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)

Reply to dr. Tara Van Ho's expert response

Professor Marius Emberland

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1. Introduction

2. Reference is made to dr. Tara Van Ho's response to my expert opinion previously submitted to the National Contact Point for Responsible Business Conduct Norway (NCP) in the above-mentioned Specific Instance. Her response provides an opportunity to explain the gist of my expert opinion and its applied methodology.

3. There is no disagreement between dr. Van Ho and me that all internationally accepted human rights are relevant when establishing a company's human rights obligations under Ch. IV of the 2011 OECD Guidelines, and this includes the right to an effective remedy as a human right. We further agree that the logic that applies to human rights in an individual-state perspective is not transferable to the context of Ch. IV of the 2011 OECD Guidelines, where the focus is on a company's possible adverse impact on individuals' human rights.

4. In her response dr. Van Ho criticises the methodology I used for assessing the scope of protection afforded to individuals by the right to an effective remedy, see for instance para. 5, in which she states that my "treaty-based analysis is inappropriate for assessing responsibilities under the OECD Guidelines", and para. 17, where dr. Van Ho believes that I "draw the contours of the OECD Guidelines and the ICCPR's application therein to the jurisdictional limits and procedural demands of states". Her response essentially negates my assessment of the scope of the right to an effective remedy by criticising me for not placing the 2011 OECD Guidelines' obligations at the centre of my analysis.

5. This criticism is misconceived. Para. 5 of my expert opinion states my mandate as being limited to expounding on "the right to an effective remedy protected by international human rights law and particularly the nature and scope of the protection an individual is afforded under [ICCPR Article 2(3)] in the context of the present case". The sole purpose of my expert opinion was to provide

an international human rights law *platform* for handling the question at issue before the NCP. One needs first to establish the scope of protection afforded to the relevant individuals by international human rights law from the perspective of the rights-holder (and not from the viewpoint of the State's responsibility). The next step is to establish whether the right in question – as established in the preceding step – has been or will be "adversely impacted", which is indeed based on a "functional relationship", in the words of dr. Van Ho, between a business and a rights-holder. This two-step approach to establishing enterprises' responsibility regarding human rights impact applies to all human rights, both those that are of a substantive character (such as freedom of expression, the right to life or the prohibition of torture) and those of a procedural nature (such as the right to an effective remedy).

6. Dr. Van Ho's criticism is also misplaced because her own expert opinion also takes a "treaty-based analysis" as a point of departure. She draws on the text of relevant treaties and other instruments, she has regard to the purpose of right to an effective remedy, and she accords weight to practice, including that of the Human Rights Committee, and considers other international law rules, and thereby applies the rules of interpretation in VCLT Articles 31-33. She further draws on typical means for analysing the scope of non-treaty based international human rights protection when she cites cases from the International Court of Justice and its predecessor (see, e.g., paras. 11 and 13 of her opinion), as I similarly did in my expert opinion (see, e.g., its section 3.2.3). Her expert opinion, like mine, has in other words endeavoured to establish the material scope of the relevant human right from the viewpoint of the rights-holder and by way of legal methodology. That we do not agree on what the sources tell us, is another matter. I have yet to see anyone suggesting that international human rights law methodology is not the appropriate point of departure when exploring the "internationally recognised human rights" that form the basis for enterprises' obligations under Ch. IV of the 2011 OECD Guidelines.

7. Dr. van Ho has however added an additional layer to her analysis, in that she applies the norms of the 2011 OECD Guidelines as an intrinsic part of the interpretation of international human rights law. In my view, consideration of the 2011 OECD Guidelines has no place in establishing the scope of protection from the viewpoint of the rights-holder. This initial step of the inquiry relies on human rights law methodology. An individual's protection by the right to an effective remedy mirrors the scope of the duties placed upon the State, and that scope therefore reflects on what obligations a business will have under the 2011 OECD Guidelines regarding the right to an effective remedy. The 2011 OECD Guidelines in my opinion provides material only for the analysis of the second step – whether the human right in question has been or will be "adversely impacted". Dr. Van Ho's criticism does not reflect that I was asked only to provide the NCP with an analysis of the first step by means of legal methodology.

8. I maintain this approach in the following.

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2. The scope of an individual's right to an effective remedy as a human right

2.1. Introduction

9. We agree that under the 2011 OECD Guidelines, "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 relationship" (para. 6). We also agree that the responsibilities of businesses to respect human rights, which, *inter alia*, includes a duty to avoid causing or contributing to adverse human rights impact and a duty to carry out human rights due diligence, cannot be established through the lens of State responsibility. The question is whether the individual human right itself has a different scope of protection when observed through the lens of businesses' responsibility to avoid causing or contributing to adverse human rights impacts and carry out human rights due diligence. Dr. van Ho's approach would suggest so.

10. This is not my view. The responsibility of a company to respect human rights must necessarily reflect what *rights* individuals have pursuant to the human right in question, and this scope of human rights protection must be assessed by way of international human rights law methodology. The question before the NCP is what due diligence *obligations* a *business* has under the Ch. IV of the 2011 OECD Guidelines regarding the right to an effective remedy. I maintain what I said in my expert opinion (as summarised in its para. 93): The right to an effective remedy as a human right is not impacted in the Specific Instance, as the human right to an effective remedy does not extend to a right of individuals to the protection of funds that could be available for economic compensation if a duty to award compensation is established.

11. I understand dr. Van Ho's response to the effect that we fundamentally disagree on this point, and I see two main reasons for our disagreement.

2.2. Dr. Van Ho obscures the concept of the right to an effective remedy

12. First, dr. Van Ho persists in obscuring the contours of the right to remedy as a human right. In her expert opinion she blurred the line between the right to a remedy following the establishment under international law of a human rights breach (what I refer to as *remedy as reparation*, which is *not* a human right) on the one hand and the *human right to an effective remedy* on the other. Only the latter of the two is relevant as part of "internationally recognised human rights" referred to in Ch. IV of the 2011 OECD Guidelines. I refer to my expert opinion paras. 16-32 on the relevance of upholding this distinction. As dr. Van Ho's response references her original expert opinion I assume that she continues to conflate the two, although her response does not consider the matter in direct terms.

13. In her response, dr. Van Ho conflates the human right to an effective remedy also with the 2011 OECD Guidelines' concept of a remedy ("remediation"), which is set forth in para. 6 of Ch. IV ("Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts ..."). There were instances of referring to this form of remediation in her expert opinion, and they are more apparent in her response: para. 6 ("... and for which they owe a remedy for when they cause or contribute to negative impacts"), para. 7 ("Yet, the UNGPs and

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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 [sic] to negative impacts on the rights identified in the Universal Declaration of Human Rights ..."), and para. 8 ("Businesses that cause or contribute to a denial of a human right incur a responsibility to remediate those harms."). All these examples refer to remediation in the sense of the 2011 OECD Guidelines, and not remedies in an international (human rights) law sense. To be clear, the 2011 OECD Guidelines' concept of remedy (remediation) is a wholly different matter than the human right to an effective remedy, which para. 46 of the Guidelines makes clear. The overlapping terminology may be contributing to obscuring our discussion of the relevant issues in this Specific Instance.

2.3. The scope of the right to an effective remedy

14. The second reason for our disagreement relates to the scope of protection afforded by the human right to an effective remedy, as protected *inter alia* under ICCPR Article 2(3). The remainder of my comments deals with this question.

15. I spent "a great deal of time establishing the accessory nature of the right to an effective remedy" (para. 3 of dr. Van Ho's response) because dr. Van Ho's expert opinion devoted much space to a discussion of the extent to which the right to an effective remedy in and by itself can be violated having regard to its accessory nature. It is common knowledge that the accessory nature of the right to an effective remedy is no bar to it being violated on its own accord, if an "arguable claim" has been made that another human right has been violated. In the Specific Instance it is undisputed that an "arguable claim" has been made that substantive human rights, such as the prohibition of torture and other forms of ill-treatment and the right to life, are at issue.

16. The crucial matter is how to establish the scope of the human right to an effective remedy as seen from the perspective of the rights-holder. On that matter dr. Van Ho and I continue to disagree, as she portrays a more comprehensive norm than is warranted by the relevant source material. Her response is however phrased in a highly ambiguous language, so it is not entirely clear to me what her expert view is. Let me briefly restate my view, also having regard to dr. Van Ho's response.

17. It is my expert opinion that a human right to an effective remedy, including its pronunciation in ICCPR Article 2(3), comprises a procedural right *to make use of* available means in domestic law that *may* effectively provide redress, but that it *does not* guarantee a particular (substantive) outcome. This also applies to claims concerning breaches of the right to life and prohibition against torture and other forms of ill-treatment. I refer *inter alia* to section 4.6.1 of my expert opinion, where this is explained with reference to sources. The essence is as follows.

18. Individuals with an "arguable claim" that another human right has been violated are entitled to protection pursuant to the right to an effective remedy in the sense that they can *avail themselves of means* provided by the State that are *capable* of giving them effective relief for the harm caused them.

19. The right to an effective remedy is structurally different from human rights that are mainly substantive (such as freedom of expression, the right to life and the prohibition of torture), but it

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shares features with other human rights that in the main are procedural (such as the right to a fair trial). Businesses are as capable as the State to take an individual's life (or, at least to some extent, to fail to secure that life) or to cause ill-treatment, and the exercise of the right to employment or freedom from discrimination relies on the state imposing duties on businesses.

20. When procedural rights are at play, however, the guarantees are in principle and primarily aimed at the relationship between the individual and the State. The States' obligation is to provide for, rather than protect against, certain procedural means. Just as with any other human rights, a business can adversely impact an individual's right to an effective remedy in given situations, however. Dr. Van Ho has identified two such instances. In her expert opinion para. 37 she states that a business "can ... contribute to the denial of an adequate remedy. An obvious example of this is if a business paying a bribe to a judge". In para. 22 of her expert response, dr. Van Ho refers to an instance in which a company "lobbies legislators to have the statute of limitations for [a case] changed to 4 months while the negotiations are already in month 5". I have no problem accepting that such instances, where the business actively attempts to frustrate the judicial process by seeking to influence state authorities, indicate that the right to an effective remedy may be adversely impacted by a business in a 2011 OECD Guidelines context. But the two examples are hypothetical and irrelevant for the purposes of the present case, where no business has ventured into such a scheme. The examples dr. Van Ho mentions in para. 19 of her expert response – on the closing down of a business or the selling of assets – belongs to a different category altogether: such actions do not seek to influence the availability of legal remedies as provided by the judicial system of the State.

21. Dr. Van Ho places much emphasis on her fashioning of the purpose of the right to an effective remedy (paras. 10 to 15). In her view, it "is not simply to give victims an opportunity to scream into the winds of justice, but rather ... aimed at bringing about a judgment capable of wiping out the consequences of a wrongful act". I do not necessarily disagree with dr. Van Ho that the right to an effective remedy may mean the "bringing about a judgment capable of wiping out the consequences of a wrongful act", but it depends on what she means by "capable of". The European Court of Human Rights uses the term when determining whether the right to an effective remedy has been observed, asking whether remedies made available in the domestic legal system are "capable" of directly remedying the impugned situation.[1] "Capable" here should be understood as *being in principle able to provide redress*. The provision does not guarantee a favorable outcome. It *does not guarantee that individuals are effectively remedied* as long as they have the possibility to effectively *attempt* to seek remedies. It entitles individuals to make use of a system of remedies that in principle *may* provide effective redress. I do not see any sources that indicate that ICCPR Article 2(3) has a different and more comprehensive purpose or scope, even having regard to the right of enforcement in Article 2(3)(c) (as explained below). If dr. Van Ho uses "capable of" in this sense, we agree.

22. It is not at all clear whether dr. Van Ho uses "capable of" in this sense, however. The text of her response is highly ambiguous at this point. On the one hand she says that "there must be an *opportunity* to secure those reparations" (para. 11), that there must be "*access* to compensation" (para. 15), and that her position is *not* "that claimants are entitled to determine a

[1] See para. 53 of my expert opinion, where I also noted that the preparatory works of the ICCPR tell us that the purpose of inserting Article 2(3) in the treaty was to mimic ECHR Article 13, and this begs an inquiry into the purpose of the latter provision.

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specific form of reparation" (para. 10). These statements seem to indicate the approach of the ECHR and the ICCPR (which I folllow). On the other hand, she claims that "the harm ... can *only* be adequately and effectively redressed through financial compensation", and that "removal of means of that compensation, the company's assets, denies them an effective remedy because the reparation *required* in this case ... is financial in nature" (para. 14) (the emphases are mine). It certainly appears like dr. Van Ho seeks to convey to the NCP the impression that the right to an effective remedy not only guarantees that a particular remedy such as compensation is effectively *available* in the legal system but that it – at least in the circumstances of the present case – also *guarantees* the rights-holder payment of that compensation, if afforded by the courts. If this is indeed her opinion, I fundamentally disagree.

23. To me, dr. Van Ho seems to continue an expansionist reading of ICCPR Article 2(3), where the right to an effective remedy as a human right *guarantees* redress. It should be noted, however, that her understanding of ICCPR Article 2(3) lacks basis in authoritative legal sources, as I also made clear in my expert opinion. In fact, dr. Van Ho in her response draws her reading entirely on *one sentence* in the Human Rights Committee's General Comment No. 31 from 2004, notably in para. 16, where it is stated that "[w]ithout reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy ... is not discharged" (para. 11 of the response). This sentence is ambiguous, however, and dr. Van Ho's reading of it does not fit with the context within which it is placed, as I explained in paras. 67-70 of my expert opinion, and the totality of interpretative material. It should be understood in the sense that the right to an effective remedy is not observed if there is *no opportunity in the legal system at all* to seek compensation. In such an instance, the remedies available are not "capable of" providing redress to the victims.

24. My reading of the single sentence in para. 16 of the Human Rights Committee's General Comment No. 31 fits with the essentially procedural nature and purpose of ICCPR Article 2(3). I am not alone in believing that the human right to an effective remedy does not guarantee a particular material outcome. As William Schabas puts it in his commentary on ICCPR Article 2(3): "It is essential to distinguish between the procedural right to an effective remedy and the substantive right to reparation".[2] Dr. Van Ho's view of how the singular sentence in para. 16 of the General Comment is to be conceived finds no support in the practice of the Human Rights Committee in individual cases. My research of this practice (referred to in para. 71 of my expert opinion) shows that the Committee has never stated that there is an unequivocal duty under Article 2(3) to ensure the payment of compensation to a victim, see paras. 71-72, 75-76 and 31 of my expert opinion: what is crucial is whether compensation is available *in principle*. Dr. Van Ho simply disregards the legal sources that negate her preferred interpretation. I am not impressed by such an approach.

2.4. Does the right of enforcement in Article 2(3)(c) provide more extensive protection?

25. The right to have remedies enforced set forth in ICCPR Article 2(3)(c), which is a sub-category of the right to an effective remedy, also does not entail a right to be compensated in full. I refer to my analysis of the duty of enforcement in section 4.6.2 of my expert opinion, where I concluded that there is no support in the practice of the Human Rights Committee for the position that the

[2] William A. Schabas: *Nowak's CCPR Commentary* (3rd rev ed) (N.P. Engel 2019) p. 70 (MN 81).

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duty of enforcement extends to a right to be compensated in full in the sense of a right of protection of funds that could be available once compensation was awarded. For one, the right to have a remedy enforced first comes into play when the legal system of the State has in fact awarded compensation ("when granted" in the words of the provision). Second, the right of an individual to benefit from the discharge of a duty "to ensure that the competent authorities shall enforce such remedies" (the wording of the provision) does not go as far as an entitlement to have funds secured for the full payment of compensation, if compensation has been awarded.

26. Dr. Van Ho and I both have considered the practice of the Human Rights Committee for the purpose of determining the scope of the right of enforcement in Article 2(3)(c). Dr. Van Ho believes that *Baritussio v. Uruguay* (1982) is prescient. In my expert opinion I discarded it as irrelevant (para. 75), as the Committee did not even consider Article 2(3) (see also para. 13 of the Committee's Views; the Committee found violations of Articles 7, 9, and 10). Be that as it may, the substance of the reasoning in *Baritussio* is in line with my reading of the scope of the right to enforcement. The Committee's conclusion was that the ICCPR was breached essentially because the claimants were kept imprisoned in blatant contravention with the law, which commanded release after sentence was served. The case suggests that the procedural aspects of the right to an effective remedy – in placing its emphasis on what can in principle be achieved in the domestic legal system – cannot be applied *in absurdum* to condone brazen disregard for the remedies nominally available.

27. I believed *Horvath v. Australia* (2009) was the more pertinent case, as the Human Rights Committee in fact concluded that Article 2(3)(c) was breached. As I explained in my expert opinion paras. 75-76, the reasoning of the Committee is indicative of the scope of protection provided by Article 2(3)(c), and I cited authorities that seem to share this assessment. My expert opinion on the extent of protection under Article 2(3), also having regard to the right of enforcement, may become clearer if we consider the details in *Horvath*.

28. The claimant, Ms. Horvath, sought action for damages due to harm suffered on account of police officers brutally assaulting her during an unlawful raid. Initially, she succeeded in obtaining compensation in the civil courts, even though the amount was considerably reduced by the appellate courts. According to settled law in the state of Victoria at the time, the individual police officers rather than the State was liable to pay damages, and where the individual officer was unable to pay, the victim would go uncompensated. Ms. Horvath was not compensated, and, further, none of the police officers involved where disciplined or prosecuted. The Human Rights Committee held that Article 2(3)(c) "means that State authorities have the burden to enforce judgements [sic] of domestic courts which provide effective remedies to victims", and that the State "should use all appropriate means and organize their legal system in such a way as to guarantee the enforcement of remedies in a manner that is consistent with their obligations under the Covenant" (para. 8.6). The Committee concluded that Article 2(3)(c) was violated because Ms. Horvath's "success ... in obtaining compensation in her civil claim has been nullified by the impossibility of having the judgement [sic] ... adequately enforced", and that both "factual and legal obstacles" accounted for this. The Committee considered "that in situations where the execution of a final judgment 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" (para. 8.7). The respondent State had not shown that "alternative avenues existed or where effective" (para. 8.7), and besides, there were "shortcomings regarding the disciplinary proceedings", which could

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have provided Ms. Horvath with some compensatory relief (para. 8.8.). On this basis, the Committee concluded that Article 2(3)(c) was violated.

29. *Horvath* reaffirms in my view the general approach of *Baritussio*: if the right to a remedy has been guaranteed by the domestic legal system, it must be effectuated in accordance with that system so far as this is consonant with "all appropriate means" within it as provided for by the State's "legal system" and having regard to the State's "obligations under the Covenant". The threshold for violating the right of enforcement is reached where a remedy provided by the State's legal system is patently disregarded (as in *Baritussio*) or where the legal system does not provide a sufficiently comprehensive range of remedies for relief (*Horvath*). From the viewpoint of the 2011 OECD Guidelines, the right to an effective remedy may be adversely impacted by a company if it seeks to diminish the range of available remedies in the justice system by bribing a judge of lobbying the legislator to abandon certain legal means. Both *Horvath* and *Baritussio* illustrate, by the way, the importance of the victims in fact attempting to avail themselves of the relevant legal avenues provided for by the domestic legal system.

30. There is a denial of justice reasoning underlying the Human Rights Committee's approach, which resonates with the primarily procedural nature of the right to an effective remedy as a human right. The denial of justice essence of ICCPR Article 2(3) would also fit with the rationale of human rights obligations pursuant to Ch. IV of the 2011 OECD Guidelines, where para. 38 emphasizes businesses' responsibilities to honour human rights where a State fails to secure relevant domestic law (or international human rights) requirements. As I noted in my expert opinion (para. 10), dr. Van Ho in her expert opinion consistently argues that there has been a "denial" of an effective remedy in the Specific Instance (see inter alia paras. 3, 6, 19 and 37). She continues to speak in those terms in her response (see, for instance, paras. 4, 7, 8, 19 and 24). Her language seems however to be inspired by the Guidelines, and not international human rights law, as she continues to speak in terms of a 'right to remediation' and not the right to an effective remedy, which is the crucial term in the Specific Instance where the NCP has decided to consider the relevance of the human right to an effective remedy and not remediation under the 2011 OECD Guidelines. In any event, I believe I have made clear above that the "denial" of a remedy is precisely the point also from the perspective of international human rights law, as it is the fitting denominator for when the right to an effective remedy is in fact violated (and where a business may adversely impact it). The human rights law threshold of denial of justice – as evidenced in the practice of the Human Rights Committee – has however not been reached in the Specific Instance.

4. Conclusion

31. I reiterate what was stated in para. 42 of my expert opinion: even if there is an "arguable claim" for compensation, it was not possible to foresee with any degree of certainty how a Swedish court or other authorities would respond to such a claim if and when it was submitted, as that necessarily would depend on the details of the claim and how it came to be espoused.

32. If at the time of the merger there was no evidence suggesting that the Swedish legal system either did not provide for the opportunity to seek compensation, or that other sufficiently effective alternative remedies were not available, or that the Swedish legal system did not provide for the enforcement of an award of damages, I would tend to agree with dr. Van Ho that

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the right of an effective remedy would be engaged.

33. This view does however not fit with reality. To my understanding Swedish law provides for several potent remedies some of which (ongoing criminal proceedings) are pending. Swedish law also provides for civil claims of damages if liability is established by the courts, and for various means of enforcement of compensation claims if awarded by the courts. The individuals in the present case have not yet made use of all available means provided for in the Swedish legal system regarding claims for compensation. If they do avail themselves of the means of seeking compensation in civil proceedings, it is not clear at all how Swedish courts would respond to that claim. Further, if Swedish courts do decide that Lundin is responsible for damages relating to harm suffered from breaches of human rights, the Swedish legal system has at its disposal several means to make the relevant individuals accountable. To my knowledge, however, no legal system has ever gone as far as to positively guarantee that full compensation is paid in the event that the perpetrator has no means to discharge their financial obligations, and that includes a proviso that the State ensures that the nominated perpetrator is financially equipped to pay an award in full.

Yours truly,

Marius Emberland