine.<sup>84</sup> Mr. Bock stated that he and other Barrick personnel were involved in the decision to engage SGA, including Mr. Beringer, regional general counsel Antoine Thibaud, and the regional Commercial Lead Nic Marques.<sup>85</sup>

62. Barrick executives were also involved in decisions related to the previous security contractor. In a press release, Barrick referred to its role hiring the contractor for its Tanzanian mines, not just North Mara: “In line with its policy of leveraging its supply chain and procurement to maximize local economic development, Barrick Gold Corporation has appointed Nguvu Moja Security Services Limited (NMSS), a 100% Tanzanian owned and managed company, to replace an international security firm at its Tanzanian gold mines.”<sup>86</sup>

<sup>81</sup> Bock Transcript q. 391-392, pp. 121-122 [CC – F305](#)

<sup>82</sup> Lyambiko Transcript q. 297-300, 342, pp 76-77, 85 [CC – F2648](#), [CC – F2657](#)

<sup>83</sup> Bock Transcript q. 387, pp. 118-119 [CC – F302](#)

<sup>84</sup> Lyambiko Affidavit para. 35 [CC – B-1-3165](#)

<sup>85</sup> Bock Transcript q. 427-430, pp. 131-132 [CC – F315](#)

<sup>86</sup> Alphonse Affidavit #1 Exhibit JJ [CC – A8389](#); Exhibit Y, p. 34 [CC – A8090](#); Exhibit TT [CC – A8421](#)

63. Barrick executives and representatives reviewed the agreement with Nguvu Moja before it was signed, including Mr. Beringer; the then-COO for the region, Willem Jacobs; and the then-Country Manager for Barrick.<sup>87</sup> Any notices under the Nguvu Moja agreement were copied to Barrick through Martin Welsh, its then-Regional General Counsel in Jersey, Channel Islands.<sup>88</sup>

64. Barrick, not NMGML, commissioned human rights specialists Avanzar to conduct human rights assessments at North Mara in 2021 and 2023.<sup>89</sup> Avanzar is based in Alberta and California,<sup>90</sup> not Tanzania.<sup>91</sup> Barrick, not NMGML, engaged Apex Companies LLC (“Apex”) to assess its conformance with the Conflict-Free Gold Standard, including at North Mara.<sup>92</sup> Apex is based in the United States, not Tanzania.<sup>93</sup> Mr. Lyambiko is not even familiar with Apex.<sup>94</sup>

#### **D. No realistic possibility that the plaintiffs can bring this lawsuit in Tanzania**

65. The courts of Tanzania do not offer a realistic alternative forum for this dispute. As noted by Barrick’s expert, former Chief Justice Othman, Tanzania suffers from a “justice gap” due to multiple factors which collectively pose prohibitive barriers to access to justice.<sup>95</sup>

66. There is no funding model that would allow this lawsuit to be brought in Tanzania. The parties are agreed that contingency fees are not permitted in Tanzania.<sup>96</sup> Entering into a contingency fee arrangement constitutes professional misconduct with consequences including

<sup>87</sup> Barrick Under Advisement Response (Bock) No. 20 p. 7 [CC – F6680](#)

<sup>88</sup> Nguvu Moja Security Services Agreement p. 48 [CC – B-1-17985](#); Bock Transcript q. 482-483, p. 149 [CC – F333](#)

<sup>89</sup> Beringer Transcript q. 160, pp. 51-52 [CC – F59](#); Lyambiko Transcript q. 361, 376, pp. 89, 92 [CC – F2661](#), [CC – F2664](#); Alphonse Affidavit #1 Exhibit CC, p. 3; [CC – A8204](#); Exhibit C p. 31 [CC – A6037](#)

<sup>90</sup> Beringer Transcript q. 155-156, pp. 50-51 [CC – F58](#)

<sup>91</sup> Lyambiko Transcript q. 362, p. 89 [CC – F2661](#)

<sup>92</sup> Alphonse Affidavit #1 Exhibit Z p. 3 [CC A8160](#); Lyambiko Transcript q. 390, p. 95 [CC – F2667](#)

<sup>93</sup> Beringer Transcript q. 74, 131, pp. 27, 45 [CC – F35](#), [CC – F53](#);

<sup>94</sup> Lyambiko Transcript q. 377, p. 92 [CC – F2664](#)

<sup>95</sup> Othman Transcript, q 42-43, [pp. 20-21](#).

<sup>96</sup> Oleshangay Report #1 para. 76 [CC – A2421](#); Expert Report of Jebra Kambole dated February 1, 2024 (“**Kambole Report**”) paras. 26-28 [CC – A5231](#); Reply Expert Report of Leonard Shaidi dated April 5, 2024 (“**Shaidi Report #2**”) para. 22 [CC – B-1-15679](#); Transcript of the Cross-Examination of Dr. Wilbert Kapinga dated May 22, 2024 (“**Kapinga Transcript**”) q. 25-31, pp. 10-11 [CC – F1744](#)

finer, suspension, or disbarment.<sup>97</sup> Notably, in a local land case against NMGML by Tanzanians living near the mine, NMGML’s counsel and Barrick’s affiant in this matter, Wilbert Kapinga, threatened disciplinary action against plaintiffs’ lawyers based on a mere suspicion that they were retained on contingency because the plaintiffs were assumed to be indigent.<sup>98</sup>

67. Moreover, Tanzanian lawyers are prohibited from charging fees below a minimum amount specified in regulations.<sup>99</sup> This is known as “undercutting” and the parties’ experts agree that it may constitute professional misconduct.<sup>100</sup>

68. Barrick rather fancifully raises the possibility that this claim might be litigated by legal aid, a possibility that does not accord with the reality of legal aid in Tanzania. Tanzania’s legal aid system was simply not designed for complex civil litigation, and there is no realistic possibility that a legal aid provider could commit resources needed to get through trial.<sup>101</sup>

69. Like all legal aid systems, Tanzania’s is stretched and beset with unmet demand. There is no government funding for legal aid in civil matters.<sup>102</sup> To the extent legal aid exists, it is provided by NGOs that rely on donors for funding.<sup>103</sup> The record shows that the vast majority of legal aid providers are either staffed by paralegals or devoted to legal education and providing assistance

<sup>97</sup>Oleshangay Report #1 para. 76 [CC – A2421](#); Kambole Report para. 28 [CC – A5231](#); Kapinga Transcript q. 25-31, pp. 10-11 [CC – F1744](#)

<sup>98</sup> Dr. Wilbert Kapinga Affidavit sworn April 4, 2024 (“**Kapinga Affidavit**”) Exhibit 9 [CC – B-1-11052](#)

<sup>99</sup> Kambole Report para. 29 [CC – A5232](#)

<sup>100</sup> Transcript of the Cross-Examination of Jebra Kambole dated May 8, 2024 (“**Kambole Transcript**”) q. 815 pp. 185-186; [CC – F1113](#) Transcript of the Cross-Examination of Leonard Paulo Shaidi dated May 16, 2024 (“**Shaidi Transcript**”) q. 398-400, p. 111 [CC – F6201](#).

<sup>101</sup> Throughout the Mara region where the plaintiffs live, and in Musoma where the High Court is located, there are only two registered legal aid providers and neither of them provides systematic legal aid. Oleshangay Report #1 para. 97 [CC – A2425](#). On cross-examination of Mr. Oleshangay, Barrick presented a small handful of examples of victims receiving compensation from Williamson Diamonds for shootings and from North Mara for land issues but Mr. Oleshangay explained that this did not come through litigation or legal aid. Transcript of the Cross-Examination of Joseph Oleshangay dated May 12, 2024 (“**Oleshangay Transcript**”) q. 175-274, pp. 39-61 [CC – F5195](#)

<sup>102</sup> Oleshangay Report #1 paras. 22, 86, 87 [CC – A2408](#), [CC – A2423](#); Kambole Report paras. 33-35 [CC – A5233](#); Expert Report of Ulimboka Mwasomola dated April 12, 2024 (“**Mwasomola Report**”) paras. 56-57 [CC – B-1-11667](#)

<sup>103</sup> Oleshangay Report #1 paras. 22, 86, 87 [CC – A2408](#), [CC – A2423](#)

filing documents to indigent claimants so that they can represent themselves.<sup>104</sup> It is rare for legal aid providers to provide legal representation by a lawyer through to trial.<sup>105</sup>

70. Barrick has not identified a legal aid provider with the capacity, resources, and expertise to litigate a civil action against Barrick. The cross-examination of Barrick’s expert on legal aid demonstrates that the system was not designed to provide counsel in complex civil claims:

- a. The examples of legal cases conducted by the University of Dar Es Salaam Legal Aid Clinic (“LAC”) included an uncontested adoption order and a dispute over a land purchase agreement.
- b. Most cases had limited or no appearances by an LAC lawyer.<sup>106</sup>
- c. LAC does not act on matters outside of the largest city, Dar es Salaam. It has no offices in the Mara region which is very far from Dar es Salaam.<sup>107</sup>

71. Barrick raises the possibility, without evidence, that the largest and most established legal aid provider in the country, the Legal and Human Rights Centre (“LHRC”), might be able to act as plaintiffs’ counsel. This possibility is directly contradicted by LHRC’s head of litigation and legal representation for legal aid clients in its clinic covering North Mara, Joseph Oleshangay.<sup>108</sup> He testified that LHRC is simply not equipped to take on complex civil claims.<sup>109</sup> LHRC has a small budget for litigation matters. For 2024, LHRC’s legal aid department has a budget of US \$50,000 to cover approximately 20,000 clients annually.<sup>110</sup> As a result, resources are directed at legal education and empowerment of claimants for self-representation.<sup>111</sup> When providing counsel,

<sup>104</sup> Oleshangay Report #1 paras. 22, 90-91 [CC – A2408](#), [CC – A2424](#); Transcript of the Cross-Examination of Ulimboka Mwasomola dated May 13, 2024 (“**Mwasomola Transcript**”) q. 124-126, p. 30 [CC – F5099](#); Othman transcript q 81, p. 36 [CC – F5990](#)

<sup>105</sup> Oleshangay Report #1 paras 84, 90-91, 97-98, 114, 129 [CC – A2423](#), [CC – A2424](#), [CC – 2425](#), [CC – A2428](#), [CC – A2431](#); Mwasomola Transcript q. 123, pp. 29-30 [CC – F5098](#)

<sup>106</sup> Mwasomola Transcript q. 58-118, 136-137 pp. 17-28, 31-32 [CC – F5086](#), [CC – F5100](#),

<sup>107</sup> Mwasomola Transcript q. 121, 131-134, pp. 29, 31 [CC – F5098](#), [CC – F5100](#)

<sup>108</sup> Oleshangay Report #1 paras. 8-10, 97-98, 103 [CC – A2406](#), [CC – A2425](#), [CC – A2426](#)

<sup>109</sup> Oleshangay Report #1 paras. 96, 98, 114-116, 129 [CC – A2425](#), [CC – A2428](#), [CC – A2431](#)

<sup>110</sup> Oleshangay Report #1 para. 102 [CC – A2426](#)

<sup>111</sup> Oleshangay Report #1 paras. 105-108 [CC – A2426](#)

LHRC concentrates on land cases that do not require extensive fact-finding and where a court ruling has the potential to impact large numbers of community members.<sup>112</sup>

### **Climate of fear and risk of political interference in Tanzania**

72. Access to justice in Tanzania is compounded by the current climate of fear created by government recriminations against prominent members of the bar and government critics.

73. The plaintiffs led evidence from respected rule of law expert Donald Deya, the long-time CEO of the Pan African Lawyers Union and previous CEO of the East African Law Society. Mr. Deya concluded that “lawyers frequently face reprisals in their representation of clients deemed unfavourably by the powerful,” “one cannot overrule the possibility of interference in cases in which the powerful have a strong interest,” and the plaintiffs “are unlikely to get a fair trial” in Tanzania.<sup>113</sup> Mr. Deya based his opinions in part on myriad reports from UN bodies, respected human rights organizations, and international law societies/bar associations, raising serious concerns regarding Tanzania’s legal system, and the risk of interference and intimidation.<sup>114</sup>

74. The Law Society of England and Wales has commented on being “gravely concerned about attacks on lawyers and the independence of the legal profession in Tanzania, which takes the form of disbarments, arrest and detention, and legislative proposals.”<sup>115</sup>

75. In September 2023, the Canadian Bar Association denounced the “harassment and detention of lawyers in Tanzania.”<sup>116</sup> Around the same time, Human Rights Watch reported that the government’s “suppression of its critics” is a “troubling sign of its low tolerance for dissenting

<sup>112</sup> Oleshangay Report #1 paras. 106, 111 [CC – A2427](#)

<sup>113</sup> Expert Report of Donald Deya dated February 1, 2024 (“**Deya Report**”) paras. 7, 8, 11 [CC – A98](#)

<sup>114</sup> Deya Report para. 186 and Appendix A [CC – A137](#), [CC – A140](#)

<sup>115</sup> Fatma Karume Affidavit sworn January 27, 2024 (“**Karume Affidavit**”) Exhibit F p. 1 [CC – A9088](#)

<sup>116</sup> Deya Report Exhibit 33 [CC - A1478](#)

views.”<sup>117</sup> Amnesty International concluded the “authorities’ crackdown on critics” revealed “their growing intolerance for dissent.”<sup>118</sup>

76. Other respected institutions have expressed concerns about lack of judicial independence and procedural fairness. In 2023, Freedom House gave Tanzania a score of 36 of 100 for political rights and civil liberties, and a 1 of 4 for independence of the judiciary, finding that “[d]ue process guarantees are poorly upheld in civil and criminal matters.”<sup>119</sup> The United Nations High Commissioner for Human Rights has reported about “continued interference with the independence and impartiality of the judicial system, the challenges faced with regard to the availability and accessibility of independent and impartial courts, the level of legal awareness and knowledge, the availability of sufficient and qualified lawyers and the possibility of a timely and fair trial, regardless of one’s socioeconomic status.”<sup>120</sup>

77. The record on this application contains several first-hand accounts of government crackdowns against Tanzanian lawyers through 2024. The evidence corroborates the reports by bar associations and other organizations that lawyers acting in public interest cases have been subjected to arrests, death threats, assassination attempts, fire bombings, threats of sedition and treason charges, misconduct proceedings, and disbarment.<sup>121</sup>

<sup>117</sup> Deya Report Exhibit 38 [CC – A1555](#)

<sup>118</sup> Deya Report Exhibit 30 [CC – A1419](#)

<sup>119</sup> Deya Report Exhibit 37 [CC – A1545](#)

<sup>120</sup> Deya Report Exhibit 46 [CC – A1621](#)

<sup>121</sup> Oleshangay Report #1, paras. 79, 109-110 [CC – A2421](#), [CC – A2427](#); Joseph Oleshangay Affidavit #2 sworn May 6, 2024 (“**Oleshangay Affidavit #2**”) para. 2, 7, 24-28 [CC – A9157](#), [CC – A9158](#), [CC – A9163](#); Exhibit E [CC – A9179](#); Kambole Report para. 52 [CC – A5238](#); Kambole Transcript q. 1029-1044, pp. 230-232 [CC – F1158](#). Deya Report Exhibit 29 [CC – A1383](#); Kambole Report para 51(e) [CC – A5238](#); Deya Report para 78 [CC – A113](#); Shaidi Transcript q. 110-112, p. 35 [CC – F6125](#); Kambole Transcript q. 1061-1065, pp. 235-236 [CC F1163](#); Boniface Mwabukusi Affidavit sworn January 30, 2024 (“**Mwabukusi Affidavit**”) paras 4, 7, 22-25, Exhibit B paras 3.2 [CC – A9113](#), [CC – A9115](#), [CC – A9132](#); Transcript of the Cross-Examination of Boniface Mwabukusi dated June 20, 2024 (“**Mwabukusi Transcript**”) q. 143, 500, 521-522, pp. 37-38, 165, 172 [CC – F4323](#), [CC – F4475](#), [CC – F4482](#); Transcript of the Cross-Examination of Makarios Tairo dated May 22, 2024 (“**Tairo Transcript**”) q. 318-320, pp. 88-89 [CC – F6564](#); Alphonse Affidavit #1, Exhibit JJJ [CC – A8797](#)

78. In just one example, lawyer Tito Magoti was employed at LHRC and was arrested for over a year without trial.<sup>122</sup> Mr. Magoti was charged with crimes for which bail is not available.<sup>123</sup> Barrick’s witness Wilbert Kapinga cites to Mr. Magoti’s case as an example of the government’s coercive use of non-bailable offences to extract plea bargains.<sup>124</sup> Dr. Kapinga concludes the scheme was “being abused by the government to extort people.”<sup>125</sup> The American Bar Association concluded, “The apparent targeting of citizens, such as Magoti ... for engaging in matters of public interest contributes to a reported climate of fear and self-censorship.”<sup>126</sup>

79. The numerous incidents against lawyers follow a repressive pattern that has existed since at least 2017.<sup>127</sup> This pattern began under former President Magufuli, but Barrick’s expert confirmed on cross-examination that policies have not changed under the current President.<sup>128</sup>

80. All of the above raises the very real possibility of political interference and intimidation, all the more so in a case, such as this one, that directly implicates the TPF and involves a vital Tanzanian government asset.<sup>129</sup> The Government of Tanzania owns 16 percent of the mine, and receives 50 percent of its profits. Collectively, Barrick’s mines were recognized as Tanzania’s largest taxpayer in 2021 and 2022 and have contributed almost \$3 billion since 2019.<sup>130</sup>

81. The TPF also has a financial stake in the mine through monetary allowances and in-kind contributions under the MOU for “supplemental policing services” around the mine.<sup>131</sup>

<sup>122</sup> Kambole Transcript q. 1045-1050, pp. 232-233 [CC – F1160](#)

<sup>123</sup> Kambole Report para 51(c) [CC – A5238](#)

<sup>124</sup> Kapinga Transcript Exhibit 13 p. 51 [CC – F1774](#); Kapinga Transcript q. 62, p. 19 [CC – F1753](#); Deya Report Exhibit 28 [CC – A1357](#)

<sup>125</sup> Kapinga Transcript q. 64, p. 19 [CC – F1753](#); Karume Affidavit para. 28 [CC – A9039](#)

<sup>126</sup> Deya Report Exhibit 28 [CC – A1357](#)

<sup>127</sup> Karume Affidavit paras 9-18 [CC – A9035](#); Transcript of Cross-Examination of Fatma Karume dated June 25, 2024 (“**Karume Transcript**”) q. 177-178, p. 51 [CC – F1829](#)

<sup>128</sup> Shaidi Transcript q. 416-424, pp. 116-117 [CC – F6206](#)

<sup>129</sup> Deya Report [paras. 188-190](#)

<sup>130</sup> Alphonse #1 Exhibit S [CC – A7817](#) See also Bock Transcript q. 165, pp. 50-51 [CC – F234](#); Alphonse Affidavit #1 Exhibit L p. 3 [CC – A7759](#)

<sup>131</sup> Lyambiko Affidavit #1 para. 48 [CC – B-1-3169](#); 2022 MOU, pp. 10-12 [CC – B-1-18044](#)

### Lack of Discovery in Tanzania

82. The parties are agreed that discovery in Tanzania is extremely limited in scope as compared to Ontario. There is no equivalent to Ontario Rule 30.02(1) which requires parties to produce all relevant documents.<sup>132</sup> There is no requirement for parties to produce documents injurious to a party's legal position,<sup>133</sup> nor is there a right to oral discovery of a party.<sup>134</sup>

83. As explained by Barrick's expert Mr. Vedasto, these limits are intentionally designed to reduce litigation costs and limit the amount of documentary evidence in a case:

Litigation would become far more expensive and time-consuming if every litigant were automatically required to search for, collect, review, disclose and produce every single document in their possession, control or power that may be relevant to any matter in issue. Moreover, doing so is rarely necessary to achieve justice in civil disputes, most of which turn on or involve a relatively small number of documents.<sup>135</sup> (emphasis added)

84. Further, all pre-trial discovery in Tanzania requires an application to court.<sup>136</sup> Such applications are uncommon in practice. The general philosophy in civil litigation is that a party who makes an allegation is expected to prove it through evidence in their possession with a well-pleaded case.<sup>137</sup> Indeed, Barrick's expert, Mr. Vedasto, was only able to cite five reported cases as the most relevant regarding document discovery under the Tanzanian Civil Procedure Code ("CPC").<sup>138</sup> None of them involved allegations of human rights abuses by state actors.<sup>139</sup>

<sup>132</sup>Expert Report of Audex Vedasto dated April 5, 2024 ("**Vedasto Report**") para. 20 [CC – B-1-17119](#); Expert Report of Scott Dodson dated April 4, 2024 ("**Dodson Report**") paras. 18, 34, 38 [CC – B-1-4794](#), [CC – B-1-4798](#), [CC – B-1-4799](#); Oleshangay Report paras. 19, 26 [CC – A2407](#), [CC – A2409](#), Kambole Report para 14 [CC – A5227](#)

<sup>133</sup> Kambole Report para. 14 [CC – A5227](#)

<sup>134</sup> Vedasto Report para 59 [CC – B-1-17126](#); Transcript of the Cross-Examination of Audex Vedasto dated May 13, 2024 ("**Vedasto Transcript**") q. 53-54, p. 19 [CC – F6613](#); Kambole Report para 18 [CC – A5228](#); Oleshangay Report #1 para. 20, 55 [CC – A2408](#), [CC – A2417](#)

<sup>135</sup> Vedasto Report para. 20 [CC – B-1-17119](#)

<sup>136</sup> Kambole Report para. 11 [CC – A5226](#)

<sup>137</sup> Kambole Report para. 12 [CC – A5227](#); Oleshangay Report #1 para. 28 [CC – A2409](#)

<sup>138</sup> Vedasto Transcript q. 67, p. 22 [CC – F6616](#)

<sup>139</sup> Vedasto Transcript q. 68, p. 22 [CC – F6616](#)

85. There is no general right to access police records in Tanzania and both parties' experts agree that it is nearly impossible for victims to obtain them.<sup>140</sup> The plaintiffs have not been provided with any police reports regarding the shootings of family members<sup>141</sup> Plaintiffs' expert Mr. Kambole indicates that this has "serious impacts on a lawyer's ability to gather evidence to present a case."<sup>142</sup> Barrick's expert suggests that police documents may be obtained through civil litigation but does not cite any cases where this has actually been done.<sup>143</sup>

### **Many important witnesses outside Tanzania**

86. Numerous Barrick executives, directors, former employees and consultants with key evidence reside outside of Tanzania, including:

- a. Barrick's CEO, Dr. Bristow (Mauritius)<sup>144</sup>
- b. Barrick's CFO, Graham Shuttleworth (Jersey, Channel Islands)<sup>145</sup>
- c. Barrick's COO of the AME region, Mr. Bock (South Africa)<sup>146</sup>
- d. Other current and former Barrick appointees on NMGML Board of Directors (South Africa, UK)<sup>147</sup>
- e. Other Barrick Directors, executive leadership, and members of ESG & Nominating Committee (Jersey, United States, South Africa, England, Hungary, Dominican Republic)<sup>148</sup>

<sup>140</sup> Kambole Report para. 23-24 [CC – A5230](#); Expert Report of Leonard Shaidi dated October 2, 2023 ("**Shaidi Report #1**") para. 67 [CC - B-1-4215](#); Shaidi Transcript q. 79-81, 84-95, pp. 25-26, 27-31 [CC - F6115](#), [CC – F6117](#)

<sup>141</sup> Irondo Transcript q. 182-186, p. 40 [CC – F916](#); Transcript of the Cross-Examination of Charles Nyakina dated May 9, 2024 ("**Nyakina Transcript**") q. 138-144, pp. 26-27 [CC – F5139](#)

<sup>142</sup> Kambole Report paras 24 [CC – A2409](#)

<sup>143</sup> Shaidi Report #1 paras 67-70 [CC – B-1-4215](#)

<sup>144</sup> Beringer Affidavit para 20 [CC – B-1-2798](#)

<sup>145</sup> Beringer Affidavit para 20 [CC – B-1-2798](#)

<sup>146</sup> Bock Transcript q. 154, p. 45 [CC – F229](#)

<sup>147</sup> Beringer Affidavit para. 20 [CC – B-1-2798](#); Bock Transcript q. 294, 306-308, pp. 88, 90 [CC – F272](#), [CC – F274](#); Alphonse Affidavit #1 Exhibit E, p. 182 [CC – A6655](#); Bock Affidavit para. 8 [CC – B-1-3101](#)

<sup>148</sup> Beringer Affidavit para 20 [CC – B-1-2798](#); Bock Transcript q. 268 p. 81 [CC – F265](#)

- f. Barrick’s Sustainability Executive, Mr. Beringer (South Africa)<sup>149</sup> and his three direct reports Duncan Pettit (England), Marcel Radyn (Alberta), and Alison Brown (British Columbia).<sup>150</sup>
- g. Barrick’s Senior Vice President, Business Assurance, Risk and Business Integrity, Ashleigh Lawson, who along with Mr. Beringer is responsible for oversight and implementation of Barrick’s human rights compliance program (England).<sup>151</sup>
- h. Barrick current general counsel for the AME region, Antoine Thibaud, who receives reports of security incidents under Barrick’s procedures (England), and his predecessor, Martin Welsh (Jersey).<sup>152</sup>
- i. The two other Barrick lawyers for the AME region (England).<sup>153</sup>
- j. Barrick’s executive General Counsel, Poupak Bahamin (United States) and other Barrick legal counsel (Ontario).<sup>154</sup>
- k. Former sustainability lead for the AME region who was involved in the negotiating 2022 MOU, Hilaire Diarra (Côte d’Ivoire).<sup>155</sup>
- l. Barrick’s current sustainability lead for the AME region, Thomas Wilson (South Africa)<sup>156</sup>
- m. Barrick’s commercial lead for the AME region, Nic Marques, who was involved in the process to replace private security at North Mara (South Africa)<sup>157</sup>
- n. Former general manager of the North Mara mine, Luiz Correia, who preceded Mr. Lyambiko (South Africa)<sup>158</sup>
- o. Human rights assessors from Avanzar and Apex (Canada, United States) <sup>159</sup>
- p. Barrick employees in Strategic Matters department involved in the negotiations of the Framework Agreement with the Government of Tanzania (Ontario)<sup>160</sup>

<sup>149</sup> Beringer Affidavit first page [CC – B-1-2792](#)

<sup>150</sup> Beringer Transcript q. 34-45, pp. 16-18 [CC – F24](#); Barrick Under Advisement Response (Beringer) [No. 3, p. 11](#). Mr. Pettit plays an important role as sustainability manager with oversight and implementation of Barrick’s strategy throughout the Barrick group of companies. Beringer Transcript q. 34-45, 140-141, pp. 16-20, 47 [CC-F24](#), [CC – F55](#)

<sup>151</sup> Alphonse Affidavit#1, Exhibit E, p. 52 [CC – A6525](#); Beringer Transcript q. 115-117, p. 41 [CC – F49](#)

<sup>152</sup> Lyambiko Transcript q. 268-272, 437-442, pp. 69-70, 108 [CC – F2641](#), [CC – F2680](#)

<sup>153</sup> Bock Transcript q. 133-135, p. 40 [CC – F224](#)

<sup>154</sup> Bock Transcript q. 138-139, p. 41 [CC – F225](#)

<sup>155</sup> Lyambiko Transcript q. 330-336, pp. 82-84 [CC – F2654](#); Beringer Transcript q. 44, pp. 19-20 [CC – F27](#).

Although Mr. Diarra once resided in Tanzania, he no longer does. Mr. Diarra is originally from Mali and now resides in Côte d’Ivoire.

<sup>156</sup> Beringer Affidavit para. 26 [CC – B-1-2800](#)

<sup>157</sup> Bock Transcript q. 427-430, pp. 131-132 [CC – F315](#)

<sup>158</sup> Bock Transcript q. 484-485, p. 149 [CC – F333](#)

<sup>159</sup> Beringer Transcript q. 131, 155-156, pp. 45, 50-51 [CC - F53](#), [CC – F58](#);

<sup>160</sup> Beringer Affidavit para. 19 [CC – B-1-2797](#); Beringer Transcript q. 110-111, p. 39 [CC – F47](#)

87. There is no evidence that Tanzanian courts can compel testimony or documents from witnesses outside Tanzania. In fact, former Chief Justice Othman’s evidence is that the one CPC provision that addresses the issue has no functional effect because Tanzania has never passed a corresponding enabling statute.<sup>161</sup>

### **PART III -ISSUES AND THE LAW**

#### **A. Jurisdiction *Simpliciter***

88. Barrick misstates the law when it asserts that the test for jurisdiction is whether there is a “real and substantial connection” between Ontario and the subject matter of the litigation.<sup>162</sup> The real and substantial connection test applies only in cases of *assumed jurisdiction*, where the defendant is found outside the province. It has no application where jurisdiction is exercised on the basis of the defendant’s presence in the jurisdiction (“presence-based jurisdiction”).<sup>163</sup>

89. Presence-based jurisdiction is fundamental in many legal systems. The real and substantial connection test does not oust traditional private international law bases for jurisdiction.<sup>164</sup> According to the Supreme Court of Canada, “a defendant may always be sued in a court of the jurisdiction in which he or she is domiciled or resident (in the case of a legal person, the location of its head office).” (emphasis added)<sup>165</sup>

90. There is no question that this Court has presence-based jurisdiction over Barrick. As Barrick repeatedly states in Annual Information Forms, its head office is located in Ontario:

<sup>161</sup> Expert Report #1 of Mohamed Othman dated October 2, 2023 (“**Othman Report #1**”) para. 138 [CC – B-1-3260](#)

<sup>162</sup> Factum of Barrick Gold Corporation (“**Barrick Factum**”) [para. 112\(d\)](#)

<sup>163</sup> *Chevron Corp v Yaiguage*, [2015 SCC 42](#) (“*Chevron*”), para [84](#), citing *Club Resorts Ltd. v. Van Breda*, [2012 SCC 17](#) (“*Van Breda*”), para. [79](#).

<sup>164</sup> *Chevron*, at para [84](#), citing *Van Breda*, para. [79](#).

<sup>165</sup> *Van Breda*, para. [86](#)

Barrick’s registered office is located at 1600 - 925 West Georgia Street, Vancouver, British Columbia V6C 3L2. Barrick’s head office is located at Brookfield Place, TD Canada Trust Tower, 161 Bay Street, Suite 3700, Toronto, Ontario M5J 2S1.<sup>166</sup> (Emphasis added)

91. Barrick also refers to the Toronto office as its “headquarters.”<sup>167</sup>
92. This is a full answer to Barrick’s jurisdiction *simpliciter* argument.<sup>168</sup>
93. Alternatively, presence-based jurisdiction can be established over an out-of-province corporate defendant that was “carrying on business” in the forum at the time of the action. This is defined as “some direct or indirect presence in the state asserting jurisdiction, accompanied by a degree of business activity which is sustained for a period of time.”<sup>169</sup> The maintenance of physical business premises has consistently been found to be a compelling jurisdictional factor.<sup>170</sup>
94. Barrick accepts that it is carrying on business in Ontario “because it maintains a corporate office in Toronto.”<sup>171</sup> Barrick has been headquartered in Ontario for decades, and it has at least 50 employees there in several departments. Barrick regularly holds annual meetings of shareholders in Toronto, its common shares are listed and traded over the Toronto Stock Exchange and it is regularly required to file documents with Canadian securities regulators.

<sup>166</sup> Alphonse Affidavit #1 Exhibit E p. 15 [CC – A6477](#); Exhibit F p. 15 [CC – A6713](#); Exhibit G p. 15 [CC – A6936](#); Exhibit H p. 15 [CC – A7159](#). . In its Annual Reports, Barrick states, that the reports “will be made available to shareholders, without charge, upon written request to the Secretary of the Company at the Head Office at corporatesecretary@barrick.com or at 416-861-9911.” (emphasis added). Alphonse Affidavit #1 Exhibit A p. 217 [CC – A5775](#); Exhibit B p. 209 [CC – A5991](#), Exhibit C p. 225 [CC – A6231](#); Exhibit D p. 217 [CC – A6455](#)

<sup>167</sup> Alphonse Affidavit #1 Exhibit DD p. 9 [CC – A8219](#); Exhibit EE [CC – A8238](#)

<sup>168</sup> Barrick makes the same mistake that the parties made in *778938 Ontario Limited v. EllisDon Corporation*, [2023 ONCA 182](#), para [12](#), fn. 1. There, the parties both presumed the real and substantial test applied and argued only that test for assumed jurisdiction. The court, citing to *Chevron*, indicated in *obiter* that presence-based jurisdiction was established on the facts that the defendant was domiciled, headquartered and carried on business in Ontario. See also *Vale Canada Limited v. Royal & Sun Alliance Insurance Company of Canada*, [2022 ONCA 862](#), para. [85](#) (“Presence-based jurisdiction will be established (if the defendant has a fixed place of business in the jurisdiction on the date the action is started.”)

<sup>169</sup> *Chevron*, para. [85](#)

<sup>170</sup> *Chevron*, para. [85](#)

<sup>171</sup> Barrick Factum, [para. 43](#)

95. Where presence-based jurisdiction is established, there is no need to establish jurisdiction on the basis of the real and substantial connection test.<sup>172</sup>

**B. *Forum Non Conveniens***

96. Barrick has the burden of showing “that the alternative forum is clearly more appropriate” for the fair and efficient resolution of the dispute (emphasis added).<sup>173</sup> The burden on a defendant is high.<sup>174</sup> It is not a matter of flipping a coin.<sup>175</sup> Where a court has jurisdiction, the normal state of affairs is for the court to exercise that jurisdiction.<sup>176</sup> If the defendant does not show that the relevant factors *clearly* favour one jurisdiction, a stay will not be granted.<sup>177</sup>

97. There is no definitive list of factors on a *forum non conveniens* motion; rather, parties may raise “diverse facts, considerations and concerns”.<sup>178</sup> As noted by the Supreme Court, “the doctrine focusses on the contexts of individual cases, and its purpose is to ensure that both parties are treated fairly and that the process for resolving their litigation is efficient.”<sup>179</sup> In this case, the key factors are access to justice, access to sources of proof (including availability of documentary evidence, witnesses, and translators), and enforcement of an eventual judgment.

98. As will be argued below, this motion presents a stark choice: dismissing these claims to a jurisdiction with severe limitations on discovery where the plaintiffs will be unable to retain counsel with the experience or resources necessary to effectively litigate these claims, or continuing in this Court where those barriers simply do not exist.

<sup>172</sup> *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.*, [2003 CanLII 52135 \(ON CA\)](#) para. [29-30](#)

<sup>173</sup> *Van Breda* para. [108](#)

<sup>174</sup> *Black & McDonald Limited v. Eiffage Innovative Canada Inc.*, [2023 ONCA 91](#) (“*Eiffage*”) para. [27](#), citing *Young v. Tyco International of Canada Ltd.*, [2008 ONCA 709](#) (“*Young*”) para. [28](#)

<sup>175</sup> *Van Breda* para. [109](#)

<sup>176</sup> *Van Breda*, para. [109](#)

<sup>177</sup> *Eiffage* para. [27](#)

<sup>178</sup> *Van Breda* para. [105](#) and [110](#)

<sup>179</sup> *Van Breda* para. [105](#)

99. Barrick faces no significant prejudice in litigating claims in a court which is a mere 1.3 kms from its world headquarters where its “top down” approach to management of global human rights and security practices is centred. In contrast, there is no realistic possibility these claims would actually be pursued in Tanzania where the civil justice system has yet to provide a meaningful response to years of alleged human rights abuses at the North Mara mine.

**(i) Access to Justice**

100. Ontario courts have recognized that “[w]hen applying the *forum non conveniens analysis* it is just as important to consider fairness and access to justice as much as convenience.”<sup>180</sup>

101. The plaintiffs cannot afford hourly fees or case expenses. Tanzanian lawyers are prohibited from charging contingency fees.<sup>181</sup> Private reduced fee work is not possible.<sup>182</sup> Barrick’s suggestion that a legal aid provider could give full and adequate legal representation through trial in such a complex and highly contested matter is not supported by any cogent evidence. On the contrary, plaintiffs’ evidence is that even the largest legal aid provider, LHRC, has a legal aid budget of US \$50,000 to cover approximately 20,000 clients annually.<sup>183</sup> Most resources are directed at education and empowerment of claimants for self-representation.<sup>184</sup>

102. These profound limits on access to justice are exacerbated by repression inflicted on lawyers, particularly those pursuing public interest cases, as described at paragraphs 72-79.

<sup>180</sup> *Tyoga Investments Ltd. v Service Alimentaire Desco Inc.*, [2015 ONSC 3810](#) (“*Tyoga*”) para 67, citing *Breeden v. Black*, [2012 SCC 19](#) para 36 and *Young* para 61. Barrick’s heavy reliance on principles of comity is out of step with the clear analysis of the Supreme Court of Canada in *Nevsun SCC*. In *Nevsun*, the court held that “the deference accorded by comity to foreign legal systems ‘ends where clear violations of international law and fundamental human rights begin.’” *Nevsun* para 50. Canadian courts may consider “the nature of the justice system” in another jurisdiction in light of “the Canadian sense of what is fair, right and just.” *Nevsun* para 51.

<sup>181</sup> *Oleshangay Report* para. 76 [CC – A2421](#); *Kambole Report* paras. 26-28 [CC – A5231](#); *Shaidi Report #2* para. 22 [CC – B-1-15679](#); *Kapinga Transcript* q. 25-31, pp. 10-11 [CC – F1744](#)

<sup>182</sup> *Kambole Report* para. 29 [CC – A5232](#); *Kambole Transcript* q. 814-815, pp. 185-186 [CC – F1113](#); *Shaidi Transcript* q. 398-400, pp. 111-112 [CC – F6201](#)

<sup>183</sup> *Oleshangay Report #1* para 102 – [CC – A2426](#)

<sup>184</sup> *Oleshangay Report #1* paras 105-108 – [CC – A2426](#)

## Sources of Proof

103. The limited scope of discovery in Tanzania may provide a level playing field where both parties have similar resources and knowledge of the events underlying the dispute. But where, as here, there is a massive asymmetry in financial resources and information regarding the shootings, the limited nature of discovery creates a real risk of unfairness.

104. Despite Barrick's superficial attempt to paint plaintiffs' experts as lacking objectivity and credibility, Barrick's experts concur with plaintiffs' experts on most points on discovery:

- a. There is no procedure with a freestanding obligation on parties to produce all relevant documents comparable to Ontario Rule 30.02.<sup>185</sup>
- b. A party applying for document discovery must prove that the requested documents are in the possession of the requested party.<sup>186</sup>
- c. There is no procedure for oral examination for discovery prior to trial.<sup>187</sup>
- d. A party has to apply to court to deliver interrogatories to another party.<sup>188</sup>
- e. Interrogatories cannot be used to compel an adverse party to disclose the evidence that party intends to rely upon at trial.<sup>189</sup>
- f. A party must apply to court to seek evidence from a non-party.<sup>190</sup>

105. The significance of Tanzania's limited discovery is not whether the plaintiffs are entitled to "Rolls Royce" procedure, but (1) whether they have access to any documents at all to argue

<sup>185</sup> Vedasto Report para. 20, [CC – B-1-17119](#), Vedasto Transcript q. 52, p. 19 [CC - F6613](#); Dodson Report para. 38 [CC – B-1-4799](#); Oleshangay Report #1 paras. 19, [26 CC – A2407](#); Kambole Report para. 14 [CC – A5227](#). The strongest disagreement is about the level of specificity required an application for production of documents from another party. Oleshangay Report #1 para. 19 [CC – A2407](#); Kambole Report para. 16 [CC – A5228](#); Vedasto Report para. 34 [CC – B-1-17122](#).

<sup>186</sup> Oleshangay Report #1 paras. 19, 40 [CC – A2407](#), [A2413](#); Kambole Report para. 16 [CC – A5228](#); Vedasto Report para. 26 [CC – B-1-17121](#)

<sup>187</sup> Vedasto Report paras. 59 [CC – B-1-17126](#); Vedasto Transcript q. 53-54, p. 19 [CC - F6613](#); Kambole Report para. 18 [CC – A5228](#); Oleshangay Report pp. 20, 55 [CC – A2408](#), [A2417](#); Kambole Report p. 18 [CC – A5241](#)

<sup>188</sup> Vedasto Transcript q. 55, p. 19 [CC - F6613](#); Kambole Report para. 18 [CC – A5228](#); Oleshangay Report #1 para 42-43 [CC – A2414](#)

<sup>189</sup> Vedasto Transcript q. 205, p. 55 [CC - F6649](#); Vedasto Transcript q. 243, p. 65 [CC - F6659](#); Oleshangay Report #1 paras. 20, 47 [CC – A2408](#), [A2415](#); Kambole Report para 21 [CC – A5229](#)

<sup>190</sup> Vedasto Report paras. 42-50 [CC – B-1-17124](#); Vedasto Transcript q. 259-263, pp. 70-71 [CC - F6664](#); Oleshangay Report #1 para. 64 [CC - A2418](#)

their case in a Tanzanian court, particularly police records,<sup>191</sup> and (2) whether they have access to any information to specifically describe what documents might be in the possession of Barrick, NMGML, the police, or any other potential defendant or third party and to prove that such documents are in fact in the possession of those parties.

106. Barrick's experts do not cite a single case ever filed in Tanzania related to TPF shootings at the North Mara mine.<sup>192</sup> Experts for both parties cite only one case related to abuses by *private* security at the mine (before the time period at issue here).<sup>193</sup> That case shows the impact of limited discovery in Tanzania. The Court of Appeal dismissed the case based in part on the plaintiffs' lack of evidence about the attackers' identities and whether they worked for the mine. Only three documents were entered into evidence, all by the plaintiff. The mine, as defendant, did not file any documentary evidence or produce any report on the incident.<sup>194</sup>

**(ii) Relative ability of parties to litigate in Ontario versus Tanzania**

107. The inability to retain counsel combined with limited discovery poses major barriers to the fair and efficient litigation of these claims in Tanzania. The best evidence that these barriers are real and formidable may be the fact that after at least 77 to 100 deaths at North Mara over more than a decade, not one victim has brought a claim in Tanzanian courts.<sup>195</sup> If litigating these cases were realistically possible in Tanzania, many cases should have been brought by now.

108. The Statements of Claim before this Court allege 16 shootings and 6 incidents of torture over the period April 2021 to July 2023. Barrick's press releases indicate that deaths have

<sup>191</sup> Kambole Report paras. 23- 24 [CC – A5230](#); Shaidi Report #1 para. 67 [CC – B-1-4215](#); Shaidi Transcript q. 79-95, pp. 25-31 [CC – F6115](#); Irondo Transcript q. 182-186, p. 40 [CC – F916](#); Nyakina Transcript q. 138-144, pp. 26-27 [CC – F5139](#)

<sup>192</sup> Shaidi Transcript q. 264, p. 79 [CC – F6169](#)

<sup>193</sup> Oleshangay Report #1 para. 193, Appendix A, Tab 18 (*North Mara Gold Mine Limited v. Emmanuel Mwita Magesa (Court of Appeal of Tanzania, Civil Appeal No. 271 of 2019)* [CC – A2444](#), [B-1-3255](#); Othman Report #1 para. 113 [CC – B-1-3255](#)

<sup>194</sup> Oleshangay Report #1 paras. 23, 190-191 [CC A2444](#)

<sup>195</sup> Alphonse Affidavit #1 Exhibit XX, p. 46 [CC-A8550](#); Irondo Affidavit para. 10 [CC – A80](#)

continued at the mine after the filing of the second Statement of Claim in July 2023.<sup>196</sup> To date, no Tanzanian lawyer or legal aid organization has brought these cases to court. While Barrick led evidence that some lawyers say they are not afraid to, none have done so. None have provided a budget or evidence that there is a financially viable means to pursue these claims in Tanzania.

109. Canadian courts take into account the financial resources available to each party, particularly when a plaintiff faces financial disadvantage compared to a corporate defendant.<sup>197</sup>

110. Canadian courts on *forum non conveniens* applications have also looked to the UK jurisprudence regarding the risk that justice will not be obtained in the foreign jurisdiction.<sup>198</sup>

Access to counsel with the experience and resources to prosecute a complex claim has been considered by the UK courts to be a significant factor in jurisdiction disputes. In *Vedanta*, the UK Supreme Court relied on the fact that the plaintiffs lived in extreme poverty, had no resources to fund the litigation, could not obtain legal aid, and could not be funded through a Conditional Fee Agreement (“CFA”) because CFAs were unlawful.<sup>199</sup> Despite some evidence that lawyers in Zambia would pursue the plaintiffs’ claims, the Court concluded that they lacked the resources and experience to conduct litigation of such complexity.<sup>200</sup>

<sup>196</sup> Second SOC paras. 84-88 [CC- A9274](#); Alphonse Affidavit #1 Exhibit PP [CC-A8409](#); Exhibit QQ [CC - A8412](#); Apolinary Lyambiko Affidavit #2 sworn April 4, 2024 (“**Lyambiko Affidavit #2**”) para. 9, Exhibit 1-3 [CC – B-1-11163](#), [B-1-11165](#), [B-1-11167](#), [B-1-11169](#)

<sup>197</sup> *Thind v. Polycon Industries*, [2022 ONSC 2322](#) para. [85](#) (“*Thind*”).

<sup>198</sup> *Araya v. Nevsun Resources Ltd.*, [2017 BCCA 401](#) (“*Nevsun BCCA*”) para. [120](#); *Garcia v. Tahoe Resources Inc.*, [2017 BCCA 39](#) para. [124](#) (“*Garcia*”); *Norex Petroleum Limited v. Chubb Insurance Company of Canada*, [2008 ABQB 442](#) paras. [115-116](#). In Canada, courts consider “real risk” as one factor in the *forum non conveniens* analysis so it is structured differently than in the English cases. *Garcia* para. [125](#).

<sup>199</sup> *Vedanta* para. [90](#)

<sup>200</sup> *Vedanta* para. [91](#). Similarly in *Connelly v. RTZ Corp. plc (No. 2)* [\[1997\] ILPr 643](#), pp. 14-15, the House of Lords placed significant weight on the fact that the plaintiff was impecunious and could not obtain legal aid. The court found that the nature and complexity of the case was such that it could not be tried at all without financial assistance.

### **Convenience and expense**

111. Whereas the plaintiffs lack the financial means to ever litigate this claim in Tanzania, there is no comparable prejudice to Barrick in Ontario. Barrick is a multinational corporation with operations spanning the globe. It has significant experience and expertise at operating transnationally and in different legal systems.<sup>201</sup> Barrick is expert at gathering and transmitting information and documents from its worldwide operations, including those in Tanzania.<sup>202</sup>

112. Notably, claims arising from alleged shootings and abuses by police at North Mara have been litigated in the courts of England. Those claims were brought against the Tanzanian subsidiary, NMGML, as well as Barrick’s UK subsidiary, Acacia Mining (now Barrick TZ), that previously operated the mine.<sup>203</sup> The litigation defence was directed by Barrick’s US-based general counsel.<sup>204</sup> Barrick did not denounce the English litigation as forum shopping; it accepted the jurisdiction of the English courts.<sup>205</sup> Yet somehow, in Ontario – the location of its head office – Barrick claims it will be left to defend itself “with both hands tied behind its proverbial back.”<sup>206</sup>

113. There is no credible argument that Barrick will face any significant inconvenience if this case proceeds in a courthouse that is 1.3 km from its head office given its ability to operate very effectively in over a dozen different jurisdictions all over the globe every day.

### **Access to and availability of documents and other evidence**

114. As described above, Barrick’s Board and executives receive regular and consistent information on human rights and security issues from North Mara. There is an “upward cascade”

<sup>201</sup> Bock Transcript q. 89-91, p. 30 [CC – F214](#)

<sup>202</sup> Bock Transcript q. 92-99, pp. 30-32 [CC – F214](#)

<sup>203</sup> Bock Transcript q. 466-468, 478, pp. 143-144, 148 [CC – F327](#), [F332](#)

<sup>204</sup> Bock Transcript q. 138, 466-467, 478, pp. 41, 143-144, 148 [CC – F225](#), [F327](#), [F332](#);

<sup>205</sup> Alphonse Affidavit #1 Exhibit X, pp. 84 [CC – A7971](#); Exhibit XX, p. 99 [CC – A8603](#); Exhibit CC, p. 4 [CC A8205](#)

<sup>206</sup> Barrick Factum, para. 62 [CC – B-1-25](#)

of data on human rights and security matters to the Barrick Board.<sup>207</sup> Barrick executives are confident in the communication structures they have in place, through which they receive the information they need from North Mara.<sup>208</sup> If they request information or documents from North Mara, they will receive them.<sup>209</sup> Barrick has obtained and will continue to receive cooperation and evidence from NMGML and its employees to obtain documents and access to witnesses and information for this litigation in Ontario.<sup>210</sup>

115. Barrick also has access to required information and documents from the TPF as a matter of contract, through the MOU.<sup>211</sup> This information sharing is not only contractually required but in fact occurs.<sup>212</sup> Through the MOU and Barrick's procedures, Barrick has access to crucial evidence from the TPF and is not prejudiced by any lack of evidence on these incidents.

116. In contrast, any lawyer attempting to litigate this case in Tanzania would face serious, if not insurmountable, challenges in attempting to access critical sources of proof due to limitations on discovery. The courts of British Columbia have considered the adequacy of document discovery in the foreign jurisdiction to be a significant factor in the *forum non conveniens* analysis.<sup>213</sup> If the defendant is unable to show the foreign jurisdiction has a system for proper documentary disclosure, this will weigh against that forum being clearly more appropriate.<sup>214</sup>

#### **Access to and availability of witnesses**

117. Barrick argues that the lack of a letters rogatory procedure in Tanzania is a significant factor. With respect, Barrick greatly overstates its point, and it cuts both ways. The most that can

<sup>207</sup> Lyambiko Transcript, q. 199 p. 51 [CC – F2623](#); Alphonse Affidavit #1 Exhibit Y, p. 12 [CC -A8068](#)

<sup>208</sup> Bock Transcript q. 89-92, p. 30 [CC – F214](#); Beringer Transcript q. 28-31, pp. 13-14 [CC- F21](#)

<sup>209</sup> Bock Transcript q. 94-99, pp. 31-32 [CC – F215](#)

<sup>210</sup> Bock Transcript q. 315-316, p. 93 [CC – F277](#)

<sup>211</sup> [2022 MOU p. 14, s. 11\(a\)](#)

<sup>212</sup> Lyambiko Affidavit #2 para. 9 CC – B-1-11163; Bock Transcript q. 391-392, pp. 121-122 [CC – F305](#)

<sup>213</sup> *Araya v. Nevsun Resources Ltd.*, [2016 BCSC 1856](#) paras. [188-190](#) (“*Nevsun BCSC*”)

<sup>214</sup> *Nevsun BCSC* paras. [247](#) and [288-290](#)

be said is that it is uncertain whether a Tanzanian court would enforce a foreign request for assistance to compel testimony of a witness. In the words of Barrick's expert, former Chief Justice Othman, it is "highly uncertain" and "unlikely" that Tanzanian courts would assist a foreign court by compelling residents of Tanzania to provide evidence given the absence of a statutory authority through which the request could be made.<sup>215</sup>

118. There are no reported cases on point, which speaks more broadly to the absence of complex, transnational cases in the courts of Tanzania.<sup>216</sup>

119. Further, there is no evidence in the record regarding witnesses based in Tanzania that clearly shows: a) who they are individually, b) how many there are, c) that they would be unwilling to cooperate with the case in Ontario by appearing voluntarily either in person or remotely, or d) whether their evidence would be needed in light of other evidence, such as CCTV footage and Barrick's access to police records.

120. Relying on *Haaretz*, Barrick claims that it cannot fairly defend the claim in Ontario because it will be unable to compel witnesses located in Tanzania.<sup>217</sup> However, in *Haaretz*, the court had before it concrete evidence that witnesses would not testify voluntarily in Ontario.<sup>218</sup> The Ontario Court of Appeal in *Kyko Global* distinguished *Haaretz* partially on this basis:

Unlike *Haaretz*, the appellants did not adduce evidence that their witnesses in India would not testify voluntarily. The motion judge did not rely on videoconferencing to overcome the problem of foreign witnesses who are unwilling to testify, in the absence of evidence that those witnesses could be compelled in Ontario.<sup>219</sup>

121. Moreover, Barrick's argument cuts equally against Tanzania as a preferable forum. A Tanzanian court would not be able to issue letters of request to foreign courts. Barrick's experts

<sup>215</sup> Othman Report #1 para. 124 [CC – B-1-3258](#)

<sup>216</sup> Othman Report #1 para. 125 [CC – B-1-3258](#); Shaidi Report #1 paras. 72-73 [CC – B-1-4216](#).

<sup>217</sup> *Haaretz.com v. Goldhar*, [2018 SCC 28](#) ("*Haaretz*") paras. [63-65](#).

<sup>218</sup> *Haaretz* para. [63](#)

<sup>219</sup> *Kyko Global Inc. v. M/S Crawford Bayley & Co.*, [2021 ONCA 736](#) ("*Kyko Global*"), para [40](#).

have not stated in their reports or cited any jurisprudence that Tanzanian courts can compel testimony or documents from witnesses outside Tanzania. The only provision in the Civil Procedure Code addressing this situation does not authorize Tanzanian courts to act because Tanzania has never passed a corresponding enabling statute.<sup>220</sup>

122. This is highly significant given the large number of Barrick directors, executives, former employees, and consultants with key evidence who reside outside of Tanzania. As listed in detail above at paragraph 86, they are in the following countries – notably not in Tanzania: Mauritius, South Africa, UK, Jersey, Canada, United States, Hungary, Dominican Republic, Côte d’Ivoire.

123. The location of witnesses and documents is given less weight where the complexity of a case means it will be challenging to manage no matter the jurisdiction.<sup>221</sup> Technology has also reduced the weight given to this factor.<sup>222</sup>

124. The post-COVID reality is that many court proceedings occur virtually, which reduces the weight given to this factor<sup>223</sup> as illustrated by the Court of Appeal’s analysis in *Kyko Global*:

[T]he appellants have not demonstrated any error in principle concerning the motion judge’s observation that videoconferencing technology may offer a fair, convenient and cost-effective way to obtain testimony from witnesses abroad at trial in Ontario. It is open to an Ontario court to modify its usual sitting hours to better accommodate an out-of-country witness. Even before the COVID-19 pandemic made videoconferencing software ubiquitous, Canadian courts have considered the possibility of proceeding electronically as part of the forum non conveniens analysis [citations omitted].<sup>224</sup>

<sup>220</sup> Othman Report #1 para. 138 [CC – B-1-3260](#)

<sup>221</sup> *Nevsun BCSC* paras. [249-250](#)

<sup>222</sup> *Integrated Team Solutions PCH Partnership, LED (ITS) PCH Inc. v. Mitsubishi*, [2024 ONSC 3791](#) para. [41](#).

<sup>223</sup> *Kyko Global*, para. [40](#); *Eiffage*, para. [17](#).

<sup>224</sup> *Kyko Global*, para. [41](#)

125. The number of witnesses in foreign jurisdictions can also be minimized through the exercise of case management powers in Canadian courts.<sup>225</sup> In the event Barrick’s witnesses are required to travel to Ontario, this is “a reality of choosing to operate on a global scale.”<sup>226</sup>

### **Availability of Swahili translators in Ontario**

126. Toronto is a multinational city, and Ontario courts handle many languages on a daily basis. With a few calls, a clerk for plaintiffs’ counsel was able to identify several Ontario companies that provide Swahili interpretation and translation for legal proceedings in Toronto.<sup>227</sup>

### **(iii) Enforcement of judgment**

127. The court will consider barriers to enforcing a judgment from either forum. This factor will favour proceeding in the jurisdiction where the defendant has assets if separate proceedings would otherwise be required to enforce the decision of a foreign forum in that jurisdiction.<sup>228</sup>

128. Barrick would be a foreign defendant in Tanzanian courts and has practically no presence in Tanzania. As described above, all relevant executives and managers are located outside of Tanzania. There is no evidence that Barrick has assets in Tanzania. Barrick’s principal assets are its shareholding interests in its subsidiaries and affiliates.<sup>229</sup> Those are not in Tanzania.

129. Were the plaintiffs to succeed in winning a judgment against Barrick in Tanzania, they would likely be required to bring an action in Ontario in order to enforce that judgment.

<sup>225</sup> *Nevsun BCSC* paras. [292-293](#)

<sup>226</sup> *Mian v. Expro Group Canada Inc.*, [2024 NSSC 218](#) para. [78](#). Similarly, in *Tims v Royal Bank of Canada*, [2022 BCSC 1181](#) para. [17](#) the court concluded that the defendant, “[a]s a large multinational enterprise” was “well equipped” to litigate in multiple jurisdictions.

<sup>227</sup> Alphonse Affidavit #1 Paras. 62-64 [CC – A5552](#). The lack of Ontario translators who know the Kurya language is a red herring. There is no evidence that any plaintiff or witness needs a Kurya interpreter. All testimony and affidavits to this point have been sworn in Swahili. Irondo Affidavit [CC - A78](#), Nyakina Affidavit [CC- A68](#); Beringer Affidavit Exhibits 15-18 [CC B-1-3070](#)

<sup>228</sup> *Jacobovich v. Israel (State)*, [2021 ONSC 3558](#) para. [146](#), citing *Haaretz* para. [142](#).

<sup>229</sup> Beringer Affidavit para. 14 [CC – B-1-2796](#); Beringer Affidavit Exhibit 1 p. 17 [CC- B-1-2819](#)

130. Barrick's answer to this factor appears to be to reframe the case on the terms on which Barrick wishes the plaintiffs to proceed – suing only NMGML or the TPF in a Tanzanian court. But even then, there is no guarantee such a judgment would be enforced in Tanzania as there is significant evidence from Barrick's experts that the Tanzanian government has refused to enforce High Court and other decisions about human rights.<sup>230</sup>

**(iv) Law to be applied**

131. Ontario courts have found choice of law to be a neutral factor where the applicable law was a live issue or where the law of multiple forums was implicated.<sup>231</sup>

132. Here, the choice of law to be applied is an open question. The plaintiffs do not concede that the applicable law is Tanzanian; they have pleaded Ontario law. Foreign law must be pleaded.<sup>232</sup> Barrick has not yet pleaded Tanzanian law. If it does not, Ontario law will apply.

133. The *lex loci delicti* rule from *Tolofson* is firmly rooted in the concept of territoriality but territoriality yields in the face of breaches of peremptory norms of customary international law:

On the international plane, the relevant underlying reality is the territorial limits of law under the international legal order. The underlying postulate of public international law is that generally each state has jurisdiction to make and apply law within its territorial limit. Absent a breach of some overriding norm, other states as a matter of "comity" will ordinarily respect such actions and are hesitant to interfere with what another state chooses to do within those limits. (emphasis added)<sup>233</sup>

134. Here, the plaintiffs plead causes of actions based directly on violations of customary international law, specifically torture and extrajudicial killing, as per *Nevsun*.<sup>234</sup>

<sup>230</sup> Othman Transcript q. 47-51, 72-74, pp. 22-24, 28-29 [CC - F5976, F5982](#); Shaidi Transcript q. 312-319, pp. 91-93 [CC – F6181](#); Oleshangay Transcript q. 132-145 pp. 31-33 [CC – F5187](#); Deya Report paras. 167-168, 171-173 [CC – A133, A134](#)

<sup>231</sup> *James et al v Hongkong and Shanghai Banking Corp. Ltd.*, [2022 ONSC 4567](#) para. 80; *Kyko Global* para. 57

<sup>232</sup> *Yordanes v. Bank of Nova Scotia*, [2006 CanLII 1777 \(ON SC\)](#), para. 50; *Silver v. Imax Corporation*, [2009 CanLII 72334](#), para. 153 (“Unless or until the defendants plead the laws of other jurisdictions in their statement of defence, the assumption at this stage of the proceedings is that the law of Ontario will apply to the determination of the common law claims.”)

<sup>233</sup> *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994 3 S.C.R. 1022](#) p. 1047.

<sup>234</sup> This case is distinguishable from *Das v. George Weston Limited*, [2018 ONCA 1053](#). While *Das* dealt with sustainability standards of a parent company, the plaintiffs did not plead violations of customary international law.

135. If Tanzanian law applies, Ontario courts apply foreign law “without insurmountable difficulty.”<sup>235</sup> Tanzania is a common law country with negligence based on UK common law.<sup>236</sup>

**(v) Juridical advantage**

136. Under *Nevsun*, these plaintiffs can pursue tort claims based directly on customary international law in Ontario.<sup>237</sup> There is no basis to do so in Tanzania.<sup>238</sup> The Supreme Court emphasized the importance of these claims as “inherently different” from domestic torts which “address the heinous nature of the harm caused by this conduct.”<sup>239</sup>

**C. Credentials and credibility of plaintiffs’ experts and witnesses**

137. Barrick has aggressively attacked the credibility the plaintiffs’ experts and witnesses. Regarding plaintiffs’ legal experts, Barrick has taken a handful of interpretive disagreements about points of law addressed in a small number of cases and attempted to elevate them to a credibility battle where only Barrick’s experts are correct. In fact, the experts agree on numerous points as described above. Also, the fact that lawyers trained in the common law tradition disagree over the interpretation of a case is hardly surprising. To suggest that these disagreements are anything other than a difference in professional opinion is insulting. In any event, most of Barrick’s complaints would apply equally to its own experts.<sup>240</sup>

<sup>235</sup> *Thind*, para 70

<sup>236</sup> Othman Report #1 para. 122; Shaidi Report #1 paras. 21-25 [CC – B-1-3257](#), [B-1-4199](#)

<sup>237</sup> *Nevsun SCC* at paras. [129-132](#)

<sup>238</sup> Oleshangay Report #1, paras. 25, 201 [CC – A2409](#), [A2446](#); Shaidi Transcript q. 26, pp. 10-11 [CC – F6100](#)

<sup>239</sup> *Nevsun SCC* [paras 124-126](#)

<sup>240</sup> Amongst other things, Professor Shaidi stated on cross-examination that he believes his role as an expert is to be a finder of facts. Shaidi Transcript q. 110-120, pp. 35-36 [CC – F6125](#). He refused to treat the plaintiffs’ affidavits as evidence, calling them allegations, and reached his own conclusion that the plaintiffs’ affidavits were not credible. Shaidi Transcript q. 33-37, pp. 12-13 [CC - F6102](#); Shaidi Transcript q. 51, p. 17 [CC – F6107](#). Prof. Shaidi was forced to concede on cross that he was simply wrong on a point of law in his report and that he omitted key information. Shaidi Report #2 para. 23-28 [CC – B-1-15679](#); Shaidi Transcript q. 325-332, 387-400, pp. 94-95, 109-112 [CC - F6184](#), [F6199](#). Prof. Dodson has no expertise or experience in Tanzania yet opined in his expert report that pretrial discovery in Tanzania “appears to be adequate to permit the fair adjudication of civil disputes.” Dodson Report para. 47 [CC – B-1-4801](#); Transcript of Cross-Examination of Scott Dodson dated June 13, 2024 (“**Dodson Transcript**”) q. 1-2, p. 5 [CC – F860](#); Dodson Transcript q. 40-43, pp. 14-17 [CC – F869](#). Mr. Vedasto failed to include a key judgment in his expert report, admitted on cross-examination that one of the conclusions in his expert report was wrong, and admitted that he relied only on his own interpretation of a rule with no caselaw support. Vedasto Transcript q. 205, 239-241, 243, 259-263, pp. 55, 64-65, 70-71 [CC -F6649](#), [F6658](#), [F6659](#), [F6664](#);

138. Barrick spent significant energy in cross-examinations – and now in its factum – arguing that the evidence of plaintiffs’ witnesses regarding proceedings before the Advocates Committee is false. This argument is founded almost entirely on the notion that they have been discredited in cross-examination by documents obtained by Barrick’s Tanzanian lawyers from the Advocates Committee.<sup>241</sup> To be clear, there are no formal, published records of Committee proceedings, and Barrick has not adduced any evidence from the Committee that the records are authentic or provide complete and accurate accounts of proceedings. Barrick has not proffered a witness who was present at any of the hearings.<sup>242</sup> In contrast, two of plaintiffs’ witnesses were present at a key hearing, and a third spoke with the lawyers involved.<sup>243</sup> Several witnesses cast doubt on the accuracy of the records, which are not transcripts but a form of incomplete summary.<sup>244</sup>

139. Finally, Barrick’s insulting attack on Mr. Deya for being Kenyan misses the mark. Mr. Deya is an independent expert on rule of law. He is the long-time CEO of the Pan African Lawyers Union. His CV demonstrates deep experience on rule of law issues Africa-wide.<sup>245</sup>

#### **PART IV - ORDER REQUESTED**

140. The plaintiffs respectfully request that this motion be denied with costs.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 27<sup>th</sup> day of September, 2024.

<sup>241</sup> Barrick Factum paras. 72-26 [CC-B-1-28](#)

<sup>242</sup> Barrick’s expert, Mr. Tairo, was not present at any of the hearings and did not speak to anybody involved. In fact, he has never attended any hearing of the Advocates Committee or argued a case before, sat on, or been employed by the Committee. Tairo Transcript q. 27-32, 80-82, pp. 14-15, 27-28 [CC - F6490](#), [F6503](#). Mr. Tairo’s report was based on documents given to him by Barrick’s Tanzanian counsel, FB Attorneys. Tairo Transcript q. 77-79, p. 27 [CC - F6503](#); William Mang’ena Affidavit sworn April 12, 2024 (“**Mang’ena Affidavit**”) para. 9 [CC - B-1-11192](#)

<sup>243</sup> Deya Transcript q. 562-566, 357-358, pp. 75-76, 120-123 [CC - F688](#), [F643](#). Barrick severely mischaracterizes Mr. Deya’s evidence by claiming that he was “forced to concede” that he “simply ‘regurgitated’” what others told him. Barrick Factum para. [112\(d\)](#).

<sup>244</sup> Mwabukusi Transcript q. 353-365, pp. 104-114; Karume Transcript q. 576-577, 606, 614, pp. 171, 176, 183 [CC - F1949](#), [F1954](#), [F1961](#); Deya Transcript q. 357-358, 562-566, pp. 75-76, 120-122 [CC - F688](#), [F643](#); Tairo Transcript q. 87-93, 271-277, pp. 29-30, 77-78 [CC - F6505](#), [F6553](#).

<sup>245</sup> Deya Report Exhibit D [CC – A2376](#). Mr. Deya readily conceded that on certain matters about the Tanzanian judiciary he does not have insider knowledge that former Chief Justice Othman has. Deya Transcript q 436, 445, 456, 360-363, pp. 91, 93, 95, 96-97. [CC- F659](#), [F661](#), [F663](#)

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## SCHEDULE “A” – JURISPRUDENCE

1. *778938 Ontario Limited v. EllisDon Corporation*, [2023 ONCA 182](#)
2. *Araya v. Nevsun Resources Ltd.*, [2016 BCSC 1856](#)
3. *Araya v. Nevsun Resources Ltd.*, [2017 BCCA 401](#)
4. *Black & McDonald Limited v. Eiffage Innovative Canada Inc.*, [2023 ONCA 91](#)
5. *Breeden v. Black*, [2012 SCC 19](#)
6. *Chevron Corp. v. Yaiguaje*, [2015 SCC 42](#)
7. *Club Resorts Ltd. v. Van Breda*, [2012 SCC 17](#)
8. *Connelly v. RTZ Corp. plc (No. 2)* [\[1997\] ILPr 643](#)
9. *Das v. George Weston Limited*, [2018 ONCA 1053](#)
10. *Garcia v. Tahoe Resources Inc.*, [2017 BCCA 39](#)
11. *Haaretz.com v. Goldhar*, [2018 SCC 28](#)
12. *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.*, [2003 CanLII 52135 \(ON CA\)](#)
13. *Integrated Team Solutions PCH Partnership, LED (ITS) PCH Inc. v. Mitsubishi*, [2024 ONSC 3791](#)
14. *Jacobovich v. Israel (State)*, [2021 ONSC 3558](#)
15. *James et al v Hongkong and Shanghai Banking Corporation Limited*, [2022 ONSC 4567](#)
16. *Kyko Global Inc. v. M/S Crawford Bayley & Co.*, [2021 ONCA 736](#)
17. *Mian v. Expro Group Canada Inc.*, [2024 NSSC 218](#)
18. *Nevsun Resources Ltd. v. Araya*, [2020 SCC 5](#)
19. *Norex Petroleum Limited v. Chubb Insurance Company of Canada*, [2008 ABQB 442](#)
20. *Silver v. Imax Corporation*, [2009 CanLII 72334](#)
21. *Thind v. Polycon Industries*, [2022 ONSC 2322](#)
22. *Tims v Royal Bank of Canada*, [2022 BCSC 1181](#)

23. *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994 3 S.C.R. 1022](#)
24. *Tyoga Investments Ltd. v Service Alimentaire Desco Inc.*, [2015 ONSC 3810](#)
25. *Vale Canada Limited v. Royal & Sun Alliance Insurance Company of Canada*, [2022 ONCA 862](#)
26. *Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)*, [\[2019\] UKSC 20](#)
27. *Yordanes v. Bank of Nova Scotia*, [2006 CanLII 1777 \(ON SC\)](#)
28. *Young v. Tyco International of Canada Ltd.*, [2008 ONCA 709](#)

SOPHIA MATIKO JOHN et al.  
Plaintiffs

-and- BARRICK GOLD CORPORATION  
Defendant

Court File No.: CV-22-00690649-0000

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT TORONTO

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**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

SOPHIA MATIKO JOHN, IN HER PERSONAL CAPACITY AND AS  
LITIGATION GUARDIAN FOR HER MINOR CHILD, KELVIN;  
ANACRETUS MARINGO GIMANWA; ESTA GEORGE RANGE, IN HER  
PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER  
MINOR CHILDREN JOSEPH, GODFREY, FILEMON AND REBEKA;  
ELIZABETH MATIKO IRONDO; NEEMA STEPHEN JOHN, IN HER  
PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER  
MINOR CHILDREN JOHN, MIRIAM, ESTA, AND TIMOTHY; MASWI  
MARWA MOHABE; DOTTO WILLIAM ITAMA, IN HER PERSONAL  
CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD  
CHRISTINA; LYIMO ITAMA MACHELA; ITAMA MACHELA MAX;  
CHARLES DANIEL NYAKINA; BHOKE HAGALE MARO; DANIEL  
NYAKINA GHATI; DICKSON JULIUS SISE; SIBORA MARWA MWITA;  
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CHRISTOPHER JHOMU MAKENDE; RANGE MWITA RANGE; AND  
FREDY CHACHA WAMBURA LEMA

Plaintiffs

and

BARRICK GOLD CORPORATION

Defendant

A N D B E T W E E N:

ESTER NYANGI PETRO, IN HER PERSONAL CAPACITY AND AS  
LITIGATION GUARDIAN FOR HER MINOR CHILD LUCIA; LEONIDA  
RUBEN JOSHUA, IN HER PERSONAL CAPACITY AND AS LITIGATION  
GUARDIAN FOR HER MINOR CHILDREN, MACHUGU, NEEMA AND  
DANIEL; ABEL SAIMA MACHUGU NYAMARUNGU; CLEMENSIA  
PROTAS MARWA; MACHERA KIMIRA WANKA; CHARLES IKAYA  
MGAYA; MAHERI MWITA NTORA; AND CHARLES MWITA MSETI

Plaintiffs

and

BARRICK GOLD CORPORATION

Defendant

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Lawyers for the Plaintiffs

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1. In their Responding Factum, the Plaintiffs paint an inaccurate picture both of the reality on the ground at the North Mara Gold Mine and of the Tanzanian legal system. Moreover, they rely upon inapt case law, make assertions that are unsupported by the record, and proceed as though evidence that is inconvenient to their positions does not exist. This Reply Factum addresses only certain of the most glaring examples of these problems.

**A. The Reality of the North Mara Gold Mine**

2. The Plaintiffs attempt to characterize this action as a longstanding dispute between Barrick and so-called “artisanal miners” who are doing nothing more than seeking to “secure subsistence livelihood from the mine’s waste rock”. This distorted picture is the foundation of the Plaintiffs’ efforts to blame Barrick for the alleged actions of a sovereign and independent police force, as if the presence of and protection of the Tanzania Police Force (the “**TPF**”) at North Mara are entirely unnecessary. Nothing, however, could be further from the truth.

3. Members of local villages do not—and cannot—simply wander onto the Mine site. Nor do they merely forage for traces of gold in unwanted waste rock. Instead, the unchallenged evidence is that groups of armed trespassers illegally invade the site to steal valuable gold-bearing material from two ore stockpiles, as well as fuel and equipment. They are frequently affiliated with organized crime syndicates. They threaten, intimidate and attack Tanzanian employees of NMGML and unarmed private security personnel. They know full well that the Mine is privately-owned property and that they are not entitled to access it. Indeed, intruders must circumvent a 14-foot concrete wall, electric gates and barbed wire fencing to reach the stockpiles.<sup>1</sup>

<sup>1</sup> Affidavit of A. Lyambiko, October 1, 2023 ¶28-30, Motion Record (“**MR**”) Vol. 2, Tab 6, [CC B-1-3162](#); Cross-Exam. Transcript of S. Bock, pp. 139-140, q. 455, Joint Brief of Transcripts (“**JBT**”) Vol. 1, Tab 2, [CC F323](#); Cross-Exam. Transcript of C.D. Nyakina (“**Nyakina Transcript**”) May 9, 2024, pp. 21-23, qq. 101-111, JBT Vol. 16, Tab 13, [CC F5134](#); Cross-Exam. Transcript of E. Irondo, May 9, 2024, pp. 24-28, qq. 92-111, JBT Vol. 3, Tab 6, [CC F900](#). See also Barrick Press Release, Exhibit KK to J. Alphonse Affidavit #1, February 1, 2024, Plaintiffs’ Responding Motion Record (“**PRMR**”), Vol. 3, Tab 6 [CC A8391](#).

4. Put simply, the Plaintiffs' framing of their case is divorced from reality. It is emblematic of their persistent failure to engage with the actual record before the Court.

**B. The Court Should Conduct a Searching *Forum Non Conveniens* Analysis**

5. Even if this Court has presence-based jurisdiction to preside over these proceedings, that jurisdiction is tenuous. The uncontroverted evidence is Barrick's small corporate office in Toronto has no connection to or involvement in the management or operation of the North Mara Gold Mine. In circumstances such as these, there is a heightened risk that the commencement of legal proceedings in Ontario amounts to the very sort of impermissible forum-shopping our Courts have condemned. It is incumbent upon this Court to guard against abuse by applying a particularly stringent and searching analysis of the relevant *forum non conveniens* factors.

6. In *Haaretz*, the Supreme Court explained that “[t]he purpose of the *forum non conveniens* analysis is to temper any potential rigidity in the rules governing the assumption of jurisdiction and ‘to assure fairness to the parties and the efficient resolution of the dispute.’” The Court noted that “this is necessary given [the fact] that jurisdiction ‘may sometimes be established on a rather low threshold.’ For this reason, the *forum non conveniens* stage plays an important role in striking a balance between order and fairness.”<sup>2</sup> Although *Haaretz* did not involve a defendant that resided in Ontario, this principle should apply equally where jurisdiction *simpliciter* is established solely because a defendant maintains a brick-and-mortar office in this Province.

**C. Comparisons to *Nevsun* Are Inapt**

7. In seeking to compare this case to *Nevsun*, the Plaintiffs ignore the procedural context in which that matter was decided as well as its extraordinary facts. The issue of *forum non conveniens*

<sup>2</sup> *Haaretz.com v. Goldhar*, 2018 SCC 28 (“[Haaretz.com](#)”) ¶30, 32; *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 (“[Van Breda](#)”) ¶104-105, 109.

was not raised before the Supreme Court in *Nevsun*. Rather, the Court decided whether: (i) certain claims for alleged breaches of customary international law should be struck at the very outset of the case for being legally unviable on a “plain and obvious” standard; and (ii) the Act of State doctrine forms part of our law.

8. Contrary to the Plaintiffs’ assertions, *Nevsun* does not undermine in any way the centrality of the principle of comity in the *forum non conveniens* analysis.<sup>3</sup> Passages from *Nevsun* cited by the Plaintiffs stand for the very different proposition that the inter-judicial respect that lies at the heart of comity may be attenuated where it is clear that foreign laws or a foreign justice system actively permit and encourage violations of international law and fundamental human rights. There is no evidence of that in the case at bar. Instead, the evidence is directly to the contrary.

9. *Nevsun* concerned the Bisha Mine in Eritrea, a military dictatorship and failed state. There was no question that the Eritrean government and military were profligate human rights abusers that operated a forced labour program and engaged in torture. Moreover, the evidence established that Eritrea had a deeply compromised and barely functioning legal system that facilitated these violations. In that context, the Plaintiffs alleged that they had been forced against their will to participate in the construction of the Bisha Mine and that *Nevsun* was a knowing beneficiary.<sup>4</sup>

10. There is no valid comparison between Tanzania and Eritrea, or between North Mara and the Bisha Mine. Tanzania is a functioning democracy that subscribes to and enforces the rule of law. Its legal system, like Canada’s, is derived from the English system. North Mara was not built using slave labour. It is a major source of gainful local employment, is one of the most significant taxpayers in Tanzania, and contributes meaningfully to the health, safety and welfare of members

<sup>3</sup> See Plaintiffs’ Factum, fn 180.

<sup>4</sup> *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 ¶3-4, 7-15, 17-18, 60, 100-113, *aff’g*, 2017 BCCA 401 ¶2-8, 38-48, *aff’g*, 2016 BCSC 1856 ¶15-48, 71-110, 204-225.

of local communities and Tanzanians more generally.<sup>5</sup> The Plaintiffs’ contention that there is a risk that justice will not be done in the Courts of Tanzania—as though the legal system of Tanzania is somehow analogous to corrupted systems such as that of Eritrea<sup>6</sup>—wishes away the evidentiary record in this case. Once again, the evidence establishes the opposite.

#### **D. The Plaintiffs’ Financial Means Are Irrelevant**

11. Although the Plaintiffs adduced no evidence that they have ever attempted to obtain legal services in Tanzania, they insist that Ontario must be the *forum conveniens* because of supposedly insurmountable financial impediments to litigating this dispute in Tanzania. That assertion is flatly inconsistent with the record. It also ignores relevant case law. The reality is that:

- (a) The expert evidence establishes that free or subsidized legal services are widely available in Tanzania.<sup>7</sup> The Plaintiffs’ claims to the contrary are at best exaggerated;
- (b) Our Courts have recognized that the unavailability of contingent fee arrangements in foreign jurisdictions is, at best, a marginal factor in the *forum non conveniens* analysis.<sup>8</sup> The Plaintiffs’ heavy reliance on this factor is misplaced;
- (c) Legal aid services are available in Tanzania, and in any event the unavailability of such services is relevant only in extraordinary circumstances—*e.g.*, in highly complex litigation that turns on expert scientific evidence.<sup>9</sup> This case, in contrast, involves claims of alleged personal injury and wrongful death; and
- (d) Proceedings in Ontario are routinely stayed in favour of the courts of other jurisdictions even where the plaintiffs: (i) have limited means; (ii) have been unable to retain counsel in the foreign jurisdiction; (iii) will face financial hardship if required to litigate in the foreign jurisdiction; or (iv) may be prevented by impecuniosity from

<sup>5</sup> See the largely unchallenged expert evidence of: M.C. Othman Expert Report (“**Othman Report**”), October 2, 2023, MR Vol. 2, Tab 7.1, CC [B-1-3233](#); L.P. Shaidi Expert Report, October 2, 2024, MR Vol. 5, Tab 8.1, CC [B-1-4191](#); U. Mwasomola Expert Report, April 12, 2024, Reply Motion Record (“**RMR**”), Vol. 20, Tab 8.1, CC [B-1-11655](#); M.C. Othman Reply Expert Report, April 5, 2024, RMR Vol. 23, Tab 10.1, CC [B-1-12652](#); L.P. Shaidi Reply Expert Report, April 5, 2024, RMR Vol. 33, Tab 12.1, CC [B-1-15670](#); M. Tairo Expert Report, April 16, 2024, RMR Vol. 34, Tab 13.1, CC [B-1-16172](#); A. Vedasto Expert Report (“**Vedasto Report**”), April 5, 2024, RMR Vol. 37, Tab 14.1, CC [B-1-17117](#).

<sup>6</sup> See Plaintiffs’ Factum, fn 198.

<sup>7</sup> See Barrick Factum, ¶36, 39-40, 99.

<sup>8</sup> *Shirodkar v. Coinbase Global*, 2024 ONSC 1399 ¶¶131, 134, 138-142; *G. Leon Fam. Trust v. Volkswagen*, 2018 ONSC 4265 ¶¶39-47, 49; *Yip v. HSBC*, 2017 ONSC 5332 ¶¶257-258, *aff’d*, 2018 ONCA 626, *leave ref’d*, 2019 CanLII 23866 (SCC).

<sup>9</sup> *Connelly v. RTZ Corp.*, [1997] ILPr 643 (H.L.) at p. 3/6; *Vedanta Res. Plc v. Lungowe*, [2019] UKSC 20 ¶93-95.

pursuing claims in the foreign jurisdiction.<sup>10</sup>

#### **E. Concerns about the Discovery System in Tanzania Have No Merit**

12. The Plaintiffs' complaints about alleged inadequacies of the pre-trial discovery regime in Tanzania are seriously misguided. Those complaints mischaracterize the Tanzanian discovery system while exaggerating the supposed consensus among the expert witnesses on this issue.<sup>11</sup>

13. In arguing that differences in discovery procedures are "a significant factor" in the *forum* analysis, the Plaintiffs rely selectively upon a single lower court ruling from British Columbia. The Plaintiffs ignore a previous ruling of the Court of Appeal for British Columbia that affirmed a decision to stay a proceeding in favour of a country that permits *no discovery at all*.<sup>12</sup> The Plaintiffs also ignore that the Courts of Ontario have repeatedly stayed proceedings in favour of jurisdictions whose discovery processes are similar to those in Tanzania or are otherwise less robust than those available in Ontario.<sup>13</sup>

#### **F. Unfairness Associated with Trying these Cases in Ontario**

14. The Plaintiffs proffer a number of arguments in an effort to downplay or minimize the reality that: (i) vitally important evidence will not be available to Barrick and to this Court if the Plaintiffs' claims are tried in Ontario; and (ii) Barrick will therefore suffer profound prejudice if

<sup>10</sup> *Tamminga v. Tamminga*, [2013] O.J. No. 4515 (S.C.J.) ¶8(2), 9-10, *aff'd*, [2014 ONCA 478](#); *Arsenault v. Nunavut*, 2015 ONSC 4302 ¶78, 80-81, 83, *aff'd*, [2016 ONCA 207](#); *Currie v. Farr's Coach Lines Ltd.*, 2015 ONSC 2352 ¶41(iii), 58; *Fritz v. Fritz*, 2007 CanLII 54274 (ON SC) ¶5(4), 11, 13; [6463908 Can. Ltd. v. BellSouth Affil. Svces. Corp.](#), 2006 CanLII 40990 (ON Master) ¶27(g), 28. See also *Pavacic v. Nicely Estate*, 2008 CanLII 24228 (ON SC) ¶52-55, 87 (where, unusually, this factor was considered in the context of jurisdiction *simpliciter*).

<sup>11</sup> See Plaintiffs' Factum, ¶11, 82, 103-105; Barrick Factum, ¶100-104. For a comprehensive rebuttal of Plaintiffs' criticisms of Tanzanian discovery regime, see Vedasto Report, RMR Vol. 37, Tab 14.1 ¶16-65, RMR Vol. 37, Tab 14.1, CC [B-1-17119](#).

<sup>12</sup> *Cresbury Screen Entertain. Ltd. v. CIBC*, 2006 BCCA 270 ¶47-48, 50.

<sup>13</sup> *Nelson Barbados Group Ltd. v. Cox*, 2009 CanLII 22563 (ON SC) ¶97-100; *Lan Assoc. XVIII LP v. BNS*, [2000] O.J. No. 168 (S.C.J.) ¶41, 46-47, *aff'd* [2000 CanLII 16943](#) (ON CA) ¶4, 6, 8; *Eastern Power Ltd. v. Azienda C.E. & A.*, [1998] O.J. No. 4908 (Gen. Div.) ¶17, 24, 28-29, *aff'd*, [1999 CanLII 3785](#) (ON CA) ¶50; and, by analogy, *ATL Industries Inc. v. Han Eol Ind. Co.*, [1995] O.J. No. 250 (Gen. Div.) ¶11, 20, 33, 35. Our Courts have refused to stay Ontario proceedings in favour of jurisdictions that offer more expansive discovery rights: *Sugar v. Megawheels Tech.*, 2006 CanLII 37880 (ON SC) ¶34-39; *Domtar Inc. v. Commonwealth Ins. Co.*, [1997] O.J. No. 4093 (Gen. Div.) ¶15, *aff'd* [1998] O.J. No. 4295 (Div. Ct.); *AMJ Campbell v. Moore*, 2003 CanLII 35873 (Master) ¶13-14, *aff'd* [2004 CanLII 24031](#) (ON SC), *leave ref'd*, [2004] O.J. No. 2390 (Div. Ct.).

this motion is not granted. None of the Plaintiffs' arguments is availing. In particular:

- (a) The Plaintiffs rely misguidedly on a snippet of the evidence of Chief Justice Othman to argue that it is merely uncertain whether the Courts of Tanzania would enforce foreign Letters of Request. Chief Justice Othman's unchallenged evidence is that any effort to enforce foreign Letters of Request in Tanzania would likely fail, because there is no precedent or legal mechanism for enforcing such Letters of Request;<sup>14</sup>
- (b) The Plaintiffs' assertion in paragraph 111 of their Factum that "Barrick is expert at gathering and transmitting information and documents from its worldwide operations, including those in Tanzania" misses the point entirely. The issue is not Barrick's ability to gather its own documents, but rather its inability to access important evidence of multiple third parties in Tanzania if this matter were to proceed to trial in Ontario;
- (c) The Plaintiffs' suggestion that Barrick could use its supposed powers under MOUs between NMGML and the TPF to compel the disclosure of information and records from the Police is based on a self-serving interpretation of the 2022 MOU. The Plaintiffs ignore that adjudicating their claims will require evidence at trial—not just documents—from multiple current and former members of the TPF, as well as from a number of other third-party witnesses. In any event, the 2022 MOU was not in force when 11 of the alleged incidents at issue are said to have occurred;
- (d) The Plaintiffs rely upon *Haaretz* and *Kyko* to fault Barrick for failing to adduce evidence that establishes precisely how many Tanzanian witnesses will be called at trial, exactly who they are and that they will refuse to testify voluntarily. This criticism is meritless. *Haaretz* and *Kyko* were straightforward defamation and solicitor's negligence cases. In both cases, it was possible to identify by name the witnesses whose testimony would be required at trial.<sup>15</sup> The case at bar, on the other hand, involves 29 claims of wrongful death and personal injury pertaining to 20 disparate alleged incidents. The evidence of dozens of third-party witnesses will be required,<sup>16</sup> most if not all of whom cannot be identified at this juncture in view of the scant details provided in the Statements of Claim.<sup>17</sup> It is more likely than not that the TPF will not permit dozens of officers to take leave of their duties to travel to Toronto to testify at trial, and that in any event members of the TPF will have no interest in doing so;
- (e) The Plaintiffs' professed concern that they may be unable to compel unnamed employees of Barrick to testify at trial in Tanzania borders on absurd. There is no equivalence between employees of Barrick around the world and third-party witnesses

<sup>14</sup> See Plaintiffs' Factum ¶117 and Othman Report, MR Vol. 2, Tab 7.1 ¶124-129, CC [B-1-3258](#).

<sup>15</sup> *Goldhar v. Haaretz*, 2015 ONSC 1128 ¶38-42; *Kyko Global v. MS Crawford Bayley*, 2021 ONCA 736 ¶35-40.

<sup>16</sup> G. Beringer Affidavit, October 1, 2023 ("Beringer Affidavit"), MR Vol. 1, Tab 4 ¶57, CC [B-1-2810](#). The Plaintiffs' own pleadings indicate that there were third-party witnesses to numerous of the alleged incidents at issue (Statement of Claim, November 23, 2022 ("First SOC") ¶85-86, 88, 91-92, 94-95, 97-100, 102-105, 116, 118, 123, 131, 134-135, 138, 141, 144-145, CC [A9216](#); Statement of Claim, February 5, 2024 ¶80-81, 84, 89, 95, 100-101, 103, 106, CC [A9273](#)).

<sup>17</sup> First SOC ¶17, 20, 88-89, 97-101, CC [A9189](#); Nyakina Transcript, JBT, Vol. 16, Tab 13, pp. 23-24, 26-27, q. 108-118, 136-144, CC [F5136](#), [F5139](#); Irondo Transcript, JBT Vol. 3, Tab 6, pp. 34-37, 39, q. 145-164, 173-178, CC [F910](#), [F915](#).

in Tanzania. The former are under Barrick's control. The latter are not; and

- (f) The availability of technology to conduct virtual examinations does not diminish the unfairness associated to Barrick. *First*, there is no mechanism to compel third-party witnesses in Tanzania to testify in litigation in Ontario remotely. *Second*, as is clear from the cross-examinations conducted in connection with this motion, it is extraordinarily difficult to hear and transcribe testimony from witnesses who are located in a time zone seven hours ahead. This difficulty is exacerbated for witnesses who do not speak fluent English and who will testify through interpreters.

### **G. Tanzanian Law Is the *Lex Loci Delicti***

15. Contrary to the Plaintiffs' assertion in paragraph 131 of their Factum, multiple bodies of law are not at issue here and the *lex loci delicti* is not a "neutral factor". Tanzanian law is the *lex loci delicti* that governs each of the causes of action asserted by the Plaintiffs.<sup>18</sup>

16. The Plaintiffs' suggestion that Ontario law governs their claims because they have pleaded Ontario law and Barrick has not yet pleaded Tanzanian law is risible. *Forum non conveniens* challenges are routinely paired with jurisdiction *simpliciter* challenges, as is the case here. In such circumstances, foreign law cannot be formally pleaded in a Statement of Defence for the simple reason that delivering a Defence constitutes attornment. To the extent there is any pleading requirement at this juncture, Barrick has fulfilled it by identifying in its Notices of Motion that Tanzanian law governs the Plaintiffs' claims.<sup>19</sup>

17. In any event, for the purposes of the *forum non conveniens* analysis, the Court identifies the *lex loci delicti* without determining the substantive content of potentially applicable bodies of law.<sup>20</sup> Canadian courts have repeatedly identified a foreign body of law as the *lex loci delicti* without any suggestion that either party has pleaded or proven the substance of that law.<sup>21</sup>

<sup>18</sup> See Barrick Factum, ¶84-90.

<sup>19</sup> Barrick Notice of Motion, May 17, 2023, MR Vol. 1, Tab 1 ¶3, CC [B-1-2763](#); Barrick Notice of Motion, July 16, 2024, MR Vol. 1, Tab 2 ¶3, CC [B-1-2776](#).

<sup>20</sup> See, by analogy, [Das v. George Weston Ltd.](#), 2017 ONSC 4129 ¶225, *aff'd*, [2018 ONCA 1053](#), *leave ref'd*, [2019 CanLII 73201](#) (SCC).

<sup>21</sup> [Jacubovich v. Israel](#), 2021 ONSC 3558 ¶112-122; [Bang v. Kim](#), 2022 BCSC 1893 ¶154-159, *varied on other grounds*, [2024 BCCA 88](#); [Shanghai Zhong Jia Hua Chuang Ye Investment LLP v. Bai](#), 2022 BCSC 935 ¶36-37, [44](#).

18. The Plaintiffs appear to argue that their customary international law (“CIL”) claims are necessarily governed by Ontario law, seemingly for no reason other than that the Plaintiffs opted to sue in Ontario rather than in Tanzania. This is circular logic. Such an argument, if given effect, would incentivize forum-shopping of the worst kind. It cannot be that foreign plaintiffs may commence litigation in Ontario when their claims have no proper connection to this Province, and then resist having their claims stayed in favour of the appropriate forum by asserting that those claims are somehow governed by Ontario law simply because they were commenced here.

19. The Plaintiffs misapply *Tolofson* in arguing that the *lex loci delicti* rule does not apply to their CIL claims. The passage from *Tolofson* quoted in paragraph 133 of the Plaintiffs’ Factum simply confirms that the usual rules of comity may be attenuated or displaced in situations where there has been “a breach of some overriding norm” *in the manner in which one state makes or applies its own laws*. That has nothing whatsoever to do with the rules-based determination by this Court of which body of substantive law properly governs a particular cause of action.

20. The contention of the Plaintiffs in paragraph 136 of their Factum that they can pursue their CIL claims in Ontario but not in Tanzania is also unfair and inaccurate.<sup>22</sup> As alluded to above, a bare majority of the Supreme Court in *Nevsun* merely decided that the CIL claims at issue in that case were not necessarily hopeless or doomed to fail at the pleadings phase. Moreover, the unchallenged evidence of Chief Justice Othman is that “plaintiffs in civil proceedings in Tanzania are able to assert novel tort claims that have not yet been recognized by Tanzanian law”.<sup>23</sup>

21. The Plaintiffs’ assertion that the Courts of Ontario can apply Tanzanian law also misses

<sup>22</sup> This Court should be mindful of the principle that “if a party seeks out a jurisdiction to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction that is ordinarily condemned as forum shopping” (*Paniccia v. MDC Partners Inc.*, 2017 ONSC 7298 ¶40).

<sup>23</sup> Othman Report, MR Vol. 2, Tab 7.1 ¶122-123, CC [B-1-3257](#).

the point. A defendant has a *prima facie* right to have claims governed by foreign law determined by a foreign court that applies its own laws, and should not be put to the effort and expense associated with proving the substance of foreign law through expert evidence.<sup>24</sup>

#### **H. The Enforceability of a Tanzanian Judgment Is Not a Significant Factor**

22. The Plaintiffs place significant reliance on alleged barriers they would confront in enforcing a Tanzanian judgment against Barrick. That reliance is misplaced. To the extent that such barriers might exist, they arise because this case constitutes naked forum-shopping. The Plaintiffs have sued the wrong defendant (Barrick) in the wrong jurisdiction (Ontario). If they were to sue the right defendant (NMGML and/or the TPF) in the right jurisdiction (Tanzania), there would be no need to seek recognition and enforcement of a foreign judgment.

23. The Plaintiffs' contention that the Courts of Tanzania might not enforce a Tanzanian judgment against NMGML and TPF is irrelevant, speculative and illogical. No such claim has been asserted, either in Ontario or elsewhere. Moreover, there is no evidence that NMGML or the TPF would disregard a Tanzanian judgment such that enforcement would be required.<sup>25</sup> Nor is there evidence that the Courts of Tanzania would decline to enforce their own judgment against a private company such as NMGML. As for the TPF, the evidence of Chief Justice Othman is that the Government of Tanzania abides by its obligation to honour court orders.<sup>26</sup>

24. In raising concerns about the enforceability of a Tanzanian judgment against Barrick, the

<sup>24</sup> See Barrick Factum, ¶85.

<sup>25</sup> Where a successful plaintiff is “unlikely” to need “to resort to execution proceedings in order to obtain satisfaction” of a judgment, this factor is of reduced importance in selecting the *forum conveniens*. See [Vale Canada Ltd. v. Royal & Sun All. Ins. Co.](#), 2022 ONCA 862 ¶183, *leave ref'd*, 2023 CanLII 85843 (SCC), quoting [Teck Comminco Metals Ltd. v. Lloyd's Underwriters](#), 2009 SCC 11 ¶1, 39-40.

<sup>26</sup> Othman Report, MR Vol. 2, Tab 7.1 ¶80-81, CC [B-1-3249](#). The Plaintiffs' contention that “the Tanzanian government has refused to enforce High Court and other decisions about human rights” pertains to a handful of irrelevant decisions to which the Government, and not a private company, was a party, such as land disputes and decisions from the African Court on Human and Peoples' Rights regarding criminal detention and trial procedures (see Othman Reply Report, MR Vol. 23, Tab 10.1 ¶89-95, CC [B-1-12675](#)).

Plaintiffs note that Barrick has “practically no presence in Tanzania” and that “[t]here is no evidence that Barrick has assets in Tanzania”. There is considerable irony to that submission. It appears that the Plaintiffs wish to rely upon the corporate separateness of Barrick and NMGML when it suits them, even though the Ontario actions are largely predicated on seeking to erase the separate legal personalities of Barrick and NMGML. Moreover, the presence or absence of assets of Barrick in Tanzania is of marginal relevance at best.<sup>27</sup>

25. In any event, the Plaintiffs overstate the importance of this issue. As the Supreme Court has explained, “problems related to the recognition and enforcement of judgments” are merely one factor that “might” be considered by a Court, “depending on the circumstances” of a particular case.<sup>28</sup> This is evidenced by the numerous cases in which one court was found to be the *forum conveniens* despite the fact that the successful plaintiff would need to enforce any judgment it received from that court in a second jurisdiction.<sup>29</sup>

26. The real question is whether the selection of one forum over another will lead to “problems related to the recognition and enforcement of judgments”.<sup>30</sup> Even where there is evidence that enforcement of a judgment rendered in a particular jurisdiction would be difficult or impossible, our Courts have accepted that that jurisdiction may still be the *forum conveniens*.<sup>31</sup> Here, however, the Plaintiffs have tendered no evidence whatsoever to establish that they would face any difficulty in enforcing a Tanzanian judgment against Barrick in Ontario.

<sup>27</sup> [Haaretz.com](#), *supra* ¶96.

<sup>28</sup> [Van Breda](#), *supra* ¶110; [Haaretz.com](#), *supra* ¶83. In analogous circumstances, the Court of Appeal for Ontario has likewise confirmed that “[e]nforceability is simply one factor to be considered” in assessing questions of jurisdiction. See [Ont. v. Rothmans Inc.](#), 2013 ONCA 353 ¶28-29, *leave ref’d* 2013 CanLII 83800 (SCC).

<sup>29</sup> [Thind v. Polycon Ind.](#), 2022 ONSC 2322 ¶81; [Rooney v. Pure Extraction Ltd.](#), 2021 ONSC 5770 ¶49, 51.

<sup>30</sup> [Van Breda](#), *supra* ¶110.

<sup>31</sup> [Breedon v. Black](#), 2012 SCC 19 ¶2, 35; [Sikhs for Justice v. India](#), 2020 ONSC 2628 ¶14.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 7<sup>th</sup> day of October, 2024.

A handwritten signature in black ink, appearing to be 'JW', written over a horizontal line.

per

**DAVIES WARD PHILLIPS & VINEBERG LLP**  
155 Wellington Street West  
Toronto ON M5V 3J

**SCHEDULE “A”**  
**LIST OF AUTHORITIES**

1. [6463908 Can. Ltd. v. BellSouth Affil. Svces. Corp.](#), 2006 CanLII 40990 (ON Master)
2. [AMJ Campbell v. Moore](#), 2003 CanLII 35873 (Master), *aff'd* [2004 CanLII 24031](#) (ON SC), *leave ref'd*, [2004] O.J. No. 2390 (Div. Ct.).
3. [Arsenault v. Nunavut](#), 2015 ONSC 4302, *aff'd*, [2016 ONCA 207](#);
4. [ATL Industries Inc. v. Han Eol Ind. Co.](#), [1995] O.J. No. 250 (Gen Div.)
5. [Bang v. Kim](#), 2022 BCSC 1893, *varied on other grounds*, [2024 BCCA 88](#)
6. [Breeden v. Black](#), 2012 SCC 19
7. [Club Resorts Ltd. v. Van Breda](#), 2012 SCC 17
8. [Connelly v. RTZ Corp.](#), [1997] ILPr 643 (H.L.)
9. [Cresbury Screen Entertain. Ltd. v. CIBC](#), 2006 BCCA 270
10. [Currie v. Farr's Coach Lines Ltd.](#), 2015 ONSC 2352
11. [Das v. George Weston Ltd.](#), 2017 ONSC 4129, *aff'd*, [2018 ONCA 1053](#), *leave ref'd*, [2019 CanLII 73201](#) (SCC).
12. [Domtar Inc. v. Commonwealth Ins. Co.](#), [1997] O.J. No. 4093 (Gen. Div.), *aff'd* [1998] O.J. No. 4295 (Div. Ct.)
13. [Eastern Power Ltd. v. Azienda C.E.& A.](#), [1998] O.J. No. 4908 (Gen. Div.), *aff'd*, [1999 CanLII 3785](#) (ON CA)
14. [Fritz v. Fritz](#), 2007 CanLII 54274 (ON SC)
15. [G. Leon Fam. Trust v. Volkswagen](#), 2018 ONSC 4265
16. [Goldhar v. Haaretz](#), 2015 ONSC 1128
17. [Haaretz.com v. Goldhar](#), 2018 SCC 28
18. [Jacobovich v. Israel](#), 2021 ONSC 3558
19. [Kyko Global v. MS Crawford Bayley](#), 2021 ONCA 736
20. [Lan Assoc. XVIII LP v. BNS](#), [2000] O.J. No. 168 (S.C.J.), *aff'd* [2000 CanLII 16943](#) (ON CA)
21. [Neger v. Neger](#), 2018 ONSC 6739

22. [\*Nelson Barbados Group Ltd. v. Cox\*](#), 2009 CanLII 22563 (ON SC)
23. [\*Newsun Resources Ltd. v. Araya\*](#), 2020 SCC 5, *affirming*, [2017 BCCA 401 ¶¶2-8, 38-48](#), *affirming*, [2016 BCSC 1856](#)
24. [\*Ont. v. Rothmans Inc.\*](#), 2013 ONCA 353, *leave ref'd* [2013 CanLII 83800](#) (SCC).
25. [\*Paniccia v. MDC Partners Inc.\*](#), 2017 ONSC 7298
26. [\*Pavacic v. Nicely Estate\*](#), 2008 CanLII 24228 (ON SC)
27. [\*Rooney v. Pure Extraction Ltd.\*](#), 2021 ONSC 5770
28. [\*Shanghai Zhong Jia Hua Chuang Ye Investment LLP v. Bai\*](#), 2022 BCSC 935
29. [\*Shirodkar v. Coinbase Global\*](#), 2024 ONSC 1399
30. [\*Sikhs for Justice v. India\*](#), 2020 ONSC 2628
31. [\*Sugar v. Megawheels Tech.\*](#), 2006 CanLII 37880 (ON SC)
32. [\*Tamminga v. Tamminga\*](#), [2013] O.J. No. 4515 (S.C.J.), *aff'd*, [2014 ONCA 478](#)
33. [\*Teck Comminco Metals Ltd. v. Lloyd's Underwriters\*](#), 2009 SCC 11
34. [\*Thind v. Polycon Ind.\*](#), 2022 ONSC 2322
35. [\*Vale Canada Ltd. v. Royal & Sun All. Ins. Co.\*](#), 2022 ONCA 862, *leave ref'd*, [2023 CanLII 85843](#) (SCC)
36. [\*Vedanta Res. Plc v. Lungowe\*](#), [2019] UKSC 20
37. [\*Yip v. HSBC\*](#), 2017 ONSC 5332, *aff'd*, [2018 ONCA 626](#), *leave ref'd*, [2019 CanLII 23866](#) (SCC).

SOPHIA MATIKO, IN HER PERSONAL CAPACITY AND AS  
LITIGATION GUARDIAN FOR HER MINOR CHILD KELVIN et al.  
Plaintiffs

-and- BARRICK GOLD CORPORATION  
Defendant

Court File Nos. CV-22-00-690649-0000  
CV-24-00-714148-0000

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT TORONTO

**REPLY FACTUM OF BARRICK GOLD CORPORATION**  
**(MOTION TO DISMISS OR STAY ACTIONS)**

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**COURT OF APPEAL FOR ONTARIO**

BETWEEN:

**SOPHIA MATIKO JOHN, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD, KELVIN; ANACRETUS MARINGO GIMANWA; ESTA GEORGE RANGE, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILDREN JOSEPH, GODFREY, FILEMON AND REBEKA; ELIZABETH MATIKO IRONDO; NEEMA STEPHEN JOHN, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILDREN JOHN, MIRIAM, ESTA AND TIMOTHY; MASWI MARWA MOHABE; DOTTO WILLIAM ITAMA, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD CHRISTINA; LYIMO ITAMA MACHELA; ITAMA MACHELA MAX; CHARLES DANIEL NYAKINA; BHOKE HAGALE MARO; DANIEL NYAKINA GHATI; DICKSON JULIUS SISE; SIBORA MARWA MWITA; EMMANUEL NYAKORENGA MBURI; RYOBA ELIAS KEBWE; PASCO MAREMBELA MWITA; NYAHELI MARWA NYAKORENGA; CHRISTOPHER JHOMU MAKENDE; RANGE MWITA RANGE; AND FREDY CHACHA WAMBURA LEMA**

Plaintiffs  
(Appellants)

and

**BARRICK GOLD CORPORATION**

Defendant  
(Respondent)

AND BETWEEN:

**ESTER NYANGI PETRO, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD LUCIA; LEONIDA RUBEN JOSHUA, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILDREN MACHUGU, NEEMA, AND DANIEL; ABEL SAIMA MACHUGU NYAMARUNGU; CLEMENSIA PROTAS MARWA; MACHERA KIMIRA W ANKA; CHARLES IKAYA MGAYA; MAHERI MWITA NTORA; AND CHARLES MWITA MSETI**

Plaintiffs  
(Appellants)

and

**BARRICK GOLD CORPORATION**

Defendant  
(Respondent)

**AGREEMENT RESPECTING EVIDENCE**

The parties agree that the following evidence is required for the appeal:

1. Exhibit numbers: not applicable.
2. The Plaintiffs' (Appellants') evidence including:

*Affidavits*

- a. Affidavit of Charles Daniel Nyakina a.k.a. Charles Hagale Malo, sworn January 19, 2024;
- b. Affidavit of Elizabeth Matiko Irondo, sworn January 19, 2024
- c. Affidavit of Fatma Amani Karume, sworn January 27, 2024
- d. Affidavit of Boniface A.K. Mwabukusi, sworn January 30, 2024
- e. Supplementary Affidavit of Joseph Oleshangay, sworn May 6, 2024
- f. Affidavit of Jeanine Alphonse #1, sworn February 1, 2024
- g. Affidavit of Jeanine Alphonse #3, sworn May 6, 2024

*Expert Evidence*

- h. Affidavit of Donald Omondi Deya, sworn February 1, 2024
- i. Affidavit of Joseph Oleshangay, sworn February 1, 2024
- j. Affidavit of Jebra Kambole, sworn February 1, 2024.

*Other*

- k. Plaintiffs' Responding Factum
  - l. Table of Contents of the Plaintiffs' Compendia of Evidence and Authorities
3. The Defendant's (Respondent's) Evidence including:

*Affidavits*

- a. Affidavit of Grant Beringer, sworn October 1, 2023
- b. Affidavit of Sebastiaan Bock, sworn October 1, 2023
- c. Affidavit of Apolinary Lyambiko, sworn October 1, 2023
- d. Reply Affidavit of Apolinary Lyambiko, sworn April 4, 2024
- e. Affidavit of Mpaya Kamara, sworn April 5, 2024
- f. Affidavit of Dr. Wilbert Kapinga, sworn April 4, 2024
- g. Affidavit of Ashleigh Lawson, sworn April 5, 2024
- h. Affidavit of William Mang'ena, sworn April 12, 2024
- i. Affidavit of Tracey O'Rahilly, sworn April 4, 2024
- j. Affidavit of Richard Rweyongeza, sworn April 5, 2024
- k. Affidavit of Julia Fetila Fasie, sworn September 25, 2024

*Expert Evidence*

- l. Affidavit of Mohamed Chande Othman, sworn October 2, 2023
- m. Reply Affidavit of Mohamed Chande Othman, sworn April 5, 2024
- n. Affidavit of Leonard Paulo Shaidi, sworn October 2, 2023
- o. Supplementary Affidavit of Leonard Paulo Shaidi, sworn January 4, 2024

- p. Reply Affidavit of Leonard Paulo Shaidi, sworn April 5, 2024
- q. Affidavit of Scott Dodson, sworn April 4, 2024
- r. Affidavit of Adam Dodek, sworn April 5, 2024
- s. Affidavit of Ulimboka Mwasomola, sworn April 12, 2024
- t. Affidavit of Makarious Tairo, sworn April 16, 2024
- u. Affidavit of Audax Vedasto, sworn April 5, 2024
- v. Affidavit of Stefaan Voet, sworn April 5, 2024

*Other*

- w. English Translation Brief filed September 30, 2024
  - x. Defendant's Factum and Reply Factum
  - y. Table of Contents of Compendia
4. The Oral Evidence and Answers to Undertakings and Questions Taken Under, including the exhibits referenced therein, including:
- a. Transcript of Cross-Examination of Apolinary Lyambiko, dated May 18, 2024
  - b. Transcript of Cross-Examination of Sebastiaan Bock, dated May 28, 2024
  - c. Transcript of Cross-Examination of Grant Beringer, dated May 29, 2024
  - d. Transcript of Cross-Examination of Scott Dodson, dated June 13, 2024
  - e. Transcript of Cross-Examination of Adam Dodek, dated June 13, 2024
  - f. Transcript of Cross-Examination of Jebra Kambole, dated May 8, 2024
  - g. Transcript of Cross-Examination of Donald Omondi Deya, dated May 15, 2024
  - h. Transcript of Cross-Examination of Elizabeth Irondo, dated May 9, 2024
  - i. Transcript of Cross-Examination of Charles Daniel Nyakina, dated May 9, 2024
  - j. Transcript of Cross-Examination of Dr. Wilbert Kapinga, dated May 22, 2024

- k. Transcript of Cross-Examination of Fatma Karume, dated June 25, 2024
- l. Transcript of Cross-Examination of Boniface Mwabukusi, dated June 20, 2024
- m. Transcript of Cross-Examination of Ulimboka Mwasomola, dated May 13, 2024
- n. Transcript of Cross-Examination of Joseph Oleshangay, dated May 12, 2024
- o. Transcript of Cross-Examination of Mohamed Chande Othman, dated May 14, 2024
- p. Transcript of Cross-Examination of Leonard Paulo Shaidi, dated May 16, 2024
- q. Transcript of Cross-Examination of Makarios Tairo, dated May 22, 2024
- r. Transcript of Cross-Examination of Audax Vedasto, dated May 13, 2024
- s. Undertakings, Advisements and Refusals Arising from the Cross-Examination of  
Dr. Wilbert Kapinga
- t. Undertakings, Advisements and Refusals Arising from the Cross-Examination of  
Makarios Tairo
- u. Undertakings, Advisements and Refusals Arising from the Cross-Examination of  
Sebastiaan Bock
- v. Undertakings, Advisements and Refusals Arising from the Cross-Examination of  
Grant Beringer
- w. Undertakings, Advisements and Refusals Arising from the Cross-Examination of  
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- x. Undertakings, Advisements and Refusals Arising from the Cross-Examination of  
Elizabeth Matiko Irondo
- y. Undertakings, Advisements and Refusals Arising from the Cross-Examination of  
Charles Daniel Nyakina

- z. Undertakings, Adviselements and Refusals Arising from the Cross-Examination of  
Fatma Karume
- aa. Undertakings, Adviselements and Refusals Arising from the Cross-Examination of  
Boniface A.K. Mwabukusi
- bb. Undertakings, Adviselements and Refusals Arising from the Cross-Examination of  
Joseph Oleshangay

Date: March 31, 2025




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Plaintiffs/Appellants

-and- BARRICK GOLD CORPORATION  
Defendant/Respondent

COA File No.: COA-25-CV-0229  
Court File No.: CV-22-00-690649-0000  
Court File No.: CV-24-00-714148-0000

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**COURT OF APPEAL FOR ONTARIO**

PROCEEDING COMMENCED AT TORONTO

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**AGREEMENT RESPECTING EVIDENCE**

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**Court of Appeal File No. COA-25-CV-0229**

Court File No. CV-22-00-690649-0000

Court File No. CV-24-00-714148-0000

**COURT OF APPEAL OF ONTARIO**

B E T W E E N :

**SOPHIA MATIKO JOHN, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD, KELVIN; ANACRETUS MARINGO GIMANWA; ESTA GEORGE RANGE, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILDREN JOSEPH, GODFREY, FILEMON AND REBEKA; ELIZABETH MATIKO IRONDO; NEEMA STEPHEN JOHN, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILDREN JOHN, MIRIAM, ESTA AND TIMOTHY; MASWI MARWA MOHABE; DOTTO WILLIAM ITAMA, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD CHRISTINA; LYIMO ITAMA MACHELA; ITAMA MACHELA MAX; CHARLES DANIEL NYAKINA; BHOKE HAGALE MARO; DANIEL NYAKINA GHATI; DICKSON JULIUS SISE; SIBORA MARWA MWITA; EMMANUEL NYAKORENGA MBURI; RYOBA ELIAS KEBWE; PASCO MAREMBELA MWITA; NYAHELI MARWA NYAKORENGA; CHRISTOPHER JHOMU MAKENDE; RANGE MWITA RANGE; AND FREDY CHACHA WAMBURA LEMA**

Plaintiffs  
(Appellants)

and

**BARRICK GOLD CORPORATION**

Defendant  
(Respondent)

And Between

**ESTER NYANGI PETRO, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD LUCIA; LEONIDA RUBEN JOSHUA, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILDREN MACHUGU, NEEMA, AND DANIEL; ABEL SAIMA MACHUGU NYAMARUNGU; CLEMENSIA PROTAS MARWA; MACHERA KIMIRA W ANKA; CHARLES IKAYA MGAYA; MAHERI MWITA NTORA; AND CHARLES MWITA MSETI**

Plaintiffs  
(Appellants)

and

**BARRICK GOLD CORPORATION**

Defendant  
(Respondent)

**CERTIFICATE OF COMPLETENESS**

I, W. Cory Wanless, lawyer for the Plaintiffs/Appellants, certify that the appeal book and compendium in this appeal is complete and legible.

April 7, 2025



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Plaintiffs/Appellants

-and-

BARRICK GOLD CORPORATION  
Defendant/Respondent

Court of Appeal File No. COA-25-CV-0229  
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**COURT OF APPEAL FOR ONTARIO**

PROCEEDING COMMENCED AT TORONTO

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**CERTIFICATE OF COMPLETENESS**

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**Court of Appeal File No.** COA-25- CV-0229  
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**COURT OF APPEAL FOR ONTARIO**

PROCEEDING COMMENCED AT TORONTO

**APPEAL BOOK & COMPENDIUM OF THE  
PLAINTIFFS/ APPELLANTS  
VOLUME 2 OF 2**

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