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Stockholm 18 November 2024

LEGAL OPINION

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)

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

Reply to Professor Marius Emberland *understanding* that at the time of the merger "*Swedish law provides for civil claims of damages if liability is established by the court, and for various means of enforcement.*"

By advocate Jan Södergren

INSTRODUCTION

1. I have been asked by the NGO *Pax for Peace* to consider whether Professor Emberland´s submission in his reply to dr. Tara Van Ho´s expert response on that there indeed existed an effective remedy – access to court – to have a claim for damages by South Sudanese nationals examined on the merits in Swedish courts and – if awarded – whether there existed "*various means of enforcement,,,*" is correct.

2. Professor Emberland stated in para. 32 that if "*at the time of 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 the right of an effected remedy would be engaged.*"

3. However, in para. 33 he claims that the view of dr. Ho does not fit with reality. In his understanding "*Swedish law also provides for civil claims of damage if liability is established by the courts, and for various means of enforcement of compensation cl if awarded by the courts.*"

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4. First and foremost, it seems clear that a civil claim for damages and reparation at the time of the merger in 2021 would be statute barred. In addition, for the over 150 000 individual South Sudanese victims, it would be virtually impossible - as opposed to practical and effective – to initiate such a procedure in Sweden. There would be insurmountable practical and economic obstacles even to examine the case and obtain evidence and otherwise prepare the case. Furthermore, a claim for damages and reparation in a Swedish court against other private individuals (in the sphere of individuals themselves), based on the European Court of Human Rights is not allowed in Sweden.

5. After the credentials of the undersigned, the presentation below will follow the order described above.

Credentials

6. I graduated from law school at Stockholm University in 1993. Became a member of the Swedish Bar Association in 1993. Was employed at the Berg & Co Advokatbyrå between 1993 – 1995. Was a partner in the law firm Bratt & Feinsilber Advokatbyrå AB 1995-2006. Owner of my own firm 2006-2012. Hired as a practising lawyer at Lewis & Partner Advokatbyrå 2012-2015 and am running my own law firm since then.

7. I have been council and have won several cases in the European Court of Human Rights – one case in the Grand Chamber - and have run several cases concerning the Convention at the domestic level.

A civil claim in Sweden for damages and reparation due to a criminal act was statute barred, at the latest in September 2013.

8. In my opinion a civil claim in Sweden for damages and reparation *due to a criminal act* – was time-barred at the latest in September 2013, taking the specifics of the present case into account, for the following reasons.

9. Thus, the Prosecution in Sweden indicted the representatives of Lundin Oil for the crimes against the Laws of the Nations, as it stood prior to 2009. At that time the maximum sentence was imprisonment for four years – which is relevant for the examination of the statutory limits concerning civil claims due to crimes.

10. According to the Swedish Act on Statutory Limitations (*preskriptionslagen*, thus *civil statutory limitations*), section 3, item 3, a civil claim for damages based on a crime is not timed-barred until the crime in itself is time-barred (*åtalspreskription*, thus *criminal statutory limitation*). According to Chapter 35 section 1 in the *Swedish Criminal Code*, a penalty may not be imposed, unless the suspect has been detained or received part of the prosecution for the crime within ten years, if the most severe penalty is higher [than two years] but not more than imprisonment for eight years.

11. The civil statutory limitation for the present alleged crimes would thus be ten years after the crimes were committed and a civil claim for damages and reparations would thus be statute barred after September 2013.

12. It is not completely settled whether the progressive developments internationally and in Sweden concerning war-crimes has had any effects on the issue of statutory limitations of civil claims due to crimes against the Law of Nations. It seems that the legal position has not been addressed. But if that is the case, such a claim by the more than 150 000 victims would be practically impossible. The latter issue will be addressed in the next section.

Practical insurmountable obstacles to examining, obtaining evidence and otherwise prepare for a claim before a Swedish court

13. It is well established case law and a so-called European standard that the right to remedies must be practical and effective, as opposed to theoretical and illusory. This follows *inter alia* from the jurisprudence of the European Court of Human Rights under article 6 and article 13 in the European Convention of Human and Fundamental Freedoms.

14. What *practical and effective* in practise means, when it comes to obstacles to pursue procedures in a foreign country is well illustrated by the *Case of Arlewin v. Sweden* (judgment on 1 March 2016, No. 22302/10). A person alleging he was defamed in a TV programme sent in Sweden, and otherwise with close connections to Sweden, initiated a procedure in Sweden claiming non-pecuniary damages from the publishing company and the person being the responsible publisher, alleging defamation. The company was however registered in U.K. The Swedish courts dismissed the case without an examination on the merits, since they found that the program originated from U.K. (the Company was registered in the U.K. The program was produced in Sweden, but it was linked over to U.K. and therefrom transferred back to Sweden via a satellite, a process that took less than one second). The Swedish courts thus found that the applicant should initiate a procedure in U.K. In those circumstances the European Court considered that "*instituting defamation proceedings before the British courts could not be said to have been a reasonable and practicable alternative for the applicant.*" (para 73).

15. The European Court found a violation of Article 6 and the right to effective access to court (it did not find it necessary to examine also the claim under Article 13). This was thus said, even though U.K. is situated in Europe with a legal system and culture fairly similar to the Swedish and was still a member of EU at the time, with all the enforcement mechanisms provided for in EU law. Furthermore U.K. is still a member in the European Council of Human Rights.

16. The case shows the strict requirements – according to the European standard – for a foreign remedy to be considered practical and effective.

17. Assuming the present case have a sufficient connection to Sweden, it would not be practical and affordable for the individual victims in South Sudan to initiate a procedure in Sweden, unless the examination and collection of evidence was pursued and paid by a public prosecutor in Sweden.

18. It is therefore adequate to account for what the National Prosecution Department National Unit Against International and Organized Crime, pursuing the procedure in the criminal case before the City Court of Stockholm (case No. B 11350-14), held in a press-release on 11 November 2021 (appendix 1). It held the following:

> "**About the preliminary investigation**

> The preliminary investigation began in 2010. It concerns complicated and difficult-to-investigate crime that has been going on for several years and in a large geographical area during the ongoing civil war. During the investigation, a new civil war broke out, which is why it was not possible to travel to the area. Unlike crimes in, for example, Rwanda, the former Yugoslavia and Syria, there are also no international courts or investigative mechanisms concerning Sudan, which have been able to assist the Swedish investigation.
>
> ...
>
> Facts about the investigation:
>
> • About 270 interrogations have been held.
> • About 150 people have been heard in the investigation.
> • The preliminary investigation report comprises roughly 80,000 pages."

19. In my opinion the said is sufficient to conclude that it would in fact be practically impossible for the South Sudanese individuals to even obtain sufficient evidence for such a procedure. Such a remedy would without a doubt be considered as purely theoretical and illusory.

Civil claims for damages relying on alleged violations of the one ore several rights in the European Convention between private parties.

20. It is true that there have been developments in Sweden concerning the application of the rights in the Convention in the domestic legal system, primarily by the domestic courts' practice and later by the Swedish Parliament enacting laws, according to the principle of subsidiarity. In some cases, Sweden has even received explicit praises by the European Court, for the developments. It is perhaps the said developments Professor Emberland was referring to in holding that Swedish law provides for civil claims of damages if liability is established.

21. The developments have however been very slow and not without opposition from politicians, judges and other officials (like for instance the Chansellor of Justice). Further, it cannot be held that the development is finalized and completely in conformity with the Conventions principles.

22. That is especially when a private legal or individual person allegedly has violated another private person's rights in the Convention, thus in the private sphere, as in the present case. The jurisprudence in the domestic courts awarding damages and reparations due to violations of the Conventions was not codified in Sweden until the enactment of a new provision in the Tort Act in 2018, when the Parliament enacted a new provision which reads as follows (Chapter 3 section 4 in the Tort Act):

> The state or municipality must compensate.
>
> 1. personal injury, property damage, pure property damage, damage due to someone being violated in the manner specified in ch. 2. Section 3 and damage that is compensated according to chapter 2 § 3 a, if the damage occurred as a result of the damage victim's basic freedoms and rights

according to chapter 2 in the Instrument of Government or according to the European Convention for the Protection of Human Rights and Fundamental Freedoms has been violated by the state or municipality, and other non-pecuniary damage arising as a result of such a breach.

23. It was explicitly held in the preparatory works and directives from the Government that the new provisions should not apply in the private sphere.

24. The present case without a doubt concern alleged violations between private individuals as opposed to situation where the alleged perpetrator of an individual is the state or a municipality. The enactment of the above discussed provision followed from the case NJA 2007 p 747. In this case, which concerned Article 8, it was concluded that the convention-duty to award satisfaction for established violations domestically following Article 13 of the Convention or the concept of positive obligations, did not apply in the private sphere. Even considering the development in the Swedish legal system over the last 30 years, it cannot be held that there exists an effective domestic remedy in the private sphere, not even in theory.

CONCLUSION

25. At the time of the merger Swedish law did – for multiple reasons – not provide for civil claims of damages if liability is established by a court, taking the circumstances in the present case into account, not even in theory. That is the legal position also today.

Stockholm as above

Jan Södergren