Before the National Contact Point for Responsible Business Conduct Norway
Civil Society Coalition on Natural Resources, et al., against Aker BP and Aker ASA

Expert response by Dr Tara Van Ho

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1. I wish to briefly respond to Professor Emberland's expert opinion submitted in this case. My credentials were set out in my first submission to this NCP. As occurred then, this expert opinion is offered for the benefit of the NCP, was voluntarily offered to the complainants due to the importance of the issues in this case, and is being done without compensation of any form.
2. I write this submission with tremendous respect for Professor Emberland, who is rightly respected in general international human rights law and in other areas of public international law. His expertise is commendable, but he errs in his application of this expertise to the OECD Guidelines and the specifics of Business and Human Rights. These errors are significant and require a brief explanation for the benefit of the NCP.

The Right to Remedy is Already an Accessory Claim in this Case; the Question is on Who is Responsibility for Providing it

3. First, Professor Emberland spends a great deal of time establishing the accessory nature of the right to an effective remedy. I thought it was obvious that in this case the remedy sought is attached to the rights to life and freedom from torture, which are the focus of the criminal prosecution against Lundin executives in Sweden and the basis of the civil claims that were expected to be attached to that prosecution and which will now be pursued separately.
4. The question for this NCP is not whether the right to a remedy exists without connection to other rights—those rights are very firmly present in this case—but rather whether a business should account for a right to an effective remedy even where it was not responsible itself for the initial breach of the other substantive right. The claimants are not arguing—and I would not support a position—that Aker BP and Aker ASA are responsible for the breach of the rights to life and freedom from torture or cruel, inhuman, or degrading treatment and punishment. Rather, Aker BP and Aker ASA undertook conduct after the initial violation that had the consequence of denying the right to an effective remedy. The question is whether they should have considered this denial in their due diligence and whether by *contributing to* that denial they have breached their responsibilities.
5. This is where Professor Emberland's treaty-based analysis is inappropriate for assessing responsibilities under the OECD Guidelines (and the UNGPs). There is never a situation under the ICCPR (or the ECHR, or even the Geneva Conventions despite the clear identification of individual responsibility for war crimes) where protection of the right to an effective remedy *can be* owed by anyone other than the state party to the breach. The nature of jurisdiction within the treaty-based regimes means that the same state that breached a primary obligation will be the one that owes the accessory right to an effective remedy.

6. When moving the substance of international human rights law (and international humanitarian law where it is *lex specialis*) from the state-based treaty regime to the business responsibilities under the OECD Guidelines and UNGPs, the question of who can breach a right or who can incur responsibility moves away from jurisdictional clauses under the treaties to a question of functional relationships. Without this, it would be impossible for a business to owe reparations for negative impacts on rights protected by the International Covenant on Economic, Social and Cultural Rights (ICESCR). As Professor Emberland rightfully notes, the ICESCR does not explicitly include the right to remedy within its text; yet, that treaty is explicitly identified in both the OECD Guidelines and the UNGPs as containing rights that businesses are to account for in their due diligence and for which they *owe a remedy* for when they cause or contribute to negative impacts.[1]
7. Businesses are responsible for respecting all human rights (and where relevant, IHL provisions) by refraining from causing or contributing to their denial. Beyond the ICESCR, the OECD Guidelines (and the UNGPs) reference the Universal Declaration of Human Rights, which by its nature is non-binding on states and could never be the foundation of an effective remedial effort against the state. Yet, the UNGPs and the OECD Guidelines are clear that businesses need to respect this broader range of rights, and to remedy those rights where the businesses causes or contributes to negative impacts on the rights identified in the Universal Declaration of Human Rights, including the right to an effective remedy as identified in Article 8. The explicit inclusion of the Universal Declaration of Human Rights and the ICESCR in the OECD Guidelines clarifies how misplaced Professor Emberland's treaty-based analysis is when it comes to the question of who owes a reparation, rather than the existence of a right to remedy for which businesses are to account.
8. Despite his problematic treaty-based approach to the field of Business and Human Rights, Professor Emberland's point about primary and accessory rights is an important one. Businesses that cause *or contribute to* a denial of a human right incur a responsibility to remediate those harms. The most significant question on remedies for this NCP is whether under the OECD Guidelines a business can *contribute to* the denial of the right to an effective remedy even though the business was not responsible for the initial harm. The right to an effective remedy has already been anchored to the initial breach of the rights to life and freedom from torture (as well as pillage, forced displacement, and other rights found in both international human rights and international humanitarian law)—and the question for this NCP is only (a) whether a business should account for that in their due diligence or not, and (b) whether a business can be responsible for actions that cause or contribute to denying a victims an opportunity to seek redress.
9. I maintain the answer to those questions is yes for the reasons set out in my initial opinion. The claim underpinning the right to an effective remedy must be attached to another right, but once that is established the right contains its own substance and can be breached on its own accord; businesses are responsible for both accounting for and

[1] It must be noted that this is a minimum expectation, not the only expectation. As the 2011 OECD Guidelines make clear: "In all cases and irrespective of the country or specific context of enterprises' operations, **reference should be made at a minimum to** the internationally recognised human rights expressed in the **International Bill of Human Rights**, consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the **International Covenant on Economic, Social and Cultural Rights**, and to the principles concerning fundamental rights set out in the 1998 International Labour Organisation Declaration on Fundamental Principles and Rights at Work." (para 39).

respecting that right within their due diligence. Actions that disrupt the right of victims to secure remedy for other rights that have been breached cause a distinct human rights harm.

The Purpose of the Procedural Right to an Effective Remedy is to Secure Substantive Reparations

10. Second, Professor Emberland spends substantial time arguing that the right to an effective remedy as a matter of international human rights law is a procedural right only. At the crux of his opinion appears to be a belief that I was arguing that claimants are entitled to determine a specific form of reparation they are entitled to (see, e.g., paras 47). This was not my position. I do not claim that victims are entitled to dictate a particular form of reparation, but rather that they must be able to access reparations to fulfil the right to an effective remedy. When doing so, the nature of the reparations to be ordered can vary significantly but should be determined by the kind of harm the victims suffered and the availability of the types of redress capable of wiping out the consequences of those harms (to the extent that can occur in a human rights case).
11. At the heart of this dispute is the purpose of a procedural right to remedy. The procedural right is in furtherance of a goal. It is not simply to give victims an opportunity to scream into the wind of justice, but rather it is aimed at bringing about a judgment capable of wiping out the consequences of a wrongful act. How the procedural right to an effective remedy does that—how it wipes out the consequences—is through the realisation of substantive reparations. The substantive reparations can take many forms, but there must be an opportunity to secure those reparations capable of wiping out the consequences of wrongful acts if the procedural right to an effective remedy is to have any real meaning. That is why the Human Rights Committee has been clear that "[w]ithout reparation to individuals whose Covenant rights been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged."[2]
12. The ICCPR does not prescribe reparations in its text because it would be inappropriate to do so: what is needed in a case is context-dependent and must relate to what was lost by the victims. Amongst the forms of substantive reparations that may be appropriate for any particular case is compensation, but reparations can also include injunctive relief, satisfaction, restitution, physical, mental, social, and economic rehabilitation, guarantees of non-recurrence, or compensation aimed at redressing material and moral harm not capable of being redressed by the other forms of satisfaction.[3] The appropriate mix of these reparatory measures will vary depending on the case, but the reparatory measures secured must be aimed, as much as one can in human rights cases, at wiping out the consequences of wrongful conduct.
13. Nothing in Professor Emberland's opinion suggests that the procedural right to an effective remedy is not intended to result in a substantive reparation. Rather, he only maintains the reparation is not guaranteed to be financial compensation.

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[2] Human Rights Committee, General Comment No 31 at paragraph 16. Available at: http://hrlibrary.umn.edu/gencomm/hrcom31.html.

[3] Human Rights Committee, General Comment No 31 at paragraph 16. Available at: http://hrlibrary.umn.edu/gencomm/hrcom31.html; UN Basic Principles and Guidelines, para 18-23. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation.

14. In the current case, however, the wrongful conduct related to war crimes, including deprivation of life and torture or cruel, inhuman, or degrading treatment or punishment. In those cases, the other forms of reparation beyond compensation would be inadequate or inappropriate on their own. The harm has already occurred so there can be no injunctive relief. Similarly, not even an oil company can bring back the dead, or take away the impact of torture or cruel, inhuman, or degrading treatment or punishment. So, restitution is inappropriate. Public apologies, mental, physical, social, or economic rehabilitation, and guarantees of non-recurrence can be important contributions to holistic, victim-centred reparations but will not adequately redress the harm the victims suffered on their own. That harm is material and moral, but it is principally financial. If the complainant's claims have merit, the harm they complain of can only be adequately and effectively redressed through financial compensation.
15. The removal of the means of that compensation, the company's assets, denies them an effective remedy because the reparation required in this case (not in all cases under the Covenant) is financial by nature. That is why *Baritussio v Uruguay* is an appropriate analogy because, as Professor Emberland himself states, "the (absent) availability of other possible legal avenues is … indicative of what the Committee requires" when assessing the enforceability of a remedy (para 75). There can be no effective reparation in this case unless there is access to compensation. As such, in the words of the Human Rights Committee, without financial compensation, "the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged."[4]

The OECD Guidelines Derive Substance but not all Contours from International Human Rights Law

16. I believe a broader issue explains the differences between Professor Emberland's approach and my own as we do not disagree as significantly on the substance of the right to an effective remedy as the dozens of pages we have dedicated to the issue might suggest. Instead, I believe our disagreement rests on the nature and purpose of the OECD Guidelines themselves and their relationship to international human rights law.
17. Repeatedly, Professor Emberland wants to draw the contours of the OECD Guidelines and the ICCPR's application therein to the jurisdictional limits and procedural demands of states. He argues that remedies must be an accessory right; whereas in the current dispute, the remedy *is* an accessory right, but the question is about whether it is also a right that should be considered by businesses when they conduct due diligence. Similarly, he argues that the right to an effective remedy cannot be violated if compensation "is available in principle in the domestic legal system" (para 72), but when applied to businesses that ties the claimants' right to remediation to the willingness or ability of a domestic state to realise their own human rights obligations. The OECD Guidelines (and UNGPs) were specifically designed to address and respond to states' unwillingness and/or inability to secure remedies against a business. Similarly, Professor Emberland indicates that the duty to ensure remedies are enforceable and enforced "does not entail a duty to ensure that a party maintains sufficient funds in the event of liability" (para 74). That is true where the state itself is liable for the wrongdoing, and therefore the availability of

[4] Human Rights Committee, General Comment No 31 at paragraph 16. Available at: http://hrlibrary.umn.edu/gencomm/hrcom31.html.

funds is not in significant doubt absent sovereign bankruptcy (and even then, some would suggest that the state would remain liable). It should not be true when assessing business conduct under the OECD Guidelines given that this would allow businesses to routinely circumvent claims by simply altering aspects of their legal personality or ownership.

18. The OECD Guidelines, like the UNGPs, were not aimed at reiterating existing state obligations—those are addressed through existing treaties—but at ensuring that businesses respect human rights and remediate harms they cause or contribute to, even where a state is unable or unwilling to meet its own obligations. The OECD Guidelines call on businesses to ensure they do not "infring[e]" on human rights "and should address adverse human rights impacts with which they are involved." To realise these rights requires functional adjustments appropriate to address the differences between state violations of human rights and business impacts on human rights.
19. One of the appropriate, functional adjustments must necessarily relate to the closing down of businesses or the sale of their assets when a remedial claim is pending. This is a reality that victims do not and cannot face when their claims are against states, but which is a dangerous and clear threat to the right to effective remedies when the claim is against a business. The denial of reparations may not occur in a state-based case until a court has heard the claim; the timing of a decision and the removal of funds from the state will not impact on the ability of the victims to secure reparation.
20. When a business sells its assets, however, and removes funds from the relevant corporate personality, the victims may not have access to those funds when the domestic court finally renders its order. This conduct by the business—conduct that is unavailable to a state—can effectively render the procedural rights and aspects of the claim irrelevant and ineffective. In this case, the substantive reparation needed is financial. The absence of adequate finances in the surviving legal entity will effectively deny the victims access to a real, adequate, and effective remedy. The OECD Guidelines, and the UNGPs, were built on principled pragmatism and were intended to ensure these kinds of legal manipulations did not adversely affect victims.

Understanding the Impact of Professor Emberland's Approach Demonstrates its Inappropriateness for the OECD Guidelines

21. Finally, I think it may be of benefit for the NCP to consider the implications of Professor Emberland's approach in other contexts:
22. Imagine that Company A hires Company B to function as private security and takes adequate precautions to ensure Company B meets its human rights responsibilities. Despite Company A's efforts, Company B's employees rape and kill three women. At this point, Company A is only directly linked to the harm, not causing or contributing to it. During negotiations with Company B, the women's families indicate they will sue if their claims are not resolved within 6 months. The primary rights are those of life and freedom from torture and cruel, inhuman, or degrading treatment or punishment. Company A is upset that its name will be associated with Company B's actions, so it lobbies legislators to have the statute of limitations for this case alone changed to 4 months while the negotiations are already in month 5. Has Company A breached its human rights responsibilities?
23. Professor Emberland's approach would seemingly lead this NCP to say no. He would distinguish between the primary rights (life and torture) from the measures aimed at

redressing those rights (efforts to secure a remedy) and find that the victims were not entitled to a right to remediation from Company A and therefore Company A cannot have a responsibility to respect the right to an adequate and effective remedy. I think the appropriate answer under the OECD Guidelines is yes: by undertaking positive action to prevent access to effective procedures the business is *contributing to* the denial of remedies. This does not mean that the company is responsible for the initial harm, but it must take account of the right to remedies.

24. Now, imagine instead that Company A is the parent company who, in a panic, negotiates the sale of Company B within a week of Company B's breaches. Company B is wound up in accordance with the state's laws so that there are no longer any assets in Company B while victims are still preparing their case. Would Company A be responsible under the OECD Guidelines for contributing to the denial of remedies? Again, Professor Emberland's approach would suggest no, while I would argue unquestionably yes. An act aimed at avoiding the payment of reparations when the company is aware that victims are or will be seeking those reparations is to contribute to the denial of those remedies.

25. While I have other disagreements with Professor Emberland's claims in this piece—including his suggestion that a general principle of public international law (the right to reparation) is not broadly applicable to human rights law and his overreliance on the ECHR and the European Court (which has no jurisdiction over the ICCPR) when the Human Rights Committee has spoken on the meaning of the treaty it is entrusted to interpret—none of those issues are central to the concerns before this NCP and I therefore reserve them for future academic debates.

Sincerely yours,

Tara Van Ho