

**Before the National Contact Point for Responsible Business Conduct Norway**

*Civil Society Coalition on Natural Resources, Global Idé, Liech Victims Voices, Norwegian Church Aid, Norwegian People's Aid, PAX, South Sudan Council of Churches and Swedwatch*  
(complainants) against *Aker BP ASA and Aker ASA* (respondents)

**Expert opinion on the issue of the right to an effective remedy as provided for by international human rights law relating to the present complaint**

Professor Marius Emberland

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**1. What this expert opinion deals with**

1. Aker BP ASA and Aker ASA have asked me to assist the National Contact Point for Responsible Business Conduct Norway (hereinafter the NCP) in the Specific Instance.
2. I have read the complaint dated 31 May 2002, the complainants' submissions dated 24 November 2023, and the expert opinions of dr. Tara van Ho and Professor Anita Ramasastry. I understand the background for the case as follows:
  - (i) The NCP has decided to consider the complaint insofar as it relates to human rights due diligence in connection with the merger between Aker BP ASA (hereinafter Aker BP) and Lundin Energy Norway AS with regard to the human right to an effective remedy.
  - (ii) The complainants represent a high number of victims of serious human rights violations by a State more than two decades ago, where such violations ceased in 2003 and reparation has not taken place. The complainants claim that the private Swedish company Lundin Energy AB (hereinafter Lundin Energy) contributed to these violations and has an obligation to compensate the victims.
  - (iii) A report setting out the victims' case was submitted to the Swedish prosecutor in 2010 and prompted a thorough criminal investigation into the allegations of Lundin Energy's contribution to the human rights violations.
  - (iv) On 11 November 2021 an indictment was issued, with the Swedish prosecutor bringing criminal charges against two executives of Lundin Energy, as well as claims against Lundin Energy for a corporate fine and forfeiture of profits. Criminal proceedings before

Stockholm City Court commenced in September 2023 and are scheduled to be completed in February 2026.

- (v) Liability for reparation has not been established by an authoritative State body. Claims for compensation were submitted to the Stockholm City Court on 16 and 17 August 2023, which on 22 November 2023 decided that the claims for economic compensation could not be included in the pending criminal case as they were submitted too late and did not meet all formal requirements, leaving the claims for compensation to be considered in separate civil proceedings
3. The Human Right chapter (Chapter IV) of the 2011 OECD Guidelines introduces companies' responsibility as follows: "Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations ... avoid infringing on the human rights of others and should address adverse human rights impacts ...". It is therefore essential to establish whether there is an internationally recognised human right that is or may be impacted in the present case.
  4. The complainants have argued that there is an issue under the 2011 OECD Guidelines relevant to Aker BP's human rights due diligence on the assumption that Lundin Energy must be expected to have insufficient means to cover the costs that might follow if Lundin Energy were compelled to provide reparation in the form of economic compensation to the victims of human rights violations in Sudan in the period 1999-2003. The NCP has formulated the relevant issue in terms of an (actual or potential) adverse impact on the right to remedy (as a human right in itself). The question then arises whether the right to an effective remedy, as provided for in international human rights law, extends to a right (and a corresponding duty for a State) of protection of funds that could be available for economic compensation if a duty to award compensation is established by a national court (or should otherwise materialise). In the context of the 2011 OECD Guidelines the question arises whether there is a current or potential violation of the right to an effective remedy.
  5. I have been invited to expound on the right to an effective remedy as protected by international human rights law and particularly the nature and scope of the protection an individual is afforded under Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) in the context of the present case as it stands before the NCP. Two questions are addressed in the present opinion:
    - (i) In the context of the submissions in this case, what would constitute an "ongoing denial" or an "undue delay" of the right to an effective remedy.
    - (ii) Whether the right to an effective remedy extends to a right of protection of funds that could be available for economic compensation if a duty to award compensation is established by a national court.
  6. I have also been instructed, when relevant, to comment on the expert opinions submitted by dr. Van Ho and Professor Ramasastry.

## 2. Credentials

7. I am a full-time tenured professor of law at BI Norwegian Business School. My main responsibilities lie in BI's five-year Master of Law degree in the fields of constitutional and international law including the law of human rights, and the law of civil procedure. I have for some years given a course on the rights and responsibilities of commercial enterprises in human rights law as part of BI's Master of Science degree in Law and Business. My basic legal training comes in the form of a five-year law degree from the University of Oslo (cand. jur.) and an LL.M. from Harvard Law School. I have a doctorate degree in law (D.Phil.) from the University of Oxford on a thesis subsequently published by Oxford University Press as *Companies before the European Court of Human Rights: Exploring the Structure of ECHR Protection* (2006).
8. Prior to joining the BI faculty in 2023, I have served as associate professor of human rights law at the University of Oslo, senior legal adviser at the Norwegian Ministry of Foreign Affairs, acting appeals court judge at Borgarting Court of Appeal in Oslo, and, most recently, chief analyst at the Norwegian Ministry of Justice. Between 2008 and 2022 I was attorney at the Office of the Attorney General for Civil Affairs, representing various government ministries in civil cases before all court instances in Norway, including several grand chamber and plenary cases before the Supreme Court of Norway, and international courts and tribunals. In the capacity of attorney at the Attorney General's Office, I served as the Norwegian Government's permanent agent before the European Court of Human Rights and the United Nations human rights committees in the period 2012-2022 (and as co-agent for four years prior). I am thoroughly familiar with how international human rights bodies (and domestic courts) interpret and apply the human rights conventions of the United Nations and the Council of Europe.
9. My research interests and prior and current publications concern the intersections between international and national law, both substantive and procedural, and the role of business interests in public international law and human rights law. In my personal capacity I have served as member of several government-appointed legislative committees, the majority of which on human rights related issues, and I have been an independent consultant for the Council of Europe. I have served on the editorial committees of the Nordic Journal of International Law and Harvard International Law Journal, and I have been the editor-in-chief of the Nordic Journal of Human Rights.

## 3. The right to an effective remedy is an accessory human right distinct from remedies as reparation

### 3.1. Introduction

10. The complainants in their submission to the NCP state that Aker BP's "conduct in the context of the merger may have contributed to the denial of a remedy for rights holders", and also that there is an "undue delay of an ongoing denial of a remedy" and an "ongoing breach of the right to a remedy".<sup>1</sup> The expert opinions of dr. Van Ho and Professor Ramasastry similarly approach the core issue before the NCP by employing similar terms, including "the denial of an adequate

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<sup>1</sup> See, inter alia, paras. 2, 25, and 28 of the complainants' submission 24 November 2023.

and effective remedy”, that “the ongoing denial of remedy is itself an ‘adverse human rights impact’” in the meaning of the 2011 OECD Guidelines, and that there is an “ongoing absence of a remedy” or “an ongoing denial of access to an effective remedy”.<sup>2</sup>

11. The expert opinions further take on the statement in the NCP’s initial assessment that the right to an effective remedy “is a human right in itself”, in that they emphasise that the right to an effective remedy has “independent recognition and content” and can be subject to a violation in and by itself.<sup>3</sup> The expert opinions state that a business “can also contribute to the denial of a right to an adequate remedy”, and that it “has contributed to the denial of the right to an effective remedy in line with Article 2(3) of the ICCPR” if it “undertakes a merger or acquisition in a manner that effectively prevents victims from accessing an effective remedy – either through the denial of process or the effective denial of substantive reparation”.<sup>4</sup>
12. I understand the complainants’ position to be that they are entitled to a remedy under international human rights law in relation to human rights violations that occurred in Sudan in the period 1999-2003, and that this violation is “ongoing” until it is remedied. The Swedish private company Lundin Energy is accused of having contributed to the human rights violations, and the implication is that Lundin Energy for some time has been under an obligation with regard to remedies to the victims.
13. Aker BP’s response to the NCP of 24 June 2022 states that lack of remedy for past violations does not in and of itself constitute an ongoing human rights violation. The complainants in their submission on 24 November 2023 para. 28 (b) allege that this statement is “based on a flawed understanding of international human rights law”. I do not agree that Aker BP’s submission misrepresents international human rights law.
14. Having studied the complainants’ submissions and the expert opinions of dr. Van Ho and Professor Ramasastry, I believe two basic clarifications are called for. The first concerns the apparent conflation between the human right to an effective remedy on the one hand, and remedies in terms of a right to reparation on the other. The second concerns what it means that the human right to an effective remedy is an accessory right. I will deal with the two issues in this order, and I use dr. Van Ho’s expert opinion as my point of departure.
15. After these clarifications I will explain in more detail in the subsequent sections why there is not an ongoing violation of human rights for the purpose of the present NCP complaint.

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<sup>2</sup> See, inter alia, paras. 3, 6, 19 and 37 of dr. Van Ho’s expert opinion, and paras. 5, 24, 26, 35, and 52 of Professor Ramasastry’s expert opinion.

<sup>3</sup> See, inter alia, dr. Van Ho’s expert opinion para. 12 (the right is not “devoid of its own content” and that it has “independent recognition and content”), and further paras. 21-26 (referring to practice of the Human Rights Committee and case law of the European Court of Human Rights). Professor Ramasastry’s expert opinion generally concurs with dr. Van Ho’s expert opinion, see para. 24

<sup>4</sup> Dr. Van Ho’s expert opinion paras. 37 and 39.

3.2. The right to remedies is a two-sided concept, which in any event needs treaty basis as far as human rights violations are concerned

3.2.1. *Introduction*

16. Dr. Van Ho's expert opinion para. 13 states that the right to an effective remedy in the Universal Declaration of Human Rights (UDHR) Article 8 "reflects a general principle of public international law – of which IHRL is a subfield – in which 'any breach' of an international undertaking 'involves an obligation to make reparation' and that 'reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself'. The expert opinion then cites excerpts from the 1927 judgment of the Permanent Court of International Justice (PCIJ) in *Case concerning Factory at Chorzów*.
17. Further, para. 17 of dr. Van Ho's expert opinion recalls the *UN Basic Principles and Guidelines on the right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law* (albeit referring to Pillar 2 on businesses' responsibility rather than Pillar 1 on the obligations of States). The expert opinion says that "[t]he right to a remedy and reparation is elaborated in" this document, and that "the Basic Principles – like the 2011 Guidelines – recognise that the responsibility to provide remedies is intrinsic to meeting the responsibility to respect human rights (Principle 3(d))". This exposition forms one of the bases for the statement in dr. Van Ho's expert opinion para. 18 that "[g]iven the numerous relevant references to the right to a remedy in relevant human rights and humanitarian law instruments, businesses should account for the right to remedy during due diligence ...".
18. It is not entirely clear to me what these sections of dr. Van Ho's expert opinion intend to convey. They may, however, intimate the existence of a norm in customary international law on a right to a remedy for human rights violations that complements the provisions in human rights treaties, and that this assumed norm may impose further duties than what follow from the treaties, including a right to reparation in the form of economic compensation that corresponds with what is espoused by the complainants in the present instance. Such a position is unfounded.
19. First, dr. Van Ho's expert opinion seems not to distinguish between two different categories of international law norms on remedies that operate side by side, notably *the right to an effective remedy as a human right* on the one hand, which is the matter before the NCP, and the right to remedies as a means of reparation at an aggrieved party's disposal once a breach of international law has been established (I refer to the latter category as *remedies as reparation*), on the other. Second, dr. Van Ho's expert opinion seems to build on a misconceived assumption that the right to remedy – regardless of categorisation – in the context of human rights has an international law existence outside the scope of human rights conventions.
20. As I will explain in the following, a distinction must be drawn between the two different sets of international law norms on remedies, since only the right to an effective remedy as a human right is of relevance for the NCP complaint, and this human right only has a basis in treaty law – it does not exist beyond human rights conventions.

3.2.2. *The right to an effective remedy as a human right*

21. ICCPR Article 2(3) exemplifies the first category – the right to an effective remedy *as a human right* – and so does Article 13 of the European Convention on Human Rights (ECHR). Without exception this category refers to the right of an individual (and a corresponding duty on the

State) to have recourse to effective remedies in the domestic legal system of the State in question. As considered below, the right to an effective remedy as a human right is contingent upon the aggrieved individual having made an “arguable claim” that another human right in the same treaty has been violated, and it further does not guarantee an outcome; its nature is procedural and accessory.

22. Further, and importantly, the right to an effective remedy as a human right must have a basis in a treaty: there is no merit in the view that it exists as a customary international law rule beyond human rights conventions. Indeed, not even all human rights treaties acknowledge the right to an effective remedy as a human right. This includes for instance the International Covenant on Economic, Social and Cultural Rights, the other main convention besides the ICCPR that is explicitly mentioned in the Commentary to the 2011 OECD Guidelines in its explanation of the Guidelines’ singular concept of ‘human rights’.

### 3.2.3. Remedies as reparation

23. I do not agree with dr. van Ho’s expert opinion in suggesting that a human rights norm on remedies exists beyond human rights treaty law. I will briefly explain why this is so. The excerpts from *Factory at Chorzów* and the 2005 UN Basic Principles referred to in dr. Van Ho’s expert report paras. 13 and 17-18 exemplify the other category – *remedies as reparation*. This type of norm also needs treaty basis as far as human rights violations are concerned, and the source material on which dr. Van Ho’s expert opinion draws does not suggest otherwise. Dr. Van Ho’s expert opinion paras. 13 and 17-18 do not provide evidence of a customary rule of international human rights law on the right to a remedy, be it as a human right or as remedial sanction. The existence of the right to remedies and what it entails is a matter belonging to the realm of international human rights treaties, and how they are interpreted.
24. The *Factory at Chorzów* judgment dealt with a dispute over the form and quantum of reparation once an international law breach between two States was confirmed. Poland argued that the Court did not have jurisdiction to decide on this issue, as the decisive treaty did not consider it. The PCIJ disagreed and stated as follows (quoted in part in para. 13 of dr. Van Ho’s expert opinion):

*“It is a principle of international law that the breach of an engagement involves an obligation to make reparation in any adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.”<sup>5</sup>*

25. The International Law Commission, the UN expert body on international law, sought in its 2001 *Draft articles on State responsibility for internationally wrongful acts* to codify customary international law on the responsibility of States in relation to other States. Draft Article 31 (Reparation) sets forth that a responsible “State is under an obligation to make full reparation to the other State for the injury caused by the internationally wrongful act”. The International Law Commission’s authoritative *Commentary* makes clear that the intention of Draft Article 31 was to

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<sup>5</sup> Permanent Court of International Justice, *Factory at Chorzów* (Claim for Indemnity) (Jurisdiction) (Germany v. Poland), judgment 8 February 1927, PCIJ Series A no. 9 p. 1 at p. 21 (not, as stated in dr. Van Ho’s expert opinion, at p. 29).

codify the *Chorzów Factory* statement cited above.<sup>6</sup> Draft Article 33 further clarifies the scope of the chapter on the rules on reparation (which, inter alia, includes compensation in Draft Article 36). Draft Article 33 makes clear that these customary rules concern the relationship between States, and, conversely, not the relationship between a State and an aggrieved individual (a situation typified in international law by the law of human rights). The *Commentary* explains this further (emphases added):

*"In cases where the primary obligation is owed to a non-State entity, it may be that some procedure is available whereby that entity can invoke the responsibility on its own account and without the intermediation of any State. This is true, for example, under human rights treaties which provide a right of petition to a court or some other body for individuals affected ... The articles do not deal with the possibility of the invocation of responsibility by persons or entities other than States, and para. 2 makes this clear. It will be a matter for the particular primary rule to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account ..."*<sup>7</sup>

26. In other words: the customary rules on remedies as reparation for international wrongful acts only govern the relationship *between States*. The issue of remedies as reparation to be made by a State *to an individual* is a matter of treaty law (as a "primary rule"). Human rights treaties must consequently be consulted to clarify whether and to what extent reparation is called for.
27. There is no uniform approach in international human rights conventions as to the acknowledgement of remedies as reparation. ECHR Article 41 gives the European Court of Human Rights competence to determine that the State responsible for a breach of the ECHR must provide for reparation. But such reparation is available only insofar as the European Court of Human Rights has dealt with the case in question; it does not provide for a universal right to reparation under the ECHR beyond the Court's competence.
28. The ICCPR contains no similar provision, as it established the Human Rights Committee as a supervisory organ with a finite mandate. The Committee's primary function (Article 40) is to consider and make comments on the States Parties' periodic reports "on the measures they have adopted which give effect to the rights" of the ICCPR "and on the progress made in the enjoyment of those rights". For States having ratified the Optional Protocol, the Committee is additionally competent to "receive and consider" (Article 1) individual complaints, and to forward its "views" on their merit to the parties (Article 5(4)). The ICCPR does not provide for the Committee to decide on remedial measures when it "views" that the Covenant has been violated.
29. As far as the *UN Basic Principles on the right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law* are concerned, they were drawn up by the then Commission on Human Rights (the predecessor to the present Human Rights Council) in the form of a political resolution.<sup>8</sup> Upon the recommendation by another political organ of the United Nations – the Economic and Social Council<sup>9</sup> – the UN General Assembly, the UN's foremost

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<sup>6</sup> International Law Commission: Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 91.

<sup>7</sup> International Law Commission: Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 95.

<sup>8</sup> Resolution 2005/35 of 19 April 2005.

<sup>9</sup> Resolution 2005/30 of 30 July 2005.

political institution, on 15 December 2005 adopted the Basic Principles in the form of a General Assembly resolution and at the same time recommended that States “took them into account, promote respect thereof and bring them to the attention of” their respective national audiences, including public authorities.<sup>10</sup>

30. Para. 3(d) of the UN Basic Principles, which is mentioned but not quoted, in dr. Van Ho’s expert opinion para. 17, states that “[t]he obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to ... [p]rovide effective remedies to victims, including reparation, as described below”. As will be discerned from this, and the subsequent considerations found in the document “below” para. 3, the Basic Principles predominantly deal with availability of remedies in the sense of reparation. As William A. Schabas writes in his treatise on the ICCPR, “[i]t is essential to distinguish between the procedural right to an effective remedy [such as ICCPR Article 2(3)] and the substantive right to reparation as a victim”, and in continuation he refers to the UN Basic Principles as an example of the latter.<sup>11</sup> They also do not provide evidence of a customary international law rule on reparation for human rights violations. A close reading of the text of the UN Basic Principles clarifies that they acknowledge the distinction between existing legal obligations and policy recommendations, and that the Basic Principles belong to the latter category where there is no international law basis for them.
31. I add that the Human Rights Committee has developed detailed guidelines on implementation of reparation with reference to the UN Basic Principles, and they form the basis for the Committee’s practice to indicate to the respondent State what measures of reparation that may provide redress for the Committee’s conclusion the ICCPR has been breached in an individual case brought before it.<sup>12</sup> The Committee in its more recent practice even additionally recalls ICCPR Article 2(3) when recommending what means of reparation be suitable. This does not suggest that the Committee imposes means of reparation following its view that the Covenant has been breached, for which it has no treaty mandate. It is rather the Committee’s way of drawing the States’ attention to their binding obligation to provide for effective remedies where appropriate.<sup>13</sup> I will revert to this and other forms of practice from the Human Rights Committee below.

#### 3.2.4. Conclusion

32. To conclude, there is no basis for the view that a customary international human rights law rule on remedies exists beyond what is found in international human rights treaties. There are no rules of international law in the context of human rights violations which imposes further duties on the State and, correspondingly, more extensive rights for the individual to a remedy than

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<sup>10</sup> Resolution 60/147 of 15 December 2005, see item 2 of the preamble.

<sup>11</sup> William A. Schabas: *Nowak’s CCPR Commentary* (3<sup>rd</sup> rev ed) (N.P. Engel 2019) p. 70 [MN 81].

<sup>12</sup> Guidelines on measures of reparation under the Optional Protocol to the International Covenant on Civil and Political Rights, CCPR/C/158, adopted by the Human Rights Committee 30 November 2016.

<sup>13</sup> See similarly Paul M. Taylor: *A Commentary on the International Covenant on Civil and Political Rights. The UN Human Rights Committee’s Monitoring of ICCPR Rights* (Cambridge University Press, 2020) p. 82: “the Committee does not have power to order reparation. It instead draws to the attention of States their binding obligation to provide victims with an effective remedy, with an indication of which ones it considers appropriate”.



what flows from human rights treaties. The right to a remedy as a human right is governed by human rights treaty law, and that only. This is of direct import for the complaint before the NCP, where the human right to an effective remedy is the only matter to be considered, since that right, provided for by treaty law, does not go as far as suggested by the complainants and the expert opinions of dr. Van Ho and Professor Ramasastry.

3.3. The accessory nature of the right to an effective remedy and what it means that an “arguable claim” must have been made

33. It also seems helpful to clarify what is the nature and scope of the right to an effective remedy as a human right before I further consider the extent of rights and corresponding duties that flow from it, as well as the implications for the matter before the NCP.

34. For the complaint as it stands before the NCP, where the right to an effective remedy is the only human right to consider, the protection afforded to the individual will correspond with the international law responsibility of States Parties. The question as to what measures a *State* must take to protect an individual’s right to an effective remedy is therefore the relevant point of reference for the expectations of companies under Chapter IV of the OECD Guidelines. I mention this because dr. Van Ho’s expert opinion suggests that businesses “can contribute to the denial of a right to an adequate remedy” (para. 37), and further, in para. 39:

*“If a business undertakes a merger or acquisition in a manner that effectively prevents victims from accessing an effective remedy – either through the denial of process or the effective denial of substantive reparations – the business has contributed to the denial of the right to an effective remedy in line with Article 2(3) of the ICCPR.”*

35. I do not agree with this position.

36. The right to an effective remedy is fundamentally a *procedural* human right, and I will explain in more detail what that entails in section 4 below. It is also an *accessory* right. ICCPR Article 2(3)(a) provides that States are under an obligation “[t]o ensure that any person whose *rights or freedoms as herein recognized* are violated shall have an effective remedy ...” (emphasis added). A plain reading tells us that the right to an effective remedy in one way or another is linked with, is contingent upon, the existence of (other) rights and freedoms of the treaty; it can only be invoked in conjunction with one or more of the other rights protected by the same treaty. ECHR Article 13 similarly provides: “Everyone *whose rights and freedoms as set forth in this Convention* are violated shall have an effective remedy ...” (emphasis added). Aspects of contingency are often referred to in human rights doctrine as rights that are *accessory* in nature.<sup>14</sup>

37. A link between the right to an effective remedy on the one hand and another right in the same treaty on the other, is undeniably required. In the present case it is not disputed that other fundamental rights than the right to an effective remedy, and which are set forth in the ICCPR, were violated in the period 1999-2003. To me the pertinent question is *what form* of connection must exist between these other rights for an issue under the right to an effective remedy to arise (and, if applicable, be violated if circumstances dictate that outcome). I see two issues here.

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<sup>14</sup> See for instance William A. Schabas: *Nowak’s CCPR Commentary* (3<sup>rd</sup> rev ed) (N.P. Engel 2019) p. 67 (at MN 75); and partly dissenting opinion of Judges Garlicki and Mijovic in *Goranova-Karaeneva v. Bulgaria*, no. 12730/05, judgment 8 March 2021, para. 1.

38. I agree with dr. Van Ho's expert opinion, referring in para. 23 to the Human Rights Committee's views in *Kazantzis v. Cyprus* from 2003, that the right to an effective remedy under ICCPR Article 2(3) comes into force, and is liable to be violated, when the aggrieved party has made "an arguable claim" that another right in the treaty has been violated. It is not a condition for ICCPR Article 2(3) to apply that another right has been violated (even if the treaty text clearly says so). This is also the situation under ECHR Article 13, which is similarly worded. That it suffices that the aggrieved party makes an "arguable claim" that the other treaty right is violated has been accepted as law for a very long time, and it to me it does not merit in-depth discussion.
39. What needs be considered, however, is what it further means that the individual must present "an arguable claim" that other rights in the same treaty have been violated. For the protection of an aggrieved individual by the right to an effective remedy under ICCPR Article 2(3) (and ECHR Article 13) to arise, it does not suffice that the individual makes a claim – even where it is substantiated – in a private or informal setting. For the protection of the right to be set in motion, the "arguable claim" must be made *by using legal remedies available in the relevant domestic legal system* that are sufficiently capable of redress, typically in the form of presenting the claim in domestic courts which are authorised to handle the issue at hand. Regarding the "right to an effective remedy" in ICCPR Article 2(3)(a) this follows from reading it in the light of the provision in (b), with its emphasis on "competent authorities",<sup>15</sup> and having regard to the basic purpose of the right to an effective remedy, which is to ensure that the other rights in the treaty can be effectively protected within the domestic legal system.<sup>16</sup>
40. This has in my view fundamental ramifications for the matter before the NCP: the right to an effective remedy as a human right is a *procedural* guarantee for the individual to be able to submit – *to properly authorised domestic authorities* – that another substantive human right set forth in the same treaty has been violated. The procedural and accessory nature of the right to an effective remedy coupled with its base requirement of presenting an "arguable claim" before domestic authorities with sufficient competencies to handle such a claim, tells us that the right to an effective remedy as a human right fundamentally concerns the relationship between an aggrieved individual on the one hand and a State on the other.
41. As I will explain further in the next section – with regard to what effective remedies must be provided by the State pursuant to ICCPR Article 2(3) – the right of an individual to an effective remedy depends fundamentally on *what public institutions and mechanisms* are available for the victim of a breach of a substantive human right to have their claim for remedies considered in the domestic legal system. Further, *there is no guarantee as to a desired outcome*. In this the right to an effective remedy differs fundamentally from what is the situation regarding the majority of other human rights provisions encompassed by the 2011 OECD Guidelines' concept of 'human rights', where a private business can substantively violate the human rights of other

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<sup>15</sup> ICCPR Article 2(3)(b): "Each State Party ... undertakes ... (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy".

<sup>16</sup> William A. Schabas: *Nowak's CCPR Commentary* (3<sup>rd</sup> rev ed) (N.P. Engel 2019) p. 63 (MN 67): "It embodies the general principle of international law that not only the statutory implementation and structuring of international norms of human rights but also the specific protection of the individual against violations of these rights are primarily domestic concerns ...".

individuals (even if, under international human rights law, the State is responsible for such violations). The right to an effective remedy cannot by its very nature – structurally – be breached by a business, as it is not for private persons to set up a system of institutions and mechanisms for dealing with an “arguable claim” that another human right has been violated.

42. In my view, this will necessarily impact what forms of “actual or potential adverse impact”, as addressed in the 2011 OECD Guidelines, can arise when the human right to an effective remedy is the only matter to be considered. At the time of the merger, the individuals in the present case had not yet submitted any “arguable claim” for compensation to relevant Swedish authorities. At that time, it was also not possible to foresee with any degree of certainty how Swedish authorities would respond to such a claim, as this necessarily will depend on the details of the claim and how it came to be espoused. In the present case it remains to be seen how the Swedish State will discharge its obligations with regard to the claim for compensation pursuant to ICCPR Article 2(3), and until this becomes clearer one cannot in my view speak of a “potential adverse impact” with regard to the right to an effective remedy as a human right.

#### 3.4. Conclusion

43. The States’ duties in respect of protecting aggrieved individuals the right to an effective remedy come into force when aggrieved individuals initiate an “arguable claim” before sufficiently competent legal authorities that their human rights otherwise guaranteed by the treaty in question (ICCPR) have been violated. The State’s obligations are the only relevant point of reference for the purpose of the present complaint before the NCP, due to the very nature of the right to an effective remedy as a human right. At the time of the merger, an “arguable claim” for compensation had not yet been submitted. The identification of risks relating to potential breaches by a State of the procedural right to a human right to an effective remedy cannot arise before the State has responded to an “arguable claim” properly initiated before relevant authorities.
44. There is no basis for a view that a customary international human rights law norm on remedies established a duty to provide for remedies prior to this, and there is also no merit to a claim that there is a right to an effective remedy beyond human rights treaties that not only imposes duties on the State, but also on private persons, enterprises included.

### 4. **What effective remedies must be provided pursuant to ICCPR Article 2(3)?**

#### 4.1. Introduction

45. Another issue inherent in the complaint to the NCP, and which underlies dr. Van Ho’s expert opinion (with which Professor Ramasastry agrees), is whether the right to an effective remedy extends to a right of protection of funds that could be available for economic compensation if a duty to award compensation is established.
46. ICCPR Article 2(3) is the natural vantage point for examining the nature and scope of right to an effective remedy and it is also the focal point dr. Van Ho’s expert opinion. I do not see that dr. Van Ho’s expert opinion explicitly confirms that the right to an effective remedy would go as far as suggested by the complainants. However, it conveys a view that ICCPR Article 2(3) “contains substantive standards for remediation” (paras. 27-32) and that “remedies must not only be

available but must also be enforceable” (para. 33). Bearing in mind that it has been drawn up having regard to the complainants’ assertions, dr. Van Ho’s expert opinion certainly points in this direction, and, as referred to above, it builds on the assumption that there is an ongoing violation of the right to an effective remedy.

47. In my view, there is no support in relevant source material for an interpretation that the right to an effective remedy pursuant to ICCPR Article 2(3) extends to a right of protection of funds that could be available for economic compensation. I will explain why by applying the rules of treaty interpretation set forth in the Vienna Convention on the Law of Treaties (VCLT). This approach is in the circumstances the means through which an authoritative normative content of the ICCPR can be established. The International Court of Justice (the ICJ) is the only tribunal with a mandate to determine with international legal authority the meaning of the ICCPR. While it has not considered ICCPR Article 2(3), it has on occasion interpreted the ICCPR,<sup>17</sup> and stated that in interpreting human rights treaties, it is “required” to do so “[b]y applying ... the relevant customary rules of treaty interpretation.”<sup>18</sup>

#### 4.2. The wording of ICCPR Article 2(3)(a)

48. When determining the extent of rights and duties pursuant to ICCPR Article 2(3), the obvious point of departure is section (a), which says that a State that is party to the Covenant “undertakes ... (a) to ensure that any person whose rights or freedoms as herein recognized are violated *shall have an effective remedy ...*” (emphasised here).
49. It is commonly accepted that the general rule in VCLT Article 31(1) – that “the treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” – constitutes a single operation, in that the elements of interpretation – ordinary meaning, context, and object and purpose – are to be considered as a whole.<sup>19</sup> According to the ICJ’s case law, the operation nonetheless “must be based above all upon the text of the treaty,”<sup>20</sup> since this embodies the will of the parties. I know of no commonly accepted understanding of what is the “the ordinary meaning” of the term “effective remedy” in ICCPR Article 2(3)(a). My conception is that it refers to some kind of means, and that they must work in the real world. This would comprise an inordinately wide range of measures. The ordinary meaning of the term simply does not tell us much more than that it is a broad concept, the further meaning of which must be established by other means of interpretation. The terms by themselves do not resolve the question before the NCP.

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<sup>17</sup> See most prominently *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion 9 July 2004 [ICJ Reports 2004 p. 136] paras. 107-111; *Case concerning Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), judgment 30 November 2010 [ICJ Reports 2010 p. 639] paras. 64-89; and *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), judgment 4 February 2021 [ICJ Reports 2021 p. 71] para. 101.

<sup>18</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), judgment 4 February 2021 [ICJ Reports 2021 p. 71] paras. 78-97.

<sup>19</sup> See, e.g., the International Court of Justice in *Maritime Delimitation in the Indian Ocean* (Somalia v. Kenya) (Preliminary Observations), judgment 2 February 2017, ICJ Reports 2017 p. 3, para. 64.

<sup>20</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), judgment 4 February 2021 [ICJ Reports 2021 p. 71] para. 81.

#### 4.3. The context: other provisions of the ICCPR

50. The terms “right to an effective remedy” must be construed having regard to their “context,” which, according to VCLT Article 31(2) *inter alia* comprises other “text” in the same treaty. The immediate context of ICCPR Article 2(3)(a) is its two subsequent sub-provisions in (b) and (c). Article 2(3)(b) places explicit duties on the State that pertain to the effectiveness of the remedies referred to in (a): the provision essentially refers to the availability of legal remedies in the domestic legal system.<sup>21</sup> Further, Article 2(3)(c) speaks of the State’s duty “to ensure that the competent authorities shall enforce such remedies when granted”, thus connecting effectiveness to a domestic machinery of public enforcement of existing remedies. This suggests that a what constitute a “remedy”, and an “effective” one at that, primarily depend on the legal remedies that are available in the domestic legal system.
51. Further to the “context” I note that ICCPR Article 9(5) states that “[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”, and that ICCPR Article 14(6) places a duty on the State to ensure that “a person who has suffered punishment” as a result of miscarriage of justice, typically wrongful conviction, “shall be compensated”. These are the only places where the ICCPR explicitly mentions compensation as a remedy. This appears to me to be significant: if the right to an effective remedy in ICCPR Article 2(3)(a) should be interpreted as necessarily containing a right to be compensated for damage caused by a human rights breach, it would be expected that it was written down in explicit terms in that provision, as the drafters obviously were conscious of the qualities of a right to be compensated in analogous situations. Further, a reading of ICCPR Article 2(3) in the light of these two provisions indicates that it would require strong support in other relevant sources to conclude with an even more extensive norm, that the right to an effective remedy extends to a right of protection of funds that could be available for economic compensation.

#### 4.4. Purposive interpretation

52. VCLT Article 31(1) further requires that the ordinary meaning of the text, read in its context, must be construed “in the light of its object and purpose”. The principle of effectiveness (*effet utile*) as an interpretative means integral to this allows for placing some emphasis on a reading of human rights treaties that paves the way for an effective protection of human rights. It must be stressed, however, that purposive interpretation does not entail a *carte blanche* to insert ideals in positive law. A purpose-driven approach to the notion of “effective remedy” may be tempered by other elements inherent in the rules of interpretation. Commonly accepted norms of treaty interpretation inform us that the aim is to discover in “good faith” what has been the common intention of the contracting parties – the States – in agreeing upon a provision that secures the right to an effective remedy in a human rights treaty.
53. The ICCPR does not say what is the purpose of having an “effective remedy” as a right in the Covenant, but the *travaux préparatoires* tell us that the drafters had the intention of including in the ICCPR what already existed in ECHR Article 13.<sup>22</sup> To me this implies that ICCPR Article 2(3) must be construed having considerable regard to what flows from the provision on which it was modelled.

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<sup>21</sup> Cited in footnote 15 above.

<sup>22</sup> See details in William A. Schabas: *Nowak’s CCPR Commentary* (3<sup>rd</sup> rev ed) (N.P. Engel 2019) p. 34 (MN 6) and p. 63 (MN 67).

4.5. Relevant rules of international law: ECHR Article 13

54. The general rule of interpretation is accompanied by VCLT Article 31(3), which in section (c) states that “any relevant rules of international law applicable in the relations between the parties ... shall be taken into account”. ECHR Article 13 is clearly a relevant rule, being the human rights treaty provision most similar to ICCPR Article 2(3). Dr. Van Ho’s expert opinion relies on ECHR Article 13, and the provision may constitute a separate ground for the complainants’ arguments before the NCP. In the following I will consider ECHR Article 13 through the lens of it serving as a means of interpreting ICCPR Article 2(3), but what I say also applies if considering ECHR Article 13 as a separate ground for the complainants.
55. The European Court of Human Rights has had the occasion to interpret, apply and develop the right to an effective remedy under ECHR Article 13 in an extensive number of individual cases. The Court’s jurisprudence does not suggest that ECHR Article 13 forms the basis of a general duty on States Parties to provide for reparation in the form of compensation for a breach of the treaty. The abundant case law further shows us that the provision does not unequivocally place a duty on the State to provide for compensation as an effective remedy.
56. The case law of the Court tells us is that “remedies” in the sense of ECHR Article 13 encompass a display of primarily legal means. This includes access to domestic legal proceedings, be they civil or criminal, and whether these proceedings are accompanied by fair trial guarantees. Remedies may also include, but the list is not exhaustive, the availability of criminal investigation and other *post hoc* judicial remedies such as access to proceedings for the possible establishment of criminal liability and punishment, declaratory judgments, and compensation for material or immaterial loss.
57. The case law also makes clear that the full range of available domestic remedies must be considered as a whole in determining whether the State has discharged its duty to secure the right to an “effective” remedy; the aggregate of remedies provided for under domestic law may meet the requirement of effectiveness, even where no single remedy may itself entirely satisfy it.<sup>23</sup> The Court has on several occasions confirmed that ECHR Article 13 does not go as far as to require any particular form of remedy, as the States are afforded some measure of discretion as to the manner in which they overall discharge their duties under Article 13.<sup>24</sup> The Court generally states that for remedies to be “effective”, they must “be capable of directly remedying the impugned situation”. This is taken to mean that they could have prevented the alleged violation occurring or continuing or would afford “appropriate redress” for the aggrieved individual.<sup>25</sup> “Appropriate redress” may include economic compensation, but not necessarily so. The Court further states that “effectiveness” does not depend on the certainty of a favourable outcome for the individual.<sup>26</sup>
58. Even in cases that concern arguable claims of violations of the right to life (Article 2) and the prohibition of torture and other forms of ill-treatment (Article 3), which is the case here, the

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<sup>23</sup> See, e.g., *Silver and Others v. United Kingdom*, no. 5947/72, Plenary judgment 25 March 1983, para. 113.

<sup>24</sup> See, e.g., *Kaya v. Turkey*, no. 22729/93, judgment 19 February 1998, para. 106.

<sup>25</sup> See, e.g., *Kudla v. Poland*, no. 30210/96, Grand Chamber judgment 26 October 2000, para. 158.

<sup>26</sup> See, e.g., *Kudla v. Poland*, no. 20310/96, Grand Chamber judgment 26 October 2000, para. 157.

Court considers that the aggregate of remedies available may suffice: remedies that are available consecutively, in parallel or that cater for different aspects of redress may under an overall assessment be regarded as providing an “effective remedy” in the sense of ECHR Article 13.<sup>27</sup> It is also to be noted that in cases of an alleged violation of the right to life or the prohibition of torture and other forms of ill-treatment, the Court generally states that ECHR Article 13 requires an award of compensation – be it for material or immaterial harm – “where appropriate”, and this entails in practice that compensation for damage flowing from the breach should, in principle, be available as part of the panoply of remedies provided for in domestic law.<sup>28</sup> The case law does not go as far as requiring the State to provide compensation regardless of whether the relevant conditions in domestic law have been satisfied, and it certainly does not extend to an additional duty to ensure that the perceived perpetrator maintain sufficient funds to be able to discharge any obligation to pay damages.

59. It is helpful to know in what instances the European Court of Human Rights typically finds that ECHR Article 13 has been violated. They include absence of effective criminal investigation when called for, unavailability in principle of core legal remedies such as action for damages, and lack of due process guarantees in the domestic proceedings. The threshold for establishing a violation of ECHR Article 13 is generally high.
60. An interpretation of ICCPR Article 2(3) in the light of ECHR Article 13 will hardly result in an outcome that gives the former a more powerful human rights guarantee than the latter. In my view, ICCPR Article 2(3) interpreted in the light of relevant rules of international law strongly points to a norm that does not promise the guarantees pertaining to economic compensation that are espoused by the complainants before the NCP.

#### 4.6. “Supplementary means”: the practice of the Human Rights Committee

61. Finally, VCLT Article 32 provides for the use of “supplementary means of interpretation”:

*“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:*  
(a) *Leaves the meaning ambiguous or obscure; or*  
(b) *Leads to a result which is manifestly absurd or unreasonable.”*

62. Of the possibly relevant “supplementary means” mentioned in Article 32, I have already dealt with what may be derived from the *travaux préparatoires* of the ICCPR. What remains is the practice of the Human Rights Committee. By this I mean the Committee’s “views” in individual disputes, and the General Comment adopted by the Committee that considers ICCPR Article 2(3), notably paras. 15-20 of General Comment No. 31 on *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (2004).
63. Dr. Van Ho’s expert opinion on ICCPR Article 2(3) draws on this practice in two sections: first in paras. 27-32, and second in para. 33. I will also comment on the Committee’s practice, but I

<sup>27</sup> See, e.g., *Brincat and Others v. Malta*, no. 60908/11, judgment 24 July 2014, para. 64; and *Giuliani and Gaggio v. Italy*, no. 23458/02, Grand Chamber judgment 24 March 2011, para. 337-338.

<sup>28</sup> See, e.g., *Keenan v. United Kingdom*, no. 27229/95, judgment 3 April 2001, para. 130; and *McGlinchey and Others v. United Kingdom*, no. 50390/99, judgment 29 April 2003, para. 66.

believe it requires a different vantage point: the Committee is not a legal body, and the relevance ascribed to its practice, for international law purposes, reflects this fact. The ICJ has made clear that it is “in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the [ICCPR] on that of the Committee”. The ICJ nonetheless believes that in the name of clarity and consistency “it should ascribe great weight to the interpretation adopted by” it.<sup>29</sup> I adhere to this guideline.

#### 4.6.1. Does ICCPR Article 2(3) contain “substantive standards of remediation”?

64. I first consider dr. Van Ho’s expert opinion bearing the heading “Article 2(3) also contains substantive standards for remediation” (paras. 27-32). Para. 27 of dr. Van Ho’s expert opinion claims that Article 2(3) in addition to containing an obligation to provide “a procedural avenue for redressing wrongdoing” also comprises a duty to provide for “the substantive response necessary to ensure that the right to remediation is meaningfulness (sic) and redresses the victim’s harms”, and para. 32 similarly asserts that “the right to a remedy not only contains a procedural element but also substantive standards of redress”. The basis for this is the practice of the Human Rights Committee.
65. If this intends to suggest that the right to an effective remedy in ICCPR Article 2(3) include a right to reparation, and, further, a duty to ensure that a liable party maintain sufficient funds for paying compensation, I respectfully disagree for reasons already considered above. ICCPR Article 2(3) is a provision for the human right to an effective remedy only; it is not also a basis for remedies as reparation. The practice of the Committee cited in dr. Van Ho’s expert opinion paras. 27-32 is not conducive of changing my view on this.
66. Dr. van Ho’s claims may however also suggest that the human right to an effective remedy in ICCPR Article 2(3) imposes duties as to what forms of remedies must be made available in the State’s domestic legal system, and that the duty to ensure such remedies, in order to be “effective”, entails a right for the individual to protection of sufficient funds in the event that compensation is awarded.
67. I do not agree with such an analysis of the Committee’s practice. General Comment No. 31 says in para. 15 that States “must ensure that individuals have ... accessible and effective remedies to vindicate” the other rights of the treaty, and this comprises a range of domestic “judicial and administrative mechanisms” such as investigation (paras. 15 and 18), reparation in the form of “compensation” and “restitution, rehabilitation, and measures of satisfaction such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practice, as well as bringing to justice the perpetrators of human rights violations” (para. 16), the taking of measures “to prevent a recurrence of a violation” (para. 17), and “provisional or interim measures” (para. 19).
68. Evidently, and as is the case under ECHR Article 13, the Committee considers that States may discharge their duties to ensure the availability of remedies by various judicial and administrative

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<sup>29</sup> *Case concerning Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), judgment 30 November 2010 [ICJ Reports 2010 p. 639] para. 66. See similarly *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), judgment 4 February 2021 [ICJ Reports 2021 p. 71] para. 101, which gives precedence to an interpretation that follows the customary rules of treaty interpretation.



means; that to some extent it is up to the States themselves how the duty is discharged; and, importantly, that an outcome favourable to the aggrieved individual depends on the findings of the judicial or administrative mechanisms.

69. General Comment No. 31 does, however, indicate that certain types of remedies should be available in certain circumstances. Dr. Van Ho's expert opinion in paras. 28-31 rightly mentions that the Committee considers that "failure to investigate" and "failure to bring to justice perpetrators" of certain serious acts regarded as criminal in domestic and international law could give rise to a violation of ICCPR Article 2(3)(a).
70. I have for my part observed that General Comment No. 31 para. 16 says that in addition to the explicit reference to remedies in the form of compensation referred to in ICCPR Articles 9(5) and 14(6), "the Committee considers that the Covenant generally entails appropriate compensation". This suggests that compensation for material or immaterial damage may count among relevant remedies that should be available in the domestic legal system. The turn of phrase is, however, to be noted: it is the Committee's opinion ("considers") that compensation should be available, and what counts as "appropriate" compensation may, clearly, depend on the circumstances. The wording also presupposes that compensation has been decided by a domestic mechanism authorised to do so. It is clearly not a basis for a further duty on the State to ensure that a person keep sufficient funding in the event of liability for economic compensation.
71. General Comment No. 31 was adopted in 2004, and, while not repealed by the Committee, it has not incorporated any subsequent Committee practice. I have to the best of my ability, by using relevant search engines available for analysing the Committee's views in individual cases, consulted practice from 2004 onwards, both regarding the Committee's views on whether the right to an effective remedy in Article 2(3) has been violated, and the Committee's references to ICCPR Article 2(3) in its practice of recommending reparation following its conclusion that a State has breached the Covenant (mentioned above in para. 31).
72. In no instance has the Committee concluded that the right to an effective remedy pursuant to Article 2(3) has been violated because the remedy of compensation has not been sufficiently discharged *if it is available in principle* in the domestic legal system. In one case, from 2020, did the Committee find that lack of compensation constituted a violation of ICCPR Article 2(3). The reason for the Committee's conclusion was that the individual's claim for compensation for immaterial loss was rejected out of hand in the criminal case, and that there were *no alternative legal avenues* in the domestic system for the victim to obtain compensation outside the criminal procedure context.<sup>30</sup> As is the case with the European Court of Human Rights with regard to ECHR Article 13, the Committee tends to find violations of the right to effective remedy in instances where the most basic forms of possibly effective legal remedies are unavailable in the domestic legal system, or where public authorities, the courts included, disregard them. The expositions of Committee practice in the leading commentaries on the ICCPR tell the same story.<sup>31</sup>

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<sup>30</sup> *Mitko Vanchev v. Bulgaria*, communication no. 2820/2016, views adopted by the Committee 6 November 2020, see para. 7.7.

<sup>31</sup> See, typically, Paul M. Taylor: *A Commentary on the International Covenant on Civil and Political Rights. The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge University Press, 2020) pp. 78-86; Sarah Joseph and Melissa Castan: *The International Covenant on Civil and Political Rights. Cases, Materials and*

73. Regarding the Committee's practice (referred to in para. 31 above) to recommend forms of reparation upon finding that a complainant has been the victim of a violation of the Covenant, my analysis shows that the Committee quite often suggests compensation to be the appropriate remedy. It then invariably asks the respondent State to provide the victim with "adequate" compensation.<sup>32</sup> To me this clearly suggests that whether compensation be awarded, and by what quantum, must be decided by national mechanisms properly authorised to do so. This part of the Committee's practice also does not change my reading of what rights and duties that flow from ICCPR Article 2(3).

#### 4.6.2. *What does the duty of enforcement of remedies entail?*

74. Second, I comment on what dr. Van Ho's expert opinion considers in para. 33, under the heading "Remedies must not only be available but also be enforceable", which mentions that Article 2(3)(c) provides for a duty of enforcement, and where one case from the Human Rights Committee is used as evidence for the view that the right to an effective remedy "is not just about providing an avenue for remediation but ... also requires that remedies be enforced". To my mind this summation should be accompanied by qualifications, and, while dr. Van Ho's expert opinion does not say so explicitly, ICCPR Article 2(3)(c) in any event does not entail a duty to ensure that a party maintains sufficient funds in the event of liability.

75. The wording of the duty of enforcement in section (c) tells us that "[e]ach State Party to the Covenant undertakes ... to ensure that the competent authorities shall enforce such remedies *when granted*" (emphasis added here). The case mentioned in dr. Van Ho's expert opinion – *Baritussio v. Uruguay* – concerned an individual kept imprisoned even after she had served her sentence. I do not see its relevance for our purposes. A more pertinent example is *Horvath v. Australia* from 2014, which concerned police legislation limiting the responsibility for wrongful acts without domestic law providing for an alternative mechanism for compensation.<sup>33</sup> The Committee found a breach of Article 2(3). It noted, as a general observation, that the duty of enforcement "means that State authorities have the burden to enforce judgements [sic] of domestic courts which provide effective remedies to victims" (para. 8.6). The Committee further noted that when "the execution of a final judgement (sic) becomes impossible in view of the circumstances of the case, other legal avenues should be available in order for the State to comply with its obligation" under Article 2(3). As the respondent State did not show that such "alternative avenues existed or were effective" (para. 8.7), the Committee found a violation of ICCPR Article 2(3).

76. The Committee's reliance on the (absent) availability of other possible legal avenues is, in my view, indicative of what the Committee requires from States parties to the treaty as far as the duty of enforcement is concerned.<sup>34</sup> I do not find any support in the Committee's practice for a view that the duty extends to a general right of protection of funds that could be available for economic compensation if a duty to award compensation is established.

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*Commentary* (3<sup>rd</sup> ed, Oxford University Press 2013) pp. 867-882; and William A. Schabas: *Nowak's CCPR Commentary* (3<sup>rd</sup> rev ed) (N.P. Engel 2019) pp. 63-77.

<sup>32</sup> See, typically, *Kurmanbek Chynbekov v. Kyrgyzstan*, communication no. 2429/2014, views adopted by the Committee 30 October 2020, para. 9.

<sup>33</sup> *Horvath v. Australia*, communication no. 1885/2009, views adopted by the Committee 27 March 2014.

<sup>34</sup> See further Schabas pp. 74-75; Joseph and Castan pp. 873-877; and Taylor pp. 85-86.

#### 4.7. Conclusion

77. Based on the above I conclude that the right to an effective remedy does not extend to a right of protection of funds that could be available for economic compensation if a duty to award compensation is established.

### 5. **Remarks on the relevance of provisions in other human rights instruments**

78. I will briefly comment on the right to an effective remedy and similar concepts set forth in other human rights and other instruments than ICCPR Article 2(3), as dr. Van Ho's expert opinion suggests their significance. ECHR Article 13 is the provision that is most relevant, and it has been dealt with separately above.

#### 5.1. UDHR Article 8

79. Dr. Van Ho's expert opinion rightly does not claim that UDHR Article 8 indicates a more comprehensive right to an effective remedy than what may be discerned from ICCPR Article 2(3), but it evidently includes it as one of "the numerous relevant references to the right to remedy in relevant human rights and humanitarian law instruments" (para 18).

80. UDHR Article 8 proclaims that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law". For reasons indicated above this cannot be evidence of a customary international law norm of the right to an effective remedy, and it also does not reflect a customary international law right of reparation in cases of human rights violations. Further, I know of no source material that supports a broader reading of UDHR Article 8 than what may be derived from international human rights treaties on the right to an effective remedy.

81. In my view UDHR Article 8 is not of any assistance in the case before the NCP.

#### 5.2. Article 7 of the African Charter on Human and Peoples' Rights

82. Dr. Van Ho's expert opinion para. 15 states that "the right to an effective remedy is an independent right in the 1981 African Charter on Human and Peoples' Rights, Article 7". I cannot agree with this.

83. The provision sets out the right to a fair trial and the principle of legality in criminal law (*nullum crimen sine lege*). Article 26, on the other hand, is sometimes said to constitute the African Charter's provision on the right to effective remedies, but it is very much a watered down version ("States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of rights and freedoms guaranteed by the present Charter"). The Charter contains no provision on par with ICCPR Article 2(3). The Charter does not

constitute relevant material for the complaint before the NCP.<sup>35</sup>

### 5.3. Provisions in international humanitarian law treaties

84. Paras. 11, 12 and 16 of dr. Van Ho's expert opinion suggest that the right to an effective remedy in international humanitarian law treaties be relevant, and the Commentary to the 2011 OECD Guidelines refers in para. 40 to "the standards of international humanitarian law" as a set of norms that enterprises "should respect" in relevant circumstances.
85. Para. 11 of dr. Van Ho's expert opinion refers to the ICJ's Advisory Opinion from 2004 in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and proclaims that its para. 106 says that the rules of international humanitarian law "help define when a human right has been breached". I do not agree with this.
86. The ICJ in para. 106 simply observes that "the protection offered by human rights conventions does not cease in the case of armed conflict" and that international human rights law and international humanitarian law – being two separate branches of international law – provide different forms of protection that both applies in an armed conflict.<sup>36</sup> In my view the right to an effective remedy in Article 91 of the 1977 Additional Protocol I to the Geneva Conventions of 1949 and Articles 75 and 81 of the 1998 Rome Statute of the International Criminal Court, referred to in dr. Van Ho's expert opinion, are in any event of no relevance for the purpose of the case before the NCP. I will briefly explain why.
87. Article 91 ("Responsibility") of the 1977 Protocol Additional I to the Geneva Conventions of 1949 states that "[a] Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation." It codifies customary international law of state responsibility between warring States, including the proviso that a warring State may pay compensation as reparation once it is determined that that State has violated the laws of war. It does not encompass a direct right to compensation for individuals harmed in such a conflict.<sup>37</sup> It also does not specify in any detail what "compensation" may comprise.
88. Article 75 ("Reparations to Victims") of the 1998 Rome Statute of the International Criminal Court mandates the International Criminal Court, in cases brought before it, to order reparation to individuals, including compensation, as a sanction upon finding that a person has been convicted of a crime within the Court's jurisdiction. It does not deal with the right to an effective remedy as a human right, and it is not evidence of a customary international law rule on reparation for human rights breaches. I also do not see how Article 81 of the 1998 Rome Statute may inform aspects of the present complaint. It deals with appeals against the ICC's acquittals,

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<sup>35</sup> Article 25 of the American Convention on Human Rights (Right to Judicial Protection), not mentioned in dr. Van Ho's expert opinion, also provides for a form of guarantee of effective remedies notably less extensive than ICCPR Article 2(3).

<sup>36</sup> See also para. 105 of *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion 9 July 2004, ICJ Reports 2004 p. 136, referring to *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion 8 July 1996, ICJ Reports 1996 p. 240, para. 25.

<sup>37</sup> See further Sandoz et al: *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff 1987) pp. 1053 et seq.

convictions, and sentencing of individuals tried by the ICC for perpetrating relevant international legal norms.<sup>38</sup>

## **6. Summary observations and conclusions**

89. Above I have sought to assist the NCP in the above-mentioned Specific Instance by drawing the NCP's attention to the distinction that exists in international human rights law between the right to an effective remedy as a human right and the entitlement to remedies as reparation for human rights breaches, and that the right to an effective remedy is a matter for human rights treaty law only.
90. I have also brought to attention the nature and scope of the right to an effective remedy in ICCPR Article 2(3) (and ECHR Article 13). Since it is a procedural and accessory human right, the guarantees under it only come into play when an aggrieved individual can make an "arguable claim" in relevant domestic legal mechanisms that another right of the treaty has been violated. I have understood that the latter is a premise for the discussion of the scope of "the right to remedy as a human right in itself," as other human rights were violated in Sudan in the period 1999-2003.
91. Further, I have analysed the right to an effective remedy in ICCPR Article 2(3) by using the mandatory rules on treaty interpretation, where I have indicated what duties on the States Parties (and corresponding rights to aggrieved individuals) flow from it, and I have examined whether the right to an effective remedy under international human rights law extends to a right of protection of funds that could be available for economic compensation if and when an obligation to award compensation is established.
92. The right to an effective remedy may encompass a variety of means, but it does not guarantee a particular outcome. The individuals in question have been provided with several potent remedies by virtue of, firstly, the Swedish prosecutor's investigation into the victims' claims, and, secondly, the ongoing criminal proceedings in Sweden. The Swedish legal system opens for civil claims for damages by victims of human rights violations to be heard either in conjunction with criminal proceedings or, alternatively, in separate civil proceedings. Publicly available sources further indicate that the Swedish legal system has a sophisticated machinery for an aggrieved individual to initiate independent civil proceedings to seek compensation. The plaintiffs would be aided by the prosecutor establishing grounds for liability, if it exists. There are many ways in which a duty to pay compensation, if liability is established, can be discharged and enforced with the aid of the state, pursuant to Swedish law.
93. I offer the following conclusions to the questions I have been asked to consider:
- (i) Based on the standard required for what rights (and corresponding duties) that may be derived from the right to an effective remedy in ICCPR Article 2(3), it is in my opinion not prescient to speak of "denial" and "absence" of relevant effective remedies in this case,

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<sup>38</sup> Article 85 of the 1998 Statute of the International Criminal Court provides for rules on compensation for persons who have been wrongfully arrested or convicted for an international criminal act. This provision also does not assist for the purpose of the present NCP complaint.

and it would further not be appropriate to conclude that effective remedies have been “denied”, “absent” or “delayed” before the Swedish legal system has had the opportunity to deal in substance with a claim for compensation.

- (ii) The human right to an effective remedy does not extend to a right of protection of funds that could be available for economic compensation if a duty to award compensation is established.
- (iii) Based on the facts and claims set forth in the complaint before the NCP, I cannot see that the right to an effective remedy as a human right is impacted. I reach this conclusion based on the facts relied upon by the complainants compared to an examination of the nature and scope of the right to an effective remedy as an internationally recognised human right (cf. Ch IV of the 2011 OECD Guidelines).

\* \* \*

Yours truly

A handwritten signature in black ink, appearing to read 'Marius Emberland', with a stylized, cursive script.

Marius Emberland