CITATION: Matiko John v. Barrick Gold Corporation, 2024 ONSC 6240
COURT FILE NOs.: CV-22-00-690649-0000
CV-24-00-714148-000
DATE: 20241126

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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

AND RE: 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 MSE, Plaintiffs

– and –

BARRICK GOLD CORPORATION, Defendant

BEFORE: Justice E.M. Morgan

COUNSEL: *Joe Fiorante, K.C., Cory Wanless, and Jen Winstanley*, for the Plaintiffs

Kent Thomson, Steven Frankel, and Maura O'Sullivan, for the Defendant

HEARD: October 15-17, 2024

REASONS FOR DECISION

I. The motion

[1] The Defendant, Barrick Gold Corporation ("Barrick"), seeks to have these companion actions dismissed or permanently stayed on the basis that this Court lacks jurisdiction or, alternatively, on the basis of the doctrine of *forum non conveniens*. Both actions raise the same claims and are based on similar incidents. I will treat them as one.

[2] The Plaintiffs plead that they or their family members were injured or killed at a mining site located in the United Republic of Tanzania. The mine is owned by a company whose majority shareholder is Barrick, and for which the Plaintiffs say Barrick is ultimately responsible. Barrick submits that it is an owner but not manager and operator of the mining operation, and that in any case all of the violent incidents alleged by the Plaintiffs were perpetrated not by Barrick or its subsidiary but by the independent, sovereign Tanzanian police.

[3] It is the Plaintiffs' view that by seeking to escape Ontario jurisdiction, Barrick is attempting to have the actions tried in a foreign court that is not adequate to the task of conducting a trial of these claims, and to thereby avoid responsibility for harmful corporate conduct. It is Barrick's view that it will answer all allegations made against it, but that the only forum with any connection to the issues and where all of the evidence and witnesses are located is Tanzania, and that the English common law-based Tanzanian legal system is well up to the task of adjudicating these claims.

II. Overview

[4] Barrick began its life as an Ontario company, but some years ago was continued a British Columbia corporation whose corporate head office is in Vancouver. It is an international gold mining giant, with some 23,000 employees engaged in mining projects located around the world. Among many other things, it is 84% shareholder, along with the government of Tanzania as 16% shareholder, of North Mara Gold Mine Limited ("NMGML"), a Tanzanian company that owns and operates the North Mara Gold Mine (the "Mine"). Barrick and the Tanzanian government are also the shareholders, in the same proportion, of Twiga Minerals Corporation ("Twiga"), a Tanzanian company that provides various management services to the Mine.

[5] The Mine is located in a remote location in northern Tanzania, near the country's borders with Kenya and Uganda. The parties agree that the Mine site is regularly accessed by local residents not employed by NMGML and not authorized to access the site. These incidents have led to violence, as those entering the Mine have clashed with the local police and, reportedly, with each other.

[6] It is fair to say that although the parties agree that confrontational and violent incidents have occurred at the Mine, they describe the activity leading to these incidents in starkly different terms. According to Plaintiffs, those entering the Minde site are local craftsmen eking out a living

at no one else's expense; while according to Barrick, they are looters forcefully invading the Mine property to steal what is not theirs. Thus, in their factum counsel for the Plaintiffs state that, "Artisanal miners seek to earn a subsistence living by entering waste rock dumps in an effort to secure trace amounts of gold." By contrast, counsel for Barrick state in their factum that, "Unfortunately, the Mine is invaded regularly by trespassers who attempt to steal gold-bearing rock and other property."

[7] Security at the Mine is provided by a combination of unarmed private security guards contracted by NMGML and/or Twiga, together with armed members of the Tanzanian Police Force ("TPF"), an agency of the national government of Tanzania. All of the injuries and deaths referenced in the Statements of Claim are alleged to have been perpetrated by the TPF.

[8] The TPF operate at the Mine site under contract with NMGML. The arrangement is documented in two Memorandums of Understanding ("MOUs") dated April 2019 and May 2022, both between NMGML and the TPF.

[9] Under the MOUs, NMGML provides certain funding and equipment for the police operation at the Mine. The MOUs confirm that the TPF is, nevertheless, an independent police force of the sovereign government of Tanzania, operating pursuant to Tanzanian law and under the same chain of command as it does throughout that country. Barrick's counsel point out that the TPF would be responsible for policing and security in the North Mara region with or without the MOUs.

[10] The Plaintiffs do not suggest that any NMGML employee, and certainly no Barrick employee or officer, is engaged in security activity themselves or commands and directs the actions of the TPF on the ground. The Statements of Claim allege that the Plaintiffs or their family members were injured or killed by acts of violence perpetrated by TPF members at (or near) the Mine between April 2021 and July 2023. The pleading does not allege that any of those acts of violence were committed by NMGML or Barrick personnel.

[11] Rather, the Plaintiffs' allegation is that Barrick is responsible for management and oversight, and is thus legally answerable for injuries that occur on the Mine property. The Plaintiffs also submit that Barrick has undertaken to be responsible for human rights at its mine sites worldwide, including in North Mara, and that Barrick arranged for certain training in that respect for the Tanzanian police. The Plaintiffs also argue that the MOUs were signed by NMGML directors and officers appointed by Barrick as majority shareholder, making Barrick responsible for the conduct of the TPF thereunder.

[12] The Statements of Claim were both issued in Ontario. No claim has been issued by the Plaintiffs in Tanzania, and no claim has been brought against the TPL. Likewise, no claim has been issued against NMGML or any other Barrick-related individual or entity; that said, the pleadings do not claim that NMGML – a corporation in which, as indicated above, the Tanzanian government is a minority shareholder – is a sham or a façade for Barrick. Rather, Plaintiffs allege

that Barrick is directly responsible for oversight of NMGML and the Mine. Their counsel characterize the claims as aiming directly at the powerful parent company and ultimate source of the wrongdoing in its home jurisdiction.

[13] On the other hand, Barrick characterizes the claims as targeting the wrong defendant in the wrong court, all in an effort to avoid having to prove any actual wrongdoing at the Mine. Its counsel submit that by suing the geographically distant majority shareholder of NMGML in a jurisdiction detached from the events giving rise to the claim, the Plaintiffs will be able to emphasize generic pronouncements about corporate responsibility rather than focus on rights and wrongs on the ground during the violent incidents at issue.

III. Barrick's structure and the Mine's management

[14] In support of the view that Barrick is ultimately the source of the wrongdoing alleged in the claim, the Plaintiffs cite notices of annual meetings, website postings, reports, regulatory forms, and other public statements by Barrick with respect to the "sustainability" policies that guide its investments. They reference, for example, Barrick's 2023 Notice of Annual Meeting, where it is stated that, "Our sustainability strategy is our business plan. Sustainability is the foundation for how we conduct our business." They likewise offer as evidence of top-down management Barrick's securities filings, where the company states, *inter alia*:

> [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.
>
> 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.

[15] Plaintiffs' counsel go to some lengths to demonstrate that these statements are not just platitudes, but are part of the company's structure of "bottom-up reporting" and "top-down leadership." They point out that Barrick has a number of committees at the board of directors level engaged in sustainability efforts, including the Audit & Risk Committee, the ESG and Nominating Committee, and the Compensation Committee. They likewise point out that key responsibility for sustainability, including human rights policies, "resides with Barrick's Sustainability Executive, a position held by Barrick affiant Grant Beringer." In support of this claim, they adduce evidence that Mr. Beringer's compensation "is tied in part to attainment of the company's sustainability targets, including on human rights", and that he reports to Barrick's CEO, Mark Bristow.

[16] Barrick's counsel respond that none of this points to management of NMGML, or of the Mine, being located in Ontario. The evidence shows that Barrick has a decentralized structure, with regional teams responsible for key functions and activities. Of its 23,000 employees, only 55 are at the company's office in Toronto, and are engaged in finance, communications, investor relations, legal and corporate secretary matters, and human resources.

[17] No board member of Barrick is located in Ontario. Mr. Beringer, the Sustainability Executive, resides in South Africa. The regional sustainability lead for Africa is Thomas Wilson, who also lives in and works out of South Africa, while his immediate predecessor in that position, Hilaire Diarra, lived in and worked out of Dar Es Salaam, Tanzania. In addition, the Chief Operating Officer for Africa, Sebastiaan Bock, lives and works in South Africa, as did his predecessor in that position, Willem Jacobus Jacobs.

[18] The General Manager of Operations for Central and East Africa is Tahirou Ballo, who lives in Tanzania. Most importantly, the Mine's General Manager, Apolinary Lyambiko, who is responsible for day-to-day management of the Mine, lives in Tanzania and reports to NMGML's board, not to Barrick's. As for Barrick CEO Bristow, he is a South African who is reported to have homes and to alternately reside in a number of countries, including South Africa, the UK, the US, and Mauritius, but has no residence in Ontario or Canada.

[19] Turning to NMGML, it employs upward of 1,350 people, approximately 96% of whom are Tanzanian nationals and none of whom is resident in Ontario. These workers engage in all mine-related functions, with Mr. Lyambiko having final say on ongoing operational matters. He is a Tanzanian national, as are 13 of his 17 department heads, the other 4 being nationals of other African countries. Furthermore, all NMGML staff involved in security and community relations are Tanzanians.

[20] COO Bock has deposed that the business and management of NMGML are overseen by a five-member Board of Directors, none of whom resides in or works out of Ontario. The Board meets on a quarterly basis, with all meetings taking place in person in Tanzania. In giving evidence in this motion, Mr. Lyambiko has stated categorically that "the Mine is not operated on a day-to-day basis by employees of Barrick… [and that] NMGML has its own board of directors, management, employees, business premises, bank accounts, finance team and payroll. It makes its own personnel decisions."

[21] In addition, while the sustainability concept applies Barrick-wide, Mr. Lyambiko deposes that all applicable sustainability initiatives are implemented on the ground in North Mara, Tanzania. They are not devised in or delivered from a corporate office in Ontario or anywhere else. The initiatives are comprised of a number of localized projects and goals, including NMGML's procuring of goods and services locally and its funding of various community projects.

[22] Mr. Lyambiko also describes that he chairs NMGML's Community Development Committee, which oversees investment by NMGML in community projects identified by local stakeholders in the North Mara region. He further explains that as part of NMGML's sustainability initiatives, local residents with concerns about the Mine's operations and impacts can access and seek a remedy in a grievance process established by NMGML.

[23] As indicated in the previous section, NMGML and Twiga hired a private Tanzanian contractor to provide unarmed security services at the Mine. There is nothing in the record to indicated that Barrick is a party to this contract or that it oversees it. These security arrangements are between Tanzanian parties on both sides – i.e. NMGML/Twiga on one side and the security company, Nguvu Moja, on the other. The contracts were negotiated and concluded in Tanzania. The services thereunder have been performed in Tanzania by Tanzanian personnel governed by Tanzanian law. The compensation to Nguvu Moja is deposited by NMGML and/or Twiga directly into Nguvu Moja's Tanzanian bank account.

[24] As also indicated above, NMGML has contracted with the TPF to provide additional security at the Mine. Tanzanian law professor, Leonard Paulo Shaidi, has deposed that numerous mining companies, financial institutions and other businesses and civil society groups in Tanzania have entered into similar agreements with the TPF.

[25] This type of security contract with local police appears to be a standard arrangement in the resource industry. In *Kalma v. African Minerals Ltd.*, [2018] EWJC 3506, at para. 196, aff'd [2020] EWCA Civ 144, a case arising out of events in Sierra Leone, an English court has indicated that it "would be surprised if such payments [to Sierra Leone police] had not been made [by the mine]… the fact finding exercise must not be performed without regard to the prevailing social and political context in which it falls to be carried out."

[26] A contract with the TPF appears to have been a necessary arrangement in North Mara because of the remote location and the continuous entrance of local people, often armed, onto the Mine property. Mr. Lyambiko has testified that the trespassers detonate live explosives and engage in other hazardous conduct to access gold ore that they seek on the Mine's property, all of which requires a substantial security presence.

[27] The Plaintiffs seek to link Barack to the MOUs between NMGML and the TPF by showing that they are in keeping with general corporate policy with respect to sustainability, human rights, and security. There is, however, no evidence that Barrick, as opposed to NMGML, directed the negotiation of the MOUs or dictated their content. And although two of NMGML's directors signing the MOUs are Barrick appointees to the NMGML board, there is nothing in the record to suggest that NMGML's directors do not operate independently or exercise independent judgment. Moreover, Barrick's counsel point out that there is no connection alleged to exist between the MOUs and Barrack's Ontario office.

[28] The MOUs are local Tanzanian agreements that govern the involvement of the TPF and payment of Tanzanian police officers in Tanzanian currency by deposit into Tanzanian banks. By their terms, they require the TPF to abide by national and international human rights law and anti-corruption standards, together with Tanzanian and international policing standards. But there is nothing about that content that implicates Barick in Ontario – unless the Plaintiffs mean to say that human rights standards are foreign to the contracting Tanzanian entities, and so must have been

added or insisted upon by the Canadian shareholder. But there is no evidentiary basis to even suggest such a prejudicial conclusion.

[29] According to Mr. Lyambiko's evidence, the Nguvu Moja personnel for the most part monitor the Mine property via CCTV surveillance, and call the TPF on an 'as needed' basis when trespassers enter or other illegal activity erupts. According to the Plaintiffs, the TPF typically responds with disproportionate and unnecessary force, injuring or even killing non-threatening people.

[30] It is not the role of the court on this motion to determine which side's version is right or wrong about who uses force against whom or whether the use of force is justified in any given circumstance. But there is nothing in the record that runs contrary to the provisions of the MOUs confirming that neither NMGML nor Barrick directs, controls, or has the ability to command the TPF. To the contrary, the TPF is a national police force that operates under its own independent chain of command in all of Tanzania. This independence is expressly recognized in the MOUs.

[31] Plaintiffs' counsel point out that although the MOUs might assert the TPF's independence, Barrack's deponents, including COO Bock, have stated on the record that Mr. Bristow is a very hands-on CEO, and that he makes it his business to ensure that the Mine applies Barrick's policies. The Plaintiffs point to evidence that Mr. Bristow, who, as previously indicated, resides in South Africa, the UK, and elsewhere, typically visits North Mara at least 4 times per year, and that Mr. Bock, who resides in South Africa, visited North Mara about half a dozen times last year.

[32] While those visits do take place, they do not appear to have anything to do with the workings of the TPF or its involvement at the Mine. The record shows that in the years since the MOUs have been in place, there has been one visit – a courtesy call rather than a working meeting – to the TPF by Messrs. Berringer and Bock when they were visiting the Mine from South Africa. There is no evidence in the record that Mr. Bristow has ever met with the TPF on his visits.

[33] The record also contains no evidence ant anyone from Barrick's Ontario office has ever spoken with a Tanzanian police officer or in any way sought to direct the TPF. The sporadic visits by Barrick management to the Mine are all by Barrick's Africa-based regional executives. In fact, it is unclear from the record whether anyone from the Ontario office, which has no particular involvement in the North Mara project, has ever visited the Mine at all.

IV. The incidents

[34] To illustrate the nature of their claims, the Plaintiffs have included in the evidentiary record affidavits sworn by 2 of the 29 Plaintiffs: Elizabeth Matiko Irondo and Charles Daniel Nyakina. This sworn testimony relates the facts giving rise to the claims by these two Plaintiffs. Given that the Plaintiffs' record is submitted in response to a motion to stay or dismiss where the moving party is out to demonstrate that another jurisdiction is "clearly more appropriate" than the present

one, one can surmise that this record contains the Plaintiffs' best evidence: *Club Resorts Ltd. v. Van Breda*, [2012] 1 SCR 572, at para. 108.

[35] In other words, Plaintiffs' counsel presumably canvassed their 29 clients and adduced the most cogent evidence available in order to demonstrate the type of forum that their case demands. In this way, the Court can properly assess whether the Plaintiff's chosen jurisdiction or Barrick's proposed jurisdiction is better situated "for disposing of the litigation and thus ensuring fairness to the parties and a more efficient process for resolving their dispute": *Ibid*., at para. 109. As in a summary judgment proceeding, the Court is "entitled to proceed on the basis that the parties have put into the record all [or at least *some*] of the evidence that would be forthcoming at trial": *Switzer v. Petrie*, 2024 ONCA 474, at para. 8.

[36] Accordingly, if the moving party – i.e. Barrick – puts its "best foot forward" with evidence demonstrating the frailties of the present forum, then the responding party – i.e. the Plaintiffs – must have also put forward their best evidence and their best affiants. Otherwise, one or the other risks losing the forum challenge: *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, at para. 15. The court has nothing to rely on but the record that the parties place before it; the parties will not have a second chance to make their choice of forum case. While I do understand that the evidence in the record is of two Plaintiffs who serve as examples for the rest, I have to assume that the evidence before me is the best evidence that the parties have at this time.

[37] With that in mind, the specific evidence put forward by the Plaintiffs is instructive. Although articulated in the language of human rights law, the claim against Barrick is essentially a negligence claim. As Plaintiffs' counsel put it, "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." Plaintiffs' counsel go on to contend 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."

[38] For its part, Barrick rejects the Plaintiffs' allegations. More to the point, it contends that any oversight involvement that it did have had nothing to do with hands-on security matters, and that in any case all security at the Mine is directed and implemented in Africa, not in Ontario. Plaintiffs' counsel responds to this by emphasizing the duty of care, which they submit is based on Barrick's overall policy formulation and coordination role. The Plaintiffs therefore focus on Barrick's own policy statements, publicly accessible regulatory filings, and website and other publications.

[39] Without determining for now the merits of the duty of care argument, one element of the negligence claim that cannot be established by Barrick's publications alone, and that requires local, on-the-spot testimony, is causation. In a negligence claim, it is not enough for a Plaintiff to allege that a duty of care exists and that he or she has suffered an injury. The breach must be shown to

have actually caused or contributed to the injury; there must be a causal relationship "between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former": *Snell v. Farrell*, [1990] 2 SCR 311, at para. 26.

[40] In her affidavit, Plaintiff Elizabeth Matiko Irondo describes the death of her son at the Mine. In an introductory paragraph, she states:

> I have brought a lawsuit against Barrick Gold Corporation ('Barrick') regarding the killing of my son, Irondo Matiko Irondo, who was shot in July 2021. My lawsuit alleges that Barrick as owner of the mine is responsible for the killing of my son because of its negligent security strategy and human rights policy that led to his death.

[41] She then describes how her son would search for gold in what she calls the Mine's "waste rock", and explains that this was easier before the Mine built a wall around the perimeter of its property. Once the wall went up, individuals seeking access to the property had to breach the wall. She deposes that, "[s]ince the mine built the wall around 2018, the violence by the police has gotten worse."

[42] Ms. Irondo goes on to describe being informed that on the night her son was killed there had been some incident at the Mine, and that the TPF was conducting a search and there was blood on the ground. She then forthrightly states that she does not know the circumstances surrounding her son's death, but says that his body that she saw later in a morgue showed signs of a gunshot wound. As she puts it, "I have never been told how and why Irondo died. Ms. Irondo further laments that no one was ever charged criminally for the shooting death of her son. She fears that, in her words, "The mine and government are partners. I do not have faith in them to hold anyone responsible for Irondo's death."

[43] In his affidavit, Plaintiff Charles Daniel Nyakina describes the June 2022 death of his brother, Emmanuel Daniel Nyakina, at the Mine. Using the identical phrasing as Ms. Irondo, Mr. Nyakina states:

> My lawsuit alleges that Barrick as owner of the mine is responsible for the killing of my brother because of its negligent security strategy and human rights policy at the North Mara mine that led to his death.

[44] Mr. Nyakina's family lives adjacent to the mine; he is a subsistence farmer who grew up near the Mine but now lives some distance away. Mr. Nyakina relates that his brother would search for gold in pits outside the Mine's property as well as in remnant gold piles on the Mine's property inside the perimeter wall. Mr. Nyakina was not present during his brother's shooting and has no firsthand knowledge of the incident. He says that on the day of his death he first saw his brother in a nearby hospital where he was taken after being shot. Mr. Nyakina then deposes that he managed to speak with his brother in the hospital, and gives an unverifiable account of what he says his brother relayed to him at that time.

[45] In addition, Mr. Nyakina speculates that "Barrick may have information about the shooting of Emmanuel since he was killed inside the mine and there are lots of cameras in the area." Much like Ms. Irondo, Mr. Nyakina also laments that, as far as he knows, the TPF has not conducted an investigation into the shooting. He states that, "The police have not interviewed me or my family, or given us any information about Emmanuel's death." It is unknown whether the TPF has, in fact, investigated the incident.

[46] It is perhaps not surprising that the police have not interviewed Mr. Nyakin and his family. Mr. Nyakina deposes that none of them were present when Emmanuel was shot, and that neither he nor anyone else in his family knows what transpired. Mr. Nyakina only knows what he was told as hearsay. If the TPF did an investigation into an alleged police shooting, they, much like a court reviewing the matter, would likely be interested in hearing from actual witnesses to the event.

[47] From the statements by these two affiants, one can reach a number of significant conclusions with respect to the future trial of the claims. In the first place, the Plaintiffs' best evidence is not useful in determining the cause of any of the injuries or deaths. No amount of references to Barrick's sustainability policies, its securities filings and other publications, its website statements about community commitment, NGO statements about corporate responsibility in resource extraction, international resolutions on human rights and foreign investment, etc. will help to determine responsibility for the two deaths. The trials will evolve around the question of factual causation, and the evidence of the two Plaintiffs chosen for this motion is indeterminate on that issue.

[48] Both of the Plaintiffs' affiants concede that they do not know what transpired during the incidents in which their family members died. Both deceased were on the Mine property, presumably as trespassers since they were not employees and had no legal reason to be there; and both appear to have died of gunshot wounds.

[49] It seems likely that Ms. Irondo's son and Mr. Nyakina's brother were shot by a TPF member since the police are armed on the site of the Mine. But even this is not certain. Contemporaneous press releases contained in the motion record describe several of the incidents in issue as armed intrusions by masses of local people onto the Mine's property, with some of the injuries and deaths of the Plaintiffs being a result of those participating in these intrusions fighting among themselves.

[50] The evidence in the record cannot not establish with any certainty how or why the relatives of the Plaintiffs' two deponents were shot. Ms. Irondo and Mr. Nyakina have no first-hand knowledge of what their respective family members were doing when they died. The record does not give any insight into whether Ms. Irondo's son and Mr. Nyakina's brother – or any of the other Plaintiffs and their family members – were innocent victims of the police, were shot in self-defense by the police, or were attacked by others invading the Mine at the same time and competing for the gold ore found there.

[51] The record likewise does not reveal whether the deceased Plaintiffs were themselves armed or carrying implements that could be used as weapons, whether the police opened fire unnecessarily on isolated individuals or were overwhelmed by a large number of people invading the Mine property, etc. If one takes as an example the kind of evidence marshalled to determine causation and fault in an alleged police shooting in Canada, a conclusive finding as to whether the shooting was justified or not will involve a thorough exploration of the event on the ground, from multiple angles. Although any number of the Plaintiffs themselves may testify at trial, the record here suggests that their testimony alone will not suffice for their claim.

[52] The Plaintiffs assume that there is video surveillance footage available of the incidents at issue. That may be the case, although it is uncertain at this early stage what was captured on camera. At the same time, the record indicates that a number of the incidents in issue occurred outside of the Mine's CCTV range. The accounts in the record for the most part suggest that the violent occurrences were in the course of mass invasions of the Mine property, presenting a complex and potentially confusing scenario where multiple viewpoints will have to be explored. It is more than likely that most of the relevant evidence will have to come from eyewitnesses at the time of the event.

[53] The witnesses with evidence about the shooting incidents will likely be other individuals who entered the Mine with the injured and deceased. This will likely be accompanied by evidence presented by members of the Nguvu Moja security team, as well as NMGML staff who may have been present, and, perhaps, medical personnel at hospitals where the injured were treated. Most importantly, eye-witness testimony will have to come from the TPF members on site at the time of the various incidents, along with the TPF officers in command of those members.

[54] What is certain is that no one from Barrick's finance or communications or legal department in its Ontario office will be called as a witness to the events in issue. To the extent that the trial will turn on determining factual causation – who caused the injury and under what circumstances – every witness will have been in North Mara, Tanzania on the relevant date. Barrick's limited personnel and corporate presence in Ontario is beside the point. In fact, attempts to focus the analysis on corporate pronouncements instead of events on the ground will inevitably distract from, rather than aid, the court in its task.

[55] If the circumstances of the deaths can be established as a wrongful police shooting, there may then be a subsequent question as to whether any of Barrick's corporate policies or actions are causally connected to the deaths. But if the evidence turns out to reveal a justified police shooting, or, depending on the circumstances, perhaps even an accidental one or a wound inflicted by someone other than a TPF member, then Barrick's policies may become a non-issue; after all, Barrick and its policies will not be relevant to any inquiry if it is determined that the death or injury of a Plaintiff was not wrongfully inflicted.

[56] The primary determination of how the deaths were caused will be based on possible video footage from the Mine and on witness accounts in Tanzania alone. If the crucial witnesses cannot

or do not come to Ontario to testify, a court in Ontario will not be in a position to make a proper decision.

[57] In fact, even any subsequent analysis of Barrick's policies and their impact will be based on the evidence of witnesses in Tanzania or Barrick's regional personnel in South Africa. While documentary records can be digitally produced anywhere, it is fair to say that no one has identified a single, truly relevant witness from Ontario.

V. The Tanzanian legal system

[58] As moving party in a *forum non conveniens* motion, it is incumbent on Barrick to demonstrate that the forum selected by the Plaintiffs is more than inconvenient. Barrick "must show that the alternative forum is clearly more appropriate": *Van Breda*, at para. 108.

[59] This, then, sets up a contest between Ontario and Tanzania as competing forums for the action. As explained above, counsel for Barrick have had little problem establishing that the vast majority of the evidence and witnesses necessary for the trial will come from Tanzania; and that the one or two witnesses who are Barrick representatives (as opposed to NMGML personnel and others) will come from Tanzania or its regional team in South Africa, not from Ontario.

[60] That said, Tanzania is not a jurisdiction that is particularly familiar to Ontario lawyers and courts. That foreignness has created an occasion for a full-scale exploration of its appropriateness as a forum for litigation. As the Supreme Court of Canada noted in *Van Breda*, at para. 63, this exercise can create some tension between the need to consider the effectiveness of the foreign jurisdiction's litigation environment with the need for comity and respect for a foreign jurisdiction's legal system and policy choices:

> In Sharpe J.A.'s view [in the court below], evidence on how foreign courts would treat such cases might be helpful (para. 107). I note in passing, however, that undue emphasis on juridical disadvantage as a factor in the jurisdictional analysis appears to be hardly consonant with the principle of comity that should govern legal relationships between modern democratic states…

[61] The parties have, accordingly, invested considerable effort into exploring the pros and cons of the competing systems. And while the merits of Ontario litigation need no special consideration or expert evidence, the Tanzanian system has come in for intense examination in this motion. The Plaintiffs have produced a number of expert reports in an attempt to demonstrate that the Tanzanian legal system does not provide an appropriate forum to host their claim, and Barrick has produced a number of expert reports in an attempt to demonstrate that the Plaintiffs' attacks on the Tanzanian system are unwarranted and that its justice system is up to the task of trying this case.

a) The alternative jurisdiction

[62] Relying heavily on *Nevsun Resources Ltd. v. Araya*, [2020] SCR 156 ("*Nevsun* SCC"), at para. 50, counsel for the Plaintiffs submit that, "the deference accorded by comity to foreign legal systems 'ends where clear violations of international law and fundamental human rights begin.'" They go on to argue that 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": *Ibid.*, at para 51.

[63] This approach is a springboard for the Plaintiffs to launch an attack at large on the Tanzanian justice system, comparing it to what the British Columbia courts and the Supreme Court of Canada found in *Nevsun*:

> But faced with a stark choice between one jurisdiction, albeit not the most appropriate in which there could in fact be a trial, and another jurisdiction, the most appropriate in which there never could, in my judgment, the interests of justice would tend to weigh, and weigh strongly in favour of that forum in which the plaintiff could assert his rights.
>
> *Nevsun Resources Ltd. v. Araya*, 2017 BCCA 401 ("*Nevsun* BCCA"), at para. 120, quoting *Connelly v. RTZ Corp. plc (No. 2)* [1997] ILPr 643 (CA) aff'd [1997] UKHL 30, at para. 8.

[64] Thus, for example, citing *Nevsun* (BCCA), at paras. 188-190, the Plaintiffs submit that if a moving party is unable to show that the foreign jurisdiction in issue has a system for proper documentary disclosure, that jurisdiction will not be an appropriate one to which to remove the action. They further contend, again citing *Nevsun* SCC, at paras. 129-132, that unlike in Ontario and Canada, Tanzanian law does not provide a basis for pursuing tort claims based directly on customary international law. As Plaintiffs' counsel put it in their factum, since their clients "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*…if this lawsuit is not heard in Ontario, it will not be heard at all."

[65] There was, of course, good reason for characterizing the alternative jurisdiction in *Nevsun* as one in which there "never could" be a trial: the jurisdiction in question was a country lying north of Tanzania along Africa's eastern coast, Eritrea. That country was described as a "dictatorial, one-party state which has never held elections or implemented a constitution" and that is "one of the most oppressive regimes in the world": *Nevsun* BCCA, at paras. 5, 8.

[66] Eritrea is described by the Supreme Court as being on a "continuous war footing" where, in 2002, "the period of military conscription in Eritrea was extended indefinitely and conscripts were forced to provide labour…for various companies owned by senior Eritrean military or party officials": *Nevsun* SCC, at para 10. Masses of conscripts were placed into this National Service Program and were "forced to provide labour in harsh and dangerous conditions for years"… They were otherwise "confined to camps" for a period whose "tenure was indefinite": *Ibid.*, at paras. 10-12.

[67] Most significantly, Eritrea was characterized as a jurisdiction in which "[t]he rule of law does not exist…It has no constitution, functioning legislature or civil justice system, independent judiciary, elections…": *Nevsun* BCCA., at para. 8. It is against this background of an undemocratic regime and the "absence of a 'functioning system of justice' in Eritrea", *ibid*., at para. 5, that the Plaintiffs embark on an analysis of the Tanzanian legal system. It is likewise against this background that Plaintiffs' counsel conclude in their factum that, "The courts of Tanzania do not provide an adequate alternative forum for the litigation of these complex claims…"

[68] As described by Professor Shaidi in his expert report, Tanganyika (as it was then known) became a British colony at the end of the First World War. In 1920, the colonial government adopted, as it had in India and elsewhere in the British empire, an English common law-based legal system. This legal system remained in place with independence in 1961, and was continued in the 1964 Constitution enacted upon the union of Tanganyika and Zanzibar for the formation of the United Republic of Tanzania.

[69] Professor Shaidi relates that, "Throughout its history as an independent state…this inherited legal system and the body of laws imported and developed by the colonial legislature have shaped Tanzanian law and the Tanzanian legal system, which in turn has been developed and refined by the National Assembly (the Legislature of Tanzania) and the jurisprudence of the Tanzania Courts." The political and legal system in Tanzania was designed a century ago based on the English model, and, as in the common law provinces of Canada, has remained so until today.

[70] As the Professor Shaidi and other experts describe it, the Tanzanian legal system is structured around principles familiar to all common law-based systems:

> The legal system of Tanzania is organized around three basic principles that I expect will be familiar in any Commonwealth country: (i) the Rule of Law; (ii) the Separation of Powers; and (iii) the Independence of the Judiciary. In accordance with these principles, the Judiciary considers the cases before it, including claims against the State and all its institutions (such as the Tanzania Police Force), freely and independently.

[71] This characterization of the justice system as impartial and independent is echoed in the expert report of the former Chief Justice of Tanzania, Mohamed Chande Othman:

> The Judiciary is therefore constitutionally entitled to freedom from interference in deciding matters that come before it, and its rulings are the final word. The Judiciary is required to dispense justice fairly and impartially, without fear, favour or influence from other organs of the State and without regard to the socioeconomic status of the litigants.

> In my experience, these constitutional guarantees and mandates are not just theoretical principles. They are abided by in practice.
>
> In my opinion, informed by my lengthy career as an experienced jurist and judge in Tanzania, as well as by the diverse international experiences I have gained, the Tanzanian judiciary is transparent, well organized, and of high quality and renders impartial justice in a fair and proper manner.

[72] Chief Justice Othman was cross-examined by Plaintiffs' counsel, but it is safe to say that this description of the Tanzanian justice system was, if anything, strengthened by the evidence brought out in cross-examination. Plaintiffs' counsel questioned him on a number of speeches he has given at conferences and other forums, in which he expounded on challenges faced by the legal system, the courts, and the bar. These challenges included improving access to justice and the timeliness of justice, reducing the expense of justice, improving funding for legal representation for indigent litigants, and a concentration of lawyers in urban settings with too few lawyers in rural areas.

[73] Chief Justice Othman's extra-judicial remarks may on one hand be seen as critical of Tanzanian justice. That is certainly what Plaintiffs' counsel tried to being out in cross-examination. However, Chief Justice Othman's points are at the same time rather familiar. In fact, they are virtually identical to extra-judicial speeches and remarks on access to justice and the expense of civil litigation made by Canada's own former Chief Justice Beverly McLachlin: "Access to Justice: A Fond Farewell", Action Committee on Access to Justice in Civil and Family Matters", December 13, 2021, <https://www.justicedevelopmentgoals.ca/blog/access-to-justice-a-fond-farewell-beverley. mclachlin >.

[74] The views of Tanzania's former chief justice likewise parallel remarks about expense and delay in Canadian justice expressed by former Supreme Court Justice Michael Moldaver: "Moldaver: Major Overhaul needed in criminal justice", *National*, Canadian Bar Association, April 17, 2023, < https://nationalmagazine.ca/en-ca/articles/people /profiles/2023/major-overhaul-needed>. They also reflect the very themes that were the subject of former Ontario Court of Appeal Justice Coulter Osborne's report on court funding and legal aid reform: "The Osbourne Report", Ministry of the Attorney General, November 2007, < https://wayback.archiveit.org/ 16312/20210402061409 /http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/>

[75] In other words, what the cross-examination of Chief Justice Othman brought out was the receptiveness of Tanzanian justice to thoughtful commentary by a well-informed jurist, in exactly the way one would expect of a transparent legal system open to critique and reform. The legal policy challenges outlined in Chief Justice Othman's comments about Tanzania apply equally to Canada and Ontario; and they are all legitimate critique in an open and properly functioning legal system.

[76] On the other hand, no one would, or could, say that this kind of critique would be permitted in, or that it even applies to, Eritrea. Court delay and the expense of civil litigation represent issues that are so far from what ails Eritrean society that they are not worth even mentioning. Eritrea was described in *Nevsun* BCCA, at para. 12, as "a 'rogue state' with no functioning legal system." The comparison of that legal vacuum with Tanzania's common law system simply is not apt.

[77] This is not a case where Canada is needed to ensure that the law "percolates down from the international to the domestic sphere", as Justice Abella put it in *Nevsun* SCC, at para. 71. It is a negligence case about allegedly wrongful corporate and/or police conduct, for which the domestic Tanzanian legal system appears as well equipped as Canada's legal system.

[78] It is noteworthy that Chief Justice Othman, besides having a wealth of experience and being a well-qualified expert in his country's legal system, is acknowledged even by Plaintiffs' experts as being more knowledgeable about the Tanzanian system than they are. His report, together with that of Professor Shaidi, establishes that Tanzania's courts are fair, independent, and competent. They administer a system, and approach adjudication, in a way that is, warts and all, quite similar to Canadian and Ontario legal process.

[79] On a final note regarding the Tanzanian system at large, the Plaintiffs allege that the Tanzanian judiciary lacks independence because the Tanzanian constitution gives too much latitude to the country's executive branch of government in appointing judges and setting their remuneration. This line of argument is premised on an expert affidavit submitted by Kenyan lawyer Donald Deya, who has spent time doing a study of five east African countries – Burundi, Kenya, Rwanda, Tanzania, and Uganda – and finds that Tanzania comes up short on judicial independence because of these appointment and remuneration issues.

[80] Counsel for Barrick point out that whatever Mr. Deya's talents might be as an east African comparativist, he is not a Tanzanian lawyer, has never practiced in that country or appeared in its courts, and is at best a superficial observer of the Tanzanian legal system. His evidence is directly addressed by Chief Justice Othman, whose expertise in the Tanzanian judiciary and legal system is beyond question.

[81] In particular, Chief Justice Othman explains that Tanzanian judges are appointed with security of tenure. They cannot be removed capriciously, and their remuneration is fixed not by the president's office or any other political actor but by an independent tribunal or commission. He also points out that while the Tanzanian constitution gives the president of the country the power to appoint judges, that power is exercised only after consultation with an independent judicial commission composed of members of the bar and current sitting judges. He states that, "This consultation is constitutionally mandated, and in practice, no candidate has ever been selected from outside a short list provided by the Commission to the President."

[82] While Mr. Deya may have an interesting comparative perspective in comparing Tanzania to several of its east African neighbours, he has no expertise when it comes to comparing Tanzania

to Ontario or Canada. And yet, that is the only relevant comparison, since under the circumstances those are the forums actually in issue.

[83] I need no expert report to know that in Canada, the appointment of judges of the superior courts of the province (where the within action has been commenced) is constitutionally the responsibility of the federal government under section 96 of the *Constitution Act, 1867*, and that the appointment process is a matter of prime ministerial prerogative in which no consultation of any kind is required: P.W. Hogg and W.K. Wright, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters, 2023), Vol. 1, §8.4. Under the Tanzanian constitution, the president, as described in the expert evidence before me, plays virtually the identical role in judicial appointments as does the Canadian prime minister. If anything, the Tanzanian constitution places more checks and balances on the executive branch of government in appointing judges than does the Canadian constitution.

[84] In practice, of course, the Prime Minister of Canada typically fills vacancies by selecting from a shortlist of candidates submitted by advisory boards composed of members of the bar and sitting judges in the various provinces. But, as indicated above, that is also the case in Tanzania's equivalent process. There is no sense in which the independence of the appointment process in Tanzania is any less robust than that of the appointment process in Canada. The same is true with judicial remuneration, which in both Tanzania and Canada is fixed by an independent commission and not by the executive branch – i.e. cabinet – or by any other political arm of government.

[85] With respect, the Plaintiffs' entire line of argument relating to judicial independence leads nowhere.

b) Juridical advantage

[86] Counsel for the Plaintiffs submit that there are juridical advantages to the selection of Ontario as a forum that will be lost if the case were to be litigated in Tanzania. Counsel for Barrick responds that, as a matter of logic, juridical advantage is a zero-sum game: one party's advantage is the other party's disadvantage. For this reason alone, the notion of juridical advantage is not particularly helpful in sizing up two competing jurisdictions.

[87] Furthermore, arguments about juridical advantage often gives way to little more than a subjective preference for the lawyers' or the court's home rules. The Supreme Court of Canada has therefore warned that these types of arguments are to be treaded upon with care.

[88] In *Breeden v. Black*, [2012] 1 SCR 666, at para. 26, Justice LeBel wrote that "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." Moreover, in *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, [1993] 1 SCR 897, the Supreme Court warned that, "If a party seeks out a jurisdiction simply 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'."

[89] The advantages which the Plaintiffs identify for Ontario include: a) the more expansive discovery process available in Ontario, b) the availability of contingency fees in Ontario, and c) the ability in Ontario to claim breach of obligations owed under international human rights law. The latter two reflect relatively recent developments in Ontario, while the first one is a more longstanding difference between the Tanzanian and Ontario civil litigation rules.

[90] Turning first to contingency fees, these arrangements are a relatively recent phenomenon in Ontario law. Legal fees based on a share of awards were prohibited first in England, and then in Canada, for centuries: *McIntyre Estate v. Ontario (AG)*, 2002 CanLII 45046, at paras. 18-21 (ON CA). It has only been authorized for Ontario lawyers to charge on a percentage of recovery basis for the past two decades – i.e. since amendments to the *Solicitors Act* were introduced by means of Bill 25, *Solicitors Amendment Act (Contingency Fee Agreements), 2002*.

[91] While no longer prohibited in Ontario, contingency fees are closely regulated by the courts. They will not be approved if they are not within what the court considers to be a "fair and reasonable" range: *Raphael Partners v. Lam* (2002), 61 OR (3d) 417 (CA). The fee cannot be out of proportion to the amount of work done by the lawyer or firm, making contingency fees closer than they might otherwise be to fees charged on an hourly basis: *Halimi v. Certas Home and Auto Insurance Company*, 2023 ONSC 432, at paras. 6-7.

[92] Moreover, it is fair to say that the availability of contingency fees is far from universal. Many democratic countries with sophisticated legal systems and well entrenched rule of law values prohibit the kind of contingency fees permitted in Ontario. In *forum non conveniens* motions, this Court has not hesitated to find that, for example, the courts of Ireland are an appropriate forum despite that country having rules prohibiting lawyers from charging contingency fees: see *Shirodkar v Coinbase Global, Inc*., 2024 ONSC 1399. Indeed, almost all members of the European Union have such a prohibition. And yet, Canadian courts have routinely deferred to the policy choices of those jurisdictions in finding those forums to be appropriate alternatives for civil claims: see *Leon v. Volkswagen AG*, 2018 ONSC 426, at para. 44.

[93] Simply put, the absence of contingency fee arrangements does not disqualify a foreign jurisdiction or make it an inappropriate alternative for *forum non conveniens* purposes. Different jurisdictions make different policy choices at different times on issues of this nature. Tanzania's policy choice is neither aberrant nor unjust in any objective sense.

[94] As for the limited pre-trial discovery rights available in the Tanzanian civil litigation system, that too is not unusual. The record contains an affidavit of Professor Scott Dodson of UC Law-San Francisco, an expert in comparative civil procedure, that demonstrates that, if anything, Ontario's system of bountiful pre-trial discovery is the outlier in terms of global litigation rules. Professor Dodson notes that in Tanzania, documentary discovery and written interrogatories are

done as a matter of right. Oral examinations for discovery are available if a court, on application, determines that they are appropriate in the circumstances.

[95] According to the uncontradicted evidence of Professor Dodson, the Tanzanian system is similar to, and at times more generous than, that prevailing in the courts of Belgium, Germany, South Africa, and in commercial arbitration under the most prevalent international rules. Although oral depositions are more widely available in the United States and Canada than in virtually all other jurisdictions, that does not disqualify or render objectively "unfair" all jurisdictions but those two. As Professor Dodson points out, discovery is a trade-off; increased discovery equates to increased information available to the parties, but also equates to increased cost and delay.

[96] I agree with Professor Dodson's conclusion that, "Different jurisdictions can justifiably adopt justice systems with more limited opportunity for discovery in exchange for other litigation virtues – such as low cost and minimal delay – without degrading the overall quality of civil justice." The expert reports of Professor Shaidi and Chief Justice Othman demonstrate that the Tanzanian system has achieved a level of efficiency and fairness in its operation with more limited discovery rules than in Ontario, and that it remains an effective choice for civil litigation purposes.

[97] An alternative forum proposed in a *forum non conveniens* motion does not have to mimic the Ontario system in every detail in order to be a viable alternative. For example, in *Lan Associates XVIII L.P. v. Bank of Nova Scotia*, 2000 CanLII 16943 (ON CA), the Court of Appeal granted a stay of Ontario proceedings in favour of proceedings in the Turks and Caicos Islands. In doing so, the Court noted that the law of that jurisdiction "is based on English common law and English procedure with some insignificant variations": *Ibid*., at para. 4. The variations in detail were considered insignificant in view of the proper functionality of the alternative forum's legal system overall. "Differences between legal systems…are not *prima facie* signs of inferiority of one jurisdiction to another": *Currie v. Farr's Coach Lines Ltd*., 2015 ONSC 2352, at para. 55.

[98] In addition to these process concerns, Plaintiffs' counsel submit that Tanzanian law lacks a substantive ground that is central to the present claim – i.e. a cause of action based on violation of international law. As Plaintiffs' counsel put it in their factum, "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 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. Arya*."

[99] If contingency fee arrangements are relatively new introductions to the Ontario civil litigation system, claims based on international law are even more recent. *Nevsun*, the Plaintiff's source for the claim, was only decided by the Supreme Court in 2020. The *forum non conveniens* analysis does not size up the substantive law in the competing jurisdictions in order to measure whether the foreign law is keeping up with every new nuance announced by the Canadian courts.

The pre-2020 law of Ontario was perfectly capable of trying a case alleging wrongful death by the police, and the post-2020 law of Tanzania is equally capable.

[100] In fact, Chief Justice Othman demonstrates that the Tanzanian law reflects the same principles and values as Anglo-Canadian law when he responds to this argument by pointing out that the claim is, in its essence, a version of a police negligence claim. In his report, he sets out and elaborates on a list of claims in which Tanzanians have successfully brought wrongful death actions in the country's courts.

[101] Chief Justice Othman also cites multiple cases in the Tanzanian courts in which individuals have successfully sued the TPF, including a number of past claims arising out of events at the North Mara mine. He also references a number of cases in which the Tanzanian courts have taken jurisdiction and proved themselves capable of handling claims against foreign corporations just like Barrick, with trade and investments in Tanzania.

[102] In doing so, Chief Justice Othman makes the point that not only are the courts in his country independent of government and objective in their assessment of the police and foreign corporations with investments in the country, but they are open and flexible in their application of the law. As he puts it, in the field of tort law, plaintiffs in civil actions in Tanzania can, and do, raise novel claims that have not to date been recognized by Tanzanian law. In Chief Justice Othman's words:

> Tanzanian law accepts the common law principle that the categories of torts are not closed, and that in appropriate cases novel torts can be established. In the case of *Francis Ngaire v. National Insurance Corporation of Tanzania*, [1972] HCD No. 134, the High Court of Tanzania adopted the common law doctrine established in the decision of the House of Lords in *Donohue v. Stevenson*, [1932] AC 562, that 'the categories of negligence are never closed'.

[103] In so elucidating on Tanzania's approach to new legal developments, Chief Justice Othman shows that the courts and substantive law in that country are not only open to the Plaintiffs' claim, but are open in just the same way that Canadian courts are open. Just like *Nevsun* opened new gates for Canadian litigation, so the Tanzanian judiciary is open to new and innovative causes of action.

[104] Again, there is no sense in which the law of Tanzania, either procedurally or substantively, comes up short in comparison with Ontario and Canada. The Court of Appeal's view that, generally, "comity… will often prevail over any perceived loss of juridical advantage", is entirely understandable in the context of the Tanzanian legal system: *Kaynes v. BP plc* (2014), 22 OR (3d) 162, at para. 52 (CA). In my view, it is applicable to the case at bar.

c) Tanzanian legal services and legal profession

[105] Finally, the Plaintiffs claim that they are unable to find a lawyer to take their case in Tanzania for a number of reasons: the Plaintiffs are poor and cannot afford a lawyer, Tanzanian lawyers are concentrated in urban areas whereas the Plaintiffs are in remote village areas, and, finally, lawyers are alleged to be fearful of themselves becoming the victim of discipline proceedings by the Tanzanian bar.

[106] Interestingly, there is no evidence that any of the Plaintiffs have approached other lawyers or the country's legal aid clinics to see what payment arrangements, or subsidized or even *pro bono* service, might be available. No one has come forward to say that the case was turned down by a Tanzanian lawyer or legal aid clinic. That seems to be a critical omission from the record, and its absence makes it difficult to assess the veracity of the Plaintiffs' claim that local legal representation is unavailable to them.

[107] Evidence on this point is, however, provided by Chief Justice Othman. He explains that there are dozens of legal aid centres and clinics in Tanzania whose function it is to bring cases to court on behalf of indigent persons. Another of Barrick's witnesses, legal aid expert Ulimboka Lugano Mwasomola, follows up on this information. He deposes that there is a significant possibility that the Plaintiffs can obtain legal aid funded representation in Tanzania all the way through trial. In fact, the record establishes that there have been previous cases against Barrick in Tanzania that were funded by legal aid.

[108] I will add that, in any case, the courts in Ontario have been clear that in assessing competing forums, a Plaintiff's access to litigation funding is not in and of itself a relevant factor. As Strathy JA explained in *Tamminga v. Tamminga* (2014), (2014), 120 O.R. (3d) 671, at paras. 25 (CA), that is a consideration that "only arises in the aftermath of the tort". It cannot serve to "bootstrap" the domestic forum over a more connected foreign one: *Ibid*., at para. 27, citing *Gajraj v. DeBernardo* (2002), 60 OR (3d) 68, at para. 20 (CA). The domestic forum being less costly than a better connected foreign forum does not make the case more appropriately litigated in the domestic forum: *Currie, supra*, at para. 58.

[109] Secondly, the fact that Tanzanian lawyers are more numerous in urban centres than in rural areas is equally true of Ontario and, likely, every other jurisdiction in the world. Law is a profession with certain barriers to entry, including years of higher education, which, for better or worse, makes the services rather expensive and limits the social origins of those gaining entry and the location of professional services.

[110] As a comparison, I note that even in Saskatchewan, Canada's most agrarian province, there is a dearth of rural lawyers, with 80% of the profession concentrated in the two urban centres of Regina and Saskatoon: Law Society of Saskatchewan, *2016 Annual Report* (2016), at 5. Law is simply not an inherently rural profession. If this kind of urbanization of the legal profession were to be applied as a negative in assessing forums for litigation, it is hard to imagine that there would be an adequate forum anywhere; every jurisdiction would fail the test.

[111] Finally, the Plaintiffs have adduced evidence from several Tanzanian lawyers who claim to have been disciplined by that country's Advocates Committee – its equivalent to the Law Society – because they brought suits against the government. Barrick's counsel point out that while each of these lawyers did engage in litigation against the Tanzanian government or police, and each of them was indeed disciplined by the Advocates Committee, in none of the cases is there a causal link between the litigation and the professional discipline.

[112] As in Ontario, a lawyer may be an activist advocate and be free to litigate against and harshly criticize the police or government: see *R. v. Kopyto* (1987), 24 OAC 81 (CA). And that same lawyer may be subjected to discipline proceedings and even disbarred for violating one or more rules of professional ethics: see *Kopyto v. Law Society of Upper Canada* (1999), 107 DLR (4th) 259 (Div Ct). Those two legal actions are not mutually exclusive as a matter of logic, and they are not treated as such in either Tanzania or Ontario.

[113] Plaintiff's witness Fatma Karune has testified that she brought a constitutional challenge against government action, and was charged with professional misconduct for doing so. The record shows, however, that she was disciplined for being rude and insulting in her submissions – an act of incivility for which one can face professional discipline charges in Ontario as well: see *Groia v. Law Society of Upper Canada*, [2018] 1 S.C.R. 772. In her misconduct hearing, Ms. Karune apparently failed to call any evidence in defense; moreover, she apparently abused court staff, all of which led to her disbarment. The fact that she had previously brought a constitutional challenge was not the source of her professional troubles.

[114] Similarly, Plaintiff's witness, Tanzanian lawyer Boniface Mwabukusi, brought a court challenge to a government transaction dealing with management of the country's ports, and claims to have faced professional discipline proceedings as a result. The record establishes, however that he conducted a media briefing while the case was pending and while wearing his court gown, acts which are specifically prohibited under the Tanzanian rules of conduct.

[115] In Ontario, as a matter of professionalism it is also frowned upon to wear a barrister's gown during a press conference or otherwise outside of court. New lawyers are advised that "Court apparel is to be worn in the courthouse. Not on the street. When you leave the court, you should remove your gown and tabs": M. Waddell, "Some mid-winter musings on barrister basics", *Canadian Lawyer*, 14 February 2011, https://www.canadianlawyermag.com/news/general/some-mid-winter-musings-on-barrister-basics/268119.

[116] Expounding on an civl claim to the press while wearing a barrister's gown, as Mr. Mwabukusi apparently did, can lend an unwarranted suggestion of authority to the unproven allegations. In Ontario, reading an untried pleading to the press while wearing a barrister's gown may be the grounds of a punishingly high damages award in a libel suit against the lawyer: see *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130. Given that Mr. Mwabukusi's punishment was a minor admonishment, the punitive effect of the Tanzanian approach is a mild

and reasonable one. It is not out of line with the same principles of respect for the court and profession as those that prevail in Ontario.

[117] Two other Tanzanian lawyers, Jebra Kambole and Tito Magoti, deposed that they were disciplined because of their anti-government stances. But it seems that Mr. Kambole was charged with having engaged in inflammatory social media postings, while Mr. Magoti was charged with economic crimes. Neither of them, however, has ever been disbarred or dissuaded from acting against the government; in fact, the evidence indicates that they continue to do so.

[118] There is no cogent evidence to show that the Tanzanian government or the Tanzanian bar intimidates lawyers or that there are any negative consequences in Tanzania for lawyers using their legal skills to litigate against the government, its officials, the police, or large resource corporations – including Barrick. The courts appear to conduct themselves, and the bar appears to regulate lawyers' conduct, in much the same way as in Ontario.

[119] Barrick's expert witness on legal professionalism, Professor Adam Dodek of the University of Ottawa, observes in his report that the system of professional regulation in Tanzania appears to be in step with jurisdictions he has examined elsewhere. He opines that nothing about it undermines the independence of the bar. The Plaintiffs have produced no expert opinion, and have no evidence anyone other than from patently self-interested witnesses – i.e. other than lawyers who have themselves been subjected to professional discipline in Tanzania – to counter Professor Dodek's view.

[120] In all, there is nothing in the record that, for the purposes of a *forum non conveniens* analysis, establishes that Tanzania must be excluded from consideration due to some weakness in its justice system or legal profession. To the contrary, the record establishes the Tanzanian system and profession to be up to the task.

d) Letters rogatory

[121] Chief Justice Othman indicates in his evidence that there is no provision in Tanzania's civil procedure for enforcing letters of request issued by a foreign court. He states that he knows of no Tanzanian court that has taken the step of enforcing a foreign request to compel a witness to testify, and he thinks it unlikely that a Tanzanian court would do so at the request of an Ontario court.

[122] The former Chief Justice's expert opinion in this respect is uncontroverted. Accordingly, I take it as a fact that there will be no means of compelling police officers and other necessary witnesses to testify if this action were to remain in Ontario for trial.

[123] In *Haaretz.com v. Goldhar*, [2018] 2 SCR 3, the Supreme Court considered a forum controversy that pitted Ontario against the State of Israel. Justice Côté discussed, among other things, the comparative convenience and cost to witnesses of proceeding in Israel or Ontario. During the course of this discussion, she linked the concern for trial fairness with the risk that the

Israeli courts might refuse to enforce Ontario letters of request. At *Haaretz*, para. 47, she warned against courts feeling wedded to the forum chosen by the Plaintiff "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."

[124] One hallmark of a problematic situation which could deprive a defendant in Barrick's position the ability to adequately defend itself is the unwillingness of the foreign forum to enforce letters of request. As Justice Côté put it, at paras. 64-65, 70:

> [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…
>
> …[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…

[125] Justice Côté reasoned that the Court's task is to ensure that the Plaintiffs' chosen court provides an even-handed forum in terms of procedure. Where the foreign court lacks a mechanism for enforcing letters of request from an Ontario court, fairness is not served by the action remaining in Ontario. The foreign location of key witnesses, and the inability to compel those key witnesses from the foreign jurisdiction to testify in the home jurisdiction, is an important factor in moving the entire action to the foreign court. In that way, the Court can more adequately carry out its duty "to ensure that both parties are treated fairly": *Haaretz*, at para. 79.

[126] Chief Justice Othman's evidence establishes that Tanzania sits in the same position with respect to letters of request as Israel did in the *Haaretz* case. Key witnesses – in particular, members of the TPF – will not be required to testify at trial in Ontario. That will create evidentiary gaps that would not be present if the trial took place in the same country where the events in issue took place – i.e. in Tanzania – where third parties, including the police, can be compelled to testify as a matter of course.

VI. Jurisdiction

[127] It is well established in law that there is a distinction between whether the Court has jurisdiction over a matter, and if it does, whether that jurisdiction should be exercised. As the Court of Appeal explained in *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP* (2016), 135 OR (3d) 743, at para. 34, leave to appeal refused, [2017] SCCA No. 54, the analysis always "begins with an inquiry into jurisdiction *simpliciter*".

[128] This analytic approach had earlier been expounded upon by the Court of Appeal in *Muscutt v. Courcelles* (2002). 60 OR (3d) 20, at para. 43, where Sharpe JA said that the analysis entails "a fact-specific inquiry, but the test ultimately rests upon legal principles of general application. The question is whether the forum can assume jurisdiction over the claims of plaintiffs in general

against defendants in general given the sort of relationship between the case, the parties and the forum." As Justice Sharpe went on to explain, jurisdiction *simplicit*er asks "whether there is a real and substantial connection between the court and either the defendant . . . or the subject-matter of the litigation": *Ibid*., at para. 69.

[129] The "real and substantial connection" test was ultimately embraced by the Supreme Court of Canada in *Club Resorts Ltd. v. Van Breda*, [2012] 1 SCR 572, at paras 101-102. In that case, Justice LeBel, in a unanimous decision, identified it as foundational to the concept of jurisdiction. He further confirmed that the analysis for establishing jurisdiction is separate and distinct from the subsequent question of whether the court should exercise its discretion to hear the matter. The latter analysis arises as a secondary step once jurisdiction has been found to exist, and only if a defendant seeks such a discretionary order in a *forum non conveniens* motion.

[130] Although the jurisdictional analysis and the logically subsequent *forum non conveniens* analysis have elements that are similar, the Supreme Court has drawn a clear distinction between the two. Neither of them are perfunctory issues; that is, each stage in its own way requires the court to delve into a careful analysis of the appropriate geographical home for the litigation. The overall approach prioritizes order and predictability by putting the jurisdictional issue up front, before analyzing the subsidiary issue of whether fairness and efficiency will be best served by the court exercising its jurisdiction: *Jacubovich v. Israel (State)*, 2021 ONSC 3558, at para. 58, citing *Haaertz*, at para 28.

[131] Starting with the question of jurisdiction, the Court of Appeal has indicated that there is nothing in the case law to suggest that "an Ontario court should approach the issue of taking jurisdiction in a restrained manner": *Airia Brands Inc. v. Air Canada*, 2017 ONCA 792, at para. 99. To the contrary, the entire analysis "begins with an inquiry into jurisdiction *simpliciter*, on the principles set out in *Club Resorts Ltd. v. Van Breda*" – i.e. with an application of the real and substantial connection test: *Excalibur*, at para. 34.

[132] In *Van Breda*, the Supreme Court was careful not to leave the applicable test without providing some guidance on how to apply it. Justice LeBel elaborated, at para. 90:

> [90] To recap, in a case concerning a tort, the following factors are presumptive connecting factors that, *prima facie*, entitle a court to assume jurisdiction over a dispute:
>
> (a) the defendant is domiciled or resident in the province;
>
> (b) the defendant carries on business in the province;
>
> (c) the tort was committed in the province; and
>
> (d) a contract connected with the dispute was made in the province.

[133] Justice LeBel then went on to clarify, at para. 95, that, "The presumption of jurisdiction that arises where a recognized connecting factor — whether listed or new — applies is not irrebuttable." It is open to the party challenging jurisdiction to "establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them": *Ibid*.

[134] Accordingly, a court could conclude that it lacks jurisdiction either "because none of the presumptive connecting factors exist ***or*** because the presumption of jurisdiction that flows from one of those factors has been rebutted": *Ibid*., at para. 100 [emphasis added]. In either case, it must dismiss or stay the action; the court cannot proceed with a case in the absence of jurisdiction. On the other hand, if jurisdiction is established, "the claim may proceed, subject to the court's discretion to stay the proceedings on the basis of the doctrine of *forum non conveniens*": *Ibid*.

[135] Counsel for the Plaintiffs takes the position that the question of a real and substantial connection to the forum is only relevant where a plaintiff's chosen forum is one where a defendant has no discernable physical presence in the jurisdiction. This submission is further elaborated in their factum: "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')."

[136] In other words, it is the Plaintiffs' view that once jurisdiction has been *prima facie* established through application of one of the factors listed in para. 90 of *Van Breda*, the 'real and substantial connection' inquiry is done away with. That approach would, in Barrick's case, dispense with the need for any further analysis of Ontario jurisdiction.

[137] Barrick, as previously indicated, does have a physical presence in Ontario – its relatively small, but nevertheless its existing finance, legal, and communications office is located in Toronto. It therefore falls with the description of para. 90(b) of *Van Breda* – it "carries on business in the province". In Plaintiffs' counsel's view, that dispenses with any further need to establish jurisdiction or to show a real and substantial connection.

[138] With the greatest of respect, Plaintiffs' counsel overstate the role played by the *prima facie* jurisdictional factors set out in para. 90 of *Van Breda*. The 'real and substantial connection' analysis does not end with a finding of *prima facie* jurisdiction; rather, the onus changes. In fact, the Supreme Court has stated that if, *prima facie*, jurisdiction is asserted in the absence of a real and substantial connection of the claim to the location of the court, it would amount to "forum shopping": *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, [1993] 1 SCR 897, at para. 32. The Court of Appeal has echoed that view, stating that "forum shopping, while understandable, is unprincipled and is not to be encouraged": *Vale Canada v. Royal & Sun Alliance Insurance Co*, 2022 ONCA 862, para 156.

[139] It was a feature of older English common law that the presence of a defendant within a plaintiff's chosen jurisdiction sufficed to establish that jurisdiction as the forum for the action. In fact, the rule was strict enough that once a party was served in the jurisdiction with an originating process, jurisdiction *simpliciter* was firmly established. As described by Lord Denning, this applied regardless of the circumstances that made the service possible, including the fortuitous visit of a foreign defendant to England to see the races at Ascot: *Maharanee of Baroda v. Wildenstein* [1972] 2 QB 283, at paras. 12-13 (CA).

[140] In more recent times this strict, one-dimensional jurisdictional rule has been reconsidered in the U.K.: see *Spiliada Maritime Corp v Cansulex Ltd*. [1986] UKHL 10. In Canadian law, the situation has become somewhat more complex, and presence-based jurisdiction, at least where a defendant carries on business in the given province (although not, presumably, where he or she merely visits for a day), is still a recognized basis on which a court may assert its authority: *Chevron Corp. v. Yaiguaje*, [2015] 3 SCR 69, at para. 81. As Justice LeBel went on to elaborate in *Van Breda*, at para. 96, a defendant's carrying on business within the territory of a plaintiff's chosen court is a *prima facie* indicator of jurisdiction, but that can be rebutted where the real subject matter of the litigation "is unrelated to the defendant's business activities in the province."

[141] Thus, while the Plaintiffs have established that Ontario has *prima facie* jurisdiction over this action against Barrick, that is only the first stage of the *Van Breda* analysis. As defendant, Barrick can bring evidence to show that, despite its presence in the jurisdiction, there is no relationship – no real and substantial connection – between the subject matter of the litigation and the jurisdiction chosen by the Plaintiff. In *Van Breda*, Justice LeBel used this example in explaining, at para. 96, how *prima facia* jurisdiction can be rebutted:

> [W]here 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. On the other hand, where the presumptive connecting factor is the commission of a tort in the province, rebutting the presumption of jurisdiction would appear to be difficult, although it may be possible to do so in a case involving a multi-jurisdictional tort where only a relatively minor element of the tort has occurred in the province.

[142] It is Barrick's position that the subject matter of the litigation – the injuries and deaths that took place at the North Mara Gold Mine and the acts responsible for those harms – is located in Tanzania. Barrick further states that the business that it does carry on in Ontario – finance, media relations, and legal affairs – does not amount to any real relationship, or only to an unsubstantial relationship, between the subject-matter of the litigation and Ontario: *Kornhaber v. Starwood Hotels*, 2014 ONSC 6182, at para. 8.

[143] More to the point, regulatory filings and other communications about Barrick's global policies of sustainability do not bring the actual management, supervision, and security measures at the Mine into Ontario. These filings and communications do not assign a geographic location to

matters at issue in the action, and the ability to rebut them is an important check on jurisdiction. This is especially the case in the internet age, where publications can be accessed anywhere and can otherwise appear to place an action anywhere in the world: *Haaretz,* at para. 40.

[144] As an example, filings and communications by a global mining company like Barrick, or postings and links on its website, are analogous to the marketing efforts of an international hotel chain like the Westin hotels. This Court has held that communications and website postings about healthy cuisine do not bring an episode of food poisoning at a China-based restaurant owned by Westin into Ontario jurisdiction: *Ibid*., at para. 11. The place where the injurious food was prepared, served, and consumed is the jurisdiction with the real and substantial connection, regardless of the general communications strategy carried out at Westin's Toronto office.

[145] The presence in Ontario of communications personnel and policy statements may suffice as presumptive connecting factors, but they "are tenuous and not sufficiently connected to the subject matter of the litigation": *Jacubovich*, at para. 98. The fact that the Mine is operated by NMGML, which is a Tanzanian company managed in Tanzania and overseen by senior management and board members based in Tanzania, makes the connection to Tanzania a strong one and any connection to Ontario a tenuous one at best. Added to that is the fact that the specific and crucial relationship between the Mine and the TPF is pursuant to a contract formed in Tanzania between that country's police and the Tanzania-based NMGML.

[146] With all of this connection to Tanzania and disconnection from Ontario, the presumption of presence-based jurisdiction in Ontario is rebutted.

[147] To find that this Court has jurisdiction over this claim "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*…": *Jacubovich*, at para. 97. No invoking of solemn principles of human rights and corporate responsibility can overcome the evidence that the corporate entity that manages the Mine, the individuals responsible for security policies and other operations, and the violent incidents resulting in the Plaintiffs' injuries, are all located in Africa and centred in Tanzania.

[148] In short, the evidence is conclusive that the Mine at the centre of the claim is not operated or overseen from Ontario. It is likewise conclusive that the incidents that are the subject matter of the claim did not occur in Ontario, and that the human rights violations alleged in the claim did not take place in Ontario. Any presumption of jurisdiction that flows from Barrick's unrelated presence in Ontario is thereby rebutted.

VII. *Forum non conveniens*

[149] Since I have concluded that Ontario does not have jurisdiction *simpliciter*, it is not necessary to ask whether the court should exercise its discretion to decline jurisdiction. However,

in the event that I am wrong in my conclusion about jurisdiction, I will at least briefly engage in a *forum non conveniens* analysis.

[150] The Supreme Court of Canada has instructed that, "The party raising *forum non conveniens* has the burden of showing that his or her forum is clearly more appropriate": *Breeden v. Black*, [2012] 1 SCR 666, at para. 37. As Justice Lebell explained it in *Van Breda*, at para. 103, "The defendant must show, using the same analytical approach the court followed to establish the existence of a real and substantial connection with the local forum, what connections this alternative forum has with the subject matter of the litigation."

[151] Justice LeBel then set out a non-exhaustive list of factors to consider in sizing up the competing forums, at para. 105:

> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
>
> (b) the law to be applied to issues in the proceeding;
>
> (c) the desirability of avoiding multiplicity of legal proceedings;
>
> (d) the desirability of avoiding conflicting decisions in different courts;
>
> (e) the enforcement of an eventual judgment; and
>
> (f) the fair and efficient working of the Canadian legal system as a whole.

[152] Of these factors, only (a) and (f) are of particular relevance or controversy here. In terms of a multiplicity of proceedings, other cases have already been brought against Barrick in the Tanzanian courts. Since the present actions now appear to encompass all known claimants in respect of TPF shootings at the Mine, a multiplicity will be avoided if this action is litigated in the Tanzanian courts.

[153] Furthermore, "…the law to be applied in torts is the law of the place where the activity occurred, i.e. the *lex loci delicti*": *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 SCR 1022, at 1050. And, according to the Court of Appeal, there is "no actionable wrong without the injury. The place where 'the activity took place' which gives rise to the action is in the [place where the accident/injury occurred]: *Leonard v. Houle* (1997), 36 OR (3d) 357, at para. 20 (CA).

[154] The Plaintiffs' claim is that Barrick should have interceded in, and that it negligently monitored and oversaw, matters at the Mine in Tanzania. As previously discussed, any involvement in the Mine's affairs by Barrick will turn on evidence regarding its executives in Tanzania and, regionally, in South Aftica. The lawsuit does not realistically claim that the Plaintiffs

were injured by anything Barrick did in Ontario, although the Plaintiffs have in their pleading – in what Barrick's counsel says amounts to "pleading artifice" – tried to place the alleged wrongdoing in Ontario: *Das v. George Weston Limited*, 2017 ONSC 4129, at para. 236, aff'd 2018 ONCA 1053.

[155] In this respect, the claim is analogous to the Ontario class action claim against Loblaws in respect of injuries and deaths caused by the collapse of the Rana Plaza, a building in Bangladesh used by Loblaws' contractors in that country. In that case, "the [plaintiffs] framed their pleadings to situate the wrongful activity in Ontario" by focusing on a lack of oversight and structural audits by Loblaws. Nevertheless, the Court found that the plaintiffs' injuries, and the tort, "occurred in Bangladesh, the 'jurisdiction substantially affected by the [respondents'] activities": *Ibid*. (CA), at para. 34.

[156] It is likewise Tanzanian law that will apply to the management and security protocols at the mine, and to the oversight and implementation of those strategies during the incidents in which the Plaintiffs were injured or in which their relatives died. It is in Tanzania that the tort occurred and the injuries were incurred. That will be the only choice of law open to the court, whether this case is litigated in Ontario or Tanzania.

[157] In any case, Chief Justice Othman's evidence establishes that Tanzanian tort law – and, especially, negligence law – is from the same common law origin and embraces the same legal principles as Ontario tort law. The former Chief Justice is also clear that Tanzanian courts are as capable as any in flexibly applying the law and innovating with new causes of action if the circumstances call for it. There will be no conflicting decisions if the present actions are litigated in Tanzania.

[158] One consequence of the application of Tanzanian law is that the *Family Law Act* ("*FLA*") claims brought by surviving relatives of deceased individuals who died at the Mine will have to be dismissed regardless of where the case is tried: *Prefontaine v Frizzle*, 1990 Carswell Ont 347 (ON CA). The courts have reasoned that *FLA* claims are derivative, and will be struck if the main claims are not based on Ontario law: *Bowes v. Chalifour*, [1992] OJ No 2960, at para. 12 (SCJ). Accordingly, those Plaintiffs whose claim derives from rights conferred in the *FLA* will lack a cause of action unless they can find a claim under Tanzanian law that parallels that under Ontario's *FLA*. I will add, parenthetically, that the Plaintiffs have not pleaded any such Tanzanian source of the derivative family claims.

[159] Turning to the question of enforceability, there should be no problem enforcing any eventual judgment against Barrick, since it has indicated that it will attorn to the Tanzanian courts and submit itself to Tanzanian law. Barrick is a corporation with a presence, and assets, in multiple jurisdictions across the globe. A judgment from a court to which it attorned would doubtless be enforceable in any of those jurisdictions; it certainly would be in Ontario or across Canada, if that is where Barrick's assets are found. In fact, given that NMGML could easily be added as a co-Defendant with Barrick if the case is litigated in Tanzania, enforcement would be easiest, and

would avoid a multiplicity of proceedings, if it took place within the same legal system as the trial itself – i.e. in Tanzania: see *Haaretz*, at para. 142.

[160] That leaves the first and last factors – convenience and expense on one hand, and fairness and efficiency on the other. Convenience and expense weigh in favour of Tanzania as the jurisdiction where virtually all of the witnesses are located. Although the Plaintiffs argue that their expenses will be greater in Tanzania due to the lack of contingency fees, the expert evidence of Chief Justice Othman is that the Plaintiffs will indeed have access to *pro bono* or subsidized representation by Tanzanian legal aid organizations.

[161] Frankly, it defies logic to say that flying dozens of witnesses some 12,000 km across an ocean is more convenient and efficient than bringing them from the North Mara region to the nearest courthouse in Tanzania. I will also note here that the Court of Appeal has advised that the "new reality" of virtual hearings does not lessen the significant weight given to the distance and time change factor that one must account for in dealing with witnesses located in foreign locations: *Black & McDonald Limited v. Eiffage Innovative Canada Inc*., 2023 ONCA 91, at para. 22. The great distance of Ontario from the witness' location in terms of geography and time zone is of great significance to the *forum non conveniens* analysis.

[162] And that is to say nothing of the costs involved in housing the witnesses for the duration of a trial in Toronto, translating all documents from Swahili to English and having Swahili-English simultaneous interpretation throughout the trial. The time and resources for this language effort would be necessary in an Ontario trial. But as Chief Justice Othman indicates, Tanzania trials are conducted in Swahili and English as a matter of course, and this combination of languages would engage no special allocation of resources.

[163] In terms of fairness, the trial must be fair to both parties: *Haaretz*, at para. 79. Given the unavailability of police witnesses, a trial in Ontario would certainly be unfair to Barrick. It is also possible that the Plaintiffs themselves or their witnesses will be unable to travel the great distance, making an Ontario trial unfair to the Plaintiffs' side as well. A trial in Tanzania, by contrast, would not suffer from these problems.

[164] Again, Chief Justice Othman's uncontradicted evidence is that there no mechanism in Tanzania for compelling any witness – and definitely not a police officer – to testify in a foreign proceeding. Without that, Barrick would be limited to its own, NMGML's, and perhaps Twiga's personnel as witnesses, but would not be able to call any police officers to testify as to precisely what happened during the incidents in which the Plaintiffs were injured or killed. Justice Côté observed the very same problem at play in *Haaretz*, at paras. 65, 70:

> …[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.

[165] Barrick's counsel point out that in *Haaretz*, at para. 79, the Ontario action was stayed on the basis of a serious, but unproven concern that letters of request might not be enforced in Israel. In the case at bar, that concern has crystallized into a proven fact. There is undisputed expert evidence from Chief Justice Othman, which is supported in the expert evidence of Professor Shaidi, that the Courts of Tanzania will not enforce letters of request issued by this Court. This unchallenged evidence establishes that the Tanzanian courts will not compel evidence from residents of that country, including TPF officers, for use in a foreign (i.e. Ontario) proceeding, but they will do so in a domestic (i.e. Tanzanian) proceeding.

[166] Accordingly, if this Court were to take jurisdiction over the trial, Barrick would be severely hampered in its defense of the Plaintiffs' claims. Virtually all of the witnesses whose evidence will be required for it to mount a viable defense reside in Tanzania. And as some of the most important witnesses are not employees of either Barrick or, for that matter, NMGML, Barrick cannot compel, and will likely not persuade, any of them to testify or produce relevant documents for a trial in Ontario.

[167] In that case, the court in Ontario would hear no witnesses with respect to the manner in which the incidents involving the TPF occurred, or whether they happened at all. The court would then have no evidence for determining whether the TPF actions were justified in the specific circumstances of each incident. It would likewise have little or no evidence of the ways in which the Plaintiffs' injuries were incurred, the extent of each injury and whether the injury was in fact the cause of the Plaintiffs' family member's death, etc.

[168] Counsel for Barrick submit that it is unimaginable that this Court could entertain multiple wrongful death claims in the absence of first-hand witnesses to each incident that is alleged to have caused the deaths. I agree. And yet, the record before me suggests that the Plaintiffs cannot produce even one relevant witness to the incidents in question. As indicated at an earlier stage of these reasons, the only Plaintiffs who testified in connection with this motion confirmed that they have no such first-hand evidence. The eye-witnesses will therefore have to be produced by Barrick as defendant, but without a means to compel their attendance, Barrick would be stymied in its efforts.

[169] There is really no comparison between Ontario and Tanzania as jurisdictions that can properly try this case. A trial in Ontario would either be bereft of relevant evidence, or it would focus its efforts on platitudes about human rights and corporate responsibility without delving into the actual facts at issue in the claim.

[170] Barrick, in effect, concedes that corporations should make every effort to ensure safety and human rights compliance at the sites of their operations and investments. But no corporation, including a global giant like Barrick, is responsible for violence and/or deaths caused by others or contributorily caused by the claimants themselves.

[171] I am cognizant of the fact that a *forum non conveniens* analysis must also take into account any unfairness the Plaintiffs would suffer if I decline jurisdiction in favour of Tanzania. However, the record before me establishes to my satisfaction that the laws, the judiciary, the bar, and the justice system of Tanzania overall, present no insurmountable hurdle to a fair trial of this action.

[172] What the Plaintiffs offer as a reason to reject Tanzania as an appropriate forum is an inapt comparison to a non-democratic, non-rule of law country – Eritrea – and unfounded allegations of prejudice, political intimidation, and a lack of independence by the judiciary. Those suggestions are not based on the kind of cogent evidence – the "real risk" rather than the spectre of hypothetical risk – that is required to counter an otherwise appropriate foreign jurisdiction: *Garcia v. Tahoe Resources Inc*., 2017 BCCA 39, at para. 124.

[173] On the other hand, cogent evidence of the common law foundation and proper functioning of the Tanzanian court and legal system has been provided by the former Chief Justice of the country and one of its most prominent law professors. To overlook that evidence, and to use the *Nevsun* case and its factual origin in Eritrea as a constant reference, risks undermining comity and expresses unfounded insult on Tanzania as the forum under consideration: see *Das*, at para. 288; *Das* (CA), at para. 37.

[174] Given the remoteness of Ontario from the matters at issue, and the fact that crucial witnesses would inevitably be absent from an Ontario trial, it is incumbent on me to decline jurisdiction over the trial of this action. A trial in Tanzania is the only way for all the relevant evidence on both sides to be aired in court.

[175] The evidence before me establishes that the Tanzanian bar and the Tanzanian judiciary are capable of conducting a fair, efficient, and just trial. As between Ontario and Tanzania, it is Tanzania that is clearly the more appropriate forum in which to try the matters raised in this claim.

VIII. Disposition

[176] This Court lacks jurisdiction to determine the matters at issue. The actions are dismissed.

[177] If the Court had jurisdiction, the actions would be permanently stayed on the basis of *forum non conveniens*.

IX. Costs

[178] The parties may make written submissions on costs. I would ask counsel for Barrick to send their brief submissions by email to my assistant within 10 days of today, and for counsel for the Plaintiffs to send their equally brief submissions to my assistant within 10 days thereafter.

Date: November 26, 2024 **Morgan J.**