Before the National Contact Point for Responsible Business Conduct Norway

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

NOTE FROM AKER BP ASA AND AKER ASA

Reference is made to the NCP Secretariat's e-mail 3 December 2024, forwarding a memo by advocate Jan Södergren entitled "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". According to his credentials, Mr. Södergren is a practising attorney running his own law firm and we note that he is a former partner of the law firm Bratt & Feinsilber Advokatbyrå AB (now Advokatbyrån Bratt Feinsilber Harling AB), the law firm representing 17 of the 32 South Sudanese victims who filed civil claims before Stockholm City Court in the criminal proceedings.

1. Introduction

First, we need to point out the obvious; the specific instance procedure is non-legal in nature and is not intended to examine legal issues. The subject matter for the specific instance is the Aker companies' due diligence into actual or potential adverse impact of the transaction on the South Sudanese victims' right to an effective remedy for human rights abuses as protected as under the internationally recognised human rights instruments. An issue has arisen regarding the interpretation of the International Covenant on Civil and Political Rights (ICCPR) Article 2(3) and the European Convention on Human Rights (ECHR) Article 13 in the context of the present case. To assist the NCP with an analysis of the relevant issues of international human rights law, the complainants engaged dr. Tara van Ho, and in response the companies offered the expert opinion by Professor Marius Emberland addressing the same issues.

Now, the complainants introduce an expert opinion addressing Swedish law relating to statutory limitation and civil and criminal procedure to support an argument that the Swedish legal system in practise denies the claimants the right to an effective remedy in accordance with ECHR. The development of the specific instance in the direction of purely legal issues, both under international human rights law and domestic legal systems, suggests that the NCP procedure may be less suited to consider the Complaints than what seemed to be the case at the time of the Initial Assessment. The question for the NCP concerns the measures expected by the companies' due diligence in connection with the transaction, and not a detailed analysis of foreign law based on legal sources and how they are applied in the domestic legal system. (The mere fact that a legal opinion is furnished more than two months after the respondents' final written submissions, also suggests that these are not straight-forward legal issues.)

For this reason, we see no need to engage an expert on Swedish procedural law and implementation of human rights instruments in Swedish domestic law but will provide some comments on the legal opinion of Mr. Södergren and its relevance to the matters under consideration, based on a *prima facie* reading of the opinion. Professor Emberland has prepared a brief note in response to Mr. Södergren's opinion on human rights law regarding the right to an effective remedy, which is attached. We also attach Stockholm City Court's decision dated 22 November 2023 in case B 11304-14 (the ongoing criminal case about Lundin's alleged contribution to war crimes in Sudan).

2. Swedish law on statute of limitation

With reference to the *Swedish Act on Statutory Limitations, section 3, item 3* and the *Swedish Criminal Code, Chapter, 35 section 1*, Mr. Södergren asserts that a civil claim for damages and reparation was statute barred by September 2013 (with the caveat that the law is not completely settled for the types of claims in question). If no legal claim existed in 2021, the transaction could not have had an adverse impact on the right to an effective remedy for pursuing a legal claim through a judicial mechanism. Mr. Södergren's legal opinion in effect negates the assertion that the companies' due diligence should have identified an adverse impact on human rights in respect of the right to an effective remedy under ICCPR Article 2(3) and other human rights instruments.

If Mr. Södergren's suggestion is that Swedish law regarding statute of limitation amounts to a failure to secure the right to an effective remedy for the pursuit of a compensation clam under ECHR Article 13 or ICCP Article 2(3), we strongly disagree.

3. Practical obstacles to an effective remedy through a Swedish court procedure

Mr. Södergren does not dispute that Swedish procedural law allows for victims' claims for pecuniary damages to be admitted and handled by the Swedish courts. Rather, the opinion points to "*practical insurmountable obstacles to examining, obtaining evidence and otherwise prepare for a claim before a Swedish court"* and states: "*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".*

That is, however, exactly the case here. The Swedish prosecution authorities have – instigated by the complainants' 2010 report Unpaid debt - investigated, pursued and assembled evidence for an indictment for criminal liability, all paid for by the Swedish state. The criminal proceedings commenced on 5 September 2023 and are scheduled to be completed by February 2026. Swedish law provides for civil claims for damages caused by a criminal action to be adjudicated in the criminal proceedings and such claims were indeed brought by 32 South Sudanese claimants. Although there is no reference to these proceedings in the legal opinion, Mr. Södergren's conclusion that a right to an effective remedy exists only in theory may reflect Stockholm City Court's decision, a few months into the proceedings, to refer the compensation claims to separate civil proceedings. We have attached the court's decision dated 22 November 2023 and will draw the NCP's attention to the following:

Firstly, the court explicitly confirms that Swedish procedural law grants an aggrieved party the right to bring claims for damages in criminal proceedings with no formal requirements and that these provisions apply to South Sudanese claimants in the present case. The court may nevertheless refer such claims to separate proceedings under civil procedural if continued joint processing would entail significant disadvantages. The court found that to be the case here, on the following grounds:

- Civil claims by 32 plaintiffs were not submitted until 16 and 17 August 2023 - just days before the commencement of the proceedings on 5 September 2023.
- Lawyers representing the South Sudanese victims had been involved in the prosecution authorities' investigations as early as 2015. Following the indictment in November 2021, the claimants' lawyers had participated in the preparatory process for the proceedings and had been urged to bring civil compensation claims in a timely fashion. At the first planning meeting on 20 October 2022, counsel for the aggrieved parties had stated their intention to submit the claims by the end of 2022.
- The indictment is based on Lundin's alleged contribution to severe harms from military attacks by the Sudanese army and militia groups. The claims for damages from the 32 individuals, totalling SEK 110 million, concerned specified harms suffered from specified military attacks on

specified dates and the factual submissions for the claims were apparently not covered by the prosecution's case or the vast evidence presented by the prosecution. Some of the events had occurred outside the geographical area for Lundin's alleged contribution to military attacks. The court concluded that the handling of these claims would necessitate considerable further preparations and would require a stay of the proceedings.

After careful consideration, weighing the claimants' interest in joint proceedings against the consequences of the late submissions of the claims, the court found that a continued joint handling of the civil claims in the criminal proceedings would cause a significant disadvantage - not the least because it would prompt a delay of approximately one year. Claims submitted on behalf of 27 aggrieved parties were referred to separate proceedings, while claims submitted on behalf of the 5 parties for whom counsel had not presented a power-of-attorney to represent them, were dismissed. The court emphasised that this outcome was caused by the complainants themselves (through their Swedish counsel):

> *Med hänsyn till det som nu har sagts måste det anses vara målsägandena själva – genom målsägandebiträdena – som har föranlett den uppkomna situationen genom att, trots påpekanden från rätten och försvaret angående vikten av att ge in anspråken i tid, ge in anspråken en mycket kort tid före huvudförhandlingens början och fullmakter först när huvudförhandlingen pågått en längre tid. Sammantaget är omständigheterna sådana att en fortsatt gemensam handläggning skulle medföra sådana väsentliga olägenheter som anges i 22 kap. 5 § brottsbalken. De enskilda anspråken ska därför avskiljas för att handläggas i den för tvistemål stadgade ordningen.*

4. Conclusion

We find Mr. Södergren's analysis to be both incomplete and inconsistent. The opinion omits to mention that the claimants have already invoked judicial remedies afforded them by the Swedish judicial system. The right to have claims for damages and reparation handled in criminal proceedings provides for an efficient and accessible process for adjudicating such claims. There are no formal requirements and claimants can base their case entirely on the prosecution's presentation of evidence and substantiation of liability. In the present case, the only obstacle to continue under this avenue for remedy was the undue delay by the claimants themselves. That a domestic court refers claims submitted a few days prior to the start of complex and lengthy court proceedings to separate proceedings, certainly does not render the right to an effective remedy purely theoretical and illusory.

It might be added that the Complaints' submissions in the specific instance regarding the financial resources required to address remedy under the OECD Guidelines are based on the same type of legal claims as submitted to the Swedish court, calculated under Sudanese law and custom and multiplied with the estimated 160 000 victims.

We also refer to the Expert note by Professor Emberland, who refutes Mr. Södergren's interpretation of the European Convention on Human Rights and its application to the circumstances of this case.

Lysaker, 23 December 2024

Aker BP ASA and Aker ASA